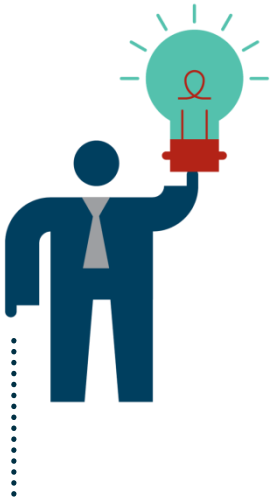
Interpretations of existing regulation concerning ICOs in selected European and Asian Countries



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Contents

A. Introduction

Virtual Currencies have recently been extremely fashionable. Starting with the "mother" of all virtual currencies, the Bitcoin, which is currently – accompanied by the media – reaching astronomic prices (the "price" for a Bitcoin is currently[1] just under EUR 10,000 and rose briefly up to EUR 13,000 at the end of 2017), many other virtual currencies have emerged over the last few years. Trading in virtual currencies (also known as digital currencies or crypto currencies) is booming. A more recent development in the crypto industry is the so-called Initial Coin Offering ("**ICO**"). Based on a company's initial public offering ("**IPO**") an ICO represents a new form of corporate financing for digital companies.

The success story around the ICO of the internet browser "brave" in May 2017 illustrates why an ICO can be attractive for start-ups / founders: within 30 seconds the record-breaking sum of USD 35 million was collected by means of the ICO of brave's tokens. The by far largest ICO of the popular messenger service Telegram, which has already attracted USD 850 million in pre-token sales from institutional investors, is currently attracting attention. In the future, customers will be able to pay for their purchases with tokens. Other examples are "Bitwala", that offers a platform for financial transactions and a token which, according to its description, is designed as an equity investment (in a "digital company"), and "Savedroid", which offers a virtual wallet for buying and selling crypto currencies.

The alleged advantage of an ICO for digital start-ups / founders is that many members of the crypto industry believe that ICOs and tokens are not subject to regulatory and capital market regulations and are therefore not regulated. Compared to a conventional IPO this could save substantial costs for capital market law support, in particular the preparation of a prospectus and avoid any subsequent obligations. However, this assessment may often not be correct from a regulatory point of view. In individual cases, this would result in far-reaching (liability) risks.

Initial Coin Offering as the initial offer of a newly created virtual currency

The term Initial Coin Offering is based on the term IPO. While the IPO is the first public offer of existing shares from shareholders or newly created shares from a capital increase, the ICO refers to the first offer of newly created tokens (also called coins) by the issuer of the tokens ("**Token Issuer**"). Tokens are units of a virtual currency which are often based on a blockchain. Interested parties acquire the tokens ("**Token Holders**") and thus fund the project planned by the developers. The ICO is often a blockchain-based form of crowdfunding since many people fund a project which is "digitally recorded" by a blockchain. The tokens can be designed in different ways and serve for the funding of a wide variety of projects. For example, tokens can include voting rights regarding the project to be funded, a right to receive a profit share / dividend payment, the use of a product or service or even no right at all.

[1] 12 March 2018

The newly created tokens are purchased by investors either with traditional currencies such as EUR or USD. However, much more frequently they are paid with an already existing virtual currency such as Bitcoin or Ether. The long-term goal of an ICO is usually to fund a project – that can be either described in detail or more general. In general, the project does not exist when the new tokens are issued since a certain amount is required before the project can be realised. In order to convince potential investors, the developers of the tokens usually prepare a so-called "white paper" which describes the planned project and states the details of the ICO such as issue volume, price and period. Furthermore, so-called terms and conditions are published which regulate the rights and obligations between ICO issuers and Token Holders. In addition, often a secondary market for tokens is established. Here, the Token Holders can realise a profit when selling the tokens. In a nutshell, the intention of an ICO is to create a new virtual currency to fund projects.

Virtual currencies are "internet currencies" created in a computer network. All transactions and balances of virtual currencies are managed in a decentralised computer network. This distinguishes them from national currencies since they are not issued by a central state authority and are therefore non-governmental. Virtual currencies are limited to a specific maximum amount from the outset. The best-known examples of digital currencies are currently Bitcoin and Ether. These digital currencies are created by cryptographic calculation using blockchain.

What is a blockchain?

The blockchain is a database that contains a continuously expandable list of transaction data records in form of blocks and is organised on a decentralised basis. The transactions take place peer-to-peer without the intermediation of a bank. The blockchain is a kind of virtual "cash book" for all transactions regarding the respective virtual currency. The blocks of the blockchain are connected to each other. Each block contains a code of the previous block ("**Hash**"), a time stamp and transaction data as well as the entire transaction history of the blockchain. This information is encrypted in the respective block. This means that several transactions are combined in one block, which is chronologically based on the previous block. This creates the chain of blocks (blockchain). A new block must first be generated by the network participants, which is called "**mining**".

The network participants first have to solve a difficult mathematical problem by using their IT (computing power). They compete with each other for the fastest solution to the problem and thus for the validation of the transaction. The fastest computer that ultimately performs the validation receives a reward in form of accounting units or tokens. For example, regarding Bitcoin, the accounting units are so-called Satoshis which is the smallest subunit of Bitcoin (1 Bitcoin = 100 million Satoshis). Whoever ultimately performed the validation forwards copies of the blocks to all network participants; so that all network participants have always stored the latest status of the blockchain. Due to the decentralised storage, the information about the transaction is less susceptible to manipulation. In case a dishonest participant tries to alter the transaction information, the network will know right away that something has happened because the coding of the block would be invalid.

In principle, anyone who has the appropriate software can participate in the mining process. However, the participating computers are regularly professionally built mining farms due to the

enormously high performance requirements. Therefore, these mining farms are extremely energy-intensive.

The advantage of the blockchain is its high level of transparency since all transactions can be viewed publicly in the "cash book". On the other hand, the block chain also offers strong anonymity since the persons involved in a transaction cannot be identified by name. The latter is sometimes criticised as being fertile soil for criminal activities.

Different types of tokens

In practice, three different types of tokens have emerged. Due to the current very rapid changes in ICOs the following types of tokens are neither exhaustive nor can they serve as unchangeable definitions.

- **Utility Tokens**: The tokens grant a (one-time) future benefit following the realisation of the project – like a digital voucher. Such future benefit can be *e.g.* storage space in a cloud storage service, access to a digital trading platform and payment methods on such platform or discounts for advertising-related product views. There are also Utility Tokens that do not grant any right at all. In such case, a shortage by so-called "burning" (disabling tokens) of all "undrawn" tokens shall increase the value of the “drawn” tokens. The “burning” is done by the Token Issuer or third parties after completion of the ICO. If the Token Holder sells his tokens on a secondary market, he can benefit from "rising prices".

- **Investment Tokens**: These tokens represent assets and can be structured as both, debt or equity. For example, Investment Tokens may provide for a debt claim against the issuer for future profits or capital or an equity-based membership right. Examples are Bitwala or KuCoin. Bitwala is a blockchain-based crypto currency bank. Its Investment Token shall be linked to shares in Bitwala GmbH, although further details have not been published so far. KuCoin is a stock exchange-like market for crypto currencies. Its tokens (known as KuCoinShares) aim to involve the shareholders in the trading fees generated on KuCoin.

- **Currency Tokens**: In principle, Currency Tokens do not go beyond the function as crypto currencies and should serve as a decentrally stored surrogate for money. They serve as a payment method for buying goods or services. In order to act as a suitable payment method, they must be stable in value, exchangeable and representative (in relation to an equivalent value). The best known example is Bitcoin. Other well-known examples of Currency Tokens are Ether, Ripple or spin-offs (so-called forks) of Bitcoins (Bitcoin Cash) or Ethers (Ethereum Classic, which continues the original Ethereum platform).

Of course, besides these, hybrid forms consisting of various tokens described above may exist. For example, Utility and Investment Tokens can also fall into the category of Currency Tokens, which can affect the legal classification.

Typical procedure of an ICO

ICOs often proceed as follows:

- publication of a white paper describing the project and its funding, and publication of technical specifications (software, etc.)
- Smart Contract (based on Ethereum blockchain) is created and allows generation and distribution of tokens at a later stage
- during a certain time period payments (mostly Bitcoins or Ethers) are accepted via Smart Contract
- each payment receives a public key (account number) from Smart Contract and assigns tokens to Token Holders based on public key
- tokens can be stored in wallets (from third parties), and can be traded on crypto currency exchange platforms
- tokens can be exchanged or sold for services after a project is completed

Tanja Aschenbeck, LL.M. (San Francisco), Partner, Osborne Clarke, Germany

B. ICOs are not completely unregulated

I. Belgium

1. Introduction

There is currently no specific regulatory framework regarding ICOs in Belgium. Neither ICOs, crypto currencies nor tokens are given a particular legal status or qualification.

Belgian regulators (the Financial Services and Markets Authority ("**FSMA**") and the National Bank of Belgium ("**NBB**")) have on several occasions issued warnings on the risks related to ICOs and crypto currencies and are closely monitoring the evolution and developments regarding ICOs and crypto currencies.

Furthermore, the FSMA endorsed the ESMA statement[2] of 13 December 2017 and issued its own Belgium-related statement[3] on the same day which emphasised the high risks of ICOs and the fact that, should ICOs qualify as financial instruments, they may be subject to several regulations:

- The prospectus directive;
- The directive on markets in financial instruments ("**MiFID II**");
- The directive on alternative investment fund managers ("**AIFMD**");
- The regulation on market abuse ("**MAR**");
- The directive on the prevention of money laundering ("**AMLD4**").

The application of these regulations depends on the structure of the ICO and the characteristics of the tokens.

The payment services directive ("**PSD2**") and the directive on e-money ("**EMD2**") should also be added to that list as, depending on the characteristics of the ICO and the underlying tokens, they could also potentially apply.

In addition to European regulations, depending on the structure and characteristics of the ICO and the tokens, the following local Belgian laws and regulations are potentially applicable:

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[2] https://www.esma.europa.eu/press-news/esma-news/esma-highlights-ico-risks-investors-and-firms
[3] https://www.fsma.be/sites/default/files/public/content/EN/Circ/fsma_2017_20_en.pdf

- The FSMA regulation of 3 April 2014 banning the distribution of certain financial products to retail clients. This regulation prohibits the marketing on a professional basis of any financial product whose return depends, directly or indirectly, on 'virtual money'. Although the regulation does acknowledge the existence of crypto currencies, it does not provide a clear legal qualification of this notion but only designates them by default as "any form of unregulated digital currency that is not legal tender".

- The law of 16 June 2006 on public offers of investment instruments and on the admission of investment instruments to trading on regulated markets, which transposes the prospectus directive but with a larger scope than the directive. The law of 16 June 2006 is the only national law applicable to prospectuses in Belgium.

- The law of 18 December 2016 regulating the recognition and definition of crowdfunding and containing various provisions on finance. This law introduces licensing requirements for crowdfunding platforms and rules applying to providers of crowdfunding services.

Apart from these specific regulations, other more general laws should be taken into account when designing an ICO, such as consumer protection rules, contractual law, accounting standards, etc. Finally, due to their digital nature, ICOs raise the typical issues linked with the use of internet, such as the questions of applicable laws and competent jurisdiction.

2. National regulation

a) Regulatory requirements for Token Issuers

The scope of application of the Belgian law on prospectus requirements is broader than the EU rules.

The obligation for Token Issuers to publish a regulated prospectus mainly depends on the characteristics of the token and whether it would qualify as an "investment instrument" publicly offered within the meaning of the law of 16 June 2006.

Within the meaning of the law 16 June 2006, the notion of "Investments instruments" includes:

- Transferable securities within the meaning of the prospectus regulation, which are defined as all classes of securities negotiable on the capital markets (with the exception of payment instruments). This does not mean that the security has to be effectively traded on the capital markets, it only needs to be tradable.

- Investments instruments that do not constitute transferable securities within the meaning of the prospectus directive and are defined as all the instruments which

allow an investment of financial type regardless of the underlying assets. This scope has been justified by the willingness of the legislator to submit all instruments giving rise to a financial investment to a prospectus when offered publicly to investors.

Given the broad scope of the definition provided by the law of 16 June 2006, depending on their characteristics, tokens such as Investment Tokens may fall within the scope of the law of 16 June 2006 either as a transferable security either as an investment product.

b) Regulatory requirements for intermediaries and platforms

The legal qualification of a token has a potential impact on the status and legal requirements applicable to industry players such as exchange platforms and intermediaries.

In particular, tokens that would qualify as financial instruments within the meaning of the law of 2 August 2002 on the supervision of the financial sector and on financial services (the law transposing MiFID I and partially MiFID II into Belgian law) would trigger the obligation to obtain a licence for companies that offers related services.

In practice, an exchange platform of tokens structured in such a way that they qualify as financial instruments, would have to apply for a licence as an investment firm or brokerage firm under the law of 25 October 2016 on the access to the provision of investment services and on the status and control of portfolio management and investment advices companies and the law 24 April 2014 on the status and control of credit institutions and brokerage firms as appropriate. More generally, within the framework of tokens qualified as financial instruments, the provision of services such as operation of platforms that operate as multilateral trading facilities, the buying and selling of tokens on a professional basis on own account, portfolio management and investment advices would lead to the obligation to obtain a brokerage firm or investment company licence before the start of the activities.

On the other hand, Utility and Currency Tokens depending on their structure may be qualified as payment instruments or electronic money. This is potentially the case for Tokens that provide payment solutions. In those cases, the Token Issuer would have to obtain a licence as a payment service provider or an electronic money issuer under the law of 11 March 2018 on status and control of payment and e-money institutions, on the access to the activity of payment services provider, and to the activity of issuance of e-money, and on the access to payment systems.

Finally, with the future implementation of the 5th Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, a platform or intermediary which provides services related to virtual currencies will potentially be subject the requirements of the Belgian anti-money laundering regulation. In that case, platforms and inter-

mediaries would have to set out proper policies and procedures regarding client identification, transaction monitoring and suspicious transaction reports.

3. Conclusion

Given the lack of a clear legal framework, Token Issuers may face a complex challenge assessing which set of rules should be applicable based on the characteristics of the tokens.

Before launching an ICO, industry players should carry out an in-depth assessment of the structure of the ICO and the design of the tokens in light of the potentially applicable regulations, as well as engage in open discussions with the regulators on the structure of the ICO. In practice the FSMA strongly encourages potential Token Issuers to enter into direct contact with them through the Fintech Contact Point (a dedicated platform managed by both the FSMA and the NBB) and submit their ICO structure before launching the ICO.

Contact details of the authors:

Joan Carette
Partner

T +32 25 15 93 26
E joan.carette@osborneclarke.com

Jean-Christophe Vercauteren
Associate

T +32 25 15 93 62
E jean-christophe.vercauteren@osborneclarke.com

Osborne Clarke
Marnixlaan
23 avenue Marnix
1000 Brussels
Belgium

T +32 2 515 93 00

II. France

1. Introduction

Today in France, ICOs are not specifically regulated. The Autorité des Marchés Financiers ("**AMF**"), the French Financial Supervisory Authority, has warned investors of the risks ICOs could present, as they do not benefit from the guarantees associated with IPOs on regulated financial markets or other financial investment schemes regulated by the AMF. The AMF also warned investors about material inaccuracies or omissions that could be found in ICO white papers, since this documentation does not require its prior approval.

The AMF is nonetheless aware that ICOs can be an alternative to traditional financing, appropriate in particular where a project is destined to a public of web users at the international level and requires a fast time to market in high-speed innovative and competitive markets. Hence, it has launched a research programme called UNICORN ("Universal Node to ICO's Research & Network") on 26 October 2017. As part of this programme, a public consultation was organised end 2017, to which 82 respondents answered. A summary of the consultation was published on 22 February 2018.

Through its consultation, the AMF tried to determine which regulations would likely apply. It concluded that given the wide diversity of these operations, the analysis had to be made on case-by-case basis. Indeed, the organisation of an ICO could be subject to regulation, depending on the analysis of the tokens. The AMF states however that most of the ICOs it is aware of do not fall under the rules it ensures compliance with.

In parallel, the AMF also met with entrepreneurs who have organised ICOs or wish to, to finance a variety of projects ranging from advanced distributed ledger technologies to hotel bookings or renewable energies, insurance and regtechs. The total volume of these projects shown to the AMF is around EUR 350m.

2. National regulation

a) Regulatory requirements for Token Issuers

The AMF insists on the fact that ICOs may have very variable features which do not allow taking a unique approach for their analysis, and that the legal regime applicable to ICOs and issued tokens depends on their qualification, which always needs to be made on a case-by-case basis.

The AMF nevertheless identifies mainly 2 major potential types of tokens, implying distinct legal qualifications: security tokens, which may be considered as financial securities and utility tokens, which are more of a right of usage, giving access to a product or service which the ICO has allowed to develop and launch.

Although the ICO initiators should be the ones in charge of qualifying the token and applying the appropriate regime to their ICO projects, the AMF reckons that there is a strong call for guidance from the regulators, at the national and European level, in particular by the issuance of a list of criteria to be used for the analysis – as the often-referred Howey Test used by the SEC in the US.

Interestingly, the AMF does not take position at this stage on the underlying qualification of crypto currencies as such. However the authority notes that the French criminal code currently prohibits the circulation of any unauthorised currency, and that some respondents are of the view that this prohibition should be amended.

Tokens as financial securities

Financial securities are defined in article L. 211-1,II of the French Monetary and Financial Code ("**MCF**") as:

1. Equity securities issued by joint-stock companies;

2. Debt securities;

3. Units or shares in undertaking for collective investment.

Where a token would qualify as a financial security, the ICO would then be subject to the relating existing regulations, in particular applicable to public offerings of financial securities.

However, many arguments are raised, by the AMF as well as by the respondents to the consultation, to exclude tokens from these qualifications – provided that a case-by-case analysis remains necessary for all ICOs, an analysis which should be based on the nature of the rights embedded in the security, rather than on the form of the security or the legal status of the Token Issuer. In this respect, a token may qualify as a financial security if it embeds rights similar to those usually embedded in an equity or debt security.

As for equity securities, it is argued that (i) the tokens do not offer the rights associated with an equity security: right to liquidation surplus, to submit draft resolutions to shareholders meetings, or to vote or take part to shareholders meetings and that (ii) they do not give their holders a right to share in the company's dividends. On the contrary, the rights attached to a token are known in advance in a smart contract and do not depend on the company's economic policy and performance.

As for debt securities, it is argued that such qualification does not apply if the debt is not a pecuniary debt. However the analysis may evolve if a debt were to be considered in the absence of a pecuniary counterpart, which is not a totally closed option in the AMF's opinion.

In conclusion, the consultation confirms the AMF's general analysis based on the ICOs it has examined, to exclude the qualification of issued tokens as equity securities and, more broadly, as financial securities, because the criteria are generally not met. However, again, the qualification may not be totally excluded should these criteria be met by specific projects in practice.

As for derivatives, the AMF cites one respondent who raises that such qualification should not be permanently excluded, but rather assessed on a case-by-case basis.

In any case, the inclusion of ICOs within the scope of the prospectus requirements and the AMF visa, implementing the European sector rules, would require adapting the Regulation 2017/1129 of 14 June 2017, and consequently an initiative at the European level rather than at the French level.

b) Regulatory requirements for intermediaries and platforms

The AMF believes that regulation should focus on projects rather than on entities: a regulation dedicated to ICOs should not create a new regulated status for the Token Issuers or stakeholders, because the situations and profiles of ICO initiators would be too diverse to catch in a single status, but should rather focus on regulating projects – by a visa, an authorisation or similar approach.

In this respect, the AMF mention that ICO initiators may be caught in a regime close to those which already exist for intermediaries. The AMF details in particular the status of intermediaries for the trading of "miscellaneous assets" (*intermédiaire en biens divers*, "**IBD**"). Such intermediaries are regulated under the French Monetary and Financial Code with conduct-of-business rules: requirement to inform the public and customers, requirement to hold a professional insurance, requirement to open a dedicated account in the books of a regulated credit institution, and subject to the AMF supervision over all their promotional materials.

ICOs are said to involve assets which may be comparable to "miscellaneous assets". Therefore, although the application of this regime is challenged – as it would in particular imply considering a token as an asset with a property and pecuniary dimension, which is not always true and as the ICO initiator is usually not an intermediary but the recipient of the offering – this regulatory option seems to be considered by the AMF.

Other potential qualifications (collective investments, French crowdfunding statuses) are mentioned by the AMF but do not seem to be seriously envisaged. The AMF does not either develop potential qualifications as payment services providers or intermediaries, an area which is within the jurisdiction of the ACPR, the French authority in charge of supervising the bank and payment industry.

c) Outlook

One regulatory option emerging out of three

The AMF mentioned 3 options for providing a legal framework to ICOs:

1. Establish best practices without changing the existing laws;

2. Extend the scope of existing laws in order to include ICOs within the scope of public offerings;

3. Adopt new regulations adapted to ICOs.

A majority in favour of a specific regime (option 3)

Two thirds of the respondents to the consultation answered in favour of option 3, namely regulating ICOs specifically, the second preferred option being option 1, ie keeping with existing laws as complemented by best practices. Option 2 was endorsed by three respondents only.

All respondents were in favour of issuing an information document in order to inform token purchasers at least on:

- The identity of the legal entity responsible for the offering,
- Their founding managers and their professional competences,
- The project relating to the ICO and its evolution,
- The rights granted by the tokens and
- The accounting treatment of the funds.

The legal analysis of the tokens may also be included.

Such information may be inserted in documents such as a white paper or a manifesto, which are already used in the industry and which should be drafted by independent experts and may be standardised.

According to the AMF, the respondents were also a majority to support:

- Transparency requirements (pre and post-sale), including: valuation of tokens; information on the number and percentage of free tokens allocated as reserve or remuneration and/or on pre-sold tokens, etc.;

- Management requirements, including using escrow accounts for funds raised and
- Anti-money laundering and terrorist financing rules.

This would be the basic structure of a specific regulation applying to ICOs, on which the AMF indicates it is working on in coordination with the other involved public authorities.

Two sub-branches are envisaged in this option: a mandatory authorisation regime applicable to all ICOs available to the public in France or an optional authorisation regime. Setting up an optional regime would add trust to those which voluntarily submit to it but without requiring all ICOs to. And non-authorised ICOs would have to clearly inform the public on the absence of authorisation.

The optional regime was approved by almost all the participants, judging the solution well balanced. According to the AMF, this regime would protect investors while attracting projects of quality to France, allowing to sort through serious and non-serious projects. In all cases, unregulated ICOs should be subject to information on risks.

What about non-binding best practices? (option 1)

A best practices guide based on existing legislation would not be legally binding. Therefore, several ICOs may be subject to various legal frameworks, including potentially general consumer protection rules. However, in this system it can be anticipated that numerous ICOs will stay unregulated. Furthermore, ICO project holders will have to determine to which regime their operation is subject to, which can be complex and a source of legal uncertainty.

This option has nonetheless a large number of favourable opinions from participants of the public consultation.

What about including ICOs in the IPOs framework? (option 2)

For option 2 which would include ICOs in the framework applicable to "traditional" IPOs, the AMF focuses on European law and more specifically on the Prospectus Regulation 2017/1129 of 14 June 2017, coming into force on 21 July 2019.

The scope of this regulation would have to be extended to include tokens public offerings. The advantage of this option is to bring legal certainty to ICO investors as these operations would benefit from a single legal framework, regardless of the difficult qualification of tokens.

Following this regime, a regulated "prospectus" would replace the "white paper" which content differs too much from one ICO to another. This prospectus would give guarantees to investors encouraging them to invest in ICOs.

This option has been rejected by almost all participants of the public consultation.

However, all these regimes depend on how tokens qualify.

3. Conclusion

An "Action plan for the growth and the transformation of companies" Bill, called "**Pacte**" in French ("*Plan d'Action pour la Croissance et la Transformation des Entreprises*"), intended for helping French SMEs confronted with international competition to grow, should be discussed before summer by Parliament. The government wishes to insert a new ICO regulation in the Pacte Bill. This new regulation may be inspired from the optional authorisation regime as developed by the AMF in its consultation paper. The inclusion of a specific regime for ICOs to be integrated in the Prospectus Regulation would require a coordinated action from the national authorities at the European level, through the ESMA and the European legislative bodies. One more general and long-term consequence of the in-depth analysis of ICOs by the French financial authorities may be the development of a more favourable approach to crypto currencies, which are a key element in ICOs, and which have been viewed with strong suspicion by the French authorities so far.

Contact details of the authors:

Osborne Clarke
163 Boulevard Malesherbes
75017 Paris
France
T +32 2 515 93 00

Beatrice Delmas-Linel
Managing Partner

T +33 1 84 82 46 42
E beatrice.delmas-linel@osborneclarke.com

Lise Breteau
Partner

T +33 18 48 24 552
E lise.breteau@osborneclarke.com

Catherine Olive
Partner

T +33 18 48 24 532
E catherine.olive@osborneclarke.com

III. Germany

1. Introduction

In Germany, many members of the crypto industry and Token Issuers believe that ICOs are completely unregulated in Germany. This assumption may be caused by the lack of a specific national or European "ICO law". Germany's Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – "**BaFin**") has already taken a number of positions regarding the regulation of ICOs. First, BaFin has published a consumer notice pointing out the dangers of ICOs.[4] The European Securities and Markets Authority ("**ESMA**") has also published a corresponding warning. According to BaFin, risks associated with ICOS can be, for example, the enormous price fluctuations of virtual currencies, the lack of a liquid secondary market and a possible total loss of the investment. In addition, white papers that are published in the context of ICOs are often hardly comprehensible or verifiable since they are not approved by BaFin. BaFin also refers to possible licensing or prospectus obligations under German law, which must, depending on the case, be observed.

Furthermore, in the end of February 2018, BaFin published an information letter which assesses the categorisation of tokens in the area of securities supervision in detail. According to this information letter, tokens may constitute securities within the meaning of section 2 para. 1 of the German Securities Trading Act (*Wertpapierhandelsgesetz* – "**WpHG**") or section 2 no. 1 of the German Securities Prospectus Act (*Wertpapierprospektgesetz* – "**WpPG**"). This would be irrespective of a possible securitisation or the designation e.g. as "Utility Token". Far more important are the corporate rights or debt claims as well as comparable claims embodied in the token. Further, tokens could constitute interests in an investment fund within the meaning of the German Capital Investment Code (*Kapitalanlagegesetzbuch* – "**KAGB**") or – subsidiarily – an investment product within the meaning of the Investment Products Act (*Vermögensanlagengesetz* – "**VermAnlG**"). The consequence is the applicability of procedural obligations, transparency and market abuse requirements for intermediaries and prospectus obligations of Token Issuers.

In addition, there could be licensing obligations under the German Banking Act (Kreditwesengesetz – "**KWG**") and the Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz* – "**ZAG**"). Licensing obligations pursuant to the ZAG must be taken into account if the intermediary provides payment services within the meaning of section 10 para. 1 ZAG. If the intermediary, at the request of the investor, transfers the real equivalent value of the token via its own account to the Token Issuer, the intermediary is conducting money remittance business within the meaning of section 1 para.1 sentence 2 no. 6 first alternative ZAG. However, virtual currencies (but not the real equivalent value of the token) are usually paid as the return for the "token purchase". Therefore, there is no transfer of the *real equivalent value* of the token and thus no money remittance business.

[4] https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2017/fa_bj_1711_ICO_en.html

If the intermediary acts at the request of the Token Issuer, it may conduct acquiring business within the meaning of section 1 para.1 sentence 2 no. 5 second alternative ZAG. Both money remittance business and acquiring business require a licence by BaFin.

Other countries have also taken clear positions regarding the regulation of ICOs. In mid-2017, the U.S. Securities and Exchange Commission already announced its legal assessment that tokens may be "securities", depending on their structure. This would result in (subsequent) obligations under capital market law. Likewise, the Dutch Minister of Finance took a position in this regard and, depending on the concrete form of the tokens, affirmed that they may constitute securities. The relevant Chinese and South Korean authorities even went one step further and completely banned ICOs. As a result, a large number of ICOs must be unwound.

The advance of these countries in the field of ICOs gives reason to take a closer look at the German regulatory and capital market requirements for Token Issuers and trading platforms. It must not be overlooked that the general provisions of German banking supervisory law and capital market law may apply to the (initial) issuing of tokens. In particular, non-compliance with possible licensing and prospectus obligations can lead to criminal liability, enormous fines and claims for damages. When examining possible obligations under German supervisory law, a distinction must be made between the Token Issuer and trading platforms or intermediaries offering services in connection with ICOs ("**Intermediaries**").

2. National regulation

a) Regulatory requirements for Token Issuers

aa) Token as securities – possible prospectus requirements for the Token Issuer according to the WpPG

Whether tokens are subject to a prospectus requirement under the WpPG depends, in particular, on whether tokens are classified as securities.

Securities within the meaning of the WpPG are, in general, transferable securities that can be traded on a market. The criteria for the classification of a security are *standardisation* and *transferability* or *tradability* on financial or capital markets (fungibility).

Standardisation means that the securities can be determined on the basis of common, standardised characteristics and are therefore tradable. This means that the type and number is sufficient for the securities to be tradable. Investment instruments that have been individually designed to meet special client requirements are not standardised. Tradability means fitness for circulation. This is in particular the case if the transfer of the securities is based on principles of property law but not by assignment. The transfer must therefore not depend on restrictions. For example, shares of a German “GmbH” are unfit since a transfer requires a notarized agreement. It is not necessary that a security is securitised. However, a right must be embodied in the security. In addition to the definition of securities, the WpPG provides for an exemplary catalogue of securities, including:

- *“shares and other securities which are comparable to shares or shares in corporations or other legal entities, as well as certificates representing shares*

- *any other securities which grant the right to acquire or dispose of such securities or which result in a cash payment determined by reference to transferable securities, currencies, interest rates or income, goods or other indices or measures”*

The interesting question is whether the three abovementioned examples of tokens constitute securities. This plays a key role in the question of regulation by the WpHG or WpPG.

As a rule, a *Utility Token* grants a future benefit after the realisation of a project. Utility Tokens are generally standardised. In addition, the token must embody a right. Since *Utility Tokens* lack special rights such as voting rights or comparable rights, they highly likely do not constitute securities.

Currency Tokens are units of a crypto currency. As far as *Currency Tokens* have not been further developed, a Currency Token as a "substitute currency" is probably not a security either. This is due to the lack of corporate and property rights (or comparable rights).

Investment Tokens contain asset values. They can be structured as both, debt and equity. For example, they can be linked to profit-sharing or membership rights. In this case, a classification as a security must be examined in detail on a case-by-case basis. In principle, tradability is possible via crypto trading platforms. Here again, the tokens are standardised, provided that the company / project issues a certain amount of tokens of the same type. The Investment Tokens regularly contain shareholder rights (e.g. voting rights) and/or asset values. However, the Token Issuer can exclude the transferability of the tokens. For example, it must be carefully examined whether the transferability of the tokens has special requirements. This is due to the fact that the transferability is already legally strongly limited depending on the company structure of the Token Issuer. This applies particularly if tokens are linked to company shares – which is planned in the crypto scene at the moment. Further, the rights granted by the token must be assessed in detail.

bb) Token as an investment product – possible prospectus requirement for the Token Issuer according to the VermAnlG

Provided that tokens are not subject to securities prospectus regulations, tokens may constitute investment products (*Vermögensanlagen*) within the meaning of section 1 para. 2 of the VermAnlG. This depends on the rights associated with the token. If a token constitutes an investment product within the aforementioned meaning, it is subject to a prospectus requirement under the VermAnlG.

According to section 1 para. 2 no. 1 VermAnlG, investment products are *"shares granting a participation in the result of a company"*. This may comprise all tokens issued by companies that grant a right to profits of this company, provided that the right is based on fixed rules. In particular, an Investment Token could constitute such investment product if it grants a right to profit distribution or revenue share or a subscription right when additional tokens are issued. Utility

Tokens and Currency Tokens generally do not grant any right to profits. Therefore they highly likely do not classify as an investment product within the meaning of section 1 para. 2 no. 1 VermAnlG.

Tokens probably do not constitute (profit-participating) subordinated loans ((*partiarische) Nachrangdarlehen*) within the meaning of section 1 para. 2 no. 4 VermAnlG. Subordinated loans within the meaning of section 1 para. 2 no. 4 VermAnlG are loans granted by a lender to a borrower, and which provide for a qualified subordination. In addition to a fixed interest rate, subordinated loans can also provide for a participatory interest.

The equivalent to be paid for an *Investment Token* may constitute such subordinated loan. Irrespective of this, however, a loan classifies as a "loan" (*Darlehen*) under civil law if an *amount of money* is provided. This means that the tokens must not be paid with other tokens such as Ethereum or Bitcoin. Rather, they must be paid with "real" money (EUR, USD, etc.). According to German Law, only legal tender ("Fiat Money") constitutes "real" money within the aforementioned sense.

Utility Tokens or Currency Tokens rather do not meet the criteria of a profit-participating subordinated loan. This is because the Token Issuer has no repayment claim against the subordinated lender (Token Holder) for the equivalent value that the Token Holder has to pay for the Utility or Currency Token.

Tokens could also constitute profit participation rights (*Genussrechte*) within the meaning of section 1 para. 2 no. 5 VermAnlG. However, this depends on the structure of the tokens. Profit participation rights are long-term commitments of a sui generis nature. They are aimed at recurring benefits in the form of a participation in profits and losses of the issuing company. Profit participation rights are not defined by law and are very flexible. Therefore, a classification of tokens as profit participation rights should always be taken into account. An indication for a profit participation right may be the issue of token conditions (such as the typical terms and conditions). However, those must be equal for all and must provide for a revenue/profit share or fixed interests / dividends*. Utility tokens* or *Currency Tokens*, on the other hand, should not constitute profit participation rights as they do not provide for any profit rights.

In any case, tokens may also fall under the catch-all provision of the so-called other commercial investments of section 1 para. 2 no. 7 VermAnlG. No. 7 provides for two different alternatives. The first alternative comprises forms of investments that grant or promise both a claim for repayment and interest (loan-like fundings).

The first alternative of commercially comparable investments is likely to include (only*) Investment Tokens* that grant a loan-like repayment claim and interest over a certain period. However, this catch-all provision only applies if the tokens are not already covered by any other form of investment products.

The second alternative is an investment that provides for an asset-based, cash-settled claim for the temporary transfer of money. In contrast to the first alternative, no interest is paid, but the investor receives a commercially comparable benefit.

Utility Token Issuers usually do not grant a claim for a cash settlement. Rather, they usually do not grant a claim at all or (at least also) a non-cash benefit or service as equivalent value to the transfer of virtual currencies. Such benefit or service can be *e.g.* discounted goods, or the use of storage space. Therefore, Utility Tokens should not fall under the second alternative either. As a rule, *Currency Tokens* do not provide for any claim for the Token Issuer. They merely serve as money-substitute created under private law and can be exchanged for goods or services, provided that there is a sufficient market value for the tokens. This may be different for *Currency Tokens* where a central Token Issuer pays or promises an equivalent value for the "return" of the tokens.

Investment Tokens that grant (or promise) a back and forth of cash flows without claims for profit or interest can constitute a commercially comparable investment within the meaning of the second alternative. This is, in particular, the case if the token merely promises (or provides) a repayment of money at a later date or an advance purchase of goods or services (which should at no time actually lead to the delivery or provision of these services).

b) Regulatory requirements for intermediaries and platforms

In principle, the use of tokens as "substitute money", and also the purchase or sale of tokens that have been mined or purchased is not subject to authorisation under the KWG. However, under certain circumstances, a license is required.

From BaFin's point of view, tokens generally constitute financial instruments in the form of units of account within the meaning of the KWG. A license is required particularly for companies or persons who deal with tokens on a commercial basis.

If tokens are structured as securities and **intermediaries** who sell the tokens on the secondary market (*e.g*. via a platform) are involved, these intermediaries require a license from BaFin for the provision of financial services in within the meaning of section 32 KWG. The type of the license depends on the type and scope of activity of the intermediary.

In particular, the provision of principal broking services comes into consideration. In the field of virtual currencies, persons or platforms buying and selling virtual currencies (tokens) commercially in their own name for the account of others carry out principal broking services which are subject to a license requirement. In addition, platform operators may operate a multilateral trading facility with tokens. According to BaFin, this requires the operation of a multilateral system that matches the interests of a large number of persons in buying and selling financial instruments. This must take place within a system and according to fixed provisions, and in a way that results in a contract for the purchase of the tokens.

In addition, investment brokering or contract broking comes into consideration.

The commercial matching of token buyers and sellers on the secondary market constitutes, depending on the concrete form, investment brokering or contract broking within the meaning of the KWG. This would result in a license requirement. This may apply particularly to intermediaries who offer trading platforms for buying and selling tokens as messengers or even representatives of buyers or sellers. Examples for such platforms are the typical crypto-currency exchanges Kraken, Tokn, etc.

If the tokens are designed as an investment product, a license pursuant to section 34f of the German Trade, Commerce and Industry Regulation Act (*Gewerbeordnung* – "**GewO**") may be sufficient - instead of a licence pursuant to the KWG. Also, a licence / registration under the German Capital Investment Code could be considered in individual cases.

In addition, the platform or the intermediary must also ensure compliance with any requirements pursuant to money laundering provisions.

3. Conclusion

All this shows: Unlike numerous reports to the contrary, ICOs are **not** completely unregulated. The lack of specific ICO laws does not lead to a legal vacuum. In fact, general German (supervisory) law is applicable, provided that (also) the German market is addressed. Generally, this should be at the case if an ICO is conducted via internet. BaFin confirmed this and just recently clarified that the concrete structure of the tokens was decisive for the question whether an ICO is subject to regulation under supervisory or capital markets law. Non-compliance with supervisory regulations will cause administrative measures such as the suspension of business or high fines by BaFin. Due to the enormous sums raised by ICOs, BaFin will probably intervene restrictively. Investors and Token Issuers should therefore not be tempted by "fast money". Rather, they should take ICOs with caution and check the relevant provisions thoroughly in advance (or have them checked).

Moderate regulation of the ICO industry could also mean security and stability for the market and for the investors. This could encourage even more potential investors to invest in ICOs and further fuel the emerging market.

Therefore, it remains to be seen how the ICO market will react under the continuing efforts of various nations to further regulation of ICOs, and whether this can stop the ongoing success story.

Contact details of the authors:

Osborne Clarke
Innere Kanalstraße 15
50823 Cologne
Germany
T +49 221 5108 4000

Tanja Aschenbeck, LL.M.
Partner

T +49 221 5108 4104
E tanja.aschenbeck@osborneclarke.com

Thorge Drefke
Associate

T +49 221 5108 4104
E thorge.drefke@osborneclarke.com

Jan-Michael Polke
Associate

T +49 221 5108 4104
E jan-michael.polke@osborneclarke.com

IV. Hong Kong

1. Introduction

In Hong Kong, currently, there is no specific regulatory framework or legislation with regards to either ICOs or digital tokens. Hong Kong's financial regulator, the Securities and Futures Commission ("**SFC**"), has opined that typical digital tokens and ICOs will be considered a form of "virtual commodity", and as such will not be subject to regulation.

However, where the digital token offered in the ICO contains terms, features and characteristics of a "security" as defined under Hong Kong Securities and Futures Ordinance (Cap 571) ("**SFO**"), they will fall under the regulatory purview of the SFC, and, will be subject to licensing and conduct requirements.

Furthermore, Hong Kong law does not differentiate between Investment Token, Currency Token, or Utility Token. Under Hong Kong law, all tokens are considered a virtual commodity, unless it has characteristics of a security as defined under the SFO.

2. National regulation

a) Regulatory requirements for Token Issuers

By way of example, where a digital token offered in an ICO represents an equity or ownership interest in a limited liability company, such tokens may be regarded as 'shares' in the company and will be deemed a "security" under the SFO. If a token confers upon the Token Holder certain rights similar to those of a shareholder of a company, including, but not limited to right to receive surplus assets upon winding-up, or a right to receive dividends, it will also likely be considered a form of "security".

A digital token may also be construed as a security where the token is used to create or to acknowledge a debt or liability owed by the Token Issuer to the Token Holder. This would likely be treated as a form of "debenture", which is included under the definition of "security" under the SFO.

Additionally, if the proceeds of the ICO are managed collectively by the Token Issuer to invest in projects with the aim of allowing such Token Holders to participate in a share of the returns provided by such project, it will likely be regarded as a form of "collective investment scheme", which also falls under the SFO definition of "security".

Where the ICO involves an offer to the Hong Kong public to acquire a "security" or to participate in a "collective investment scheme", it will trigger registration and authorisation requirements under Hong Kong law. Consequently, disclosure documents intended to provide potential inves-

tors with material information must (unless an exemption is applicable) comply with the prospectus requirements under Hong Kong's IPO regulatory regime

Hong Kong regulatory treatment of a 'security' ICO remains untested. We are not aware of any 'security' ICO having been issued in Hong Kong. Hong Kong Token Issuers actively seek to ensure that their respective ICOs are not a form of security, and thus not subject to regulation. Moreover, it remains unresolved how the SFC will regulate a 'security' ICO or Token, or whether the Hong Kong Stock Exchange will permit such an offering to be listed.

It should be noted that under Hong Kong law, there can only be one securities exchange, being The Stock Exchange of Hong Kong. As such, a 'security' ICO or token would not be permitted to be traded on any other crypto currency exchange in Hong Kong.

Additionally, Hong Kong law does not recognise digital tokens as a means of exchange. Under Hong Kong law, a digital token is a "virtual commodity" unless it falls within the definition (or has the characteristics) of "securities" as defined under the SFO.

b) Regulatory requirements for intermediaries and platforms

Where the digital token of an ICO falls under the definition of "security", dealing in, advising on, managing, or marketing a fund investing in such digital tokens may constitute a "regulated activity" under the SFO. The SFO stipulates 10 types of regulated activity, and provides a detailed definition of each of them. These activities include:

- Dealing in securities
- Dealing in futures contracts
- Leveraged foreign exchange trading
- Advising on securities
- Advising on futures contracts
- Advising on corporate finance
- Providing automated trading services
- Securities margin financing
- Asset management
- Providing credit rating services

Parties engaging in a "regulated activity" are required to be licensed or registered with the SFC, regardless of whether the parties involved are located in Hong Kong or not, so long as the activities target the Hong Kong public.

Broadly, a license is required where the intermediary is a not an authorised financial institution (as set out in the SFO), and a registration is required where the intermediary is an authorised financial institution.

3. Conclusion

As the crypto currency industry in Hong Kong grows, so has the scrutiny from the SFC. The SFC has taken a number of enforcement actions against Token Issuers, and exchanges since the beginning of 2018.

Whilst Hong Kong is a laisse faire jurisdiction, a cautious approach must nevertheless be taken with regards to digital tokens and ICOs. Given that the terms and features of a particular token in underlying the ICO differs from case to case, in-depth analysis and professional advice should be sought prior to any public offer, as violations of the SFO attracts both civil and criminal penalties.

Contact details of the authors:

John Koh
Partner

T +852 2535 0108
E john.koh@osborneclarke.com

Frankie Tam
Senior Associate

T +852 2535 0114
E frankie.tam@osborneclarke.com

Alice Li
Legal Director

T +852 2535 0110
E alice.li@osborneclarke.com

Osborne Clarke
Suite 3002
30/F
Prosperity Tower
39 Queen's Road Central
Hong Kong
T +852 2535 0188

V. Italy

1. Introduction

In Italy, ICOs are not specifically regulated. The Italian Market Regulator (CONSOB) has warned investors of the risks ICOs could present, as they do not benefit from the guarantees associated with IPOs on regulated financial markets or other financial investment schemes duly regulated.

Nevertheless it is also well known on the Italian market that ICOs can be an alternative to traditional financing.

CONSOB, with its official bulletin no. 44 issued on December 2017[5] has made reference to the ESMA notes regarding ICOs and virtual currencies, and has made clear that investments in ICOs are subject to high risks, being virtual currencies extremely volatile; in addition and depending on the investment scheme adopted, an ICO could lack of the appropriate protections granted by the applicable laws (Prospectus Directive, MiFID, AML, Consumers Directive, AIF Directive) and regulations to the retail investors.

CONSOB, also warned that it is not possible to exclude that some ICOs involve money laundering or fraud to the investors.

No public consultations have been issued by the Italian regulators to solicit a view on the need to adopt a specific regulation, even if it is possible that a specific regulation will be issued by the end of 2018.

The legal regime applicable to tokens depends on their qualification. There are two main qualifications: (i) security tokens, which may be considered as financial securities and (ii) utility/reward tokens, which are more of a right of usage, giving access to a product or service which the ICO has allowed to develop and launch.

If a token would qualify as a financial security, the ICO would then be subject to the relating existing regulations, in particular applicable to public offerings of financial securities to retail investors.

For the purpose of this booklet we will make reference to the above mentioned three types of tokens (Utility/Investment/Currency Tokens).

2. National regulation

a) Regulatory requirements for Token Issuers

Unless a token can be regarded as a utility token, the following laws and regulations may be applicable to an ICO:

- Consolidated Italian Financial Law, Law Decree n. 58 on 24 February 1998 ("**TUF**");

[5] https://www.esma.europa.eu/ press-news/esma-news/esmahighlights-ico-risksinvestors-and-firms.

- Issuer Regulation, adopted by CONSOB with the resolution n. 11971 on 14 May 1999 as subsequently amended and restated ("**CONSOB Regulation**");

- Consolidated Banking Law, Law Decree n. 385 onl 1 September 1993 ("**TUB**");

- Law Decree 90/2017, implementing the 4th AML Directive ("**AML Decree**").

Potential application of the TUF

ICOs can be subject to the TUF provisions requiring, inter alia, the issuing of a prospectus (according to the provision of CCONSOB Regulation 11971/1999) if the amount of the ICO is exceeding EUR 5m, or is soliciting less than 150 retail investors, or soliciting only professional investors, unless the following exemptions may apply

Even though it is possible that the purchaser of the *Utility Token*, considers among the economic benefits that he could obtain: (a) the utilisation of the services/goods at a very lucrative price and (b) to make money through the difference between the price paid (as first buyer) for the use of the services/goods and the real price that will be applied when it will be available on the market, TUF application could be excluded on the assumption that the main interest is to buy the Utility Token to benefit from the use of the service and that, at the end of the period agreed with the company, the buyer of the token could buy only the service/good made available.

The issue related to the qualification of investment as financial nature was repeatedly discussed by CONSOB [6] which issued some notes on this topic and has qualified a financial investment as an investment having all the following characteristics: (i) the use of capitals, (ii) an expectation of remuneration, (iii) the undertaking of a risk related to the use of capitals; in a specific case where the capital has a secure benefit (the redemption of the token) and it is comparable to it, (actually it will be probably discounted compared to the effective value of the benefit bought) we consider that the last characteristic of the above definition is not applying to this type of token.

Furthermore, it is useful to verify if the tokens could be relate to the derivative financial instrument category, in order to apply to them the definition of derivatives contract of the standard accounting IAS 39 (adopted in December 1998 and in force from the 1th January 2001).

This definition enhances the typical qualities of the derivative. IAS 39 defines derivative as a financial contract or instrument that has, in the same time, the following characteristics: "(a) its value changes in connection with the variation of the interest rate, the price of a financial instrument, the price of a good, of a change rate of a foreign exchange, of a price index or rate, of a credit rating or credit index or any other pre-determined floating (sometimes defined "underlying"); (b) it does not require an initial net investment or an initial net investment that is lower than what would be required for any other type of contract from which it can be expected an answer similar to the variation of the market's factors; (c) it is set to a future date, with regulation deferred after the date of the negotiation".[7]

The required co-existence of all of the three characteristics above underlines the aleatory nature of the contract.

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[6] See the Communications DEM/10016056 of 26 February 2010, DEM/9057728 of 19 June 2009, DEM/8035334 of 16 April 2008 and DEM/DME/5017297.

[7] Girino E., I contratti derivati, 21 ss.

In the case of the issuing of Utility Tokens we consider that the only risk is the company capability to complete its project and ensure that the buyer of the utility token can take benefit from the services or goods that he is entitled to buy (also in the case of a discounted price compared with the price of the market) when it will be available on the market and thus it is sure that it has a pre-determined value connected to a future benefit (that the purchaser has the right to receive), likewise the pre-sale of a good that it is not available on the market yet and it is sold at a discounted price compared to the price of the same good that will be applied to all other buyers. Thus the TUF rules will not be applicable.

If the company will be issuing *Investment Tokens*, the ICOs is subject to the full TUF provisions applicable to IPOs (including prospectus regulations, MiFID, consumers regulation) and relevant regulations issued by CONSOB and is going to be regarded as a common IPO; in case the ICO fund-raising of the company is not higher than 5 million, during the 12 months, the exemption to the publication of a prospectus set forth in Article 34-ter, Paragraph 1, letter c) of the CONSOB Regulation will apply..

Currency Tokens are units of a crypto currency. As far as Currency Tokens have not been further developed, a Currency Token as a "substitute currency" is probably not a security either. This is due to the lack of corporate and property rights (or comparable rights).

b) Regulatory requirements for intermediaries and platforms

On the basis of classification of the tokens outlined in the introduction of this booklet, platform and intermediaries offering tokens to retail investors may be subject to specific regulation and authorised to operate only if an appropriate license is granted to them in Italy or pass-ported by another EU jurisdiction.

In principle, *Utility Tokens* can be offered by platforms operating without a specific license, similarly to reward crowdfunding platforms.

Investment Tokens offering is allowed only to platforms/intermediaries operating under a MiFID license granted by the Italian regulator or pass-ported from another EU jurisdiction; in case of offering of this kind of tokens intermediaries are also subject to all the regulation applicable to the offering of financial instruments (including, inter alia, investments services, AML, MiFID, investment brokerage, investment advice and portfolio management).

Provided that *Currency Tokens* are considered units of a crypto currency and thus as a "substitute currency", the Bank of Italy came to the conclusion that the relevant offering activity requires the license to operate a trading platform and a banking licence.

Potential application of the TUB

The offering of *Investment Tokens* is subject to the need of a MiFID license and intermediaries and platforms shall be subject to the full set of applicable laws and regulations, including inter alia, investments services, AML, MiFID, investment brokerage, investment advice and portfolio management

As of today and lacking a specific regulation, *Currency Tokens* are considered units of a crypto currency and thus as a "substitute currency" which is not a security; the conclusion about the qualification of Currency Tokens, is mainly based on the lack of corporate and property rights or other comparable rights, connected to this kind of token.

As a result of the above conclusion, the second area that, in our opinion, requires a preliminary verification is analysis related to the virtual currency regulation with reference to ICOs involving

the issuance of Currency Tokens is needed. This currency, how clarified by the Bank of Italy, does not represent in virtual form the common legal tender currency (Euro, Dollar, Pound) and it is not been issued or guaranteed by a central bank or a public authority.[8]

The virtual currency does not have legal tender and therefore does not have to be compulsorily accepted, by law, for the extinction of a monetary obligations, but can be used to buy goods or services only if the seller is willing to accept it and has the following features: (i) it is created by a private issuer; (ii) the consumer does not have its physical detention; (iii) it can be bought with legal tender currency and often the owners of the portfolio are anonymous.

It has to be underlined that the Bank of Italy[9] has clarified that the purchase, utilisation and acceptance, as a mean of payment, of the virtual currency are legal although the activity of issuing virtual currency and of conversion of legal tender currency in virtual currency or vice versa, can turn into an activity that can be contrary to the laws that limit these kind of activities only to subjects that are qualified by the Italian law in accordance to the Articles 130 and 131 of the TUB, or Articles 131 ter of the TUB and 166 of the TUF.

Furthermore, the Bank of Italy reported that a European regulation aiming to regulate this topic is expected, and that the activities of issuing and managing virtual currency it is not subject to the supervision of the Italian Banking authority.

With reference to the possibility of legally issuing virtual currency, we point out the first decision issued by an Italian court,[10] that dealt with the argument partially, related to the purchase of Bitcoins; the sentence stated that the sale of Bitcoins is an high risk operation for the consumer and therefore those who advertise this kind of sale, on their own or on behalf of third parties, have to inform the interested consumers about the risks related to the investment, in accordance with the articles 67 and following articles of the Italian Consumer Code, related to the topic of distance marketing of financial services to consumers.

Please also note that the activity of operating a crypto currency trading platform in Italy shall require the license to operate a trading platform and, as already reported by the Bank of Italy, also a banking licence; as far as the intermediaries of such kind of platform are concerned, considering the number of regulated activities involved by this business, they shall be subject to several regulations, including inter alia, investments services, AML, MiFID, investment brokerage, investment advice and portfolio management.

As a result of the above Italian Token Issuers tend to avoid the issuance of crypto currencies and to use foreign exchange/trading platforms, even if this may cause issues with reference to the AML laws and regulations which applies because of the Token Issuers is based in Italy or the investors are Italian.

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[8] EBA opinion on virtual currencies, 4 July 2014.

[9] Banca d'Italia, 30 January 2015, in which memorandum "*Avvertenza sull'uso delle cosi dette valute virtuali*".

[10] Court of Verona, 24 January 2017, with the remark of G. U. Miranda, in Banca Borsa e titoli di credito, 2017, pages 467 e ss. The main topic of this ruling was the fiscal treatment applicable to the activity of conversion of the legal tender of currency into bitcoin virtual currency and vice versa, but it played an important role in order to recognise the legality of its issue and connected activities.

Potential application of the AML Decree

From a general point of view we consider that the AML Decree is applicable to any transaction of capital-raise, also in the case that it can be qualified as a reward raise and certainly when it is qualified as a financial investment.

An ICO can request the application of the Anti-Money Laundering regulation that was implemented in Italy after the adoption of the fourth Directive on Anti Money Laundering.

On this matter the Bank of Italy had reported that the risk of the virtual currency is its utilisation for illegal or criminal intentions, including money laundering due to the impossibility to verify who the owners of the virtual portfolios are (they often tend to remain anonymous).

For that reason it is clear that ICOs present risks connected to the anonymity of the buyers of the tokens, that can be used for illegal or criminal activities such as those reported by the Bank of Italy. In order to do so the subject who will manage the virtual fund-raise has to identify the buyers in accordance to the fourth Directive on Anti Money Laundering and, in Italy, to the AML Regulation.

On this matter it is possible to refer to the recent modification of the anti-laundering regulation through the AML Decree, introducing in letter g) of the first Paragraph of Article 1 the definition of "virtual currency", as "the virtual representation of value, not issued by a central bank or public authority, not connected to a legal tender currency, and used as a way of trade in order to buy goods or services and it can be virtually transferred, negotiated and stored".

The definition is used in the above said law, in order to apply its regulation to "the providers of services related to the use of virtual currency, restricted to the activity of conversion of virtual currency into legal tender currency or vice versa". Basically, when a subject (typically an exchange) acts in Italy, it has to register in the exchange-rate register and has to apply to the anti-laundering regulation related to the adequate verification of the consumers and the report of suspicious operations.

From the AML Decree perspective if an ICOS is based on Utility Tokens, Investment Tokens or Currency Tokens, it is not relevant at all, provided that the AML Decree will be applicable either when a currency is converted in a virtual currency (which is usually the case in an ICO) or when an investment transaction is completed (in case an Investment Token is issued).

3. Conclusion

In Italy, until a specific regulation on ICOs is issued, an ICO based on the issuance of Investment Tokens which can be qualified as financial instruments will be subject to the above listed laws and regulations (Prospectus Directive, MiFID, AML Decree, Consumers Directive, AIF Directive).

Nevertheless if an ICO is based on the issuance of Utility Tokens, shall be certainly subject to anti-money laundering and terrorist financing laws, while it is not going to be subject to investment laws and regulations.

Some issues may arise in connection with Currency Tokens, provided that there is no specific applicable regulation in Italy and the Bank of Italy has not yet issued any statement on this matter.

Contact details of the authors:

Osborne Clarke
Corsa di Porta Vittoria 9
20122 Milano
Italy
T +39 02 541 3171

Umberto Piatelli
Partner

T +39 02 5413 1762
E umberto.piatelli@osborneclarke.com

Stefano Panzini
Associate

T +39 02 5413 1741
E stefano.panzini@osborneclarke.com

VI. Netherlands

1. Introduction

There is currently no specific regulatory framework regarding ICOs in the Netherlands. Neither ICOs, crypto currencies nor tokens are given a particular legal status or qualification. However, ICOs may be subject to several regulations that are supervised by the Dutch regulators (the Authority for the Financial Markets (*Autoriteit Financiële Markten*) ("**AFM**") and the Dutch Central Bank (*De Nederlandsche Bank*) ("**DNB**")).

The AFM and DNB have issued warnings on several occasions on the risks related to ICOs, crypto currencies and tokens and closely monitor the evolution and developments of these products. Furthermore, the AFM endorsed the ESMA statement of 13 December 2017 and issued its own Dutch-related statement on the same day.

On 24 January 2018, the committee of Finance, residing under the Dutch Minister of Finance, organised a roundtable on crypto currencies and ICOs for which both the AFM and DNB have issued a position paper. The position papers hold the most pressing risks the Dutch regulators flag.

Apart from the warnings to the public, the Dutch regulators are fairly open to questions regarding ICO's, crypto currencies and tokens, which questions they typically handle as part of the AFM and DNB jointly operated InnovationHub[11]. At least one crypto currency platform has been placed in the AFM/DNB regulatory sandbox so far.

2. National regulation

a) Regulatory requirements for Token Issuers

Prospectus directive

If a token qualifies as a security, a token may only be offered to the public in order to raise funds after a prospectus has been approved by the AFM and is published. The prospectus directive 2003/71/EC ("**Prospectus Directive**") qualifies securities as follows:

- shares in companies and other securities equivalent to shares in companies,
- bonds and other forms of securitized debt which are negotiable on the capital market, and

[11] https://www.dnb.nl/toezichtprofessioneel/innovationhub/index.jsp

- any other securities normally dealt in giving the right to acquire any such transferable securities by subscription or exchange or giving rise to a cash settlement

- excluding instruments of payment;

In case a token falls within the definition of a security according to the prospectus directive, the Token Issuer in principal needs the approval of the AFM before publishing a prospectus and raising funds from the public. Especially Investment Tokens tend to qualify as a security, since they represent assets and can easily be equity structured.

The Dutch Financial Supervision Act (*Wet op het financieel toezicht*) ("**Wft**") and its underlying regulations provide a number of exemptions from the obligations under the prospectus provisions. These exemptions include the following:

- The offering is addressed to qualified investors only;

- The offering is addressed to fewer than 150 persons;

- The offering is addressed to the public on a non-profit basis;

- The aggregate maximum value of the amount payable for all the shares that are offered across Europe is less than EUR 5,000,000 over a maximum period of 12 months.

If a token is exempted from the prospectus obligation on the basis of the above exemptions, it does not need an approval of the AFM. However, in that case it is mandatory for the Token Issuer to notify the AFM and to use the following picture in the offering documents and in any other marketing material in order to warn investors that they are investing outside supervision of the AFM.

Please note! You are investing outside AFM-supervision. No prospectus requirement for this activity.

Further, the AFM can take enforcement actions under the Enforcement of Consumer Protection Act ("**Whc**") in case it finds the offering party has provided misleading or incorrect information to retail clients.

AIFMD

Next to prospectus provisions, it is also possible that tokens are qualified as participation rights in an investment fund, which is a specific type of equity security. This occurs when a Token

Issuer raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors. In short, if the investor's assets are pooled and collectively invested, the tokens qualify as participation rights, which leads to the applicability of the Alternative Investment Fund Managers Directive ("**AIFMD**").

ESMA has published guidelines concerning the meaning of raising capital that make clear that the transfer or commitment of capital can take the form of both subscriptions in cash or in kind. This means a crypto currency investment in exchange for a token, can be perceived as a subscription, hence qualifying the investment as 'raising capital' under AIFMD.

If the investors receive tokens in return for their investments, the manager of the investment fund (the Token Issuer or a third party) may need an AIFM license to operate in the Netherlands. Under certain circumstances, however, an exemption might apply. In order for an exemption to apply, the following terms have to be met.

- An open-end or leveraged fund does not exceed the threshold of EUR 100,000,000; and
- A closed-end unleveraged fund does not exceed the threshold of EUR 500,000,000

Next to this, at least one of the following terms needs to be fulfilled.

- An AIFM only offers tokens to professional market parties;
- An AIFM only offers tokens of a nominal value of at least EUR 100,000; or
- An AIFM offers tokens to less than 150 persons.

If case an exemption is applicable, the manager of an investment fund still needs to notify the AFM of the applicability of an exemption and is required to comply with the Dutch Anti-Money Laundering Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*) ("**Dutch AML Act**").

Prohibition against attracting repayable funds

Repayable funds are, in short, deposits or other fiat currencies that have to be repaid at a certain point in time. Under the Wft, it is prohibited to attract repayable funds from parties other than professional market parties without dispensation of DNB.

Because of this prohibition, it is not allowed for a Token Issuer to attract fiat money from the public that he agrees to pay back in the future. This rule however does not apply to parties that only attract repayable funds of at least EUR 100,000 per investor, because DNB considers

these parties as professional market parties. The prohibition to attract repayable funds applies regardless of the question whether the tokens qualify as securities.

PSD2 / 2EMD

Electronic money (e-money) is qualified in Directive 2009/110/EC as *electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions (…), and which is accepted by a natural or legal person other than the electronic money issuer*. In short, e-money is issued against a receipt of funds to enable parties to make payments with the e-money to parties other than the issuer of the e-money. A company that issues e-money, in principle requires a license from DNB and needs to comply with the provisions laid down in the Dutch AML Act.

In the definition of e-money in the Wft, 'on receipt of funds' is implemented as 'on receipts of money'. This means that in order for a Currency Token to qualify as e-money under the Wft, the token has to be bought with fiat money (e.g. euro's or dollars). If the Currency Token is bought on receipt of a crypto currency (e.g. Bitcoin or Ethereum), it is not considered to be issued on receipt of money and does not qualify as e-money. This interpretation has been confirmed in 2013 by the Dutch Minister of Finance and by the AFM in 2017. Further, in order to fall within the e-money definition, the Currency Tokens issued on return for money, need to be used to make payment transactions to third parties. A payment transaction is defined in the second Payment Services Directive ("**PSD2**") (please see further under 'regulatory requirements for intermediaries and platforms'). However, even if Currency Tokens meet all elements of the definition of e-money, Token Issuers may be able to rely on exemptions in 2EMD for certain small electronic money institutions.

Other general Dutch laws

Apart from these specific regulations, other more general laws should be taken into account when designing an ICO, particularly in respect of taxation, consumer protection rules, contractual law, accounting standards, intellectual property. Finally, ICOs raise typical issues linked with the use of internet, such as the questions of applicable law and competent jurisdiction.

b) Regulatory requirements for intermediaries and platforms

MIFID II

If tokens qualify as financial instruments, the Markets in Financial Instruments Directive 2014/65/EU ("**MiFID II**") is applicable. Financial instruments are defined in Annex I, section C MiFID II and include, inter alia, transferable securities (prospectus directive) and units in collective investment undertakings (AIFMD).

Under the MiFID II regime, brokers or intermediaries that offer investment services concerning financial instruments require a license to operate as an investment firm. Offering investment services includes services like (i) investment advice, (ii) the reception and transmission of orders and (iii) execution of orders.

Under MiFID II, it is further required to have a license when performing investment activities concerning financial instruments. A platform performs investment activities when it is dealing in financial instruments for own account or if it is qualified as an Organised Trading Facility ("**OTF**") or a Multilateral Trading Facility ("**MTF**"). The OTF and MTF are both trading venues in which third parties buying and selling interests in financial instruments are able to interact in a system in a way that can result in a contract. If an online token exchange performs investment activities, and the tokens fall within the meaning of financial instruments, the online token exchange in principle requires a license. In addition, parties who performed investment services are obliged to comply with the provisions of the Dutch AML Act.

Intermediation in repayable funds

Where a Token Issuer may be attracting repayable funds (as mentioned under 'prohibition against attracting repayable funds'), a trading facility could be providing intermediary services in respect of repayable funds. In case a Token Issuer attracts repayable funds from the public, the online token exchange that acts as an intermediary in this process in principle needs dispensation from the AFM. According to the AFM, this dispensation is only required in case the intermediary service actually contributes to the establishment of an agreement between the ICO and the investor. This could for example be the case if an intermediary collects investor's data and sends it to a Token Issuer in order to establish an agreement.

PSD2/2EMD

Next to Token Issuers, intermediaries and platforms could also be subjected to the PSD2 (which is expected to take effect in the Netherlands in the second half of 2018) and 2EMD provisions.

PSD2 regulates eight payment services as defined in Annex I to PSD2, including:

- Offering and operating a payment account;
- Execution of payment transactions;
- Issuing of payment instruments and/or acquiring of payment transactions;
- Money remittance;
- Payment initiation services; and

- Account information services.

For instance, intermediaries that remit funds to Token Issuers may be captured under PSD2 as money remitters. In specific cases, other payment services could be provided by intermediaries and platforms as well. PSD2 prohibits providing payments services without a license.

Further, under the Wft, it is in principle prohibited to provide intermediary services concerning e-money or payment accounts without a license. If tokens (such as Currency Tokens) qualify as e-money, providing intermediary services in that respect could require a license. Another example is a platform or token broker that offers to its clients and integrates in its platform a third party e-money account or payment account operated by e-money issuer or payment institution.

3. Conclusion

Given the lack of a clear legal framework, Token Issuers may face a complex challenge assessing which set of rules should be applicable based on the characteristics of the tokens. Even if the ICO is designed in a way that the tokens do not qualify as financial instruments such as securities, certain regulations like the prohibition to attract repayable funds may still be applicable.

Before launching an ICO, Token Issuers should carry out an in-depth assessment of the structure of their ICO and the design of the tokens in light of the potentially applicable regulations, as well as engage in open discussions with the regulators on the structure of the ICO. In practice the AFM and DNB strongly encourage potential Token Issuers to enter into direct contact with them through the InnovationHub and submit their ICO structure before launching the ICO. However, ICO-issuers should keep in mind that, while the regulators may give soft guidance, they will neither act as your legal advisor nor as your compliance officer.

Contact details of the authors:

Johannes de Jong
Head of Regulatory

T +31 20 70 28 678
E johannes.dejong@osborneclarke.com

Matthijs Leijendekker
Junior Associate

T +31 20 70 28 914
E matthijs.leijendekker@osborneclarke.com

Osborne Clarke
IJdok 29
1013 MM Amsterdam
The Netherlands

T +31 20 70 28 600

VII. Singapore

1. Introduction

In Singapore, ICOs of digital cryptographic tokens ("**tokens**") are not directly regulated. The Singapore government has not issued legislation which is specifically targeted at ICOs. As of February 2018, the Minister for Finance has confirmed that, at present, there is "no strong case to ban crypto currency trading" in Singapore.

Nonetheless, the Monetary Authority of Singapore ("**MAS**"), the central bank and financial services regulator, is primarily concerned with, and regulates, two aspects of ICOs:

- first, the nature of the token; and
- second, the possibility of the tokens being used for money laundering and/or terrorism financing.

2. National regulation

a) Regulatory requirements for Token Issuers

The MAS regulates financial products by way of the Securities and Futures Act (Cap. 289) ("**SFA**"). Products which are considered to be "capital markets products" will fall within the purview of the SFA, and consequently, will be regulated by the MAS.

"Capital markets products" means:

(a) securities;

(b) futures contracts;

(c) contracts or arrangements for the purposes of foreign exchange trading;

(d) contracts or arrangements for the purposes of leveraged foreign exchange trading; and

(e) products as the MAS may prescribe as capital markets products.

Thus, tokens which fall within the definition of "capital markets products" will be regulated as such under the SFA.

In general, *Investment Tokens* which represent assets, and can be structured as debt or equity, will likely be considered to be "securities" within the meaning of the SFA. "Securities" are defined broadly in the SFA, and include debentures, stocks or shares, and units in collective investment schemes.

Therefore, Investment Tokens such as those which are structured as shares which represent an ownership interest in the Token Issuer, or as a unit in a collective investment scheme (such as an investment fund), will be considered to be "securities" within the meaning of the SFA. Accordingly, these Investment Tokens will be regulated under the SFA as an offer of securities.

An ICO for these Investment Tokens must satisfy the requirements under the SFA for the offer of securities. These requirements include the need for a prospectus that has been prepared in accordance with the SFA and registered with the MAS.

In the prospectus, the Token Issuer must include such information that investors and their professional advisers would reasonably require making an informed assessment of the offer, including information on the rights and liabilities attaching to the tokens, and the financial position of the Token Issuer. The inclusion of false or misleading statements in the prospectus may lead to criminal and/or civil liability on the Token Issuer, the directors of the Token Issuer, the issue manager, the underwriter and/or the maker of the false or misleading statement.

However, tokens which do not fall within the SFA's definition of "capital markets products" will not be regulated under the SFA. Therefore, tokens which only have a limited right of use of the Token Issuer's platform, i.e. *Utility Tokens*, will not be regulated under the SFA.

Most ICOs will be for the sale of Utility Tokens. Given that such Utility Tokens do not fall within the scope of the SFA, and therefore do not require a prospectus as part of the ICO, the token sale process can take place in a much quicker fashion. However, this will require careful analysis of the token's characteristics to ensure that the token is not structured in a manner that resembles a capital markets product.

The regulatory position in respect of *Currency Tokens* (which only serve as a surrogate for money, as a payment method for buying goods or services) is less clear.

(a) Provided that the Currency Tokens do not fall within the definition of "securities" or any other capital markets products, as defined in the SFA, they will likely not be regulated pursuant to the SFA. Thus, an ICO for these currency tokens will not require a prospectus.

(b) Further, in respect of tax treatment, currency tokens such as Bitcoins are not considered as "money", "currency" or "goods" for taxation purposes. Instead, the supply of Currency Tokens is treated as a supply of services. The use of

Currency Tokens to purchase goods and services will be considered a barter trade between the two parties.

It remains to be seen how the treatment of Utility Tokens and Currency Tokens will evolve, given that these are subject to minimal regulations at present. In this regard, the draft Payment Services Bill (discussed in the last section) may provide an indication of the increased scrutiny and regulation that these tokens will be subject to.

b) Regulatory requirements for intermediaries and platforms

Depending on the nature of the tokens being offered, i.e. whether these tokens are Utility Tokens, Investment Tokens or Currency Tokens, the activities in respect of these tokens may also be regulated.

Generally, activities in relation to Investment Tokens will be regarded as activities in relation to capital markets products, and will be regulated accordingly. Intermediaries dealing with Investment Tokens will therefore need to comply with the relevant regulatory and licensing requirements.

The SFA regulates a broad range of activities, such as dealing in securities and fund management. If the tokens in question constitute "capital markets products" (e.g. securities), such that the SFA applies, the SFA may regulate certain activities in respect of these tokens.

Possible intermediaries in the ICO process include:

(a) platforms which facilitate the ICO and/or a secondary market for the trading of the tokens post-ICO; and

(b) persons who provide financial advice in respect of the tokens.

Platforms facilitating trading of Investment Tokens (whether pursuant to the ICO or for secondary trading) may be regulated under the SFA. Such platforms may be regarded as establishing or operating a "securities market" or a "futures market", and these platforms must be approved by the MAS as an approved exchange, or their operators must be a recognised market operator.

Persons who provide financial advisory services in respect of Investment Tokens may be regarded as rendering financial advice within the meaning of the Financial Advisers Act (Cap. 110) ("**FAA**"). This may include activities such as advising others on the tokens, marketing a collective investment scheme in relation to these tokens, and issuing research reports concerning these tokens.

Other forms of dealing with Investment Tokens may also be regulated. For example, entering into agreements for the acquisition, disposal, subscription or underwriting of tokens which are securities may be regarded as "dealing in securities".

By contrast, intermediaries who are strictly concerned with Utility Tokens and Currency Tokens will fall outside of the purview of the SFA and the FAA, given that these are not capital markets products (within the meaning of the SFA) or investment products (within the meaning of the FAA). Thus, these intermediaries will not be regulated under the SFA. For example, platforms facilitating the trading of Utility Tokens and Currency Tokens will not require MAS approval as an approved exchange, nor must their operators be recognised market operators.

Anti-Money Laundering / Countering financing of terrorism

As transactions involving tokens are typically anonymous, and only require the seller's cryptographic wallet address for the transfer, there is a risk that tokens can be used for money laundering and/or terrorism financing.

There is no single anti-money laundering / countering the financing of terrorism ("**AML/CFT**") legislation in Singapore. The AML/CFT requirements can be found in various pieces of legislation, regulation and guidelines, including:

(a) the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A) of Singapore ("**CDSA**");

(b) the Terrorism (Suppression of Financing) Act (Cap. 325) of Singapore ("**TSFA**");

(c) the United Nations Act (Cap. 339) of Singapore ("**UN Act**"); and

(d) sector-specific regulations and guidelines, e.g. guidelines issued by the MAS.

In general, all parties have an obligation to report suspicious transactions (under the CDSA), and are also prohibited from dealing with or providing financial services to designated individuals and entities. These obligations would apply to all Token Issuers and intermediaries as well, regardless of whether the tokens are Investment Tokens, or are merely Utility Tokens or Currency Tokens.

To fulfil these general AML/CFT obligations, it would be prudent for Token Issuers and intermediaries to conduct know-your-client checks on token purchasers, to verify the person's source of wealth and the source of funds for the purchase of tokens, and to ensure that the persons are not designated and/or sanctioned individuals and entities.

3. Conclusion

At present, the offer of Investment Tokens and ancillary activities thereto are heavily regulated, mainly under the SFA. Heavy penalties will apply for the offer of Investment Tokens which do not comply with the requirements under the SFA. Further, intermediaries will also be regulated, and may require a license or an exemption from the MAS in order to provide ancillary services in relation to Investment Tokens.

While Utility Tokens and Currency Tokens do not face the same regulatory hurdles at present, it should be noted that the MAS has introduced a draft Payment Services Bill ("**Bill**"). This Bill is intended to regulate payment services and payment intermediaries.

Under the Bill, tokens will be regulated as "virtual currencies". Services relating to virtual currencies may be regarded as regulated activities, and intermediaries wishing to provide such virtual currency services may require a license from the MAS in order to operate.

These intermediaries will therefore have to abide by any AML/CFT regulations that the MAS stipulates, and any other regulations and/or guidelines which the MAS may wish to impose. These are likely to be more stringent than the current AML/CFT regime currently applicable to Token Issuers and intermediaries.

Contact details of the authors:

Osborne Clarke
1 Raffles Place #04-61
One Raffles Place Tower 2
Singapore 048616
T +65 6350 4380

Chia-Ling Koh
Director

T +65 6350 4382
E chialing.koh@osborneclarke.com

Dax Lim
Director

T +65 6350 4384
E dax.lim@osborneclarke.com

Ralph Lim
Director

T +65 6350 4383
E ralph.lim@osborneclarke.com

VIII. Spain

1. Introduction

To date, there is no specific law governing ICOs in Spain, although it does not mean that there are no other regulations or legislation, particularly, the Securities Markets Law (Ley del Mercado de Valores or "**LMV**") that may apply to this innovative financial method. The National Securities Markets Commission ("**CNMV**") has raised repeated concerns about the absence of specific regulations aimed at protecting non-qualified investors against this new growing phenomenon, and considers that ICOs do not offer the same guarantees as other traditional products that are duly regulated in Spain. The rapid growth of this new phenomenon has led Spanish regulators to issue several warnings about the potential risks investors may be exposed to. In a statement dated 8 February 2018, jointly issued by the CNMV and the Bank of Spain, the regulators emphasised the risks of investing in this type of digital assets, in line with the statement issued by the European Securities and Markets Authority on 13 November 2017.

Spanish ICO precedents

No ICO has been registered with the CNMV yet so there is no precedent on how Spanish regulators will handle token issues. However, there are some examples of Spanish companies that have conducted ICOs, although, so far, they have subjected those token offerings to the laws of foreign jurisdictions in order to avoid the Spanish regulatory framework.

Analysis of the joint statement by the CNMV and the Bank of Spain of 8 February 2018

(a) Highlighted Risks

(i) Unregulated space

One of the main concerns for both entities is the absence of a particular regulation for tokens issued through an ICO, as well as the relationship between the different agents that may commercialize such tokens. The regulators warn that non-qualified investors do not enjoy the same protection mechanisms and guarantees as those provided in other type of investments.

(ii) Problems arising from the cross-border nature of ICOs

ICOs are an international reality and they do not respect borders. Therefore, the CNMV and the Bank of Spain urge supranational entities to jointly and uniformly regulate this type of product.

In addition, given the cross-border nature of ICOs, regulators have voiced their concern over the speed and lack of control in which the invested funds can be transferred and the place where they can finally reside.

(iii) High risk of losing the invested capital

One of the main features of this type of investments is that they are highly speculative and that there may be strong fluctuations in the price of the tokens, so there is a considerable risk of losing all the invested capital.

In addition, both entities highlight the fact that, as opposed to other regulated products, there are no mechanisms for protecting investors, due to the lack of adequate regulations.

(iv) Liquidity problems and extreme price volatility

The CNMV and the Bank of Spain also alert investors to the difficulties they may experience if they decide to exchange tokens for traditional currencies, since such exchange is not fully guaranteed because of the lack of transparency and specific regulation on ICOs.

(v) Inadequate information

Finally, the CNMV and the Bank of Spain also warn investors that ICOs do not offer sufficient and comprehensive information, and that they may not be suitable for the financial needs and risk profile of each investor. Because of that lack of information, non-qualified investors may be not able to assess and weigh the risks associated to these digital assets.

(b) Types of tokens

The CNMV and the Bank of Spain distinguish between 2 types of tokens, depending on the main purpose of the holder of the token:

(i) Utility token

These tokens are exclusively aimed at giving access to a certain service or product by exchanging them for such service or product.

(ii) Security token

These tokens are aimed at participating in the Token Issuer's future revenues or obtaining a benefit when the tokens increase in value.

In any case, such distinction is not exclusive and, therefore, a token exchangeable for a service or product can also be considered to be a speculative investment asset.

(c) Potential applicability of the securities market regulations

In the absence of a specific regulation, the CNMV and the Bank of Spain recommend analysing, on a case-by-case basis, whether an ICO involves an issuance or offer of securities, in which case the token may be regarded as a security under the LMV. A token should be considered a security if it (i) gives rights or prospects of sharing the potential revaluation or profitability of a business or project and (ii) is eligible for general and impersonal trading on a financial market.

The fact that a token may be qualified as a security entails the applicability of the European and national securities regulations. In particular, when examining possible obligations under Spanish securities market regulations, a distinction must be made between the Token Issuer and the trading platforms or intermediaries offering services in connection with ICOs ("**Intermediaries**").

2. National regulation

a) Prospectus requirements for Token Issuers

Offerings of transferable securities in Spain are subject to local securities regulations. According to article 2.1 LMV a transferable security is defined as "any patrimonial right, regardless of its name, which, because of its own legal configuration and system of transfer, is susceptible to being traded in a generalised impersonal way in a financial market". Therefore, any ICO that implies an offering of tokens that may be qualified as securities under the LMV, will be subject to the registration requirements set out in the LMV (unless such offering qualifies as a non-public offering as further explained below).

Under the LMV, an offering for the sale or subscription of securities will qualify as a public offering if it provides sufficient information by any means on the terms of the offering and the securities offered to allow a potential investor to decide whether to acquire or subscribe the offered securities. Public offerings require the registration of a prospectus with the CNMV, unless the offering is qualified as a non-public offering and therefore benefits from an exception to such registration requirements. According to article 35 LMV, the following offerings of securities are not considered public offerings:

(a) an offering of securities exclusively addressed to qualified investors;

(b) an offering of securities addressed to less than 150 natural or legal persons per EU Member State, without including qualified investors;

(c) an offering of securities addressed to investors who acquire securities for a total consideration of at least EUR 100,000 each;

(d) an offering of securities whose unit nominal value amounts to at least EUR 100,000; and

(e) an offering of securities amounting to a total of less than EUR 5,000,000 in the European Union, which limit shall be calculated over a period of 12 month.

However, the placement and commercialization of securities issued through any of the offerings contemplated in the preceding paragraphs (a) to (e) (inclusive), which are generally addressed to the public through any form of advertising, require, in each case, the intervention of an entity that is authorised to provide investment services. However, this obligation does not apply to the activity carried out by crowdfunding platforms duly registered as such under Spanish law.

b) Regulatory requirements for intermediaries and platforms

Depending on the type of services provided by the intermediaries, they may qualify as investment services providers under the LMV and be therefore subject to registration requirements. Investments services providers are classified as follows, based on the specific types of services provided:

(a) Broker-dealers (sociedades de valores):

These entities may trade professionally, on their own or their parties' behalf, and carry out any investment services and ancillary activities under LMV.

(b) Brokers (agencias de valores):

These entities may only trade professionally on behalf of third parties and may carry out investment and ancillary services except for:

(i) trading on their own behalf;

(ii) underwriting the issuance or placement of financial instruments; and

(iii) granting loans and credit to investors to deal with financial instruments, to the extent that the grantor of the loan participates in the transaction.

(c) Portfolio management firms (sociedades gestoras de carteras):

These entities may only provide the following services:

(i) discretionary and individualised management of investment portfolios on the basis of mandates granted by investors;

(ii) investment advice (i.e. the provision of personal recommendations to a client, either at the request of the latter or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments);

(iii) consultancy services for companies on capital structure, industrial strategy and other related matters, as well as other services and advice on the merger and acquisition of companies; and

(iv) investment research, financial analysis or general recommendations relating to transactions in financial instruments.

(d) Financial advisory firms:

Individuals or legal entities may provide the services listed under paragraphs (ii), (iii) and (iv) of the preceding section (c) as financial advisory firms.

All investment services providers are subject to registration with the CNMV. The requirements to be registered and authorised depend on the type of investment service entity (being stricter for a broker-dealer and less demanding for a financial advisory firm). So depending on the types of services to be provided, intermediaries should reasonably opt for the more flexible type of authorised entity.

On the other hand, platforms dealing with or exchanging crypto currencies may be subject to money laundering regulations and authorisation and registration requirements. Depending on the specific activities conducted by the platform, it may be regarded as a multilateral trading facility.

3. Conclusion

Spain has no laws banning ICOs, which means that this financial method is not prohibited. However, the specific requirements and conditions to be met by the Token Issuer and any intermediaries participating in the offering must be assessed on a case-by-case basis, in order to determine if tokens and intermediaries are subject to the CNMV's supervision and registration.

Contact details of the authors:

Osborne Clarke
Paseo de la Castellana 52
28046 Madrid
Spain
T +34 915 764 476

David Miranda
Partner

T +34 934 191 818
E david.miranda@osborneclarke.com

Ignasi Bruguer
Abogado/Lawyer

T +34 934 191 818
E ignasi.bruguer@osborneclarke.com

IX. United Kingdom

1. Introduction

Whilst there is currently no regulatory framework or generally accepted or standardised model specifically governing ICOs, it is not correct to say that all ICOs are unregulated in the UK.

In a statement[12] published on 12 September 2017, the UK Financial Conduct Authority ("**FCA**") stated that whilst many ICOs will fall outside the regulatory space, whether any use or application of distributed ledger technology (including ICOs) falls within its regulatory boundaries can only be determined on a case-by-case basis. Depending on how they are structured, some ICOs may involve regulated investments and firms involved in an ICO may be conducting regulated activities. In addition, the FCA has noted that some ICOs feature parallels with Initial Public Offerings (IPOs), private placement of securities, crowdfunding or even collective investment schemes. Some tokens may also constitute transferable securities and therefore may fall within the FCA's prospectus regime.

Accordingly, the FCA has urged businesses involved in an ICO to carefully consider if their activities could mean they are arranging, dealing or advising on regulated financial investments and therefore fall within the FCA's (or indeed any other regulator's) regulatory perimeter, or in the case of digital currency exchanges that facilitate the exchange of certain tokens, whether they need to be authorised by the FCA to be able to deliver their services.

The FCA has also warned consumers about the risks of ICOs, labelling them "very high-risk speculative investments". Like other European regulators, the FCA has identified the high price volatility, the potential for the system to be used for fraudulent purposes and the possibility for investors to lose their entire stake as being some of the major risks associated with ICOs. Whereas for an IPO there is a prospectus issued to investors which has been approved by the FCA, ICOs usually only provide a 'white paper'. According to the FCA, an ICO white paper might be "unbalanced, incomplete or misleading" and requires a sophisticated technical understanding of the token's characteristics and risks. The fact that investors are extremely unlikely to have access to UK regulatory protections like the Financial Services Compensation Scheme or the Financial Ombudsman Service is highlighted by the FCA as a key risk for investors.

Late in 2017, the FCA published a Feedback Statement[13] on its discussion paper (DP 17/03) in which it assessed the possible impact of, and its primary regulatory concerns with, the adoption of distributed ledger technology in the financial services sector. With regard to ICOs, the FCA set out in an Annex to the Feedback Statement an analysis of the regulatory considerations on

[12] https://www.fca.org.uk/print/news/statements/initial-coin-offerings
[13] https://www.fca.org.uk/publication/feedback/fs17-04.pdf

ICOs. Primarily, those involved in an ICO must be aware that digital tokens may constitute a transferable security and so may fall within the ambit of the rules on financial promotion, the prospectus regime, and/or the regulatory perimeter.

On 6 April 2018, the FCA published a further statement[14] confirming that while crypto currencies are not currently regulated (provided they are not part of other regulated products or services and the FCA does not consider them to be currencies or commodities under the Markets in Financial Instruments Directive (2014/65/EC – "**MiFID II Directive**"), crypto currency derivatives are capable of being financial instruments under the MiFID II Directive. Firms conducting regulated activities in crypto currency derivatives must therefore comply with relevant provisions in the FCA's Handbook and directly applicable EU regulations.

The FCA explains that it is likely that dealing in, arranging transactions in, advising on or providing other services that amount to regulated activities in relation to derivatives that reference either crypto currencies or tokens issued through an ICO, will require authorisation and be supervised by the FCA. This includes:

- Crypto currency futures - a derivative contract in which each party agrees to exchange crypto currency at a future date and at a price agreed by both parties;

- contracts for differences ("**CFDs**") with crypto currencies as the underlying investment - cash-settled derivative contract in which the parties to the contract seek to secure a profit or avoid a loss by agreeing to exchange the difference in price between the value of the crypto currency CFD contract at its outset and at its termination. The risks of these products were notified by the FCA in a consumer warning published on 14 November 2017; and

- crypto currency options - a contract which grants the beneficiary the right to acquire or dispose of crypto currencies.

The application of the Prospectus Directive, MiFID II Directive or the Alternative Investment Fund Managers Directive ("**AIFMD**") could be triggered by an ICO, particularly if tokens are structured and tradable in a way that resembles common financial instruments. For example, if an ICO is used to raise capital from a number of investors with a view to investing in accordance with a defined investment policy, it might qualify as an AIF. Firms involved in such ICOs may therefore need to comply with the AIFMD.

Accordingly, from a UK perspective, Token Issuers and their advisers must consider the full ambit of legislation that may be relevant to the carrying on of regulated activities, the publication

[14] https://www.fca.org.uk/news/statements/cryptocurrency-derivatives

of a prospectus and the making of financial promotions, as well as anti-money laundering and data protection legislation applicable in the UK.

Furthermore, a number of the UK's leading crypto currency companies have recently joined together to launch a self-regulatory trade body – called 'CryptoUK' – to improve industry standards and engage policy makers on the future of the sector. At the date of writing, the Association does not represent ICOs, however CryptoUK has committed to developing a specific Code of Conduct for the process.

2. National requirements

a) Regulatory requirements for Token Issuers

Token as "transferable securities" – possible prospectus requirements

Some tokens may constitute "transferable securities" (as defined in MiFID II Directive) and therefore may fall within the prospectus regime.

A prospectus is required in the circumstances laid down by the Prospectus Directive as implemented by sections 85 and 86 of the Financial Services and Markets Act 2000 ("**FSMA**"). Under these provisions, unless an exemption applies, an approved prospectus is required when transferable securities are offered to the public in the UK (or for which admission to trading on a regulated market will be requested). This may also apply to pre-sale arrangements, for example, that give rights to tokens that are "transferable securities" or are themselves "transferable securities". Contravening sections 85(1) or (2) of FSMA is a criminal offence.

The definition of "transferable securities" refers to "those classes of securities which are negotiable on the capital market" (instruments of payment are excluded). The term "security" for these purposes is not defined, but (following statements made by the European Commission) would arguably capture those tokens capable of being traded on an exchange.

Whether a token constitutes a security as defined in MiFID II Directive is determined by reference to the rights attaching to the token and must be assessed on a case-by-case basis. Generally speaking, tokens that carry rights equivalent to those attaching to shares in companies are likely to be deemed to be securities. Since utility tokens lack voting rights (and other comparable rights), it is likely that they would not be deemed to constitute securities for these purposes, however the rights granted by the token must be assessed in detail to form a definitive conclusion on this.

Notwithstanding that a token is deemed to constitute a security, there are various exemptions and exclusions from the obligation to produce a prospectus in relation to public offers (for example, where the offer is addressed to fewer than 150 persons or to qualified investors only, or where the quantum of securities being offered is below a minimum threshold). Many Token

Issuers will typically wish to structure the ICO so as to avoid the (often costly and time consuming) requirement for a prospectus.

The new Prospectus Regulation (2017/1129/EU) (the "**New Prospectus Regulation**") that will repeal and replace the existing Prospectus Directive (2003/71/EC) and the Prospectus Regulation (809/2004/EC) is expected to come fully into force in the UK in 2019. Among other changes, the New Prospectus Regulation will amend the general exemption to the obligation to produce a prospectus relating to small scale offerings. Offerings will only be exempt from the requirements in the New Prospectus Regulation if they are for a total consideration of EUR 1,000,000 or less over a 12 month period. This threshold may be increased to EUR 8,000,000 for the same period at the discretion of Member States. There is currently no indication of the level at which the UK will set this threshold.

b) Regulatory requirements for intermediaries and platforms

Under the general prohibition in section 19 of the Financial Services and Markets Act 2000 ("**FSMA**"), a person may not carry on a regulated activity in the UK, or purport to do so, unless they are either an authorised person or an exempt person. It is a criminal offence (punishable by up to two years in prison, or a fine, or both) for a person to carry on activities in breach of the general prohibition in FSMA. If an authorised person carries on regulated activity for which it does not have the relevant permission, that person could be subject to disciplinary action by the FCA (levying of fines, removal of permissions, etc). In addition and in either case, agreements may be rendered unenforceable, which could potentially require compensation to be paid to investors who acquired tokens.

Whether a participant in an ICO requires authorisation will depend on:

- whether they will be carrying on activities that relate to instruments which could be "specified investments" (such as shares, instruments creating or acknowledging indebtedness like bonds or debentures, units in a collective investment scheme, or derivative instruments like options, futures or contracts for differences);

- whether those activities constitute "regulated activities" (for example, dealing in such specified investments, arranging transactions in those investments, advising on them or operating a collective investment scheme); and

- whether the activities are carried on by way of business.

Depending on their precise structure and function, some tokens may constitute "specified investments". For example, tokens that grant a Token Holder some or all of the rights that would typically be enjoyed by:

- a shareholder (for example, entitlements to dividends declared, profits or the proceeds of the assets of an insolvent company); or

- a bondholder (or the holder of any other instrument creating or acknowledging indebtedness) (e.g., a right to the repayment of a sum of money); or

- a participant in a fund (for example, to profits or income from the acquisition, holding, management or disposal of the fund property),

are likely to be considered "specified investments". Tokens that give rights to other tokens or to other specified investments, or that have characteristics of derivatives (e.g. futures, options or contract for differences – see above) are also likely to fall within the UK regulatory perimeter.

However, not all tokens will fall within the regulatory perimeter as "specified investments" (for example, if no legal rights attach to the tokens, they are unlikely to constitute specified investments). Although, it should be noted that agreements or instruments (including other tokens) that refer to or give rights to unregulated tokens may themselves amount to "specified investments".

There are a number of regulated activities that Token Issuers and participants in ICOs would need to consider, including (for example) deposit-taking and e-money issuance, payment services, CFDs and derivatives, as well as the broad definition of what constitutes a collective investment scheme. The categories of specified investment and regulated activities are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("**RAO**").

If an ICO does involve the issue of an instrument which is capable of being a specified (i.e. regulated) investment, participants in the ICO (such as intermediaries arranging investment by investors in the Token Issuer, or advising investors) may require authorisation (if they are not authorised already) and may be subject to relevant regulatory requirements which may apply to those regulated activities (such as, for example, conduct of business requirements set out in the Conduct of Business Sourcebook ("**COBS**") of the FCA Handbook, and the FCA's Principles for Business).

c) Marketing an ICO

Financial promotions

If the token is a specified investment, the Token Issuer (and firms acting for the Token Issuer) may also need to consider if promotional materials issued in relation to an ICO amount to a communication which is an invitation or inducement to engage in investment activity (i.e., a financial promotion). Under section 21 of FSMA, a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity unless the promotion

has been made or approved by an authorised person or it is directed at a person who falls into one of the exempt categories of recipient and meets a series of tests.

Authorised firms communicating or approving a communication which amounts to a financial promotion in relation to an ICO will need to comply with the financial promotion provisions in the FCA's COBS sourcebook (COBS Chapter 4).

Agreements entered into by a person as a customer as a result of an unlawful financial promotion are unenforceable against that customer (section 30, FSMA). It is also a criminal offence for an unauthorised person to communicate a financial promotion in breach of the section 21 of FSMA. As the criminal offence is committed by the person communicating a financial promotion, it should be noted that this offence can be committed by persons other than just the Token Issuer.

Misleading statements and impressions

If the token is a specified investment, section 89 (misleading statements) and section 90 (misleading impressions) of the Financial Services Act 2012 ("**2012 Act**") will also apply in respect of Token Issuer's marketing material, including the white paper.

Under section 89 of the 2012 Act, a Token Issuer will commit a criminal offence if it knowingly or recklessly makes a materially false or misleading statement, or dishonestly conceals any material facts, with the intention of inducing, or it is reckless as to whether it might induce, another person to enter into, or to refrain from entering into a relevant agreement (for example, a token subscription agreement).

In addition, it is also an offence under section 90 of the 2012 Act if, among other things, a Token Issuer does any act or engages in any course of conduct which creates a false or misleading impression as to the market in, or the price or value of, a relevant investment in order to induce another person to acquire or subscribe for investments (such as tokens).

Civil liability may arise in respect of untrue or misleading statements in, or omissions from, the prospectus or other marketing documents or other publicly available materials (for example, on the basis of negligent misstatement and deceit) irrespective of whether the token constitutes a specified investment. Criminal, as well as civil, liability may also arise in respect of misleading statements, deception or false representation.

ICO white papers invariably contain wide ranging disclaimers, including that the white paper does not constitute investment advice or legal advice, and that investors take the full risk with their money. The effect (and enforceability) of these disclaimers is yet to be tested under English law.

3. Conclusion

Looking to the future of ICO regulation in the UK, on 22 February 2018, the UK House of Common's Treasury Committee launched an inquiry into digital currencies and blockchain on the basis that "People are becoming increasingly aware of crypto currencies such as Bitcoin, but they may not be aware that they are currently unregulated in the UK, and that there is no protection for individual investors." The inquiry will, among other things, look at the regulatory response to digital currencies from the UK government, the FCA and the Bank of England ("**BoE**"), and how regulation could protect consumers and businesses without restricting innovation. In particular, the inquiry will look at the risks around volatility, money laundering and cybercrime presented by digital currencies. It will also look at whether the UK could learn any lessons from the regulatory approach taken by other jurisdictions.

In addition, the inquiry will look further into how blockchain may be applied in the financial services sector now and in the future. The BoE is already researching digital currencies, with its fintech accelerator investigating the use of blockchain for real-time gross settlement systems last year. The FCA's regulatory sandbox, which allows businesses to test their products in the open market, featured blockchain-based payments, remittance and insurance companies in its most recent cohort. As yet there are no timelines or estimates of when we can expect to see reports from the inquiry, however the deadline for written submissions is 30 April 2018.

Furthermore, as part of the FCA's 2018/19 Business Plan, the FCA has committed to work with the BoE and HM Treasury as part of a taskforce to develop thinking and publish a discussion paper in the second quarter of 2018 outlining its policy thinking on crypto currencies.

Contact details of the authors:

Osborne Clarke
One London Wall
London EC2Y 5EB
UK
T +44 207 105 7000

Michael Lewis
Partner

T +44 207 105 7059
E michael.lewis@osborneclarke.com

Paul Anning
Partner

T +44 207105 7446
E paul.anning@osborneclarke.com

Anna Perry
Senior Knowledge Lawyer

T +44 207 105 7526
E anna.perry@osborneclarke.com