Fundraising via ICO

A Regulatory Perspective

Virtual Round Table Series
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An initial coin offering (ICO) is a concept that has come to real prominence during the last three years, alongside the rise of blockchain or distributed ledger technology (DLT), as a way for businesses utilising blockchain to raise funds.

Conceptually, it sits somewhere between crowdfunding and a traditional initial public offering (IPO), offering investors tokens, as opposed to equities, in exchange for their investment funds.

The significant difference from an IPO or a private equity raising, is that the tokens don't automatically infer an ownership stake in the business, but instead often provide a different benefit to the buyer. Utility tokens are usually limited in number and integral to the business model of the issuer, giving a right to participate in the goods or services offered by the issuer. Other tokens may infer a right to receive a dividend, a voting right, a license, a property right or a right to participate in the future performance of the issuing company. In this case, the token issuance is referred to as an STO (Security Token Offering). In some jurisdictions, such as Switzerland, it may also be referred to as a payment token, but either way, this type of token is likely to fall under securities regulations. None of these rights are always guaranteed, however, because of the nascent nature of regulation within the sector.

Despite the immature, largely untested regulation in certain jurisdictions, ICOs have proved incredibly successful, with issuers raising 2.8 billion euros globally through ICOs in 2017. This popularity seems to lie with the transparency and ease of access associated with blockchain technology. As an example, many start-ups have chosen to issue their tokens on the Ethereum blockchain, using the cryptocurrency Ether, or their own currency, as a method of purchase. This allows investors to purchase and hold tokens from a laptop, without requiring the services of expensive brokers, agents or advisors.

The obvious problem with an unregulated, or newly regulated, industry though, is the lack of any real safety net for investors. Due to the global and virtual nature of many blockchain companies, there is very little recompense possible if investments fail or are discovered to be scams. There is also currently very little oversight as to the quality and sustainability of many of the issuers coming to the ICO market.

Many legislators are scrambling to catch up, and major authorities such as the US Securities Exchange Commission (SEC) and the French Autorité des Marchés Financiers (AMF) are already thinking outside the box in an effort to incorporate the ICO phenomenon into national legislation in a fair and appropriate fashion.

One major debate revolves around how to categorise the tokens issued, whether they should be subject to existing securities laws, or should instead be classified as commodities or simple assets. The answer lies in the nature of the token and what it can be used for – leaving room for grey areas to exist.

This difficulty in identifying the true nature of tokens, extends to other relevant areas, such as secondary exchanges and tax treatments, and will require significant cooperation between major regulators on a global stage to resolve satisfactorily.

Within the following report, we assess the pros and cons of ICOs, asking why they should be used, as opposed to other forms of capital raising, and which companies or business models they are most appropriate for. We also get an update on current legislative developments from nine legal experts representing different, but equally progressive, jurisdictions across the globe, taking their views on how ICOs can best be policed on a national and supra-national level.

Finally, we look at secondary exchanges and discuss how profits from tokens should be treated when crystallised by ICO investors.

The View from IR

Rachel Finch

Channel Sales Manager

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

U.S. - NEW YORK

Noreen Weiss

MacDonald Weiss PLLC

1 646 513 3284

weiss@macdw.com

Noreen Weiss is an accomplished corporate and transactional lawyer and management advisor, with over 25 years' experience advising the C-Suite, Boards of Directors, and investors on all manner of finance, commercial and transactional matters.

As a practicing lawyer in London, Tokyo and New York, Noreen has spent her career focused on international work at the highest level of business and finance, with deep expertise in domestic and cross border finance and business structuring, corporate finance deals from seed and angel investments through to late state venture capital investments and Regulation D private offerings and IPOs, capital markets (global debt and equity offerings) and cross border business development transactions such as M&A and joint ventures.

Noreen is a former in-house counsel for Home Box Office (HBO), a Fortune 100 Company, therefore she understands the practical business challenges that executives face each and every day, and she brings this business-minded perspective to all her client matters. Additionally, her experience living and working for several years in London and Tokyo provides valuable insights when serving her international client base.

BRAZIL

Lavinia Junqueira

Partner, Tudisco, Rodrigues & Junqueira

55 11 2935 4555

lavinia.junqueira@trlaw.com.br

Lavinia has more than 20 years of experience as a lawyer, advising financial institutions and companies, while structuring and implementing financial transactions in Brazil and abroad, including regulatory and tax issues.

She acts as senior counsel to Brazilian multi-national companies, and has extensive experience with legal issues related to the Brazilian financial market, including the Brazilian Central Bank foreign exchange regulations, tax and regulatory advice for financial institutions, and assistance to international banks to structure and set up their Brazilian operations.

She is also Professor at IBMEC in São Paulo on the Specialization Program on Planning and Financial Markets Gestax/IBMEC and the Preparation of Master in Tax Management Program.

SWITZERLAND

Diego Benz

Lawyer & Notary, Zwicky Windlin & Partner

41 41728 7161

d.benz@zwplaw.ch

Diego Benz studied law at the University in Zurich and was admitted to the bar as an Attorney at Law and Notary of the Canton of Zug in 2005. He has extensive experience in practising corporate, commercial and contract law. Diego also gained profound knowledge in the area of finance and accounting at the University of Lucerne (CAS). He became a partner at Zwicky Windlin & Partner on 1 January 2015.

Among different memberships, Diego is a member of SAV (Swiss Bar Association), Advokatenverein des Kantons Zug (Zug Bar Association), registered at the Cantonal Bar Register of Zug, Joint Chamber of Commerce Switzerland – CIS, British Swiss Chamber of Commerce – BSCC and Crypto Valley Association.

SLOVAKIA

Andrea Vasilova

Partner, VASIL & Partners

421 220 906 400
vasilova@vasilpartners.com

Andrea Vasilova was admitted to the Slovak Bar Association in 2003, following graduation in commercial law and traffic policing at the Police Academy of Bratislava.

She began her legal career in 1999, working as an in-house lawyer for IPEC Management Ltd, one of the biggest property developers in the Slovak Republic.

She was as associate lawyer with business consultancy ES Partners for two years, before joining Vasil & Partners in 2004. VASIL & Partners is a unique Slovak law firm as, in addition to Slovak and Czech law the firm deals with English law.

Andrea graduated from the Economic University in Bratislava in the faculty of General Economics, specialising in finance, banking and investments.

DUTCH CARIBBEAN

Luis Santine

Partner, InfoCapital N.V

599 9529 1015
luis.santine@infocapital.cw

Luis Santine, is the founder and managing director of InfoCapital and CX Pay; providing diversified advisory services related to international business solutions and transaction services.

Luis is experienced in exchange listing services on the DCSX and is active in the startup scene, helping to facilitate fintech startups with access to finance through the Earlybird Funding platform. Luis has built significant expertise and experience in e-commerce and e-payments advising clients on payments and transactional structures, while providing merchants with (online) payment solutions through the CX Pay platform.

On an executive level, Luis is a board member of Travelsure Insurance Company, Manrique Capriles International and is active as board member of charitable organizations like the Curacao Athletic Scholarship Foundation and the Sea Turtles Conservation Curacao. Luis has extensive experience in the international financial sector, having occupied the positions of Interim Managing Director of the Curacao Development Institute (CDI), Managing Director of the South American International Bank (SAIB), CEO of the Dutch Caribbean Securities Exchange (DCSX).

SPAIN

José María Dutilh

Managing Partner, LeQuid, Social Enterprise and Business Law Firm

34 914 184 352
jose.maria.dutilh@lequid.eu

Jose Maria is managing partner of the reputed Lequid, Social Enterprise & Business Law Firm located in Madrid Spain and partner in charge of the Insolvency Administration of I-LEY Jurídico y Financiero.

He graduated in Business Studies (ICADE – E1), with a Master degree in Corporate Insolvency Law from San Pablo CEU University and a Masters in General Business Administration from ESDEN Madrid.

He also has a Masters in Legal Advice for Companies (IE-Instituto de Empresa) and a Masters in Tax Advice for Companies (IE-Instituto de Empresa).

Jose Maria is specialised in the fields of Mergers & Acquisition, Restructuring, Corporate Governance, Dispute Resolutions, Acquiring companies and business units through the Bankruptcy Law, and Family Protocol. He is also a mediator in civil, commercial and insolvency areas and an arbitrator specialised in corporate conflicts.

Currently, he is Secretary General of the Benelux Chamber of Commerce in Spain and president of AELAC (Asociación Española Letrados Administradores Concursales).

MALTA

Dunstan Magro

Managing Partner, WDM International

356 21 232 096

dmagro@wdm.com.mt

Dunstan is the founder and managing partner of WDM International, a multidisciplinary professional services firm. His specialist practice areas are audit, tax, business and corporate advisory, and he also holds directorships and acts as a company secretary in a varied portfolio of clients.

Dunstan graduated as an accountant in 1997 from the University of Malta after carrying out research and writing a dissertation entitled “The Financial Implications of Joint Ventures and Mergers within the Perspective of the Competition Act”.

He has served as the Honorary Treasurer and as a council member of the Malta Institute of Management, and has served as a Member of the Prevention of Money Laundering and Financing of Terrorism sub-committee of the Institute of Financial Services Practitioners. Currently Dunstan is a Committee Member of the Small & Medium Sized Practices of the Malta Institute of Accountants.

Dunstan has delivered numerous lectures and presentations, both in Malta and overseas, focusing on business ethics and the prevention of money laundering.

POLAND

Dr. Robert Lewandowski

Partner, DMP Derra, Meyer & Partners

48 22 10 10 740

R.Lewandowski@derra.pl

Robert is the founder and managing partner of his firm and head of the Warsaw and the Wrocław offices. He has previously worked for major legal firms in Warsaw and London and has written many legal books and taught university courses in English, German and Polish.

Robert studied mathematics and German philology at the University of Warsaw, before studying law at the University of Mainz / Germany and passing the second state legal examination in Mainz/Germany in 1998.

He enrolled in the list of German attorneys in Frankfurt am Main (2000), then, from 2001 – 2005 he worked as a lawyer at Gleiss Lutz in Warsaw/Poland which included secondment to Herbert Smith in London.

He became an independent lawyer in Warsaw in co-operation with Derra, Meyer & Partners, co-founding the Polish branch of DMP Derra, Meyer & Partners. During the last ten years he has overseen the establishment and development of the two Polish offices while practising and advising clients in his position as the senior figure.

FRANCE

Benoît Couty

Tax Partner at Pichard & Associés & Tax Group Leader at AFGC

33 6 1448 0214

benoit.couty@pichard.com

Benoit Couty joined Pichard & Associés as partner in charge of tax after having acquired significant experience in large network law firms such as Baker & McKenzie and PwC. He advises large international groups (mainly from north America and northern Europe) with respect to their French operations as well as French group with respect to their development abroad. He advises on the tax aspects of mergers & acquisitions, tax grouping and de-grouping, LBOs and share capital reorganizations and has a notable expertise in French tax litigation including transfer prices.

Benoit joined AFGC in 2017 as a tax expert to investigate growing concerns about tax issues related to crypto-assets, both for investors and companies issuing token. He was recently appointed co-leader of AFGC tax group and issued several technical notes to the French tax authorities (Lawmakers, Finance ministry, French treasury and revenue service) notably setting out innovative tax rules designed for crypto-assets. He is an active member of several working groups and think tanks that discuss Crypto regulation in France.

SESSION ONE - WHY USE AN ICO?

What are the disadvantages and advantages in your view of using an ICO as a method of fundraising, as opposed to a more traditional IPO or private equity route?

Noreen Weiss - U.S. (NW) One of the basic things that some issuers find advantageous about an ICO, as compared with traditional methods of raising money by selling equity or convertible debt, is that they are not giving up equity. There are two primary reasons to consider at an ICO. One is to raise money without giving up equity, and the second is the ability to raise large sums of money to fund a developing business that is not much more than an idea.

In order to raise equity or convertible debt, typically an investor expects a business plan that's a lot further along, with some proof of concept or prototype available. An ICO can allow a company to raise money necessary to develop the a blockchain platform before there are any service or products on the platform that are actually available for sale or use. The token itself could be a utility token, namely a way of buying and selling services on the platform, but the challenge is that, under applicable law, the token may be deemed regulated in some fashion, for instance as a security or a commodity or as a business that acts like a money transmitter. Simply having a utility does not exempt a token from these regulatory compliance issues.

Benoit Couty - France (BC) I agree with Noreen that the upside to an ICO, is not being required to dilute equity in any way, as opposed to a standard equity investment or potentially an STO.

They also allow a presale of services and goods because of the use of utility tokens. The tokens that circulate on the platform are a convenient way to fund a project, involving a community with exchanges between members. It is not only a good way to raise money, but also structure a business model. The token helps to build a new kind of business model, which some refer to as tokenization. There are, of course, downsides because of abuses. People have lost their once irrational faith in ICOs and are now looking closer at the details for fear of scams. It's an aspect we should take into account, because it is more difficult to complete a successful ICO now.

ICOs do have a credibility problem, but the good projects will emerge. It may be more difficult though, because they will have to show they are good projects. Last year everything was successful because it was the new thing, and the market was rising. This craziness will make it more difficult, but the good projects will prevail.

Dunstan Magro - Malta (DM) I agree with the points raised by my previous interlocutors. From my end, I do recall a Harvard Business Review article by Jeffery Bussgang and Ramana Nanda, which commented that certain observers have pointed out that blockchain projects may have an inherent incentive and strategic reason to be more aggressive in raising capital earlier in the experimentation process. Two additional benefits of ICOs may therefore be summarised as follows:

• To jumpstart network effects that provide a first-mover advantage - tokens issued through an ICO are the means through which users transact between a decentralised network of participants without the need for any central organization or platform. By making the tokens issued through the ICO widely available and liquid (and by using the cash raised to finance further development of activity on the network), projects can rapidly channel developer attention towards their protocols.

• To generate publicity that allows them to solicit broad feedback on their beta product - The publicity around the upcoming launch of an ICO that plans to raise several tens or even hundreds of million dollars is a related way to drive developer interest and engagement. This focused attention from developers has the added benefit of crowdsourcing feedback on the beta version of the project.

Although ICOs do come with real benefits, they also have their disadvantages. There are very real potential downsides to a large, public fundraising through an ICO. One can appreciate the disadvantages of ICOs and why they are important, by analysing why staged venture-capital financing has been so successful in the first place.

A fundamental characteristic of commercialising new ventures is the high failure rate they face. A solution to this challenge is multi-stage financing, which allows entrepreneurs and investors to learn about the ultimate viability of an idea through a sequence of investments over time. Multi-stage financing is usually seen as benefiting the investors: It allows them to commit only a fraction of the money upfront, preserving the option to abandon the investment if the idea does not pan out, but allowing them to reinvest if things continue to go well.

On the other hand, from the entrepreneur's point of view, the earliest money invested into a venture, which is raised when uncertainty is highest, is the most expensive. By raising a small amount of money initially and de-risking the venture through a series of structured experiments, entrepreneurs who succeed, raise subsequent capital at higher prices and are able to retain a higher share of the venture they have built.

One can consider ICOs as the wild west of fund raising, unlike an IPO which is subject to stringent regulations which are subject to onerous filing requirements which do take months to complete. An ICO is not an efficient way to secure that a project is adequately financed throughout its development until the project is actually completed. Through an ICO an investor might not be sufficiently motivated to complete the project, which highlights the problems created by systematic scammers. This therefore stresses the importance of adequately regulating ICOs.

Another disadvantage to consider is the following. Many early stage ventures start off in 'stealth mode' to prevent their idea from being widely accessible and among the reasons firms have taken advantage of the abundance of growth capital to remain private much longer (e.g., Uber, Airbnb, WeWork) is that it allows them to only selectively disclose confidential information that can be important for strategic reasons to not be available to competitors. An ICO exposes a start-up's strategic roadmap and, in many cases, actual software code to the public, allowing competitors to learn and adopt elements of it into their own protocols.

Luis Santine - Dutch Caribbean (LS) While an IPO is seen as the first sale of stocks issued to the public by a firm on an international trade platform, such as a securities exchange, ICOs are considered mainly as a new fundraising mechanism for blockchain start-ups.

An ICO is typically an unregulated form of startup crowdfunding which allows companies to raise as much capital as they wish without a central authority overlooking the entire campaign or issue.

Companies active in the field of blockchain and particularly cryptocurrencies, typically face significant challenges with the opening of bank accounts. ICOs can therefore serve as a convenient way to raise capital in the form of a token issu-

ance. In some instances, the crypto exchange can simply be seen as a 'super' broker with token reserves. With no adequate regulation or real AML policies in place, ICOs can easily be subject to market manipulation and lack of clarity around taxation.

The major utility which an investor can enjoy through stocks is that they are entitled to receive dividends and can also enjoy voting rights during a shareholders meeting. In contrast, by an investment made into an ICO, an investor is entitled to tokens issued by the firm in exchange. However, they are not entitled to any sort of ownership of the project. Unlike with IPOs, it is therefore also common for investors to avail some of their services to the issuing company in exchange for tokens.

One of the main challenges facing ICOs is the common lack of traditional analytical logic in specific business cases. A significant number of crypto projects are merely conceptual ideas with a minimal viable product and scarce traditional financial plans, cash flow statements or balance sheets. Valuation is currently based on a combination of ideas, team reputation, advisory, token economics, continual development and upgrades, while hype also still plays a huge role in the crypto world.

Lavinia Junqueira – Brazil (LJ) I believe the biggest advantages of an ICO are the lower cost of issuance, and the potential for it to be a quicker way to get funding if the project is a success, as compared to equity issuance or even international debt issuance. Another advantage is that, as a utility or commodity, the token can blend into the project and become a part of the business plan itself.

Disadvantages in Brazil are linked to anti-money laundering and anti-corruption rules. Some companies may not be able to meet with those rules if they are participating in the ICO market. This is something they need to be very aware of, because the penalties may be high if they're contributing to money laundering and corruption.

Another issue is that the market is new and may in the future involve competition. With competition and demand comes volatility in the pricing of an ICO. You may not know how much money you have to pay at the end of the day for your debt, or if you are going to be able to roll over this debt. Because of the lack of regulation or limited regulation, you may also be subject to economic bubbles and disruption risks.

U.S. – (NW) It's interesting what you say about tax implications Lavinia, because that is a disadvantage and it can vary from jurisdiction to jurisdiction.

In the US, if you sell a token, then you're selling property according to the tax authorities, so the money that the company receives can be taxed, in dollars, in the year it is received.

People who are buying and selling tokens are also being taxed in fiat currency, on the value of the gain. This may be a problem, since the person transacting in the token may not have actual money to pay the tax in dollars when all transactions are denominated in Bitcoin or some other cryptocurrency.

I also note that the cost of an ICO is not always lower. Some exchanges charge $1million and up to list a token, but that can be offset by the ability to raise more money than in a traditional raise or even an IPO.

France – (BC) One of the downsides of an ICO is the lack of clarity, certainty and predictability in terms of regulation. This includes tax accounting and tax treatment.

It is not clear today in most of the jurisdictions, how you can roll over the profit from the amounts that you raise. The starting point is that you are immediately subject to tax on the full amount that you raise. Alongside this exposure, is also VAT exposure, and obviously when you exchange crypto assets you are taxed on the capital gain, without a fiat currency gain to pay for the tax.

In France, we have identified those issues and are working towards some solutions accounting-wise and tax-wise to fix those things. It's not yet perfect, but we are moving in the right direction.

Diego Benz - Switzerland (DB) A distinction should be made between coins and tokens. Tokens are not coins, since not all ICOs aim to have own coins, and rely on other cryptocurrencies as a method of value transfer.

With regard to tokens, one of the advantages is that no bank account is required, however clients may want to collect FIAT currency, which would require a normal bank account.

Some jurisdictions that are more favourable for ICO's, such as Switzerland, which ranks highly from an ICO perspective and a regulator perspective.

There are jurisdictions, including the US, that allow clients to use an investment contract called a SAFT (Simple Agreement for Future Tokens), which is regulated as a security. It is a useful instrument if the issuer does not want to put in the effort to make their token issuance comply with mandatory securities regulations, or if they are simply not ready to issue tokens. The SAFT contract allows the purchaser who holds the SAFT to convert it to tokens in the future when the tokens are finally sold to the public, at an exchange rate that is converted at a discount to the ICO price.

However, instead of using a typical SAFT, it can be favourable to use documents which allow tokens to be offered to private purchasers in the form of token purchase agreements drafted under Swiss law. One of the reasons for that is to make it as difficult as possible for foreign regulators to qualify this purchase agreement as a security offering. Nevertheless, careful advice must be taken around which jurisdictions require a SAFT.

With respect to the valuation of coins traded by banks, the Swiss Financial Markets Supervisory Authority (FINMA) sent a letter in October to EXPERTsuisse, the association for audit, tax, and fiduciary professionals, stating that;

"FINMA has recently received an increasing number of enquiries from banks and securities dealers holding positions in crypto-assets and subject to capital adequacy requirements, risk distribution regulations and regulations for the calculation of short-term liquidity ratios".

According to the reports the 800 per cent risk weight applies to crypto assets both in the banking and the trading book. A risk-weight of 800 per cent means that, for purposes of calculating capital requirements, the market value of crypto-assets is multiplied eight times. The bank has to support 8 per cent of this risk-weight with capital, i.e. 64 cents for each franc of market value. Under the Basle III bank capital framework, risk-weights are somewhere between 0 per cent for highly-rated sovereign debt and 150 per cent for non-investment grade corporate debt, high-volatility real estate or past due exposures. Secured real-estate credit carries a risk-weight of 35 per cent, while the highest risk weight under the current regime is 1,250 per cent for positive replacement values from failed derivatives and securities transactions or payments.

Taking into account the rationale for the calibration of risk weights under the Basle III capital framework, it is clear that it is the extreme volatility of cryptocurrency that warrants such a high risk weight. On the other hand, is seems equally clear that this rationale is valid only for cryptocurrencies that have no intrinsic value and do not represent any sort of claim against an issuer, but not for crypto-assets in general.

The fact that auditors requested advice from FINMA on how to calculate the capital charge for crypto assets is another clear sign that this new asset class is quickly making inroads into the banking system.

France – (BC) ICOs do apply more readily than more traditional fundraising to certain industries, products or ideas. Any project that is based on

blockchain technology will have an interest in doing an ICO, because they issue tokens and plan that the token issued will be exchanged on their platform. It is possible I suppose for regular projects with no blockchain involvement to also use this form of fundraising, but not with the same upside as for truly blockchain-based projects.

U.S. – (NW) An issuer should also question whether its product is actually appropriate for an ICO on the blockchain, since not everything fits this model. "What is the use case?" The other issue, even if you have an idea that works really well on the blockchain and has the functionality for a token, is whether it will attract the kind of investor who typically invests in ICOs.

The kind of people who invest in tokens are a demographic that is super tech-savvy and wants interesting technology products. When you have ICOs that are in more traditional, non-tech real world sectors, it can be more difficult to raise money. Shipping is an example of a great use of blockchain technology, but we are assisting a shipping client with an ICO that is having trouble getting traction because it is not the kind of sexy tech product that tech-oriented investors recognise or appreciate. This kind of weird market dynamic happening right now is interesting.

Robert Lewandowski - Poland (RL) Within the Polish market, the downsides of ICOs currently prevail over the benefits resulting from using cryptocurrency, however, recent statements made by the Polish Financial Supervisory Authority, Komisja Nadzoru Finansowego (KNF) and the Polish Government, suggest there is a potential market for cryptocurrency.

An advantage of cryptocurrencies, is that they are decentralised, unregulated and have no government or state-related institution as yet determining their value. This enables users to set up their own system of valuing the currency and make crypto deals faster, gaining larger profits within a shorter period of time.

Most cryptocurrencies introduced here in Poland do not require any form of personal information disclosure, so the process of making cryptocurrency deals is more or less anonymous. The parties to such transactions also do not have to worry about crimes such as identity theft, which are common within traditional payment transactions.

Additionally, crypto transactions are in the public domain, with all these transactions available on the network. This differentiates the cryptocurrency from traditional digital transactions, within which the access to transfer of money can only be accessed by approved entities such banks or public prosecutors.

With regard to disadvantages, there is no existing regulatory body or (government) institution in Poland dedicated to monitoring cryptocurrencies and transactions subject to this currency, at the moment. The value of cryptocurrencies is not determined by established and reputable institutions in Poland, and there is currently no legal framework backing cryptocurrency in Poland in the form of decrees, laws or/ directives.

Cryptocurrencies are, instead, regulated by the individuals/entities offering the currency in question. This makes the currency fickle and dependant on the private vested interests of third parties. It is unknown how the rights and interests of the parties involved could be sufficiently protected and enforced by legal means.

In Poland, the attitude to this currency by highly ranked Polish authorities such as KNF has been negative. KNF started a smear campaign to scare users against cryptocurrencies, and the campaign had a negative impact on ICOs in Poland.

Using cryptocurrencies in Poland, does not require any form of identification and disclosure of personal data such as full name, billing address, phone number or tax identification number etc. This phenomenon makes cryptocurrency transactions, such as ICOs, difficult to trace, and they may, therefore, be used for illicit activities as well.

U.S. – (NW) Robert touched on a very important point about digital assets – the fact that ownership is anonymous – which creates issues for KYC and AML (anti-money laundering) compliance laws, that are designed to prevent the funding of terrorist and criminal activities. Governments have a legitimate interest in preventing crime and terrorism, and are grappling with how to apply those regulations in the crypto context. Also, institutional and professional investors such as investment funds and advisors and pension funds, are bound by strict KYC and AML regulations that will prevent them from investing in tokens if the chain of ownership cannot be vetted.

Andrea Vasilova – Slovakia ICOs offer lots of opportunities, because they allow investors to gain exposure to an asset which may be of great value in the future. On the other hand, investment in ICOs is also connected with potential high risk. There are no guarantees that a particular project will be successful, or that the value of the cryptocurrency will grow at all. A good instrument for risk limitation is to use diversification and to invest the capital among more than one ICO.

When comparing ICOs with fundraising via IPO, I see a real cost advantage. IPOs are strictly regulated in most countries, and subject to very strict and costly rules. ICOs are not regulated, so are cheaper to issue. This low level of regulation may be considered as an advantage or a disadvantage, since investors do not get any shares or voting rights when investing in an ICO.

Within the framework of the Slovak legislation the question of legal regulation of crypto currencies is currently focused on the question of the method of taxation of income from sale of crypto currencies. The Slovak Ministry of Finance has issued a document entitled; 'Methodological guidelines on the process of taxation of virtual currencies,' which defines the virtual currency as a digital bearer of value, which is neither issued nor guaranteed by the central bank or the public authorities, and is not necessarily linked to legal money. It does not have legal status, but is accepted by some natural persons or legal entities as a means of payment which may be transferred, stored or electronically traded.

The sale of virtual currency is defined by the ministry, for the purpose of taxation, as exchange of the virtual currency for another asset, or the exchange of the virtual currency for the provision of a service, or exchange for another virtual currency.

José María Dutilh - Spain ICOs are still rarely used in Spain, despite continuously gaining global relevance. Compared to a figure of 60 million euros in 2016, ICOs raised 2.8 billion euros globally in 2017.

Spanish authorities hold a reluctant position regarding the trustworthiness and maturity of ICOs and the cryptocurrency sector, despite ICOs offering emerging technology companies ways to finance themselves independently, without the need for large-scale investors and venture capital firms or private equity funds. With the flexibility ICOs provide, entrepreneurs gain more freedom in the planning and execution of their vision, which fosters innovation. Moreover, the democratisation of investment may nurture competition and thus deter the formation of oligopolies.

The Comisión Nacional del Mercado de Valores (CNMV) is the Spanish government agency responsible for the financial regulation of the securities markets in Spain. The agency warns investors that, to date, no issue of cryptocurrency or any ICO has been registered, authorised or verified by any supervisory body within Spanish jurisdiction, although there have been private closed ICOs.

Cryptocurrencies are not supported by the Spanish Central Bank or other public authorities in Spain, since they have different features to FIAT currency. It is not obligatory to accept cryptos as a mean of payment of debts or other obligations, the circulation is limited, and its value fluctuates strongly, so it cannot be considered either as a good deposit of value or a stable account unit.

Noreen Weiss pictured at the 2018 IR Annual Conference in London

Currently, Spanish legislation does not expressly regulate ICOs, rather it considers the tokens as negotiable securities.

As such, investors lack the special protection offered by Spanish and EU legislation for regulated investments. ICOs are therefore vulnerable to fraud, price manipulation or other illicit activities.

Taking IPOs as a counterpoint, the EU Prospectus Directive introduces capital thresholds for traditional IPOs. These thresholds trigger prospectus requirements and detailed reporting requirements. Comparable transparency provisions do not yet exist for ICOs, which causes substantial legal insecurity regarding the promised performance of projects. As most projects, at the time of the ICO, only exist on paper, investor protection is an urgent issue. This is exacerbated by the fact that the current ICO craze causes many entrepreneurs to issue tokens haphazardly. Lastly, there have been various scam incidents and growing speculation may create a financial bubble.

For entities that participate in ICOs, the European Securities and Markets Authority (ESMA) says that they must be clear about whether they are carrying out regulated investment activities, because they must comply with the corresponding legislation in each case if so. The agency mentions four European directives that may be relevant to these products: Brochures Directive, Financial Instruments Markets Directive (MiFID), Alternative Investment Fund Managers Directive (AIFMD) and the Fourth Anti-Money Laundering Directive.

SESSION TWO - TOKEN REGULATION

Which regulator do you recommend to oversee an ICO? Where and how should an ICO be undertaken?

U.S. – (NW) The primary issue about regulating an ICO, is that tokens are being issued in an existing legal environment. We see jurisdictions actively struggling to figure out how to fit this square peg into the round hole of their existing legislation. Also, the nascent industry has been riddled with fraud, and fraud prevention is a major consideration of all regulators so the market should expect that they will take action meant to protect the public and to curb abuse.

In the US, for example, we have several potential regulators. Depending on the attributes of the token, it can either be a security, a commodity, or money. The CFTC (Commodity Futures Trading Commission) which regulates commodities and futures, has ruled that token are commodities, with the effect that they must be traded on a registered commodity exchange unless the token falls within an exemption (most tokens would fall within the 28-day actual delivery exemption). If the token has the attributes of a security, the key attributes being that the purchaser buys it with the expectation of profit, then it is deemed a security (under the law, if it's a security it is not a commodity, so at least we don't have two regulators regulating the same token), and securities can only be sold through an effective registration statement filed with the SEC or an exemption from registration. There are no rules that give a "pass" to a digital asset, just because it's a digital asset – if it has the attributes of something that is already regulated, it's regulated. The exchanges themselves are also subject to regulation if their activities are tantamount to moving money, which brings the exchange within the banking regulatory authority.

Some jurisdictions are beginning to enact ICO specific regulations, with clear criteria so that the token issuer will know that it is in compliance with law. The danger is that the ICO is only compliant in that specific jurisdiction, not in every other jurisdiction, and it gives the issuers a false sense of security. They believe the law in the jurisdiction of issuance which prescribe that their token won't be classified as a security, but they don't bother to pay attention to the other jurisdictions where they want to sell the token. ICOs are global offerings and must comply with the law in every jurisdiction where the token is offered and sold. We need a global approach, some sort of harmonised international approach to this, or perhaps a treaty approach that recognises the status of an ICO in the jurisdiction that governs the issuer and the ICO documentation.

Malta – (DM) I agree with Noreen, ideally, we could have harmonised legislation dealing with all the aspects of ICO's, but as things stand today, unfortunately, this is not the case.

Malta has come up with its own regulator and legislation concerning ICOs. So far Malta has enacted three pieces of legislation with the single aim of providing legal certainty for businesses operating in the crypto and distributed ledger technology (DLT) sectors.

The legislation comprised the Malta Digital Innovation Authority Act, which established the regulatory authority. This Authority will be dedicated solely towards the supervision and certification of the DLT platforms and smart contracts.

The other piece of legislation which Malta has come up with is the Innovative Technology Arrangement and Services Act, which covers the certificate in mechanism for any technology arrangements that voluntarily take place under this act. Finally, we have the Virtual Financial Assets Act (further referred to as VFA Act), which basically regulates the ICOs issued to and from Malta, as well as ancillary services.

These three Acts are designed to work seamlessly together and provide ICO issuers with a comprehensive framework that looks at both the integrity of the whitepaper, as well as at the technology behind it. This is an industry that relies heavily on technology. The certification on the integrity of the DLT software and architecture used gives more assurance to investors, since if the technology is flawed, it will impair the successful implementation of what is specified on the whitepaper.

Under this new regulatory regime, an issuer of the ICO is required to undertake the Financial Instrument Test prior to offering such DLT asset to the public in or from within Malta to determine whether the asset would fall under this new regulatory regime or not.

The test determines whether the DLT asset issued through the ICO qualifies as;

- A Financial Instrument (also Security Token) as defined under the EU Markets in Financial Instruments Directive (MiFiD), exhibiting qualities that are similar to equities, debentures, derivatives.
- Electronic money.
- A virtual token (or utility token) a form of digital medium recordation whose utility, value, or application, is restricted solely to the acquisition of goods or services within the DLT platform.
- A Virtual Financial Asset, which defined in the law any form of digital medium recordation that is used as a digital medium of exchange unit of account, or store of value.

Tokens classified as virtual tokens (also 'utility tokens') would be exempt from any regulation, while tokens classified as financial instruments would be regulated by EU and Maltese laws and regulations relating to financial services such as MiFID II, the Prospectus Directive, and the Investment Services Act, and would fall outside the scope of the new VFA Act. Should a token not fall under the definitions of a Virtual Token, electronic money, or a financial instrument, then it will be considered as a VFA and shall be regulated by the newly enacted law, the VFA Act.

We will learn by doing, since this is all relatively new and we are still in the infancy stage of this legislation. What I believe will happen over time, is that other jurisdictions will copy what we have done and improve upon it and obviously we will then be in a better position to learn from each other's mistakes.

Eventually we should arrive at a time where legislation is eventually harmonised to create an effective and efficient mechanism to regulate the whole industry.

France – (BC) The thing about France, which is interesting, is that a year ago, the government initiated a big consultation process with several hearings. They wanted to know about the companies that were involved in ICOs and what they were expecting in terms of regulation.

This process ended one month ago and the result was that they decided that an optional ICO visa would be a good solution for the ecosystem.

It's an optional label that the Autorité des Marchés Financiers (AMF), which is the equivalent of the US Securities and Exchange Commission (SEC) in France, has created. The AMF looks at projects and grants visas depending on the seriousness of the project.

They check whether the company is officially registered, and verify whether the managers have disclosed their full identities and backgrounds. They look into whether the information given in the white paper is accurate, and doesn't make misrepresentations. They also assess whether the project has serious infrastructure in terms of IT and also custody solutions for crypto assets.

If all these criteria are met, they will grant a visa and then keep a white list of all projects that have been reviewed and considered as serious projects.

Of course, this doesn't provide any guarantees about the success of the project, but at least it guarantees the seriousness of the project, and the fact that it is not a scam, meaning the people behind the project are real people with real involvement.

This is one leg of the project. The other leg is that the AMF will also issue a license for crypto service providers, like intermediaries that involve crypto business. This allows them to get a license from the AMF and increase their credibility.

This is all in the draft bill and it will officially be enacted in early 2019, without any expectation of significant changes to the mechanism. Aside from this, we are also currently working on the tax side to make sure ICOs for accounting and tax purposes are more easy to manage.

France has decided to go its own way in terms of legislation for now, and to come up with something that they feel is good to attract projects to France. They want to start issuing visas, and they think that they will get the best projects from other countries because they have this mechanism. If this regulatory framework proves being efficient going forward, Europe could adopt the same kind of approach.

U.S. – (NW) You have the benefit of having the European Union and, so, it's feasible to have a multi-jurisdictional approach in due course. The United States, being off on its own, would have to enter into a treaty to be able to go along with that kind of regime.

If a token or coin has the attributes that would trigger other non-digital assets to be regulated, then there is no difference conceptually. It's not apparent why, in that instance, a token or coin should be given special treatment compared to other kinds of instruments. So, I find that there's a little bit of naivety on the part of the issuers in the market, to think that somehow they're special and they deserve better treatment. The jurisdictions that are making the policy choice to create new laws that distinguish the token or coin from the other kinds of assets that fall under regulation are leading the pack, and that is very useful, but it doesn't mean that there isn't going to be a law in every other jurisdiction that the issuer must comply with. It's a start, but it does not solve the problem yet.

Slovakia – (AV) Current Slovakian laws and regulations are not able to keep up with the newest technologies. In my opinion the regulation of ICO issuance should be undertaken by the European Union, while laws around taxation of ICOs should be decided by individual countries.

The fifth Anti-Money Laundering Directive brings under its legislation cryptocurrency exchanges and wallet services, with the exception of those services that do not hold the private keys from their customers´ money. Earlier this year, the EU ordered all platforms for buying and selling crypto currencies to adhere strictly to know your customer (KYC) and anti-money laundering (AML) protocols. The purpose of this step was to reduce financial crimes, ensuring that cryptocurrency exchanges and commercial banks work under the same KYC and AML regulations.

The big question is whether to apply existing EU financial rules on cryptocurrencies, or whether to write completely new rules. In my opinion, all participants in the 'chain' of an ICO need to be regulated, either from the perspective of fundraising via ICO, or from the perspective of taxation of the income from trading with cryptocurrencies. Changes in Slovak legislation do not cover areas such as the potential fall in value of cryptocurrencies, or the valuation of cryptocurrencies gained by mining.

The question when is the token a security and when is it a utility or commodity, should be considered according to each particular project.

Spain – (JMD) Depending on their allocated purpose, tokens can be subject to different regulations that aim to safeguard the protection of investors and consumers. For instance, as we have seen, the US Securities and Exchange Commission (SEC) holds that ICOs are subject to securities regulation or at least liable to registration if they are used to raise financing in a publicly accessible market. Token issuers refute the SEC's assessment because tokens serve purposes such as usage rights of the platform's services. Since the described purposes go beyond mere tradability, which is characteristic for traditional stocks, they argue that ICO are exempt from securities regulation.

U.S. – (NW) This is down to the hubris and naivety of the ICO issuer, who may believe they deserve to be treated better and not regulated, despite that fact that what they are selling meets the criteria of being regulated under the existing law.

Spain – (JMD) True, so, despite absence of specific ICO regulation in Spain, issuers should align their use of the token with the existing rules possibly applicable to ICOs. Various regulations are relevant in this context in Spain.

National securities regulation may be applicable in Spain, provided that investor rights go beyond the mere provision of future services.

Crowdfunding platforms, which resemble ICOs, are exempted from the scope of the relevant Spanish law 5/2015 of April 27. However, issuers whose tokens are equity-like, according to Art. 50 (1) (a) of the same law, could face legal restrictions.

So far, the EU remains silent on the legal categorisation of ICOs. This allocates regulation to the member states. Still, the recent securities regulation amendments, inter alia prospectus regulation and the European MiFID II, may influence ICOs in a harmonising way across member states.

The National Securities Markets Commission of Spain - Comisión Nacional del Mercado de Valores (CNMV) has stated its position regarding cryptocurrencies, announcing the decision to apply the current regulations until there is a proper framework corresponding to the European continent.

This type of measures has not only been taken in Spain by its respective entity. In previous opportunities, the same has been adopted by other international watchdogs, such as the US Securities Exchange Commission (SEC), or the European Securities and Markets Authority (ESMA).

According to CNMV, depending on what an ICO is used for, it can be included in the scope of the Securities Market Law (LMV) and, therefore, be subject to such regulation and to the monitoring by the CNMV.

In Spain, due to the broad concept of marketable securities included in art. 2 LMV, the majority of ICOs should be included within the scope of this law and, therefore, the issuance of cryptocurrencies should not be free, requiring authorisation by the CNMV.

Securities issued through ICOs that comply with certain requirements, should be considered subject to the LMV and other regulations, including MiFID II and the EU Prospectus Directive.

Depending on the volume and to whom the ICO is directed, it will be regulated as a public offering, or as an investment service.

According to art. 35 LMV, an ICO will not be considered a public offering and, therefore, will be subject to the regulation of investment services, if it:

1. It is addressed exclusively to qualified investors.

2. It is addressed to less than 150 individuals or legal entities, without including qualified investors.

3. It is aimed at investors who acquire securities for a minimum amount of EUR 100,000.

4. The nominal value of the unit value is, at least, EUR 100,000.

5. It is issued for a total amount in the EU of less than EUR 5,000,000 over a period of 12 months.

Luis Santine pictured at the 2018 IR 'On the Road' in Toronto

Brazil – (LJ) There are regulations that may apply to ICOs in Brazil, but there is no specific ICO regulation.

In Brazil, there's a regulation that only the Brazilian currency can be issued in Brazil. Because ICOs may be seen as a currency depending on how they are issued and traded, it is important for no one to actually arrange both the business of issuing and arranging trading of ICOs in Brazil. Notwithstanding, Brazilian companies can issue ICOs, Brazilian companies and investors can purchase ICOs, or use them as a method of issuing debt. Brazilian brokers can trade ICOs and help issue ICOs, but because of the regulatory concerns around whether or not ICOs are currency, we recommend them to always use non-Brazilian platforms.

Whenever a company issues ICOs as a mean to raise debt, there's also an issue about selling securities in Brazil to Brazilian resident individuals and companies. If a company markets a debt instrument in Brazil to Brazilian investors publicly, this may be viewed as a public offering of securities. The company and the offer are subject to prior registration with the Brazilian Securities Exchange Commission. Therefore, if a company issues ICOs as a mean to raise debt, it is important to be careful on the way to market it. It may be possible to market via the internet, but not specifically to Brazilian resident investors, or physically and locally to Brazilian investors.

Brazil is a country that has a controlled foreign currency regulation meaning that any significant movement of the Brazilian currency across borders, and vice versa, has to be traded within the regulated foreign exchange market and disclosed to the Brazilian Central Bank.

It's always important for Brazilian companies to make sure that whenever they do issue an ICO, they are complying with the regulations that require them to flow the payments through the foreign exchange market and register foreign capital if necessary with Brazilian central bank. If all of that can be accommodated, then it's possible to do it.

As has already been said, there are also tax issues in Brazil, because the ICOs are viewed as credit. We do not have VAT and other sales taxes on credits, but we may have foreign exchange taxes, capital gains and withholding taxes on gains and interests, so this also has to be analysed.

Brazil is not currently a good place to hold and sponsor an ICO platform, because of the discussion around whether or not ICO are currency, but it's a good place to do business because you do not have many regulations, you just need to make sure that you are compliant with all the general regulations on public offerings of security, foreign exchange and tax.

While choosing a location to use as a platform to issue and trade the ICO, Luxembourg and the Netherlands are good candidates from a Brazilian perspective, because of the treaty network, but then of course local regulations have to be analysed.

France – (BC) There is a distinction within French regulation, between utility tokens and security tokens. I speak subject to Noreen's input, but in the US there is a trend for many ICO tokens to fall into the definition of security, therefore triggering the regulatory constraints that go with securities.

In France, it seems that true utility tokens could avoid being subject to security regulations.

U.S. – (NW) That is true, since the definition of a security in the US essentially captures an investment contract, and the SEC has said that tokens are investment contracts.

But the thing is that, even if you have a pure utility token, if it meets the element of a security under the "Howie test" (named after the court case where the test was laid out), then the token that the issuer thinks is a utility can become a security. To be a security, the token needs to be an investment of some kind of value (fiat currency, or crypto) in an enterprise, with the expectation of profit that is derived from someone else's actions.

If you're selling a utility that only allows you to buy and sell services on a blockchain, for example, then the expectation of profit is potentially not there. But, if the token issuer also lists that token on a secondary token exchange, creating the expectation of a secondary market, then it is creating an expectation of profit which can change that utility into a security, meaning it is regulated like a security. However, even if the issuer hasn't created the expectation and managed to keep its token outside the grip of the securities laws, as I noted earlier, it is still a commodity regulated by the CFTC. This means that it can only be traded on a regulated commodity exchange, unless it meets an exemption, which luckily can easily be met if the issuer transfers control of the token within 28 days.

In addition to my earlier comments regarding token exchange, the token itself is subject to restriction on its resale if it is not sold pursuant to an effective registration statement filed with the SEC. Securities purchased under Regulation D are not freely tradable; they are deemed 'restricted' and can only be sold pursuant to an effective registration statement or a resale exemption. The primary safe harbor rule for resales of privately placed securities is Rule 144, which allows free trading after the lapse of one year from the date of sale (or six months if the issuer is subject to the periodic reporting obligations of the Securities Exchange Act of 1934, which is an issuer who files quarterly and annual reports with the SEC, in essence, a public company), subject to limited exceptions that allow for resale within the one-year holding period. The rule is more limiting if the buyer is an affiliate or has certain control over the issuer. The concept of 'tacking' under Rule 144 means that if the securities are trans-

ferred within that one-year period pursuant to an exempt transaction, then the periods for which the security was held by each exempt-transaction purchaser are tacked, in other words, the one-year period does not restart with each exempt resale within the one-year period.

Poland – (RL) In February 2018, Polish journalists reported that the Polish Central Bank (NBP) had financed an anti-crypto video, in which investing crypto currency was declared as a risky and unreasonable business. At the beginning of May 2018, the Polish Financial Supervisory Authority (KNF) also started an aggressive social media campaign against cryptocurrencies, informing the public about the risks associated with cryptocurrencies and pyramid schemes. These measures were mostly criticised by crypto-friendly investors and individuals. Following this criticism, the KFN changed its position, and confirmed that cryptocurrency trading was completely legal in Poland. In addition, the authority stated that the Polish government was focused on the development of a regulatory framework for the Polish market to prevent crimes such as money laundering, tax evasion and terrorist financing. On 13 July 2018, the KFN introduced a new regulatory system for Bitcoin and alternative coins.

The new regulatory system states that entities and individuals trading in cryptos, should be deemed as 'Obliged Institutions'. This means that those entities are subject to further obligations under the Polish Act on Countering Money Laundering and Terrorism Financing. The Obliged Institution is required to apply certain procedures in the event of any suspicious activity. Should the act be breached, then the cryptocurrency bureau or exchange stock market will be enrolled on the 'List of Public Warnings' and handed high financial penalties.

The current preliminary model for ICO issuance in Poland is based on cooperation with a traditional financial institution (bank) located in Poland and monitoring by the KNF. An individual planning to deal with cryptocurrency in the Polish market has to set up a company officially registered within the Polish National Entrepreneur Register (KRS). The company offering the cryptocurrency through crypto currency exchange bureaus or any other platforms of exchange are not subject to the Polish Payment Services Act and that means they are not required to obtain any permit or approval from KNF for cryptocurrency dealings. In addition, these dealings are also not governed by the Polish Act of Trading in Financial Instruments, and as a result cryptocurrency is free from any licenses as well. Despite this orientation there are still many banks in Poland refusing to provide services for companies associated with cryptocurrencies, denying bank account applications or closing down bank accounts. This has led to further protests from investors and the Polish Bitcoin Association (PBS).

As we have discussed, there have recently been some attempts undertaken by the Polish authorities to regulate the cryptocurrency industry in Poland. Such regulation cannot be excessive, however, and they should provide a regulatory framework for the Polish market which includes basic provisions for manner of offering cryptocurrency, types of permitted cryptocurrencies, rights and obligations of the parties involved, along with advice on risks associated with cryptocurrency.

Cryptos offered through ICOs should be subject to securities legislation in Poland, if the volume of the transaction in question and the investment audience warrants it. In our judgment, a prospectus should also be attached to ICO issues, detailing all the necessary information and risks connected with purchasing cryptocurrencies.

Switzerland – (DB) Switzerland is considered by leading authorities and consultants, to have favourable ICO regulation. In February this year, the Swiss Financial Market Supervisory Authority (FINMA) issued guidelines concerning the regulation of ICOs. According to these, ICOs may be subject to financial market laws, depending on the characteristics of the token that is issued.

FINMA describes three classes of tokens. The payment token, the utility-token and the asset (or security) token. The payment-token includes cryptocurrencies and tokens that can be utilised as payment means, whereas the utility-token enables access to a service or digital usage by means of the blockchain.

Finally, the asset-token represents a value and can contain a claim. According to FINMA, there are also so called hybrid-tokens that feature several different characteristics. Therefore, the ICO token might be subject to AML, securities or banking law.

FINMA assesses whether financial market law has been breached on a case-by-case basis, recognising the innovative potential of distributed ledger technology and taking a technology neutral approach.

FINMA also recognises the innovative potential of DTL (distributed ledger technology) and takes a technology neutral approach. In addition, Switzerland has a very strong service provider ecosystem and further fruitful framework conditions. The fact that auditors requested advice from FINMA on how to calculate the capital charge for crypto assets is another clear sign that this new asset class is quickly making inroads into the banking system.

In addition, the Swiss parliament has introduced the new FinTech licence with relaxed requirements very recently. The FinTech licence allows institutions to accept public deposits of up to CHF 100 million, provided that no interest is paid on such deposits and that these are not invested.

And on top of that, trading on the first bitcoin ETP (Exchange Traded Products) is possible on the SIX Swiss Exchange, Switzerland's leading stock exchange.

Dutch Caribbean – (LS) The issuance process depends on the demographic of the project. For example, if it's a business that operates in the US you might be better off following guidance from the Securities and Exchange Commission (SEC). However, a blockchain startup can easily launch a token in a crypto friendly jurisdiction, crowdfund and later incorporate in a different jurisdiction. That's why know your customer (KYC) and anti-money laundering legislation (AML) are essential for overall compliance.

The definition of a token is dependent on the interpretation of what security means. Generally, a token is a utility, an asset or a unit of value issued by a company. There are two primary types of tokens that you are likely to see in the ICO space. Namely utility tokens and security tokens.

Utility tokens are simply app coins or user tokens. They enable future access to the products or services offered by a company. Therefore, utility tokens are not necessarily created to be an investment. The token powers something or has a function for services within the platform in which it has been issued, such as reward/voucher style tokens.

A security token is a digital asset that derives its value from an external asset that can be traded. There's a distinction between an equity token (with voting rights) or a currency token (monetary value). Therefore, these tokens are subject to federal laws that govern securities. Commodity tokens or asset tokens (i.e. gold) often fall under this category.

One of the challenges often faced is when tokens are added to an exchange with a monetary value and the question arises whether that automatically makes them a security. This will only work within the ecosystem where it was built, since if a security was to be launched on another exchange it would be subject to that exchange's smart contracts and blockchain. A new global regulatory/monitoring body could be a way of overcoming this, however blockchain organisations and cryptocurrencies are not currently subject to sharing data, accounts or figures and financials.

SESSION THREE - RESALE AND TOKEN EXCHANGES

What are the implications of resale and exchange listing on the legal character of a token post-ICO?

Poland – (RL) The Polish government introduced a new bill regarding the taxation of cryptocurrency incomes in August 2018, which will be subject to negotiations by the Council of Ministers and the Polish Parliament. The bill distinguishes between decentralised cryptocurrencies and centralised cryptocurrencies, aiming to simplify and clarify the procedure for reporting and paying taxes on revenues generated from crypto-related transactions. In accordance with the aforementioned act on Counteracting Money Laundering and Terrorism Financing, the draft law defines virtual currency as a 'digital representation of value' stating that cryptocurrency can serve as a medium of exchange and be accepted as means of payment; they can be stored and transferred electronically and used in e -commerce.

Pursuant to the bill, revenues from virtual currency transactions should be part of the taxable income of natural persons and entities, however, the exchange of cryptos will not be taxed. Cryptocurrency miners are also expected to pay taxes on their profits and the tax base for this taxation will depend on the nature of their business activities.

In the event of a miner being an independent entrepreneur, they will pay tax on the proceeds generated from the sale of mined cryptocurrency. Should the mine work on behalf of another person/entity, then the amount of their remuneration will be subject to taxation. All of these transactions should be reported on annual tax returns.

Poland currently has a progressive income tax scheme for individuals within two rates: 18 per cent for annual income of up PLN 85,528 (approx. USD 22,686) and 32 per cent for any amount above this limit. For corporate entities, there is a linear tax rate of 19 per cent.

Malta – DM When issuing an ICO in or from Malta, Issuers need to establish from the initial stages whether after issuance, they would like to admit to trading on an exchange the said token, or whether for example the token may later be converted to a financial instrument as this will have a bearing on how the token will be classified when carrying out the Financial Instrument Test to determine under which regulatory regime the issuance of the token will fall, and whether it can be admitted to trading.

In the case of utility tokens, the VFA Act provides that they may only be redeemed within the ecosystem of the DLT platform on which they were issued and are therefore not permit be listed on a DLT exchange. Exchanges regulated under the VFA Act (i.e. VFA exchanges) will only be able to list tokens that are classified as virtual financial assets following the carrying out the Financial Instrument Test. VFA exchanges are not permitted to admit for trading on their exchange any utility or security tokens. Only a trading platform that is licenced to admit for trading financial instruments under a different regulatory regime to that of VFA exchanges can list security tokens.

Brazil – (LJ) If someone wants to resell an ICO token in Brazil, it's not impossible, the only issue that you need to be aware of is not to create a parallel currency in Brazil.

This applies if you are issuing the ICO tokens and arranging for people to accept them and repurchase them at the same time. If you are promoting ICOs sold in Brazil as a parallel currency, this is a breach of banking regulations in Brazil. We have a lot of people who purchase and sell, of course, but no one is issuing here.

Concerning the exchange listing in Brazil, ICOs qualify as a credit that can be used to pay for services and utilities. As a credit right, it's possible to list, you just need to have a sponsor to help you achieve that.

If a company wants to issue an ICO and make a public market in Brazil, gathering local investors to invest and establish local trading, then it will be necessary to use agents, brokers and dealers to register the positions. Registration documentation will need to be provided and it will be a challenge for the ICO to meet with all those regulations.

France – (BC) The optional visa from the AMF, would make it necessary to provide information about the plan to introduce the token on an exchange, so there is no incompatibility.

The fact that the token is listed or not on an exchange, does not change the possibility of issuing an ICO. It's part of the global plan, so I don't have particular comment on this.

The comments I would have is more the regulation of exchanges themselves and here obviously we would like to attract some French-based exchanges, which we don't have right now or at early development stage. We are working on establishing a regulatory background that would be favourable for exchanges to develop in France.

I have one question for Noreen though, since I wanted to understand something she said. Noreen, did you say that if you have a utility token and it is listed on a token exchange, then that makes it a security token, just because it is listed on an exchange.

U.S. – (NW) It's possible, yes, if, when marketing the token, the issuer advertises that the token will be listed on an exchange with a secondary trading market for it, doing so creates the expectation of profit which is one of the key elements determining whether or not something is a security. In fact, one of the very first enforcement actions that the SEC brought in the ICO market, back in December of 2017, was against a company called Munchee, which was precisely for this reason.

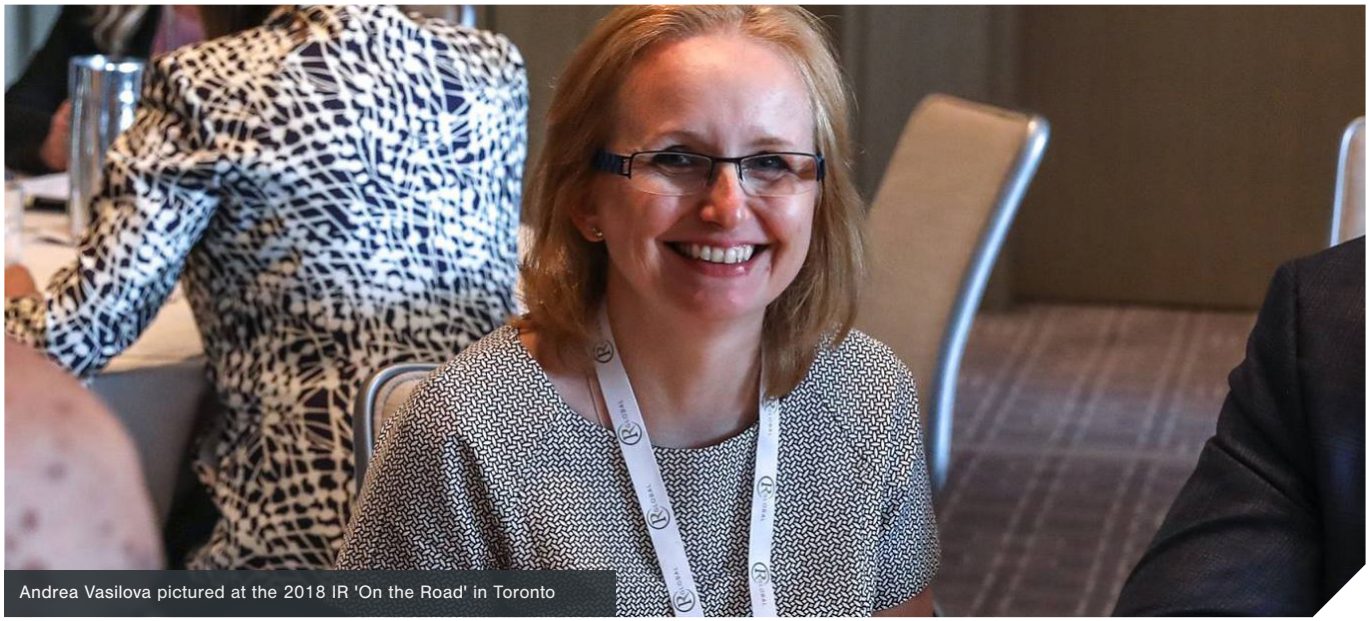
Switzerland – (DB) The main difference between buying and selling commodities and securities lies in what is being sold to the purchaser - commodities can be sold under a futures contract, and, under such circumstances, are subject to a different regulator in some jurisdictions than a security.

The Canton of Zug recently published a detailed leaflet with respect to how cryptos have to be declared on a tax return. It deals with how crypto assets are taxed as property, whether they attract income tax, how commercial trade is taxed, and how capital gain and loss in private wealth is taxed/deductible. Finally, it deals with how tokens with rights should be taxed.

Dutch Caribbean – (LS) Post-ICO, it is often the exchange's duty to filter out clients that don't comply with certain laws due to their residence. It's important that the ICO is handled with the adequate KYC to avoid any problems for the foundation that issues the ICO.

Utility tokens will likely require continued careful monitoring while the crypto market is moving more and more towards the STO (security token offering) space which is good for investors that are looking for that additional regulation and security. That said, commodities and utilities are still very powerful when used legitimately in their own right.

Currently the Central Bank of Curacao and Sint Maarten does not have any specific guidelines on ICO's. However, an ICO token can have several legal implications depending on its nature and whether it qualifies as a security. In this respect, legislations will have to be examined on a per



Andrea Vasilova pictured at the 2018 IR 'On the Road' in Toronto

case basis. Moving forward, the Dutch Caribbean Securities Exchange (DCSX) is the only authorised and licensed securities exchange in the Dutch Caribbean.

As a self-regulatory organisation, subject to direct supervision by the Central Bank of Curacao and Sint Maarten, the DCSX can facilitate the listing and trading on its exchange of stocks and bonds, mutual funds, ETFs and other fund types, as well as other instruments as approved by the DCSX. It is in this capacity that the DCSX is likely to be the leading authority in the Dutch Caribbean to accommodate ICOs in the near future.

Profits will vary depending on what is put onto the exchange. There are not a lot of security tokens out there and it would require looking at listing and trading fees like any natural exchange. It is likely to take some time to build something like this up even though jurisdictions like Gibraltar seem to be moving quickly into this space.

Slovakia – (AV) In Slovak legislation, neither trade with cryptocurrencies, or post-ICO tokens are subject to specific regulation.

In order to ensure that the token gives good returns and maintains a stable and healthy price after ICO, it is necessary to follow a few steps such as constant communication with the investors on current progress with the project, education of the investors about the project, and promotion of the project on the right channels in order to let it be visible among investors.

The legal regulation of cryptocurrencies in Slovakia, is focused only on the manner of taxation of the income from its sale. The particular provisions of the income tax act are considered as the legal base of the taxation of the income from the sale of virtual currency. If virtual currency is not included in the business assets of the entity, then the income from its sale is considered as other income, otherwise it is considered as income from financial property. For the purpose of valuation and bookkeeping, cryptocurrency meets the definition of short term financial property other than money, which is the same as a security.

Slovak lawgivers will wait for new EU rules, before implementing further laws, meanwhile they will concentrate on the questions already addressed.

Spain – (JMD) The Comisión Nacional del Mercado de Valores (CNMV) has identified different channels for the resale of tokens post-ICO. Each channel has its own legal singularities and risks.

Firstly, there is direct commercialisation via the internet. It refers to acquisitions through platforms that operate on the internet, known as cashiers of cryptocurrencies. It can happen that the investor does not directly own the cryptocurrencies, but only the rights in front of the unsupervised platform or intermediary.

This can expose buyers to the insolvency risk of the intermediary and to the risk of non-compliance with basic principles of correct and diligent carrying custody and registration of assets. Additionally, the risk of money laundering should be taken into account.

There is also the option to purchase via CFDs (contracts for differences). Only professionals should consider this type of high risk contract. On the other hand, the entity that offers these products must be authorised by the CNMV to provide investment services and comply with all the information obligations and other applicable rules of conduct.

It is also possible to gain exposure to ICO tokens through futures, options and other derivatives. It must be borne in mind that commercialisation of this type of product under public offer (article 35 of the text Consolidated of the Securities Market Law, TRLMV) by professionals between unskilled investors (retailers) could require a brochure approved by the CNMV or another European Union authority that has been the subject of a passport.

Alternatively, investment funds or other types of collective investment vehicles that invest in cryptocurrencies can be used. This type of vehicle or funds investment must be authorised or registered with the CNMV. Until now, there is no fund of these characteristics registered at the CNMV, and the funds that could legally, if authorised, invest in cryptocurrencies, cannot be traded among retail investors.

Exchange-traded products (ETPs) and exchange-traded notes (ETNs), with underlying exposure to tokens, also require the approval of a prospectus explanatory statement by supervisors also subject to the passport regime previously mentioned.

The European Union considers cryptocurrencies such as Bitcoin as a means of payment, therefore, VAT is applied to any purchase of goods or services, but VAT does not apply to the transmission of the currency. When cryptocurrencies are used as an investment through a broker and accrue gains or losses, this will have to be incorporated into income tax calculations and subsequent taxes paid.

Capital gains in Spain are taxed at 19 per cent up to EUR 6,000, 21 per cent above that up to EUR 50,000 and 23 per cent above EUR 50,000.

Contacts

UK HEAD OFFICE

IR Global
The Piggery
Woodhouse Farm
Catherine de Barnes Lane
Catherine de Barnes B92 0DJ

Telephone: +44 (0)1675 443396

www.irglobal.com
info@irglobal.com

KEY CONTACTS

Rachel Finch
Channel Sales Manager
rachel@irglobal.com

Nick Yates
Editor
nick@irglobal.com

CONTRIBUTORS

Noreen Weiss (NW)
MacDonald Weiss PLLC – U.S. - New York
irglobal.com/advisor/noreen-weiss

Lavinia Junqueira (LJ)
Tudisco, Rodrigues & Junqueira – Brazil
irglobal.com/advisor/lavinia-junqueira

Diego Benz (DB)
Zwicky Windlin & Partner – Switzerland
irglobal.com/advisor/diego-benz

Andrea Vasilova (AV)
VASIL & Partners –Slovakia
irglobal.com/advisor/andrea-vasilova

Luis Santine (LS)
InfoCapital N.V – Dutch Caribbean
irglobal.com/advisor/luis-santine-jr

José María Dutilh (JSM)
LeQuid, Social Enterprise and Business Law Firm – Spain
irglobal.com/advisor/jose-dutilh

Dunstan Magro (DM)
WDM International – Malta
irglobal.com/advisor/dunstan-magro

Dr. Robert Lewandowski (RL)
DMP Derra, Meyer & Partners – Poland
irglobal.com/advisor/robert-lewandowski

Benoît Couty (BC)
Pichard & Associés – France
irglobal.com/advisor/benoit-couty