



Blockchain & Cryptocurrency Regulation

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Contributing Editor
Josias Dewey

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Ireland

Maura McLaughlin, Pearse Ryan & Caroline Devlin
Arthur Cox

Government attitude and definition

While the Irish Government has, to date, remained largely silent on its attitude towards cryptocurrencies, the Irish Department of Finance issued a Discussion Paper on Virtual Currencies and Blockchain Technology in March 2018. The Paper discusses various aspects of both, such as risks and benefits of currencies, but also gives examples and details of countries which are either proponents or opponents of cryptocurrencies and/or blockchain technology.

While the Discussion Paper does not outline or represent the attitude of the Irish Government on this topic, it states that no one policy measure or State agency has the ability to comprehensively address all the risks and opportunities in the area. Instead, it states that to evaluate each of these issues the Irish Government will require the expertise of multiple State agencies such as the Department of Finance, the Revenue Commissioner, the Data Protection Commission and the Department of Business, Enterprise and Innovation to allow for the development of holistic policy measures that encourage innovation while addressing risks to consumers, investors and businesses.

In order to facilitate this process, the Department of Finance is currently in the process of establishing an inter-departmental working group on blockchain and cryptocurrencies in order to, amongst other things, monitor international developments in the area, engage with other areas of Government, assess possible involvement, and consider if policy recommendations will be necessary.

In Ireland, cryptocurrencies are not regarded as either “money” or “currency”. The Central Bank of Ireland (CBI) has issued a warning on its website that cryptocurrencies are not legal tender and are neither guaranteed nor regulated by the CBI. The dangers associated with such currencies, as mentioned by the CBI in its warning, include their extreme volatility, the absence of regulatory protection, and the risk of being given misleading or incomplete information.

The CBI also issued an “Alert on Initial Coin Offerings” in December 2017. The purpose of the alert is to warn against, amongst other things, the high risk of losing all invested capital due to the lack of regulation and the associated risk of becoming the victim of fraud or other illicit activities. Extreme price volatility was also mentioned as one of the risks.

There are currently no cryptocurrencies which are backed by either the Irish Government or the CBI. While other jurisdictions around the world are investigating the use of digital currencies, no such plans have been announced to date by either the Irish Government or the CBI.

Cryptocurrency regulation

There is no specific cryptocurrency regulation in Ireland, but there is also no specific prohibition in Ireland on any activities related to cryptocurrency.

The CBI is the competent authority in Ireland for the regulation of financial services including electronic money, payment services and securities law. The CBI has yet to indicate the extent to which existing financial regulation will apply. The CBI has issued warnings in relation to ICOs and cryptocurrencies and has also contributed to the European Securities and Markets Authority (ESMA)'s warnings to both consumers and to firms engaged in ICOs (see also "Government attitude and definition").

In respect of cryptocurrency regulation, we expect that the CBI will focus on securities law and the recognised EU concepts of "transferable security" and "financial instruments" as defined in the 2014 European Union Markets in Financial Instruments Directive (MiFID II) and the characteristics which they view as bringing cryptocurrencies or tokens within those definitions. Depending on their structure, cryptocurrencies could be classified as transferable securities, which would bring them within scope of a range of securities laws. For example, the issuer of a cryptocurrency may be required to publish a prospectus (or avail of an exemption) prior to their being offered to the public, or certain activities in respect of the cryptocurrency may require authorisation as an investment firm under MiFID II.

A pure, decentralised cryptocurrency is unlikely to be a transferable security, while a token with characteristics similar to a traditional share or bond may be. It is also possible that true "utility" tokens intended for exclusive use on a platform or service will not be transferable securities. The definition of transferable security is non-exhaustive and it is for each issuer and their advisers to determine whether their cryptocurrency or token is a transferable security.

As in many jurisdictions, the regulatory environment in relation to cryptocurrencies and their interaction with securities law is not yet settled and ESMA acknowledges that depending on how an ICO is structured, it may fall outside the regulated space entirely.

Sales regulation

Depending on the structure of an ICO or token, it may fall within the regulated space and require the publication of a prospectus (or availing of an exemption from that requirement, see above) prior to it being offered to the public.

Taxation

There are no specific rules for dealings in cryptocurrencies, and normal basic principles apply. The Irish Revenue confirmed this in a publication issued in May 2018. The taxation of dealings in cryptocurrencies will generally follow the underlying activities. Thus the receipt of cryptocurrency in lieu of cash for goods or services rendered will generally be taxed as income. Dealing in cryptocurrencies of themselves will depend on the nature and level of activity of the dealer. Occasional investment in and disposals of cryptocurrencies would likely be treated as a capital receipt, currently taxed at 33%. Where there is significant and regular dealing, this could be considered to be trading, which for a company would be taxed at 12.5%, or the marginal higher rates for individuals. The actual tax position will depend on an analysis of the specifics of each transaction, and would need a case-by-case consideration, as is normal in trading activity.

If it is assumed that the profit may be taxable under some heading, the next issue is valuing the profit generated. This is naturally a challenge, and indeed records of trades through various exchanges may be difficult, if not impossible to obtain. It is likely that this area will be the subject of further guidance from the Irish Revenue in due course, but in the interim, those dealings in cryptocurrencies should keep all relevant contemporaneous records to assist in the valuation.

No Irish VAT arises on the transfer of cryptocurrency. Irish stamp duty should not arise, although as stamp duty is a tax on documents, the manner in which the transfer takes place would be worth monitoring to ensure that a stampable document has not been inadvertently created.

The territoriality aspect of cryptocurrencies is still an involving area. In the case of an Irish resident (and for an individual ordinarily resident) person, they will usually be liable to tax in Ireland on their worldwide income and gains (subject to any reliefs or exemptions, including double tax treaty reliefs). A non-resident person will generally only be subject to tax on Irish-sourced income or gains, or profits of an Irish trade. (In the case of individuals, tax may also apply where amounts are remitted into Ireland.) It is evident therefore that understanding the source or situs of cryptocurrencies is of significance in international dealings. This is likely to be an area that will be developed further.

Money transmission laws and anti-money laundering requirements

There is a risk that certain ancillary services in connection with cryptocurrency could be subject to regulation as a form of money remittance or transmission under the Payment Services Directive (PSD) or, where PSD does not apply, under the Irish regulatory regime for money transmission. For example, the operator of a cryptocurrency platform who settles payments of fiat currency between the buyers and sellers of cryptocurrency could be viewed as being engaged in the regulated activity of money remittance/transmission. There are a number of exemptions which may be applicable, for example, where the platform operator is acting as a commercial agent or where the platform could be viewed as a securities settlement system. The application of the exemption would depend on the features of the trading platform.

The application of existing Irish anti-money laundering requirements to cryptocurrencies is unclear due to uncertainty surrounding the regulatory status of cryptocurrency. Where the cryptocurrency or any activity relating to it is subject to regulation (e.g. it has the characteristics of transferable security), then Irish anti-money laundering requirements will apply.

The 5th Anti-Money Laundering Directive (AMLD5) will impose new anti-money laundering requirements on cryptocurrency exchanges and custodians operating in Europe. AMLD5 has not yet been implemented in Ireland.

Promotion and testing

Ireland does not operate a regulatory sandbox, of which cryptocurrency or token issuers could avail themselves. The Irish Department of Finance is establishing an intra-departmental working group with a view to engaging with industry and overseeing developments in virtual currencies and blockchain technology. The Industrial Development Authority, the government agency tasked with attracting inward investment, has led efforts by the Irish Blockchain Expert Group to establish Blockchain Ireland, to help promote and share information on blockchain in Ireland. Further, the CBI recently announced that it was

establishing an innovation hub to allow companies to engage directly with the CBI in the areas of Fintech and innovation, including a new dedicated page on its website.

Ownership and licensing requirements

In principle, there are no specific ownership and licensing requirements set out with regard to cryptocurrency. More specifically, while heavily regulated retail funds (e.g. UCITS funds) have specific restrictions on the type and diversity of assets they can hold, which restrictions would likely exclude cryptocurrencies, there are no generally applicable restrictions on investment managers owning cryptocurrencies for investment purposes. In addition, no specific licensing requirements are imposed on anyone who holds cryptocurrency as an investment advisor or fund manager.

However, in stating the above, it should be noted that the CBI has not, to date, confirmed its position on the status of cryptocurrencies as a security, a token or otherwise and as such, until such time as that position is clear, the precise treatment of cryptocurrencies, and any rules that might apply to advising on the issuance of or dealing in the same will ultimately depend on the CBI's determination of that analysis.

Particular areas that regulation might touch on include:

- (a) Is the crypto currency itself a security, subject to securities regulations of all forms, or is it something else, a token, another form of right, etc.?
- (b) The status of the issuer of a cryptocurrency – i.e. is it an issuer of a security, is it a collective investment scheme, or are the cryptocurrency and the issuer outside of these types of categories?
- (c) Is a crypto currency an eligible asset for holding by certain regulated entities including UCITS, Insurance Company, Banks, etc.?

In relation to the last category above, this question is likely only to be answered by wider EU regulation, which is likely to follow only after an exhaustive analysis of the first two questions. As things stand, cryptocurrencies do not fall within the categories of eligible assets for the above.

In relation to the issuer status, the CBI has not yet provided any guidance as to their thoughts on whether certain coin offerings creating a crypto currency may effectively be structured to come within AIF or Investment Company definitions, i.e. be defined as a "Fund".

Applying Fund definitions to what is traditionally seen in ICOs, it would seem to be a difficult argument to make to suggest that the purpose of the undertaking was collective investment, and the entities do not usually seek to pool investors' funds to provide a pooled return, rather they are often a commercial undertaking. In addition, although it might be said that capital was being raised from a number of investors, it is not usually being invested in accordance with a defined investment policy, nor is that capital being invested for the benefit of those investors.

While tokens may ultimately be sold in a secondary market for profit, the schemes themselves do not seek to provide a pooled return as such and in addition, it does not appear that any eventual price for the token would be based on the value of the assets into which investors' capital was invested and, furthermore, there is a case to say that the underlying assets are those of a normal commercial business developing its own products and services, rather than assets being bought, held and sold primarily to provide a pooled return.

Therefore, while this has not been the subject of regulatory or other decision to date, traditional forms of initial coin offerings would not appear to be Funds (AIFs under the EU rules regarding same).

Finally, the analysis of cryptocurrencies as a security may well be undertaken on a case-by-case basis, with the specific characteristics of individual currencies being key to a determination of whether they are a security issued by a company, and as such subject to the relevant securities laws, or if they are something else.

Mining

There are no restrictions in Ireland on the mining of cryptocurrency. As noted above in the “Cryptocurrency regulation” section, the regulatory status of cryptocurrency in Ireland is uncertain. It is likely that the focus going forward will be on securities law.

Mining of cryptocurrency is a technical process relating to the release of new cryptocurrency and the tracking of cryptocurrency transactions on a blockchain. Where the cryptocurrency is a form of transferable security, the mining activity could be viewed as a form of securities settlement system. However, as the mining is carried out on a decentralised basis, it does not fit neatly into any existing regime for securities settlement. On that basis, we would view mining as an unregulated activity under Irish law.

Border restrictions and declaration

In Ireland, there are no border restrictions or obligations which are specifically aimed at cryptocurrencies. The traditional reporting requirements for “cash” (which is defined as currency, cheques and money orders or promissory notes) when entering or leaving the European Union do not apply to virtual or cryptocurrencies. This is because they are deemed to be neither “cash” nor “currency”.

Reporting requirements

In respect of financial regulation, there are currently no specific reporting requirements relating to cryptocurrencies. (See “Money transmission laws and anti-money laundering requirements”.) Where the cryptocurrency or any activity related to it is subject to regulation, then Irish anti-money laundering requirements will apply. This will include obligations to submit suspicious transaction reports to the Garda Síochána and the Revenue Commissioners.

Estate planning and testamentary succession

As a general rule, a person can devolve their assets by a will in any jurisdiction, although it is common to have a complementary will or similar document in jurisdictions in which significant assets are located. As mentioned above, the situs of cryptocurrencies remains an area of discussion, so this will be a matter that will evolve in time.

From an inheritance tax perspective, Irish inheritance tax can arise if any of the following are relevant:

- Irish disponent;
- Irish beneficiary; or
- Irish property.

In the case of individuals with a presence but perhaps not fully within the tax net in Ireland, the situs of cryptocurrencies will be an important consideration.

Acknowledgments

The authors acknowledge with thanks the contribution to this chapter by:

Ian Dillon

Tel: +353 1 920 1788 / Email: ian.dillon@arthurcox.com

Ian is a senior member of the firm's Asset Management & Investment Funds Group with experience in all aspects of Irish fund law and regulation. Ian's particular focus is on alternative investments including all aspects of AIFMD as well as hedge, real asset, credit, private equity and liquid fund formation. In addition, Ian has advised on the funding of initial coin offerings and issuers including in relation to their regulatory status.

Declan McBride

Tel: +353 1 920 1065 / Email: declan.mcbride@arthurcox.com

Declan is a senior member of the Financial Regulation Group. He advises a wide range of domestic and international financial institutions. Declan's experience includes providing advice on authorisation requirements, anti-money laundering, payment services, Central Bank of Ireland investigations and compliance with conduct of business rules.

**Maura McLaughlin, Partner****Tel: +353 1 920 1182 / Email: maura.mclaughlin@arthurcox.com**

Maura advises international and domestic listed, public and private companies, as well as public sector bodies, on all aspects of company law and a wide range of commercial matters, as well as advising listed companies on compliance and governance issues. She has extensive experience of advising on public and private mergers and acquisitions, with particular emphasis on takeovers, schemes of arrangement and mergers. Maura has employed this experience to achieve clients' strategic objectives, notably in the design and implementation of structures permitting the inversion or migration of holding companies to Ireland. Equity capital markets work is another area of focus: Maura regularly advises on Irish securities laws, and has acted for companies, investors and underwriters on listings and fundraisings. Prior to joining the firm, Maura worked for Linklaters' London office.

**Pearse Ryan, Partner****Tel: +353 1 920 1180 / Email: pearse.ryan@arthurcox.com**

Pearse is a partner in the Technology & Innovation Group and member of the firms cross-departmental FinTech Group and Cyber Security Group. Pearse specialises in the areas of digital transformation/cloud computing, commercialisation of technology innovation/technology related IPR, computer security/fraud, cyber insurance, e-commerce and Fintech. Pearse is a member of the Irish Blockchain Expert Group, as well as the new Lex Mundi Blockchain Group. Pearse is a frequent writer and speaker on Fintech and cyber security topics. This includes recurring speaking slots with the Incorporated Law Society of Ireland (PPCII and Diploma courses) and The Honorable Society of King's Inns (Advanced Diploma in White Collar Crime). Pearse was a part-time lecturer 2017/2018 on the National College of Ireland new MSc in Fintech.

**Caroline Devlin, Partner****Tel: +353 1 920 1224 / Email: caroline.devlin@arthurcox.com**

Caroline is Co Chair of the Arthur Cox Tax Group, and is an experienced partner in taxation in particular in financial services issues. She is a member of the Law Society Taxation Committee, and represents the Law Society in many of its dealings with the Irish Revenue Commissioners. She is editor and co-author of the Institute of Tax publication, *The Law and Practice of Stamp Duty*. Caroline advises domestic and international clients on tax planning, including in particular financial services, also involving cryptocurrencies and ICOs, along with other raising capital products for companies and financial institutions. She is very experienced in advising clients in the most efficient manner on establishing in Ireland.

Arthur Cox

Ten Earlsfort Terrace, Dublin 2, D02 T380, Ireland

Tel: +353 1 920 1000 / Fax: +353 1 920 1020 / URL: www.arthurcox.com

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