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# Blockchain 2022

Portugal: Law & Practice

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VdA

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# PORTUGAL

## Law and Practice

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## 1. BLOCKCHAIN MARKET AND BUSINESS MODEL OVERVIEW

### 1.1 Evolution of the Blockchain Market Definition

There is no uniform definition of blockchain or distributed ledger technology (DLT) in Portugal. Regardless of the variations and different types of technology (eg, permissioned or permissionless, public or private), blockchain and DLT are usually used interchangeably to refer to a distributed database stored in a network of nodes and maintained by a consensus algorithm.

Therefore, except where expressly specified otherwise, these two terms will be used interchangeably to refer to the legal and regulatory challenges associated with this technology.

#### The Blockchain Market in the Last 12 Months

The Portuguese blockchain market is in the early stages of development, but the adoption of blockchain-based solutions across various industries has increased in recent years, particularly outside the financial sector, such as the non-fungible token (NFT) market.

The effects of the COVID-19 pandemic on the Portuguese blockchain market have been conflicting. On the one hand, adoption plans and the development of proofs of concept were postponed, especially by large national and international entities operating in the market. On the other hand, the need for secure digital transactions and operations stimulated growing interest in the technology, particularly in the healthcare sector.

In this regard, the EU Blockchain Strategy aimed at developing a “gold standard” for blockchain and promoting use of the technology to ensure data security has also inspired recent initiatives in the area. Moreover, the hype surrounding NFTs continues in the Portuguese sports, art, gaming

and entertainment industries. Lastly, there has been a significant rise in interest in real estate negotiations involving cryptocurrencies, leading the Notaries Association to issue specific guidance on the matter, which came into effect in April 2022.

The Portuguese blockchain market mainly consists of national and foreign large entities, SMEs and start-ups, as well as some spin-offs, local tech hubs and incubators. The main industries exploring blockchain, cryptocurrencies and smart contract technology applications are financial services, healthcare, supply chain and distribution, retail and energy.

Notwithstanding the above, interest in the Portuguese blockchain market among foreign entities was boosted by the publication of Council of Ministers Resolution 29/2020 in April 2020, as part of the Portuguese government’s Digital Transition Action Plan, establishing the general principles for the preparation of the legislative framework for Technological Free Zones (*Zonas Livres Tecnológicas – ZLTs*) and Decree-Law 67/2021 establishing the legal framework for establishing ZLTs. These aim to be real-life geographical areas set up as regulatory sandboxes aimed at promoting and facilitating research, demonstration and testing activities for innovative technologies, products and services, including blockchain applications, across all industries.

#### Blockchain Market Issues in the Next 12 Months

Some of the trends identified in the past year are expected to continue (and possibly expand) over the next year, such as the increased use of NFTs and the application of blockchain technology in the data and healthcare industries.

Solutions and plans postponed due to the pandemic are also likely to be relaunched, especially

in the distribution, retail, health and energy sectors.

The number of registrations of cryptocurrency providers with the Bank of Portugal (*Banco de Portugal* – BdP) is expected to increase. At the time of writing, there are four registered providers, while eight more processes are under way.

There has been an increase of interest in real estate negotiations involving cryptocurrencies. Following the specific guidance on the matter by the Notaries Association, similar transactions are expected to increase.

The ZLTs framework will significantly contribute to the development, experimentation and adoption of the technology in the Portuguese market.

Moreover, considering that blockchain/DLT is not subject to uniform regulation in Portugal or the EU, any EU-wide regulatory or policy initiative would have an impact on the national blockchain market.

In this regard, the EU Digital Finance Package, which sets out the general lines for the digital transformation of the financial sector, comprises a set of proposals that are expected to have a direct impact on the market, if approved:

- the proposal for a Regulation on Markets in Crypto-assets (MiCA);
- the proposal for a Regulation on Digital Operational Resilience for the Financial Sector; and
- the proposal for a Regulation on a Pilot Regime for Market Infrastructures based on Distributed Ledger Technology.

Other recent legal acts may also be of relevance for the market, such as:

- the Data Governance Act; and

- the proposal for a Data Act.

Note that these acts have an impact not only on the financial sector but also on other industries, as they cover matters related to tokenisation, including utility tokens.

The tax treatment of crypto-assets is also an important issue that will shape the market in the coming months.

The EU Blockchain Strategy – notably, the activities of the European Blockchain Services Infrastructure and the interest of the European Commission in promoting legal certainty for digital assets and smart contracts – will have a direct impact on the European and Portuguese blockchain markets. Lastly, the EU Blockchain Observatory publications and studies produced for the European Parliament show that European legislators have a growing interest in matters related to smart legal contracts, intellectual property, data protection, cybersecurity/cybercrime, territoriality and the enforceability of current regulations on actors in the chain.

## 1.2 Business Models

### Energy

Starting in 2018, major energy entities have launched various projects and competitions leading to proofs of concepts for the development of alternative models of energy distribution using blockchain and smart contract technology.

### Banking and Finance

Four cryptocurrency providers are registered with BdP, while eight more processes are under way.

While there is much interest and curiosity among major market players in confirming the advantages of blockchain models, it remains to be seen whether any of the announced projects will indeed be implemented.

## Supply Chain Management

Some retail and large-scale distribution stakeholders have either announced their plans to use blockchain technology for supply chain management, or have already started doing so.

For instance, one large international retailer has used blockchain technology to provide information to consumers on the life cycle of certain controlled products and to ensure food quality and security. The same retailer has also announced its goal to integrate blockchain technology into its entire controlled production line.

## Healthcare

Several national SMEs have developed apps to ensure the security of information exchange, especially in the healthcare sector and in collaboration with hospitals in Portugal.

## Smart Contracts and Self-sovereign Identity (SSI)

There is growing discussion around the combination of smart contract technology with DLT, for either B2B or B2C applications across various industries. Similarly, some Portuguese companies have started exploring the possibility of providing SSI-related services.

## Real Estate

There has been a significant rise in interest in real estate negotiations involving cryptocurrencies, leading the Notaries Association to issue specific guidance on the matter, which came into effect in April 2022.

## 1.3 Decentralised Finance Environment

Although no decentralised finance projects have yet been completed and become fully operational in the Portuguese jurisdiction, the ecosystem is interested in such developments and is paying close attention to what happens in this respect.

## 1.4 Non-fungible Tokens

Despite predictions for the opposite, the NFT market is growing in Portugal. Over the past year and continuing throughout the first quarter of 2022, several organisations have either launched their own NFT marketplaces or have been collaborating with NFT developers, especially in the areas of sports, art, gaming and entertainment.

At the same time, taking advantage of the Portuguese innovation ecosystem, in April 2022 one of the first events exclusively focused on NFTs – the Non Fungible Conference – took place in Lisbon, with various marketplaces, investors and collectors participating. Some start-ups have also started exploring NFTs in the metaverse. Other applications currently being explored on a smaller scale involve tokenisation in finance and real estate.

## 2. REGULATION IN GENERAL

### 2.1 Regulatory Overview

#### Overview

As mentioned in **1.1 Evolution of the Blockchain Market**, blockchain/DLT and cryptocurrencies are not subject to uniform regulation in Portugal nor in the EU.

Considering that Portugal is a member of the EU and that European legislators are aiming for EU-wide harmonisation when it comes to emerging technologies, the Portuguese legal framework is expected to closely follow European initiatives, and any EU-wide regulatory or policy initiative will have an impact on the national blockchain market.

For specific policy initiatives and regulations, please refer to **1.1 Evolution of the Blockchain Market**.

### Competent Authorities

The opinions, guidelines and recommendations of European and national authorities issued in relation to blockchain and cryptocurrencies, both sector-specific and non-sector-specific, also have an impact on blockchain and crypto-assets activities. Such authorities include:

- the European Banking Authority, the European Securities Markets Authorities and the European Insurance and Occupational Pensions Authority in relation to the banking and finance sector and, in general, for AML/CFT purposes;
- the European Data Protection Board and the European Data Protection Supervisor for matters related to data protection and privacy; and
- the European Union Agency for Cybersecurity for cybersecurity issues.

The respective national authorities are as follows:

- the Portuguese central bank (BdP);
- the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* – CMVM);
- the Portuguese Data Protection Authority (*Comissão Nacional de Proteção de Dados* – CNPD); and
- the National Centre for Cybersecurity (*Centro Nacional de Cibersegurança* – CNCS).

### 2.2 International Standards

Portugal has been a member of the Financial Action Task Force (FATF) since 1990, and BdP and CMVM are also parties thereto.

BdP further participates in the Bank for International Settlements (BIS).

While both regulators recognise the recommendations of the FATF and BIS, there is no specific

Portuguese legislation formally implementing them.

### 2.3 Regulatory Bodies

#### Banking and Finance

Since 1 September 2020, BdP has been the entity responsible for the registration and supervision of compliance with the AML Law (Law No 83/2017 on money laundering and terrorist financing) and related rules for entities operating with virtual assets. However, the BdP's responsibility is limited to AML prevention, and does not cover other domains of prudential banking conduct or conduct of any other nature.

CMVM is the regulator responsible for supervising the financial instruments market. Accordingly, the scope of its jurisdiction relates to those virtual assets that are legally classified as securities (*valores mobiliários*). CMVM shall only supervise crypto-assets that may be legally qualified as such.

#### Data Protection, Privacy and Cybersecurity

In addition to the financial regulators, it is also important to highlight the competent authorities in data protection and cybersecurity, given the data and security implications of blockchain and on crypto-assets.

CNPD is the national supervisory authority responsible for monitoring any data processing activity that takes place in the Portuguese territory or targets Portugal-based individuals, and has the ability to impose administrative fines.

CNCS is the national authority responsible for ensuring the cybersecurity of state entities, operators of critical infrastructure, essential services pursuant to the NIS Directive, and digital service providers.

## Consumer Protection

The Directorate-General for Consumer Protection (*Direção-Geral do Consumidor*) is the entity responsible for ensuring consumer protection in the Portuguese territory, including in relation to the provision of digital products and services, and has the ability to impose administrative fines.

## Other Sectors

With reference to **1.2 Business Models**, the following authorities are of relevance in relation to other sectors that have been developing blockchain-based projects:

- energy – the Energy Services Regulatory Authority (*Entidade Reguladora dos Serviços Energéticos*) and the Energy Agency (*Agência para a Energia*); and
- health – the Regulatory Health Authority (*Entidade Reguladora da Saúde*) and the National Authority for Medicine and Health Products (*Autoridade Nacional do Medicamento e Produtos de Saúde*).

## 2.4 Self-regulatory Organisations

There are no self-regulatory organisations or trade groups that perform regulatory or quasi-regulatory roles with respect to businesses or individuals using blockchain in Portugal.

However, the Portuguese Blockchain Alliance should be mentioned. Although it does not have any self-regulatory binding authority, it collaborates with various stakeholders from different industries and with universities and research institutions, aiming to promote the dissemination of knowledge and collaboration in the area of blockchain.

## 2.5 Judicial Decisions and Litigation

As far as is known, there are no judicial decisions or ongoing litigation regarding blockchain or cryptocurrencies in Portugal.

In any case, please note that, as a civil law jurisdiction, Portuguese case law does not rely on the doctrine of binding precedent.

Moreover, the Court of Justice of the European Union (CJEU) has not issued a decision on blockchain, with the exception of C-264/14, which referred solely to services directly linked to the exchange of cryptocurrency for legal tender. In this case, the CJEU decided that the exchange of cryptocurrency for traditional currency qualifies as a supply of services for VAT purposes. As to the question of whether these transactions should be regarded as exempt supplies, the CJEU pointed out that cryptocurrency, being a contractual means of payment, cannot be regarded as a current account or a deposit account, a payment or a transfer. Moreover, unlike a debt, cheques and other negotiable instruments, cryptocurrency is a direct means of payment between the operators that accept it. Therefore, the CJEU ruled that transactions such as the exchange of cryptocurrency for traditional currency, and vice versa, should be exempt from VAT. The CJEU did not expressly address the subject of whether the exchange of a cryptocurrency for another cryptocurrency should also be regarded as an exempt supply of services for VAT purposes. However, the same reasoning applies and the answer should therefore be the same.

Notwithstanding, please refer to **2.8 Tax Regime** regarding the rulings of the Portuguese Tax Authority (PTA) on cryptocurrencies.

## 2.6 Enforcement Actions

Without prejudice to the decisions of the PTA mentioned in **2.8 Tax Regime**, there are currently no enforcement actions being taken in Portugal vis-à-vis activities using blockchain.



## 2.7 Regulatory Sandbox

There is currently no regulatory sandbox in Portugal specifically geared towards blockchain-based projects.

Nonetheless, Council of Ministers Resolution 29/2020 and Decree-Law 67/2021, mentioned in **1.1 Evolution of the Blockchain Market**, aim to establish Free Technological Zones, which are regulatory sandboxes.

Portugal Finlab (an innovation hub) was set up by the banking, securities and insurance regulators to develop innovative fintech projects, which can naturally also include DLT/blockchain.

Moreover, Portugal is a member of the Pan-European Blockchain Association, which together with the European Commission is preparing the parameters for a regulatory sandbox on data portability, B2B data spaces, smart legal contracts and SSI for critical sectors, such as health, environment, mobility and energy. The efforts for the development of the sandbox are underway, and the results thereof may lead to a regulatory initiative from the European Commission.

## 2.8 Tax Regime

### Overview

For clarity purposes, it should be noted that the Portuguese tax regime has not been updated to consider the use of blockchain or cryptocurrencies.

### Transactions With Cryptocurrencies

Although the law is silent on this matter, the PTA has already issued binding rulings on the Value Added Tax (VAT) and Personal Income Tax (PIT) implications of transactions with cryptocurrencies.

### VAT

In line with the CJEU's interpretation of the VAT treatment of transactions with cryptocurren-

cies (in Case C-264/14, *Skatterverket v David Hedqvist*), the PTA ruled that transactions such as the exchange of cryptocurrency for traditional currency (and vice versa) and mining activities should be exempt from VAT.

Following the CJEU's judgment, which should apply in all EU Member States, the binding rulings issued by the PTA were an important step forward in the definition of the VAT treatment of cryptocurrency transactions. With these binding rulings, entities exchanging cryptocurrencies, as well as start-ups and users, are now operating in a safer environment in Portugal from a VAT perspective. Buying, selling, sending, receiving, accepting and spending cryptocurrencies in exchange for legal tender currency (and vice versa) will not trigger a VAT liability, thus allowing economic agents to deal with cryptocurrencies as they would with legal tender currency or other types of money.

### PIT

For PIT purposes, the PTA ruled that any gains derived from the exchange of cryptocurrency for legal tender currency (and vice versa) should not be considered as income for PIT purposes, to the extent that this activity does not constitute a business or professional activity. Indeed, the PTA concluded that gains derived from the sale of cryptocurrency would not fall under the concept of capital gains or investment income as defined by the Portuguese PIT Code and, consequently, that those gains are not covered by the taxable base of the Portuguese PIT. However, the PTA was silent on the criteria to qualify the exchange of cryptocurrency as a trading activity that amounts to a business or professional activity.

Nevertheless, it should be noted that binding rulings only bind the PTA towards the taxable person who submitted the ruling request and in relation to the specific facts and questions presented to the PTA in this request.



## Blockchain-Based Transactions

Despite posing very complex challenges (such as the allocation of taxing rights for income and VAT purposes, the relevance of (identifying) the place of human and technical resources, and the qualification of tokens for tax purposes), tax issues related to blockchain-based transactions have not yet been addressed by the Portuguese legislator or the PTA.

## Automatic Exchange of Information Between EU Member States

Regarding the automatic exchange of information in tax matters, the PTA has reported the release of the initial impact assessment of the European Commission's Proposal for a Directive (so-called DAC 8) amending the Directive on administrative co-operation in the field of taxation as regards cryptocurrencies and electronic money. Developments in this area are awaited.

In 2021, the European Commission launched a public consultation to collect data and evidence to evaluate the need for new rules on the reporting and exchange of information for tax purposes on e-money and crypto-assets, as well as new rules on penalties and compliance measures for the various reporting obligations under the DAC framework and the potential scope of those provisions. The consultation gathered stakeholders' views on the use of e-money and crypto-assets, the type of information that is available on customers, transactions and investments, and which reporting mechanisms may be used. The outcome of the consultation is now available, alongside an impact assessment for an amendment.

## 2.9 Other Government Initiatives

Without prejudice to the initiatives described in **1.1 Evolution of the Blockchain Market** and **2.7 Regulatory Sandbox**, the Portuguese government (through Portugal Digital) and the national authorities, especially CMVM and BdP, are mak-

ing efforts to raise awareness and increase the digital literacy of citizens and investors regarding blockchain and cryptocurrencies by offering training sessions or informative documents and periodically organising conferences and seminars in collaboration with blockchain market stakeholders and universities.

## 3. CRYPTOCURRENCIES AND OTHER DIGITAL ASSETS

### 3.1 Ownership Overview

There are currently no specific rules or regulations addressing the ownership of cryptocurrencies or blockchain-based digital assets in Portugal.

In any case, the rules on ownership/entitlement will depend on the nature of the asset. A digital asset could be a representation of an underlying asset or a natively digital asset. In this regard, a digital asset could qualify as digital content or could be equated to the nature of the asset that it is representing.

Rules on the ownership of goods or assets are generally determined in accordance with the Portuguese Civil Code and basically relate to the type of assets at stake and, in particular, whether they are subject to mandatory registration (such as real estate assets or other types of movable assets, including vehicles or aircrafts).

### Finance

From a finance perspective, the closest resemblance to the ownership of digital assets is that related to dematerialised/book-entry securities, such as shares. Pursuant to the Portuguese Securities Code, the ownership of shares not represented through physical paper certificates is evidenced through certificates of ownership

issued by the registering entities where the individual registration accounts are held.

### 3.2 Categorisation

Without prejudice to the future MiCA and the fintech sector, there are no specific laws, regulations or judicial decisions addressing the categorisation or nature of digital assets and tokens. Please see **3.1 Ownership** regarding the nature of digital assets in general and matters of ownership/entitlement.

At this stage, there is still no legislation in Portugal providing for an appropriate characterisation of digital assets; such legislation is expected to closely follow the MiCA categorisation. However, the approach taken so far by CMVM is to consider that tokens that qualify as securities or financial instruments may fall under CMVM's supervision.

This qualification is to be conducted on a case-by-case basis and will depend on a given number of features of the token. A token may be qualified as a security if it corresponds to a document representing one or more private legal entitlements (rights and/or obligations) and in relation to which the corresponding holders are entitled to an income (for example, interest or profit sharing). Similarly, a token may be qualified as a utility token when it has non-financial purposes but, on the contrary, it intends to provide digital access to a good or service that is available on a blockchain.

In this respect, in the context of the documents made publicly available by the issuer of digital assets (including, among other elements, the "white paper"), it will be particularly relevant to assess whether the issuer creates a legitimate expectation among investors that there will be a return on investment. This return may be either the granting of a right to a dividend or interest, or the increment of the asset value by reference to the issuer or to a third party action for that effect.

### 3.3 Stablecoins

As mentioned in **3.2 Categorisation**, there is no formal treatment of tokens in Portugal, nor distinctions made between them. Therefore, there is no formal distinction between stablecoins backed by deposits of fiat currency and "algorithmic" stablecoins. The exercise to be carried out in relation to this type of asset would therefore be to assess, on a case-by-case basis, whether they can qualify as security/financial instruments or as crypto-assets subject to AML registration with the Bank of Portugal.

However, it should be noted that stablecoins are expressly mentioned in the MiCA Proposal as an asset-referenced token or e-money token (when functioning as a means of payment), and specific rules are proposed for this type of asset. According to MiCA, "algorithmic" stablecoins should not be considered asset-referenced tokens, provided that they do not aim to stabilise their value by referencing one or several other assets.

If the Proposal is approved, this classification will also apply in the Portuguese jurisdiction.

### 3.4 Use of Digital Assets

There is no prohibition on the use of cryptocurrencies as a means of payment. However, since cryptocurrencies are not recognised as fiat currency in Portugal, their acceptance as a means of payment is not legally mandatory.

### 3.5 Non-fungible Tokens

#### Overview

Currently, NFTs are not subject to specific regulation in Portugal. However, existing legal frameworks apply to the creation, marketing and sale of NFTs, such as:

- AML/CTF laws where NFTs may be qualified as digital representation of value not necessarily connected with legal established currency and that are not fiat currency, security

or other financial instrument, but that are accepted as means of exchange or investment and can be transferred, stored and sold by electronic means;

- IP laws with relation to the creation and licensing of underlying intellectual property rights;
- the e-Commerce Law (Decree-Law 7/2004, as amended);
- consumer protection laws, notably the Distance and Off-Premises Law (Decree-Law 24/2014, as amended) and the Digital Goods, Content and Services Law (Decree-Law 84/2021); and
- advertising laws, notably the Advertising Code (Decree-Law 33/90, as amended) and provisions that may apply depending on the particular characteristics of the NFT.

In addition, the creation and sale of NFTs are usually regulated contractually via specific terms and conditions of the platform. These terms vary depending on the characteristics of the product/service and of the underlying asset that the NFT represents.

Nonetheless, since NFTs are a representation of a digital or physical asset, the Portuguese Civil Code will also apply to their sale.

## 4. EXCHANGES, MARKETS AND WALLET PROVIDERS

### 4.1 Types of Markets

At this stage, there are no specific markets in the Portuguese jurisdiction for digital assets.

### 4.2 On-Ramps and Off-Ramps

There are no formal processes and no specific legal framework in Portugal under which exchanges of fiat currency for cryptocurrencies are conducted. Based on publicly available information, such exchanges are made at the initia-

tive of interested parties – including individuals or entities – through exchange houses or similar entities operating on a cross-border basis, mostly online.

### 4.3 KYC/AML

Law 83/2017 on the prevention of money laundering and terrorist financing (the AML Law) already includes certain rules on activities carried out with virtual assets (*ativos virtuais*). For instance, entities operating with virtual assets can only exercise such activity following prior registration with BdP. These same entities are also subject to certain AML-related obligations, including due diligence and identification duties, provided that certain thresholds are met.

For the purposes of these rules, the definition of “activities carried out with virtual assets” corresponds to any of the following economic activities, when exercised for and on behalf of a client:

- the exchange of virtual assets and fiduciary coins;
- the exchange of one or more virtual assets;
- the transfer of virtual assets from one address or wallet into another one; and
- the safekeeping or safekeeping and management of virtual assets or any other instruments that allow for the control, ownership, custody or transfer of those assets, including private cryptographic keys.

### 4.4 Regulation of Markets

Digital assets markets are not currently regulated in Portugal, and there have been no enforcement actions on the matter (see **2.6 Enforcement Actions**). Please see **1.1 Evolution of the Blockchain Market** regarding the relevant regulatory initiatives and **2.3 Regulatory Bodies** regarding the national competent authorities.

#### 4.5 Re-hypothecation of Assets

There is no specific regulation applicable in this respect in Portugal.

#### 4.6 Wallet Providers

There are no regulations in Portugal specifically addressing the provision of online or offline storage solutions for private cryptographic keys that control the ability to give instructions with respect to digital assets.

Note, however, that the 5AMLD (Directive (EU) 2015/849) was transposed into Portuguese law in August 2020, amending the national law on money laundering and terrorist financing.

The national law covers wallet providers providing services in the Portuguese territory, although, following the definition of the 5AMLD, it does not distinguish between online or offline storage solutions. Please see **4.3 KYC/AML** regarding the obligations applicable to wallet providers.

Notwithstanding this, the Portuguese Consumer Protection Framework and the GDPR may further apply in relation to consumer and data protection, respectively.

## 5. CAPITAL MARKETS AND FUNDRAISING

### 5.1 Initial Coin Offerings

If the initial coin offering (ICO) is addressed to investors who are resident in Portugal and if the tokens issued are qualified as securities, the ICO shall be ruled in accordance with the Portuguese Securities Code and the applicable EU legal framework on the public offering of securities. These rules will include obligations relating to the following:

- the issuance, representation and transfer of the assets;

- the trading and distribution of the assets;
- the requirements applicable to information quality; and
- market abuse.

### 5.2 Initial Exchange Offerings

There are no regulations specifically applicable to fundraising through the sale of tokens. Nonetheless, as stated in **5.1 Initial Coin Offerings**, if and to the extent that such tokens resemble securities, the Portuguese and EU rules on offers for the exchange of securities may be applicable.

At the same time, if and to the extent that there are crowdfunding activities that use tokens, the Portuguese legal regime on crowdfunding may be applicable.

### 5.3 Other Token Launch Mechanisms

There are no specific regulations in Portugal regarding distributions of tokens to community members who are likely to utilise a particular protocol via an airdrop or similar mechanism that does not necessarily involve a purchase of the token.

However, some organisations, such as in the social economy or finance sector, are exploring the possibility of the tokenisation of memberships in the context of decentralised autonomous organisations (DAOs).

### 5.4 Investment Funds

Although there is no specific law or regulation on investment funds or collective investment schemes that invest in digital assets, CMVM recently stated that vehicles that intend to invest in this class of assets should be set up as a collective investment scheme investing in non-financial assets or a specialised alternative investment fund, subject to the respective rules. Under Portuguese law, both types of vehicles are considered alternative investment funds, within

the meaning and for the purposes of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.

CMVM highlighted the importance of these investment funds making proper disclosure and identification of their intention to invest in digital assets, namely in the description of the investment policy. Moreover, the definition of the evaluation rules for digital assets comprised in the portfolio, as well as the way in which the fund manager will address and manage the risks associated with these volatile assets, constitute key items to be analysed by CMVM during the process of registration or approval of the fund, as the case may be.

## 5.5 Broker-Dealers and Other Financial Intermediaries

There are no special regulations in the Portuguese jurisdiction applicable to broker-dealers or other financial intermediaries that deal in digital assets. Nonetheless, as stated in **5.1 Initial Coin Offerings**, when any such digital assets mirror some of the features qualifying an instrument as a security, then, following a case-by-case assessment, the Portuguese Securities Code and EU legal framework may apply to such brokerage or financial intermediation services.

## 6. SMART CONTRACTS

### 6.1 Enforceability

#### Overview

There are no specific laws or regulations in Portugal addressing the legal enforceability of private contractual arrangements made in whole or in part using blockchain-based smart contracts.

Similarly, as stated in **2.5 Judicial Decisions and Litigation**, there are no judicial decisions on the matter.

The enforceability of smart legal contracts has not been addressed at the European level either. However, as stated in **2.7 Regulatory Sandbox**, it is safe to assume that the European Commission will launch a regulatory initiative on smart contracts in the coming years.

### Electronic Contracts

Smart legal contracts fall within the scope of electronic contracts and, as such, they are, in principle, admissible under the principle of contractual freedom and the admissibility of electronic contracts recognised in the Portuguese Civil Code and the e-Commerce Law (Law 7/2004).

Contracts signed electronically, without human intervention, are also enforceable.

In addition, electronic declarations satisfy the legal requirement of written form, provided that the guarantees of reliability, legibility and conservation are met.

### Exemptions

The following are exempt from the principle of the admissibility of electronic contracts:

- contracts related to family law and succession;
- contracts requiring the intervention of the courts, public authorities or entities exercising public powers;
- real estate contracts, except leasing; and
- deposits and guarantees, when these are not part of the professional activity of the individual/entity providing them.

### 6.2 Developer Liability

There are currently no specific laws, regulations or judicial decisions addressing the liability of blockchain stakeholders in Portugal, nor has this topic been addressed at the European level.

However, under the Portuguese Civil Code any legal or natural person can be held liable for damages. In this sense, a developer of a blockchain-based network or of the code that runs on the network could be held liable for losses arising through the use of this software, provided that there are losses, fault on the part of the developer (negligence or intentional misconduct) and a causal link between the fault and the losses.

In this regard, and without prejudice to the application of any specific laws such as sector-specific regulations or consumer protection laws depending on the relationship of the parties, developers' liability can be regulated contractually. This may be of relevance in private DLTs, as well as in public DLTs, through the drafting of terms of use that can exclude or limit liability in the conditions permitted by law (for instance, exclusion or limitation of liability is generally not permitted for gross negligence or intentional misconduct).

## **7. LENDING, CUSTODY AND SECURED TRANSACTIONS**

### **7.1 Decentralised Finance Platforms**

There are currently no specific laws or regulations applicable to decentralised financial platforms.

### **7.2 Security**

Theoretically, to the extent that the digital asset has no physical representation, according to the Portuguese Civil Code the appropriate security interest to be taken over the digital asset would be a pledge over such digital asset.

### **7.3 Custody**

While there are no specific rules in the Portuguese jurisdiction regarding the custody of digital assets, there are duties applicable to custodian roles with respect to securities and other

financial instruments. Accordingly, given that some of the features usually attributed to digital assets are similar to those of securities, it would be expected that any future regulatory requirements on digital assets would mirror those already foreseen in the Portuguese Securities Code for custodians of securities.

## **8. DATA PRIVACY AND PROTECTION**

### **8.1 Data Privacy**

#### **Overview**

There are currently no specific laws, regulations or judicial decisions in Portugal addressing blockchain-related data privacy issues. Similarly, this topic has not been addressed at the European level, with the exception of some reports and studies issued by the European Blockchain Observatory and on behalf of the European Parliament.

Nonetheless, the GDPR (Regulation (EU) 2016/679) and the Portuguese GDPR Implementation Law (Law 58/2019) will apply.

#### **Specific Challenges**

The application of the GDPR and, in particular, the exercise of individuals' rights and compliance with data processing principles in a blockchain environment raise various questions.

The discussion on the GDPR and blockchain mostly revolves around the following topics:

- the right to rectification: individuals' right to correct and modify their data;
- the right to erasure/right to be forgotten: individuals' right to request the erasure of their personal data; and
- the principles of data minimisation and purpose limitation: the processing of personal data must be adequate and relevant to the



stated processing purposes and limited to what is necessary to achieve those purposes.

Considering that, by design, the data included on the chain is immutable and blockchain is an append database, the tension between the technology and the GDPR is evident.

It should be noted that these challenges increase in the context of permissionless public blockchains.

In light of the above, solutions such as storing the data off-chain to allow for its rectification or ensuring that the data is made inaccessible to third parties, including the data controller, following the end of the processing or when an individual requests the erasure of their data, by destroying any key or further encrypting it, have been proposed by academia as well as entities using DLT.

However, it is understood, both in Portugal and at the European level, that blockchain provides manifold opportunities for promoting data protection and security in line with the principles of data protection by design, therefore ensuring GDPR compliance.

## 8.2 Data Protection

In addition to the issues discussed in **8.1 Data Privacy**, the use of blockchain technology, especially public blockchains, raises questions around the proper identification of data controllers or joint controllers and data processors due to the difficulty in identifying the actors involved.

This challenge further complicates the enforceability of data protection rules by individuals, data protection authorities and the courts.

## 9. MINING AND STAKING

### 9.1 Mining

There are currently no specific laws, regulations or judicial decisions regulating mining activities in Portugal.

Similarly, this topic has not been addressed at the European level.

### 9.2 Staking

There are currently no specific laws, regulations or judicial decisions regulating “staking” in Portugal.

Similarly, this topic has not been addressed at the European level.

## 10. DECENTRALISED AUTONOMOUS ORGANISATIONS (DAOS)

### 10.1 General

Although some entities have started exploring the possibility of DAOs, especially in the social economy and finance sector, as far as is known there are not yet any DAOs in Portugal.

Moreover, there is no specific law applicable to DAOs in Portugal; the legal rules applicable to the business vehicle selected by the founders of the DAO will apply.

### 10.2 DAO Governance

As mentioned in **10.1 General**, no DAOs are currently active in Portugal.

### 10.3 Legal Entity Options

As mentioned in **10.1 General**, there are currently no DAOs in Portugal. However, the selection of the business vehicle depends on the objectives and activities that the DAO wishes to carry out.



*Contributed by: Tiago Correia Moreira, Helena Correia Mendonça, Conceição Gamito and Iakovina Kindylidi, VdA*

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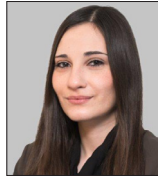
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