

Briefing
February 2018

Initial Coin Offerings *Alerts from Regulators*

Ireland Law Firm of the Year 2017
Chambers Europe Awards

Best Firm in Ireland 2016 & 2017
Europe Women in Business Law Awards

**Best National Firm for Women in
Business Law 2016 & 2017**
Europe Women in Business Law Awards

**Best National Firm Mentoring Programme
2016 & 2017**
Europe Women in Business Law Awards

Ireland Law Firm of the Year 2016
International Financial Law Review (IFLR)
Europe Awards

Ireland Law Firm of the Year 2016
Who's Who Legal

**Americas International Tax Firm of the
Year 2016**
International Tax Review

**Advised on the 'Deal of the Decade' –
Merger of Lafarge and Holcim**
Mergermarket European M&A Awards

Initial Coin Offerings are very risky for consumers as they are highly speculative in nature, and firms should consider if their ICOs require regulation – these are the key themes from recent ICO-related alerts issued by the Central Bank of Ireland, ESMA, the Financial Conduct Authority and IOSCO.

Initial Coin Offerings (ICOs), where companies raise funds from the public by issuing “tokens” or “coins” which can be exchanged for currency (usually virtual currency, such as Bitcoin) have been the subject of recent alerts from the European Securities and Markets Authority, the Central Bank of Ireland, the Financial Conduct Authority, and the International Organization of Securities Commissions.

ESMA ALERTS

In November 2017, ESMA issued two alerts, one addressed to investors who might be considering an investment in an ICO and one addressed to firms involved in ICOs.

ESMA ALERT FOR INVESTORS

This alert ([ESMA alerts investors to the high risks of Initial Coin Offerings \(ICOs\)](#)) emphasised the highly speculative nature of ICOs, the risk that

investors could lose their entire investment (in particular, as the ICO often takes place when the service or product that is being financed is very much in the early stages of development, and may not be a success), and the lack of protection available to investors where the ICO is not regulated. Other risks highlighted by ESMA were price volatility, the fact that many virtual currency exchanges on which the tokens/coins are traded are unregulated, the difficulties faced by investors in trying to redeem their tokens/coins, the lack of reliable information for investors, and potential flaws in the relatively new distributed ledger technology (DLT) or blockchain technology underpinning the tokens/coins.

CENTRAL BANK OF IRELAND ALERT FOR CONSUMERS

The Central Bank's [Alert on Initial Coin Offerings](#), published in December 2017, picked up on many of the themes from

the ESMA alert (to which the Central Bank and other EU supervisors had contributed), by emphasising the risk that an ICO investor can lose its entire investment, the unregulated nature of many ICOs, the vulnerability of ICOs to fraud, the high level of price volatility, potential difficulties in redeeming tokens/coins, the lack of adequate information available to investors, and the potential flaws in the related DLT or blockchain technology.

ESMA ALERT FOR ICO FIRMS

ESMA's second November 2017 alert, addressed to firms ([ESMA alerts firms involved in Initial Coin Offerings \(ICOs\) to the need to meet relevant regulatory requirements](#)) was designed to draw firms' attention to the fact that their ICO-related activities may require regulation, in particular under the *Prospectus Directive* (i.e. could the token/coin be a transferable security, requiring the publication of a prospectus?), the *Markets in Financial Instruments Directive (MiFID)* (since replaced by MiFID II and the Markets in Financial Instruments Regulation) (i.e. if the token/coin is a MiFID financial instrument, could the placing of,

dealing in, or advising on, that token/coin constitute a MiFID activity or service?), the *Alternative Investment Fund Managers' Directive* (could an ICO structure qualify as an alternative investment fund if it is used to raise capital from a number of investors with a view to investing that capital in accordance with a defined investment policy?) and the *Fourth Anti Money Laundering Directive*.

UK FINANCIAL CONDUCT AUTHORITY

In the UK, the Financial Conduct Authority's [Distributed Ledger Technology Feedback Statement](#), published in December 2017, also contained a section on ICOs (at Annex 1), setting out various regulatory matters that should be considered by firms involved in ICOs. Both the *Prospectus Directive* and *MiFID* were referenced. This followed the UK FCA's [Consumer warning about the risks of Initial Coin Offerings](#) from September 2017, which emphasised similar risks to those expressly referred to by the Central Bank.

IOSCO

Separately, in January 2018, the International Organization of

Securities Commissions reiterated the "clear risks associated with these offerings" in a [media release](#), reminding investors to take care when making their investment decisions.

COMMENT

The above alerts from regulators follow a similar pattern to those already issued by other regulatory bodies worldwide, focusing on existing regulatory requirements, and reminding firms and potential investors that existing regulations may apply while putting the onus on those involved in ICOs to make that determination themselves.

It is not yet clear whether there will be a move towards further regulation in this area, but the recent alerts appear to signal the intention of regulators to address the risks posed by ICOs in a somewhat coordinated manner.

Of particular interest are the recent media reports that both France and Germany will be advocating the regulation of cryptocurrency at the G20 summit in Argentina in March 2018, and the outcome of those discussions are awaited with considerable interest.



PEARSE RYAN
PARTNER, TECHNOLOGY &
INNOVATION
+353 1 920 1180
pearse.ryan@arthurcox.com



ROBERT CAIN
PARTNER, FINANCIAL REGULATION
+353 1 920 1050
robert.cain@arthurcox.com



MAEDHBH CLANCY
PSL, FINANCE
+353 1 920 1225
maedhbh.clancy@arthurcox.com

arthurcox.com

Dublin
+353 1 920 1000
dublin@arthurcox.com

London
+44 207 832 0200
london@arthurcox.com

Silicon Valley
+1 650 943 2330
siliconvalley@arthurcox.com

Belfast
+44 28 9023 0007
belfast@arthurcox.com

New York
+1 212 782 3294
newyork@arthurcox.com