

# Flash

## Portuguese law applicable to crypto-assets

Portuguese investors have been showing an increased appetite for crypto-assets, in particular the crypto-currencies, in view of its steep valuations and favourable Portuguese tax regime. Such tax regime has also led some foreign investors and service providers in this field to change their residences to Portugal.

There is not yet specific Portuguese regulation applicable in Portugal to crypto-assets, prepared in line with a coherent strategy aimed at tackling the various risks that are posed by them, the position of Portuguese Government and regulators so far being to tag along with the European Union bodies and EU regulators, thus prioritizing a common approach at an EU level.

Until this EU harmonized legal framework enters into force, there are currently various Portuguese laws that may potentially apply to crypto-assets from a different number of standpoints, depending on the type and features of those assets.<sup>1</sup>

CMVM<sup>2</sup> and Bank of Portugal<sup>3</sup>, despite acknowledging this status quo and their limitations, have also been actively monitoring the rise of crypto-assets in deals connected with Portugal, and have issued a number of warnings addressed to issuers and investors.

We analyse below the main Portuguese law issues that have arisen in respect of crypto-assets, as well as their taxation regime in Portugal.

### Asset tokens

In relation to asset tokens<sup>4</sup> offered in Portugal, CMVM has been warning investors to their risks<sup>5</sup>, and noting to issuers that if such tokens are deemed to be “securities”, any ICOs<sup>6</sup> addressed to Portuguese investors may trigger Portuguese law requirements.<sup>7</sup>

For this purpose, the concept “securities” as set forth in the Portuguese Securities Code does not materially deviate from the concept “transferable securities” defined in EU legislation such as MiFID II or the Prospectus Regulation, and as construed by CMVM, encompasses any asset tokens which:

- Are offered on a standardized basis
- Are capable of being traded on capital markets
- Grant a right or expectation to any profit or financial return, in terms comparable with other financial instruments such as shares or bonds.

<sup>1</sup> An additional layer of complexity arises in respect of the assessment of the law applicable – the issuer and investors are often located in different jurisdictions, the blockchain technology used is by definition not tied to any specific country, and the white papers or other documentation attached to the tokens may be subject to specific laws elected by the issuers.

<sup>2</sup> *Comissão do Mercado dos Valores Mobiliários*, the Portuguese supervisory authority empowered to monitor capital markets and investment services.

<sup>3</sup> Banco de Portugal, the supervisory authority empowered to monitor banking and payment services.

<sup>4</sup> Tokens representing assets enabling token owners' participation in real underlying companies, or earning streams, or an entitlement to dividend or interest payments.

<sup>5</sup> Notice dated of 3 November 2017, available in English in this [link](#).

<sup>6</sup> Operations aimed at obtaining financing from the public via issuance of tokens or coins.

<sup>7</sup> Notice sent to investors on 23 July 2018, available in Portuguese in this [link](#).





It has been accepted by CMVM and practitioners that a high number of ICOs whose information is publicly available may potentially fall within the scope of the concept “securities” and trigger Portuguese law requirements.

The requirements that could be triggered if the asset tokens are deemed to be securities are essentially the following:

- An ICO targeting the Portuguese market will require a prior registration with CMVM, and trigger the duty to submit a prospectus in compliance with the EU Prospectus Regulation, as well as to seek assistance from an authorised financial intermediary
- Asset tokens issued by a Portuguese issuer could be subject to the rules on registration and transmission of securities laid down in the Portuguese Securities Code
- Any investment services to Portuguese clients in respect of these asset tokens must be rendered by duly authorised investment firms, which are subject to prudential and conduct of business rules

So far there is no public information on regulatory proceedings brought by CMVM against an issuer, and most likely the regulator will only be able to react on an *ex post* basis in case concerns arise, since there is no duty of the issuers to notify or obtain prior approval in respect of ICOs in Portugal, unless if they are qualified as a security offering.

Yet the consequences could be serious in case of a breach: a public offering of securities violating the Portuguese law requirements could be subject to fines up to € 5,000,000 per breach as well as other ancillary sanctions; there are also prospectus liability rules that could be triggered and affect the issuer, any entity offering the tokens, the directors of these entities, and any auditors certifying the white paper and other ICO’s documentation.

Issuers should thus ensure that any ICOs addressed to Portuguese market do not trigger the Portuguese law requirements, either through avoiding their qualification as securities, or ensuring that they benefit of an EU Prospectus Regulation exemption.

## **Crypto-currencies**

As for the crypto-currencies<sup>8</sup>, Bank of Portugal has confirmed that they shall not be deemed to be fiat money in Portugal, yet could potentially qualify as “electronic money” for the purposes of the EU Directive 2009/110/EC on “electronic money institutions”, as implemented in Portugal, insofar as qualified as a “*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 (..), and which is accepted by a natural or legal person other than the electronic money issuer*”.<sup>9</sup>

However and along with EBA, Bank of Portugal also concluded that Bitcoin and other popular crypto-currencies would not qualify as “electronic money”, since “*they do not fulfil the essential requirement of e-money, which is to be redeemable*”.

## **Money laundering prevention**

From a money laundering prevention perspective, the following entities which are incorporated or established in Portugal are subject to various requirements, including the duty to perform KYC to customers, preserve information and obtain a prior registry with Bank of Portugal:

- Providers of exchange services between virtual currencies<sup>10</sup> and fiat currencies
- Providers of exchange services between one or more virtual currencies
- Services by which one virtual currency is transferred from a wallet to another wallet
- Custodian wallet providers in relation to virtual currencies

<sup>8</sup> Understood as 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.

<sup>9</sup> Bank of Portugal occasional paper on crypto-assets dated of December 2020.

<sup>10</sup> For this purpose, the concept “virtual currency” is aligned with the one stated in the AML 5 Directive, and is sufficiently broad in order to capture any crypto-asset: “*means 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.*”



The subjection of these entities to the supervision of Bank of Portugal is limited to the compliance with money laundering prevention requirements, and it should be noted they only capture the agents listed above, and hence any issuers or investors are not encompassed by these duties.

When performing KYC to customers, the entities listed above shall apply enhanced due diligence measures, given that the Bank of Portugal included crypto-currency in the list of products which may represent a higher risk of money laundering or terrorism financing.

## Taxation

There is also a lack of specific tax legislation addressing the crypto-assets, and accordingly their tax treatment is also not entirely clear.

In relation to **personal income tax**, the Portuguese Tax Authorities have already issued binding information on 27 December 2016<sup>11</sup>, establishing that based on the existing Personal Income Tax Code provisions, crypto-currencies shall not be subject to personal income tax over valuation of these assets or profits arising of their sale (categories G and E). The conclusion was that, while sales of securities or transactions in respect of derivatives would be subject to income tax according to the Code, crypto-currencies are neither securities (they are only means of payment) nor derivatives (they have an inherent value which is assessed as a result of demand/offer). However, the Tax Authorities concluded that the sale of crypto-currency could be taxed if made on a professional or business basis (i.e. an habitual and profit-driven activity) (category B).

By the same standard, and though not specifically addressed by the Tax Authorities, asset tokens may potentially be subject to personal income tax, at least if they are qualified as securities or derivatives.

The Tax Authorities also concluded<sup>12</sup> that operations of exchange of crypto-currencies with fiat money and vice versa, though potentially being subject to VAT, are currently exempted of this tax, pursuant to a provision of the Portuguese VAT Code which implemented in Portugal the Art. 135, paragraph e) of the EU Directive 2006/112/EC, since they have as their object a currency used as a means of payment.

In relation to **corporate income tax**, even though the Portuguese Tax Authorities have not issued any public statement, it appears that any profits arising of crypto-currencies and other crypto-assets sale or valuation should be subject to taxation. According to article 17 of the CIT Code, the taxable profit of a legal person shall be constituted by the algebraic sum of the net profit of the period and of the positive and negative equity variations verified in the same period and not reflected in that profit, determined on the basis of accountability and possibly corrected under the terms of the CIT Code. In this regard, also the profits arising from investment executed with crypto-assets shall be registered and subject to corporate income tax.

## Conclusion

Portuguese legislation is currently not adjusted to the reality and risks of crypto-assets; of particular concern is the possibility of issuers not being supervised when distributing asset tokens, to the extent that they are not deemed to be “securities”, which raises serious concerns, including risk of fraud.

The crypto-assets as means of payment are not regulated or subject to the supervision of Bank of Portugal, as they are not qualified as securities or payment instruments, though they also present relevant risks to investors.

Such scenario is expected to change once there is an harmonized regulation under EU law – which should be expected to occur if and when the Commission proposal of the Regulation on Markets in Crypto-Assets dated of 24 September 2020<sup>13</sup> is finally approved. This legislation will require an ex ante assessment of the offering of crypto-assets by national competent authorities, the preparation of standardized information addressed to investors, the adhesion to

<sup>11</sup>Available in this [link](#).

<sup>12</sup>Available in this [link](#) and in this [link](#).

<sup>13</sup>Available in this [link](#).



out-of-court redressal mechanisms, and other consumer protection mechanisms such as the right of withdrawal during the 14 days following the subscription of the token.

This revision process also encompasses the money laundering prevention perspective – it has already been acknowledged that the 5th AML Directive’s rules are insufficient to tackle the risks, and there is a new AML package being prepared, which is aimed at addressing them.<sup>14</sup>

Still, there will exist areas of regulation not currently harmonized at EU level, which will continue to pose challenges to practitioners, if crypto-assets are not regulated at a national level in Portugal:

- Insofar as asset tokens are deemed to be securities, the decentralized and cryptographic nature thereof appears to conflict with the rules on registration and transfer of securities laid down in the Portuguese Securities Code, which require that they are either registered with the issuer, a financial intermediary or a central securities depository.
- The nature of certain crypto-assets may conflict with the principle under which there is a close-ended number of in rem rights (such as property) under Portuguese civil law .
- The “equity tokens”, which are tokens granting rights equivalent or similar to “shares”, pose interesting challenges if issued by Portuguese companies. The equity token holders do not benefit from the “shareholder” status as regulated in the Portuguese Companies Code, since they do not represent fractions of the company’s share capital. The legal status as shareholder entails under Portuguese law a complex of rights against, and duties towards, the company, such as the right to designate and dismiss directors, special rules on directors’ liability, pre-emption rights in case of capital increases, etc. A position similar to the one of a “shareholder” could be regulated on an ad hoc basis in the ICO’s white paper, but unless there is a substantial reform in Portuguese corporate law, they will not benefit of the same rights as a statutory shareholder.

From a tax standpoint, while the regulatory framework regarding the crypto-assets universe is not defined, the great challenge will be to adapt Portuguese tax legislation to a new reality. Although some issues are starting to get answers both from the competent authorities and from expert opinions, there are many questions that remain unanswered, including more complex investments such as Staking<sup>15</sup>, as well as the definition of taxpayers' declarative procedures (adding practical debates such as the definition of the real value of crypto-assets at the time of their accounting for tax purposes).

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<sup>14</sup> Available in this [link](#).

<sup>15</sup> Staking may be defined as the act of holding crypto-currencies on a “Staking Pool” in order to earn a percentage-rate reward over time.