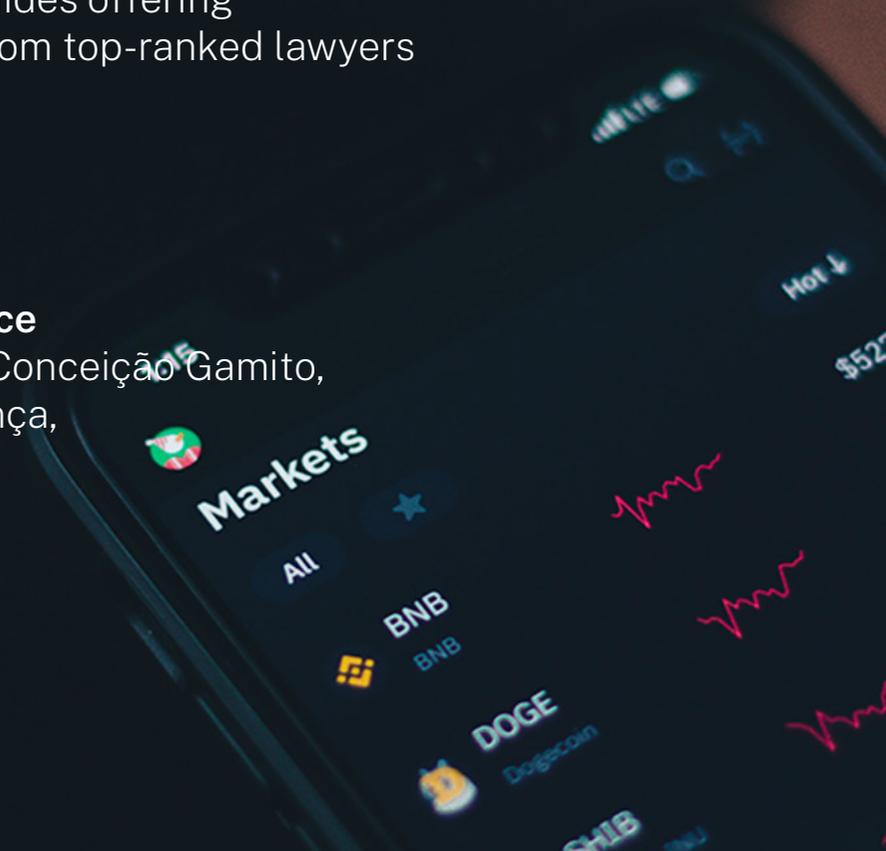

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Blockchain 2023

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Portugal: Law & Practice

Tiago Correia Moreira, Conceição Gamito,
Helena Correia Mendonça,
and Iakovina Kindylidi
VdA



PORTUGAL



Law and Practice

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VdA is a leading international law firm with more than 40 years of history, recognised for its impressive track record and innovative approach to corporate legal services. Its highly specialised legal services cover several industries and practice areas, enabling VdA to overcome the increasingly complex challenges faced by its clients. VdA offers robust solutions grounded in consistent standards of excellence, ethics and professionalism. VdA has been consistently

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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.

Over the past 12 months, the Portuguese blockchain market has also been impacted by the crypto winter. On the one hand, some ambitious adoption plans were postponed and some blockchain projects, including NFT-related collaborations, were interrupted by the sudden bankruptcies of international start-ups and scale-ups operating in the market. On the other hand, both national and international investors continue to invest in the Portuguese blockchain market. The need for secure digital transactions and operations has stimulated a growing interest in the technology – particularly among large national and international entities that are exploring the business and legal feasibility of its

application in sectors such as healthcare and real estate – and in alternative business structures, such as DAOs. Moreover, companies across sectors are increasingly exploring the possible convergence of blockchain, AI and AR/VR for various metaverse projects.

In addition, the EU Blockchain Strategy aimed at developing a “gold standard” for blockchain and promoting use of the technology to ensure data security is continuing to inspire initiatives in the area, especially through the activities of the European Blockchain Services Infrastructure (EBSI). 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, start-ups, 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.

In addition, the Portuguese legislative framework for Technological Free Zones (*Zonas Livres Tecnológicas*– ZLTs) is aimed at setting up real-life geographical areas as regulatory sandboxes to promote and facilitate research, demonstration and testing activities for innovative technologies, products and services, including blockchain applications, across all industries, making Portugal an attractive option for investment and exploration of the technology.

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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, real estate and healthcare industries. An increase in metaverse-related initiatives that combine blockchain and other emerging technologies is also expected. Postponed solutions and plans are also likely to be relaunched, especially in the distribution, real estate, 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 nine registered providers, while more processes may be under way.

There has been an increase of interest in real estate negotiations involving cryptocurrencies, with such transactions expected to increase following the specific guidance on the matter by the Notaries Association, similar transactions are expected to increase; there is also increased interest in the tokenisation of assets and DAOs.

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

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 following regulations in the EU Digital Finance Package, which sets out the general guidelines for the digital transformation of the financial sector, have a direct impact on the market:

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

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

- the Data Governance Act;
- the proposal for a Data Act;
- the Common EU Data Spaces initiative, with the proposal for Financial Data Spaces expected (this initiative was originally expected in 2022 as per the Communication of the European Commission on Common European Data Spaces, while the Financial Data Spaces was one of the strategic objectives set out in the EU Digital Finance Strategy – nonetheless, it should be noted that the Report on Open Finance by the Expert Group on European Financial Data Spaces was published on 24 October 2022);
- the NIS II Directive and its transposing law;
- the Digital Services Act (DSA);
- the proposal for an AML/CFT Package; and
- the VAT in the Digital Age (ViDA) package, which translates into three proposals amending the VAT Directive, the VAT Implementing Regulation and Regulation (EU) 904/2010 on administrative co-operation, and is divided into three pillars:
 - (a) Digital Reporting Requirements and e-invoicing;
 - (b) the VAT treatment of the platform economy; and
 - (c) a single place of VAT registration.

Note that these acts have an impact not only on the financial sector but also on other industries,

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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. In fact, 2023 constitutes a turning point for the tax framework for cryptocurrencies and other crypto-assets, as a result of the December 2022 approval, by the State Budget Law for 2023, of specific tax rules that came into force on 1 January 2023. The full extent of the changes brought about by the new rules is yet to be determined.

The EU Blockchain Strategy – notably, the activities of the EBSI in relation to decentralised digital identity and verifiable credentials, 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. Finally, 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

Since 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

Nine cryptocurrency providers are currently registered with BdP, and more processes may be 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.

DAOs

Regardless of the sector, given the innovation-driven initiatives of the Portuguese government thus far, some international companies are considering the possibility of adopting a DAO model in Portugal.

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.

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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. Moreover, more and more entities are exploring the possibility of tokenising real estate assets.

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

The NFT market is growing in Portugal, despite predictions for the opposite considering the ongoing crypto winter. Over the past year and continuing throughout the first quarter of 2023, 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.

Other applications currently being explored on a smaller scale involve tokenisation in finance and real estate, while there is a new interest in NFTs and their application on metaverse and DAO-related projects.

At the moment, these initiatives have not generated any regulatory reaction. Nonetheless, some reactions are expected at an EU level at least, in relation to the AML impact of NFTs, their VAT regime and the metaverse.

Working Paper No. 1060 on the VAT treatment of transactions involving NFTs, issued in February by the EU VAT Committee, is also of note, as it illustrates the complex challenges faced in

determining the VAT treatment of transactions involving NFT; please see **2.8 Tax Regime** for discussion of this paper.

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-asset 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;

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- 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. CMVM is further responsible for supervising matters related to consumer protection due to unauthorised financial activity, and the advertising of financial products and services.

It should be noted that the competent bodies have not changed, despite the well-known bankruptcies in the blockchain sector in 2022.

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 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 the NIS II 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

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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 debts, 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.

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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 aim to establish Technological Free Zones (see **1.1 Evolution of the Blockchain Market**), 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.

Nonetheless, during the first quarter of 2023, the European Commission launched the European Blockchain Regulatory Sandbox, which will have a direct impact on applications of the technology in areas such as data portability, B2B data spaces, smart legal contracts and SSI for critical sectors, such as mobility, energy and manufacturing. The European Blockchain Regulatory Sandbox will operate for three years, each with three annual cohorts of 20 use cases. The activities of the sandbox may lead to a regulatory initiative from the European Commission.

2.8 Tax Regime

Overview

2023 represents a turning point for the tax framework for cryptocurrencies and other crypto-assets, as a result of the December 2022 approval, by the State Budget Law for 2023, of specific tax rules that came into force on 1 January 2023.

This new tax framework is implemented as a Regulation establishing a European framework for crypto-asset markets (MiCA Regulation) is approved by the European Council and, comple-

menting this Regulation, new tax transparency rules are proposed by the European Commission for all service providers facilitating transactions in crypto-assets for customers resident in the European Union.

In a nutshell, the newly approved crypto-asset tax framework now in force can be divided into the following four pillars:

- the establishment of a legal definition of crypto-assets for tax purposes;
- the taxation of income from transactions with crypto-assets;
- the taxation on wealth transfers, covering certain transfers of crypto-assets; and
- the taxation of commissions and fees charged by crypto-asset service providers.

Legal Definition of Crypto-Assets

Starting with the first pillar, the law now comprehensive defines a crypto-asset as “any digital representation of value or rights that can be transferred or stored electronically using distributed recording or similar technology”. This definition is, in fact, very broad and is intended to cover most types of crypto-assets, such as cryptocurrencies, stablecoins, utility tokens and security tokens, but expressly excludes “unique crypto-assets that are not fungible with other crypto-assets” (ie, NFTs).

Taxation of Income From Transactions With Crypto-Assets

Moving on to the second pillar, for Personal Income Tax (PIT) purposes, income that is derived from the issuance of crypto-assets (eg, through mining activities) or from the validation of transactions with crypto-assets through consensus mechanisms within the scope of a business or professional activity will be taxed as

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business or professional income (ie, under PIT “Category B” income).

For the determination of the taxable income derived from these activities by taxpayers covered by the PIT simplified regime, a 0.95 coefficient is applied to income derived from mining activities and a 0.15 coefficient to business or professional income derived from other transactions with crypto-assets. The deduction of expenses is not allowed under the PIT simplified regime.

For taxpayers covered by the PIT organised accounting regime, the taxable income will consist of the amount of income obtained. Under the organised accounting regime, the deduction of expenses actually incurred and essential to obtaining that income is allowed.

Whether calculated under the simplified regime or the organised accounting regime rules described above, the relevant taxable income will be taxed at the PIT progressive rates, with the possible application of solidarity surcharges.

Gains from the disposal for consideration of crypto-assets are qualified as capital gains, taxable as PIT “Category G” income. However, while capital gains on crypto-assets held for less than one year are taxed at a flat rate of 28% (this rate does not apply if the taxpayer opts for the income aggregation, in which case PIT progressive rates will apply, as well as possible solidarity surcharges), capital gains on crypto-assets that do not qualify as securities and are held for more than 365 days are excluded from taxation.

Where the consideration for the disposal of the crypto-assets takes the form of other crypto-assets, the new rules provide for the crypto-assets received to be attributed the acquisition

value of the crypto-assets delivered, thus deferring taxation (if any) to the moment when the capital gain is actually realised.

The relevant disposal value for a crypto-asset is considered to be its market value at the date of disposal. The relevant capital gain for PIT purposes is the difference between the disposal value and the acquisition value, net of the part qualified as capital income, if any; the deduction of expenses necessary to and actually incurred in the acquisition of the crypto-assets is allowed.

The FIFO (First In First Out) rule is applied to crypto-assets, whereby the gains acquired more recently are sold for the purposes of calculating the balance of capital gains. If the option for aggregation is exercised (as opposed to taxation at a flat rate of 28%), capital losses may be carried forward for the following five years.

For PIT purposes, the new rules provide that any form of remuneration derived from transactions with crypto-assets (eg, staking) that is not qualified as business or professional income will qualify as investment income, taxable as PIT “Category E” income. This income is subject to a flat rate of 28% and is exempt from withholding tax, regardless of the form it takes (ie, even when paid in cash). However, when the consideration takes the form of other crypto-assets, this income will be taxed under PIT “Category G” income as capital gains, but only at the moment of disposal of the crypto-assets received.

With the aim of combating avoidance, it is provided that neither the deferral of taxation when the consideration takes the form of other crypto-assets, nor the exclusion from taxation for crypto-assets that do not qualify as securities and are held for more than 365 days, will apply to a person or entity that is not a tax resident in

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another member state of the European Union, the European Economic Area or another state or jurisdiction in which a double tax treaty or a bilateral or multilateral agreement that provides for the exchange of information for tax purposes is in force. Furthermore, crypto-assets are deemed to have been disposed of in the event of the termination of activity or the loss of resident status in the Portuguese territory. In the loss of resident status, it is also provided that the relevant taxable income is determined by the positive difference between the market value on the date the resident status is lost and the acquisition value, plus the expenses necessary to and actually incurred in the acquisition of the crypto-assets.

For Corporate Income Tax (CIT) purposes, the new rules provide that income derived from the issuance of crypto-assets (eg, through mining activities) or from the validation of transactions with crypto-assets through consensus mechanisms is considered as income derived from commercial or industrial activities, and is subject to CIT.

Similar to the new PIT rules, under the simplified regime a coefficient of 0.15 should be applied for the determination of the taxable income arising from these activities. Thus, in practice, only 15% of the taxable income derived from these activities will be subject to taxation.

Also noteworthy in this new tax framework is the creation of a reporting obligation that applies to any person or entity, with or without legal personality, providing crypto-asset custody and management services on behalf of third parties or managing one or more crypto-asset trading platforms. All of those covered by this new reporting obligation will have to report to the PTA all crypto-asset transactions carried out with their intervention, by the end of January each

year, for each taxpayer, using an official form that is yet to be approved.

Taxation on Wealth Transfers

For crypto-assets deposited in institutions whose head office, effective management or permanent establishment is in Portuguese territory (and also for non-deposited crypto-assets, in the case of succession due to death, when the transferor is domiciled in Portuguese territory or in other gratuitous transfers), when the beneficiary is domiciled in Portuguese territory, the new rules provide that the disposal of crypto-assets through gratuitous transfers (eg, donations or inheritance) may be subject to stamp tax at a rate of 10%, which is borne by the beneficiary of the transfer. However, the exemption currently applicable for gratuitous transfers of other assets in favour of certain beneficiaries (eg, spouses, unmarried partners, descendants and ascendants) also applies to gratuitous transfers of crypto-assets.

For the purposes of assessing the relevant value on which property transfer tax should be levied whenever the purchase price of a given property is fully or partially paid in crypto-assets, the new rules provide that the value of the crypto-assets given in exchange – to be determined under the terms established in the Stamp Tax Code – should be taken into account.

Accordingly, it is also established that the taxable value of crypto-assets is determined by taking into consideration the following rules, in the indicated order:

- application of specific rules provided for in the Stamp Tax Code;
- the value of the official quotation, when it exists; or

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- the value declared by the head of the estate (*cabeça-de-casa*) or by the beneficiary, which should approximate the market value as much as possible.

For the purposes of this last rule, the PTA may determine the taxable value based on the market value if it justifiably considers that there may be divergence between the value declared and the market value.

Taxation of Commissions and Fees

The new tax framework for crypto-assets provides that commissions and fees charged on transactions carried out by or with the intermediation of crypto-asset service providers domiciled in Portuguese territory or to customers domiciled in Portuguese territory are subject to a 4% stamp tax rate, which is borne by the customers. In the case of non-payment, the new rules also foresee that the customer will be jointly and severally liable with the service provider for the payment of the tax.

Value Added Tax (VAT)

Bearing in mind the above overview of the four main pillars, the new crypto-asset tax framework is silent on the VAT implications of transactions with crypto-assets.

Before this new tax framework, the interpretation of the CJEU and the binding rulings issued by the PTA were the available points of reference relied on to assess the VAT treatment of transactions with crypto-assets.

Indeed, in line with the CJEU interpretation of the VAT treatment of transactions with cryptocurrencies, the PTA ruled that transactions such as the exchange of cryptocurrency for fiat currency (and vice versa) should be exempt from VAT.

While this guidance on the exemption for the exchange of cryptocurrencies for fiat currency, and vice versa, can still be relied on, the new tax framework implies a new approach to the VAT treatment of transactions with crypto-assets. The full extent of the changes brought by the new rules is yet to be determined.

Working Paper No. 1060 on the VAT treatment of transactions involving NFTs was issued in February by the EU VAT Committee and provides a good illustration of the complexity of determining whether or not a person or entity making transactions with crypto-assets is a taxable person, the nature and corresponding VAT treatment of transactions with crypto-assets, and their place of supply and taxable amount, as well as different criteria adopted by different EU member states.

Thus, the practical application in the course of 2023 will be critical in gauging the impact of the new tax framework on the VAT treatment of transactions with crypto-assets.

Finally, the ViDA package will set the agenda for the second half of this year and in the coming years (see **1.1 Evolution of the Blockchain Market**).

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 making 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 semi-

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nars 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 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).

With regards to NFTs, while the ownership of the digital file and its metadata is undisputed, the ownership (if any) or the rights granted to the underlying intellectual property asset will be determined by the contractual relationship between the parties.

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 (eg, 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

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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 are 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 BdP.

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.

Please see **2.8 Tax Regime** regarding the tax framework for stablecoins and other crypto-assets.

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

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 for NFT providers and marketplaces;
- IP laws with relation to the creation and licensing of underlying intellectual property rights;
- the DSA;
- 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);
- advertising laws, notably the Advertising Code (Decree-Law 33/90, as amended); and
- sector-specific 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 the specific terms and conditions of the platform. These terms vary depending on the characteristics of the product/service and the underlying asset that the NFT represents.

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

Please see **2.8 Tax Regime** regarding the tax framework for NFTs and other crypto-assets.

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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 initiative 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/Sanctions

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; and
- the safekeeping or safekeeping and management of virtual assets or any other instru-

ments that allow for the control, ownership, custody or transfer of those assets, including private cryptographic keys.

Although there are no specific government sanction rules applicable in relation to blockchain-related matters, as far as is known, and governmental sanctions are expected to apply in the same fashion.

4.4 Regulation of Markets

Digital asset 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/Sanctions regarding the obligations applicable to wallet providers.

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Notwithstanding this, the Portuguese Consumer Protection Framework and the GDPR (Regulation (EU) 2016/679) may further apply in relation to consumer and data protection, respectively.

5. Capital Markets and Fundraising

5.1 Initial Coin Offerings

If the 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 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

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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, the Portuguese Securities Code and EU legal framework may apply to such brokerage or financial intermediation services, following a case-by-case assessment.

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, either due to the activities of the recently launched regulatory sandbox or within the scope of the Data Act and the Common EU Data Spaces.

Electronic Contracts

Smart legal contracts fall within the scope of electronic contracts so 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

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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 and the Portuguese GDPR Implementation Law (Law 58/2019) will apply.

Moreover, as stated in **2.7 Regulatory Sandbox**, it is safe to assume that the European Commission will launch a regulatory initiative on the use of DLT and smart contracts for data protection and data sharing in the coming years.

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.

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

In light of the above, academia and entities using DLT have proposed 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.

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.

Please see **2.8 Tax Regime** regarding the tax framework for mining activities.

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.

Please see **2.8 Tax Regime** regarding the tax framework for staking.

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.

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