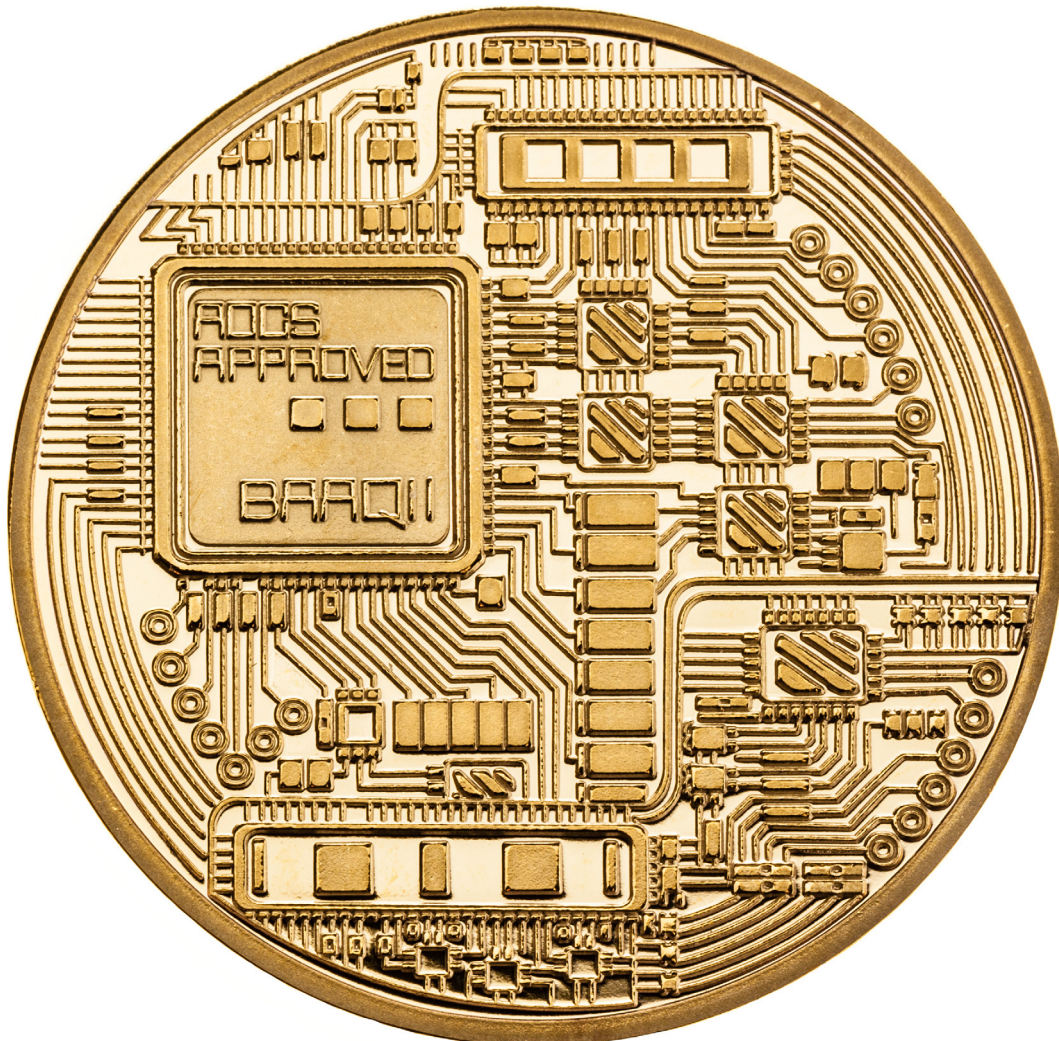


Your World First

Initial Coin Offerings

New means of fundraising





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ICOs

– new means of fundraising

At first glance, it is hard to believe and to understand the claim of enthusiasts that Blockchain technology is supposed to be comparable with the spread of the internet in the 90s.

It would therefore be a consequence of the technical, even disruptive innovations that occur in the world of tech: mainframes (60s), microprocessors (70s), PCs (80s), the Internet (90s), mobile phones/smart phones/social media (2000s and 2010s) – and arguably now Blockchain/Distributed Ledger Technology (DLT).

It's true: Blockchain technologies have the potential to disrupt the way we communicate online. In a nutshell, one has to understand five aspects:

- A Blockchain is a database...
- Which is not stored centrally, but in a distributed manner...
- From which data can per se not be removed...
- And which allows for moving digital assets...
- Under conditions predefined in a software (a so-called Smart Contract).

To be clear, Blockchain technologies allow digital assets to be moved instead of copied!

In the real world we can transfer a physical object to another person. Everybody is aware that this object has physically had a change in ownership. For example, a company share has always been issued on paper and it is clear to the public that the owner of the paper is the owner of the share. This has not been possible in the digital world, until now. Sending a document to another person via email is basically a copying operation. Neither the recipient of the email nor anybody else can be sure that the sender has deleted the document, unless an independent third party has proven it. This is the reason why banks are being used to act as trustees to store and confirm the ownership of digitalised shares.

Blockchain technologies intend to solve this issue and has the capability to actually move digital assets by proving that the sender of an asset no longer possesses it. It achieves what was done hundreds of years ago – transfer of a title connected to a physical object – but the object is now digital, not physical. The reason behind this is the use of cryptography. Only the owner of a certain private key can dispose of an asset. Since moving an asset means changing the corresponding key pair, the power of disposition only lies with the owner of the other private key who is the owner of the digital asset.

By combining this characteristic of Blockchains with the fact that there is no operator of a Blockchain (because it is run in a distributed manner by an undefined amount of so-called nodes) it is abundantly clear why the word 'disruptive' is used to describe this technology. It has the potential to change the way we communicate.

Many companies, from small start-ups to global players, are testing and working on use cases for their business. This process is ongoing and there are already some very promising ideas. However, the most discussed use cases currently are token sales – or ICOs (Initial Coin Offerings).

ICOs are means for companies to collect money. Instead of writing long business plans and conducting endless pitches, companies can simply create their own cryptocurrency, gather a community behind their project, do some marketing and write a white paper.

The following table shows some of the differences between VCs and ICOs:

Venture Capital (VC)	Initial Coin Offering (ICO)
B2B	B2B + B2C
Business plan	White paper
Elevator pitch	Website, Slack, Twitter, etc.
Equity	No equity
No community behind	Community behind
Often prototype requested	Only idea and team needed (may change in future)
Often restricted in geography	Geographic restriction only resulting from regulatory limitations
Not tradeable	Tradeable on exchanges
Neutral press	Bad 'cryptocurrency press'
Clear legal qualification	Regulated; hardly any administrative and court practice
Reliable means of fundraising	Hype? Remains to be seen

There is no generally recognised classification of ICOs. The Swiss FINMA uses the following terminology, admitting that there are also hybrid forms:

- **Payment tokens/currency tokens** do not give rise to claims on their issuer. They are rather intended to be used, now or in the future, as a means of payment for acquiring goods or services or as a means of money or value transfer.
- **Utility tokens** are tokens which are intended to provide access digitally to an application or service, usually by means of a Blockchain-based infrastructure.
- **Asset tokens** represent assets such as a debt or equity claim on the issuer. Asset tokens promise, for example, a share in future company earnings or future capital flows. In terms of their economic function, therefore, these tokens are analogous to equities, bonds or derivatives. Tokens which enable physical assets to be traded on the Block-chain also fall into this category.

The support of CMS is sought on many ICOs worldwide. Our aim is to provide token emitters with profound legal advice, based on a deep knowledge of the technologies behind ICOs. We share our insights with legislators and regulators, contributing to the development of the legal landscape.

This document is a brief guide on some of the legal challenges in certain jurisdictions and we hope you find it useful. Please reach out to our local contact persons for advice on ICOs, Blockchain and smart contracts.

Thanks to the ICO phenomenon, approximately 4 billion US dollars were raised in 2017. After a difficult start, ICOs are now becoming more and more professional and are also attractive for companies which raised and earned money with classical alternatives. This is not just hype – legislators and financial authorities have started to publish their opinions on ICOs.



Austria

To what extent is a token sale (ICO) permitted?

Currency token/Payment token

The purchaser obtains a claim to a cryptocurrency which first must be created and introduced. Only supply and demand or, if necessary, future acceptance points will determine the currency's future value. For example, future acceptance points could exist in retail trade where the coins serve as payment instruments. The purchaser obtains coins or tokens that will enable him to purchase a company's products at a certain exchange rate in the future. Such coins or tokens are seen as a voucher and not as an independent currency.

Utility token

It can be assumed that it is possible to structure a utility token in such a way, that a license is not necessary under Austrian law. Generally speaking, a utility token is not as complicated as an asset token when it comes to legal requirements.

Asset token

The ICO requires a prospectus under capital market law if the token is categorised as an investment. Additionally, the requirements of the Banking Act, Payment Services Act, E-Money Act and Securities Supervision Act must be taken into account.

Under what conditions do local laws apply to ICOs?

It is always necessary to consider legal regulatory requirements regardless of whether coins or tokens are issued in the ICO. So far, no Austrian law exists that expressly deals with ICOs. This means it is essential to check which existing laws apply that trigger a license obligation with the FMA. For example, a fixed interest rate would cause a license obligation.

Statements from authorities and/or legislator

FMA

FMA has generally confirmed, that ICOs are so far unregulated in Austria. However, the authority has made available a Fintech Navigator which provides an overview of capital markets and regulatory requirements that could apply in the context of an ICO. <http://bit.ly/2phBPR3>

Is revenue generated by the sale of tokens:

Subject to VAT?

No, if in exchange for legal currencies or in case of mining. Yes, if used as payment for supplies and other services.

Subject to corporate tax?

Generally yes, except:

- utility token, if issued as vouchers
- asset token, if qualified as equity or debt in the tax balance sheet.



Belgium

To what extent is a token sale (ICO) permitted?

In Belgium, an ICO-specific regulatory framework does not yet exist. There is no legal classification of tokens or cryptocurrencies. So far, Belgian regulators have not applied existing local securities and financial market regulations to ICOs.

However, ICOs have turned into a hot topic and we expect Belgian lawmakers to make a move towards regulation in the upcoming months.

Statements from authorities and/or legislator

Financial Services and Markets Authority (FSMA) and National Bank of Belgium (NBB)

Since 2014, both regulators have repeatedly warned via press releases about the risks of investing in ICOs and virtual currencies (including through exchanges) due to their high volatility and currently unregulated status.

— On 13 November 2017, FMSA issued a statement on ICOs. In essence, it echoes the ESMA statement dated 13 November 2017 by reasserting that ICOs are inter alia potentially subject to the following set of regulations:

- Prospectus Directive
- Directive on Markets in Financial Instruments (MiFID)
- Directive on Alternative Investment Fund Managers (AIFMD);
- Regulation on Market Abuse (MAR)
- Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD4).

The above without prejudice to any other regulation pertaining to accountability rules, tax duties or e-money.

Within the Belgian framework, a number of domestic rules are also relevant for consideration:

- **FSMA regulation dated 3 April 2014 establishing a ban regarding marketing of certain financial products to retail clients**

This regulation prohibits the marketing of financial products to Belgian retail clients where the return is linked, directly or indirectly, to a virtual currency.

- **Act dated 16 June 2006 on the public offers of investment instruments and the admission of investment instruments to trading on regulated markets**

This law provides for a prospectus (and related advertising material) to be approved by FSMA in case of public offering of investment instruments in Belgium, as well as for an intermediation monopoly for the placement of investment instruments in Belgium.

- **Act dated 18 December 2016 establishing a regulatory status for crowdfunding**

This law provides for licensing rules regarding the setup of a platform for alternative funding, as well as the rules that providers of alternative funding are bound by.

- FSMA suggests that all industry players should initiate a dialogue and share their ICO design prior to its commencement through a dedicated Fintech Contact Point.

<https://bit.ly/215Y6bo>

Is revenue generated by the sale of tokens:

Subject to VAT?

Yes. Belgian authorities have not yet explicitly treated indirect taxation issues about sales of token. Nevertheless, utility tokens and asset tokens are likely to be subject to VAT. On the other hand, currency tokens are exempt.

Subject to corporate tax?

No.



Bosnia and Herzegovina

To what extent is a token sale (ICO) permitted?

In Bosnia and Herzegovina, an ICO-specific regulatory framework does not yet exist. There is no legal classification of tokens or cryptocurrencies. So far, Bosnian-Herzegovinian regulators have not applied existing local securities and financial market regulations to ICOs.

Statements from authorities and/or legislator

Central Bank of Bosnia and Herzegovina

In January 2018, the Central Bank of Bosnia and Herzegovina stated that it has no information on the national cryptocurrency market. It warned that cryptocurrency platforms are not regulated and that the invested funds into cryptocurrencies are not insured by a deposit-insurance scheme. Further it warned such cryptocurrencies may be stolen or experience volatile value changes, and that investing in cryptocurrencies is riskier than other instruments.

Is revenue generated by the sale of tokens:

Subject to VAT?

While no express regulation or opinions exist of the relevant public authorities, the Bosnian-Herzegovinian VAT regulation is generally aligned with the EU VAT rules and ECJ rulings. It is likely that transactions including virtual currencies and tokens would be interpreted as financial transactions exempt from VAT.

Subject to corporate tax?

Although there is no explicit regulation or opinion of the relevant authorities mentioning sale of tokens, corporate income tax should apply to revenue from sold tokens (i.e. when cryptocurrencies acquired by ICO are cashed in). CIT is levied at a rate of 10%.





Bulgaria

To what extent is a token sale (ICO) permitted?

In Bulgaria, an ICO-specific regulatory framework does not yet exist. There is no legal classification of tokens or cryptocurrencies. So far, Bulgarian regulators have not applied existing local securities and financial market regulations to ICOs.

Statements from authorities and/or legislator

There are no official and binding statements by Bulgarian authorities regarding ICOs. Available authorities' statements are limited to treatment of cryptocurrencies. In a court case of 2015, the national supervision and regulatory authorities stated that they do not recognise cryptocurrencies as a legal tender.

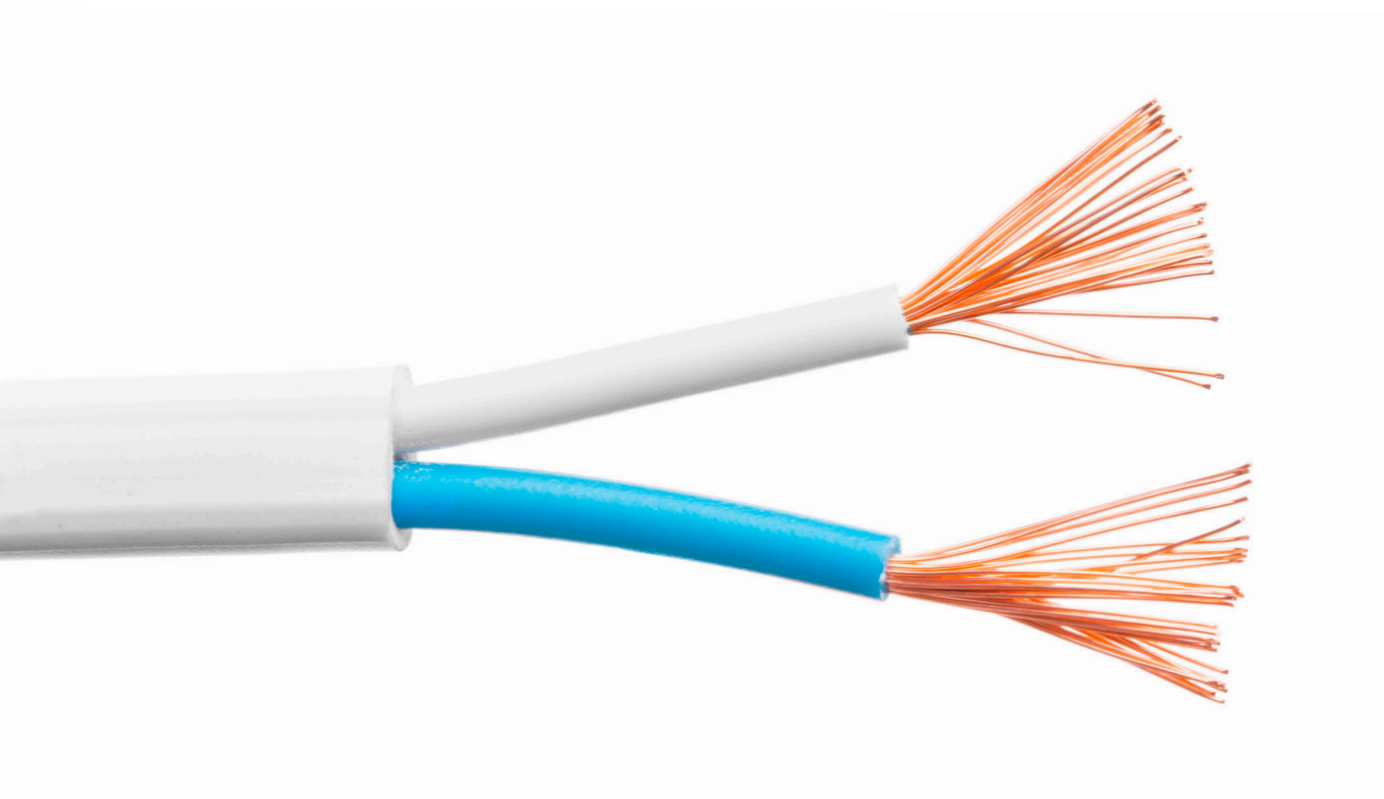
Is revenue generated by the sale of tokens:

Subject to VAT?

No. However, Bulgarian revenues authorities have not explicitly treated tax issues in connection with sale of tokens.

Subject to corporate tax?

No. However, Bulgarian revenues authorities have not explicitly treated tax issues in connection with sale of tokens.





Croatia

To what extent is a token sale (ICO) permitted?

In Croatia, an ICO-specific regulatory framework does not yet exist. There is no legal classification of tokens or cryptocurrencies. So far, Croatian regulators have not applied existing local securities and financial market regulations to ICOs.

Statements from authorities and/or legislator

HANFA (Croatian Financial Services Supervisory Agency)

HANFA issued two statements (on 28 December 2017 and 20 February 2018), warning of the risks of investing in virtual currencies due to, among other issues, their unstable value and mostly unregulated status (on Croatian and EU level).

<http://bit.ly/2phFbD1>

<http://bit.ly/2FFC5nc>

Croatian National Bank (CNB)

CNB (on 22 September 2017) issued a statement that virtual currencies are neither electronic money nor payment service. Therefore, CNB does not issue any kind of licence to the entities issuing or trading with virtual currencies and does not have any kind of control over them. Investment in virtual currencies is not protected by any regulation whatsoever.

<http://bit.ly/2pkMnOz>

Financial Stability Council

In a meeting held 12 December 2017, the Financial Stability Council basically repeated the above statement from CNB, pointing out the risk of investing into virtual currencies and that they are not considered as electronic money nor payment service in terms of legal status. They also stated that, by virtue of their features, virtual currencies do not bear resemblance to traditional currencies and financial instruments.

<http://bit.ly/2DzdHxD>

Ministry of Finance Tax Department

1. In its opinion dated 3 April 2017, Tax Department, among other things, concluded that there is no

regulation that would restrict payments in bitcoin between companies. However, companies are obliged to keep a record of transactions on its virtual accounts. On Tax Department's demand, the company is obliged to provide such records and proof of payments. Otherwise, it will be considered that the payments were made in cash and respective regulation applies.

<http://bit.ly/2pghYSm>

2. In its opinion dated 14 July 2017, Tax Department claimed that trading with currencies represents a financial transaction so it is subject to income tax on basis of capital gains. In that case, a rate of 12% plus applicable surtax would apply (e.g. surtax for residents in Zagreb is 18%).

<http://bit.ly/2HCP3yM>

Is revenue generated by the sale of tokens:

Subject to VAT?

ECJ ruling no. C264/14 applies and Croatian Tax Department explicitly quoted such ruling. Namely, in terms of VAT, transactions including virtual currencies should be interpreted as financial transactions and as such are exempt. The respective decision refers to purchase and sale of bitcoin. In that respect, this decision would likely apply to payment tokens.

Although there is no explicit regulation or opinion mentioning sale of tokens, sale of payment tokens would not likely be subject to VAT.

However, for sale of other types of tokens (since they are not legally defined yet) it is difficult to say what the VAT treatment might be.

Subject to corporate tax?

Although there is no explicit regulation or opinion of relevant authorities mentioning sale of tokens, corporate tax might apply to revenue from sold tokens (i.e. when cryptocurrencies acquired by ICO are cashed in).

Corporate tax is levied at a rate of 12% for revenue less than HRK 3 million (approximately EUR 400,000.00) and 18% for more.



France

To what extent is a token sale (ICO) permitted?

Currency token/Payment token

A payment token is considered to be a virtual currency or crypto asset. Currently, the ACPR and the Banque de France do not classify payment tokens as currencies or as means of payment in the legal sense of the term. They are therefore not subject to the regulatory framework for means of payment.

Utility token

Currently, a utility token is considered as a virtual good, giving rights to access to services or goods.

Asset token

An asset token is a token qualified as a financial instrument in the meaning of the Annexe I of the Directive 2014/65/UE.

Under what conditions do local laws apply to ICOs?

At this stage, there is no applicable law in France applying to the marketing of utility tokens, nor payment tokens whatever the nationality of the issuer of the tokens.

We expect the French Government to propose a project of law by the end of 2018.

Statements from authorities and/or legislator

AMF

15 March 2018: AMF issued a warning on a list of unauthorised crypto-asset investments platforms.

Since December 2017, the AMF has included crypto assets in its list of unauthorised other miscellaneous assets proposals, some of which are presented as crypto currencies.

<http://bit.ly/2FGHlq7>

22 February 2018: AMF made a statement on offers of cryptocurrency derivatives.

Following an analysis of the legal qualification of cryptocurrency derivatives, the AMF has concluded that platforms which offer these products must abide by the authorisation and business conduct rules, and that these products must not be advertised via electronic means.

<http://bit.ly/2GDMNrK>

4 December 2017: AMF and ACPR made a statement on virtual currencies which highlighted the risks associated with investing in cryptocurrencies.

The AMF and the ACPR have issued a press release to underline that the purchase/sale of, and investment in, Bitcoin occurs outside the scope of any regulated market, and investors are not protected from any unexpected collapse in value.

<http://bit.ly/2FIdwWU>

Is the revenue generated by the sale of tokens:

Subject to VAT?

Yes.

Subject to corporate tax?

Yes.



Germany

To what extent is a token sale (ICO) permitted?

Currency token/Payment token

Tokens which are solely used for means of payments are permitted. Because the German BaFin qualifies most tokens as financial instruments, a few restrictions apply, for example with regard to investment advice or 'dealing on own accounts'.

Under certain conditions tokens may be qualified as a security, because the BaFin takes the view that a securitisation in a physical deed is not necessary in case Blockchain technology is used. In our opinion, however, this should only apply in case of tokens that are structured under the private law of another country than Germany, but marketed in Germany.

Utility token

Tokens which can be used as a means of payment and which are linked to a right or a claim of its holder are permitted unless they are qualified as e-money. E-money is a monetary value which contains a claim against the emitter, which is issued against money and accepted by third parties as a means of payment. Permission to issue e-money is hard to obtain, which is why token designs are often designed in a way to avoid a qualification as e-money. For example, the third parties are often removed and replaced by the emitter.

As regards the qualification as financial instruments and securities, the same as stated above applies.

Asset token

Tokens which are linked to an asset are permitted. However, it has to be born in mind that some assets are themselves regulated. For example, a title in a land plot requires the involvement of a notary.

As regards the qualification as financial instruments and securities, the same as stated above applies.

Under what conditions do local laws apply to ICOs?

German e-money, securities and asset investment laws apply in the case that the respective product is marketed in Germany. Whether a product is marketed in Germany depends on a variety of factors. For example, if a website is provided in the German language by a German company, there is a strong argument that the products offered are marketed in Germany.

Statements from authorities and/or legislator

BaFin

The BaFin warned consumers against investing in ICOs and issued a paper on the legal qualification of ICOs (German only). In essence, the BaFin has not yet provided clear guidance, but mainly states that each case has to be assessed individually.

<http://bit.ly/2m2h75v>

<http://bit.ly/2phCm4I>

Federal Ministry of Finance

The Federal Ministry of Finance stated that revenue achieved through cryptocurrencies is not subject to VAT. This statement complies with a decision of the ECJ regarding the VAT exemption of bitcoin.

<http://bit.ly/2pk3WhE>

<http://bit.ly/2Gzkk6g>

Is revenue generated by the sale of tokens:

Subject to VAT?

As a rule, no, in the case of currency tokens, but likely in the case of utility tokens and asset tokens. This means that where more than a token is sold, but also a right, VAT may well apply.

Subject to corporate tax?

Usually yes.



Hungary

To what extent is a token sale (ICO) permitted?

In Hungary, there is no specific regulation regarding ICOs so far.

Statements from authorities and/or legislator

There are no binding statements by the Hungarian authorities regarding ICOs. National Bank of Hungary (*Magyar Nemzeti Bank – MNB*) The financial services regulator, MNB, issued two warnings to those investors who use or invest in cryptocurrencies, such as bitcoin. In 2016, the MNB emphasised that central banks and financial services authorities do not supervise, authorise or register cryptocurrencies so the risk is extremely high. MNB also states that there are no specific rules on liabilities, warranties and reimbursement of damages.

<https://bit.ly/2GdRirT>

In 2017 the MNB, also on the basis of the similar press releases of ESMA, highlighted the high volatility and liquidity problems of tokens. The MNB sees a further potential risk in the unregulated market since ICO whitepapers contain only limited, and often highly optimistic, information for investors. These investors may in turn be unable to fully identify the potential risks and potentially even lose their full capital in the starting phase of their project. The MNB underlines again that the regulators cannot protect harmed investors. Finally, the MNB draws the attention to the risks of money laundering and fraud. As for its competence, MNB declared that it does not supervise those financial institutions which are engaged in cross-border ICOs but licensed somewhere else in the EU. The MNB shall decide on a case-by-case basis whether an ICO from a Hungarian person/company falls within its competence.

<https://bit.ly/2pMe06P>

It remains to be seen how the MNB's approach will formulate the Hungarian market. Last year, the first Hungarian ICO (conducted by a medical services comparison website) happened outside Hungary – in Estonia.

The MNB is also open to new technology and established the Innovation Hub in order to contribute to the development of the FinTech sector. Through its information repository, communication hub and regulatory support platform the MNB Innovation Hub helps to identify legal obstacles and to improve feasibility of innovative ideas. The online platform provides connection between the supervisory authority and the innovative domestic institutions (FinTech firms, banks, insurers, etc.), and supports the awareness of international best practices. The Innovation Hub commenced its operation in Q1 of 2018.

<https://bit.ly/2I7AC5Y>

The MNB is also planning to establish the Regulatory Sandbox, a regulatory framework used for testing the innovative technologies of fintech firms and traditional financial service providers (banks, investment firms, insurers).

<https://bit.ly/2pJZ6uo>

Is revenue generated by the sale of tokens:

Subject to VAT?

Hungarian tax authorities have not yet expressed any opinion in connection with the sale of tokens.

Subject to corporate tax?

Hungarian tax authorities have not yet expressed any opinion in connection with the sale of tokens.



Italy

To what extent is a token sale (ICO) permitted?

A specific regulation for ICOs is not currently existing in Italy. As such, neither tokens nor cryptocurrencies are regulated by any applicable legal provision such as those on securities or assets. On the other hand, entities or undertakings involved in the negotiation of cryptocurrencies may be, in certain cases, subject to Italian laws such as the Consumers' Code.

Statements from authorities and/or legislator

The Bank of Italy recently launched the 'Fintech channel' to allow interested users to interact with the Authority.

The National Authority for Companies and Stock Exchanges declared that bitcoins, cryptocurrencies and financial instruments related to them hide several risks. In particular, ICOs hide a number of underlying risks.

Ongoing public consultation by the Ministry of Economy and Finance on the use of virtual currencies and anti-money laundering obligations. It is herein clarified that crypto-currencies '*may be used as a method of purchase of goods or services...although they are not issued by a central bank or public authority, nor linked to a currency having legal value*'.

The Italian Competition and Consumers' Authority, in the case PS10550 - ONE COIN/ONE NETWORK SERVICES LIMITED – VENDITA PIRAMIDALE, fined certain undertakings involved in the sale crypto-currency for violations of the Italian Consumers Code.

Is revenue generated by the sale of tokens:

Subject to VAT?

In principle yes, provided that there is a link with the Italian territory.

Subject to corporate tax?

Yes if the seller has a fiscal domicile in Italy.



The Netherlands

To what extent is a token sale (ICO) permitted?

Currency token/Payment token

Cryptocurrencies are accepted as a way of payment only on a voluntary basis by certain parties. Consequently, cryptocurrencies will not qualify as money from a legal point of view. If an ICO is structured as a currency/payment token, it falls outside the scope of the Dutch Financial supervision Act (*Wet op het financieel toezicht*, 'FSA'), unless the tokens qualify as securities within the meaning of the FSA. Reference is made to 'asset token' below.

Utility token

A utility token is neither a derivative nor asset-backed, but could be considered a right to use or consume within a Blockchain platform. The focus on use, rather than profit, clearly distinguishes them from asset tokens. In order to determine whether a utility token qualifies as a security, it is important to focus on the economic function and purpose of the token. Consequently, tokens which sole purpose is to confer digital access rights to an application or service will not qualify as securities. In this event, a utility token ICO is permitted in the Netherlands.

Asset token

It is prohibited to offer securities to the public in the Netherlands, unless a prospectus approved by the competent authority has been made generally available, or an exemption applies. Securities include a negotiable share or other negotiable instrument or right considered equivalent. Asset tokens can be structured very similarly to a share, including voting rights in the project as well as returns from the project, in which case they could qualify as securities. A token must be negotiable to qualify as a security. It needs to be assessed on a case-by-case basis whether asset tokens qualify as securities within the meaning of the FSA.

Under what conditions do local laws apply to ICOs?

Several Dutch regulatory requirements are triggered in the event that services are deemed to be performed 'in the Netherlands'. In order to determine whether an

activity is considered as such, the following indicators could be relevant *inter alia*: which disclaimers have been used, use of Dutch as the language of the activities, canvassing of residents in the Netherlands, supply of information about the Dutch tax system, and references to or the supply of information about Dutch laws.

Statements from authorities and/or legislator

Autoriteit Financiële Markten

The Dutch Authority for Financial Markets (*Autoriteit Financiële Markten*), warns that ICOs are extremely risky and highly speculative investments. They say that issuance of digital tokens is vulnerable to misleading information, fraud and manipulation and therefore advises consumers to avoid investing in ICOs.

<http://bit.ly/2FX6Gfk>

De Nederlandsche Bank

The Dutch Central Bank (*De Nederlandsche Bank*) states that financial entities involved in the offer of ICOs run the risk of getting themselves involved in manipulation, money laundering, terrorism financing and other fraudulent practices.

<http://bit.ly/2FOk1n3>

Ministry of Finance

The Ministry of Finance has announced to investigate whether it is possible to have introduce legislation on ICOs, comparable to the rules which apply on IPOs. The aim is to create legislation which leaves room for the technical aspects of ICOs and at the same time puts the Netherlands on the first row when it comes to legislation on ICOs and cryptos.

<http://bit.ly/2G0oO7X>

Is revenue generated by the sale of tokens:

Subject to VAT?

No (VAT may be due if the token entitles the investor to additional rights)

Subject to corporate tax?

Yes (applicable tax regime depends on characteristics and civil qualification of the token)



Singapore

To what extent is a token sale (ICO) permitted?

Currency token/Payment token

The sale of currency tokens/payment tokens is permitted. At present, the issuance of such tokens is not regulated by the Monetary Authority of Singapore and only cryptocurrency intermediaries/exchanges have to comply with Anti-Money Laundering and Countering the Financing of Terrorism requirements. However, this may change in the future as the Monetary Authority of Singapore has proposed changes to the payments framework in Singapore which if enforced will potentially regulate dealings with currency tokens/payment tokens.

Utility token

The sale of utility tokens is permitted and not subject to regulatory oversight provided that the utility token does not constitute a capital market product as regulated by the Securities and Futures Act. By way of illustration, if the utility tokens are used solely to access a platform and do not provide the holder with any other rights or functions attached to it, the tokens will not constitute capital market products regulated under the Securities and Futures Act.

Asset token

The sale of asset tokens is permitted. However, asset tokens are likely to constitute shares, debentures or units in a collective investment scheme and therefore the issuance of such tokens will need to comply with the Securities and Futures Act and the Financial Advisers Act.

Under what conditions do local laws apply to ICOs?

Local laws apply to all ICO operators in Singapore. Where the operator is located in another country, but directs or targets the marketing of the ICO at persons in Singapore, the local law will apply extra-territorially to the operator's activities.

Statements from authorities and/or legislator

Monetary Authority of Singapore – A Guide to Digital Token Offerings

General guidance published by the financial services regulator on the application of the securities laws to the offers or issues of digital tokens in Singapore.

<http://bit.ly/2zBaAal>

Monetary Authority of Singapore – Consumer Advisory on Investment Schemes Involving Digital Tokens (Including Virtual Currencies)

While the financial services regulator has not issued an outright ban on ICOs, it has instead warned consumers to be mindful of the potential risks of digital token and virtual currency-related investment schemes.

<http://bit.ly/2zBaAal>

Is revenue generated by the sale of tokens:

Subject to VAT?

Yes.

Subject to corporate tax?

Yes.



Slovenia

To what extent is a token sale (ICO) permitted?

In Slovenia, there is currently no legal classification of tokens and cryptocurrencies in place. Similarly, a specific regulatory framework for ICOs does not exist. Each ICO must be evaluated separately in order to determine whether it may fall within the scope of existing regulations (e.g. Financial Instruments Market Act, Investment Funds and Management Companies Act etc.). However, so far Slovenian regulatory authorities have not applied existing local securities and financial market regulations to ICOs.

Under what conditions do local laws apply to ICOs?

There is no specific local law in Slovenia applicable to ICOs.

Statements from authorities and/or legislator

ATVP (Slovenian Securities Market Agency)

ATVP (Slovenian Securities Market Agency)

In January 2018, ATVP issued consultation paper with respect to preparation of regulatory framework for ICOs. According to ATVP, ICO is a specific transaction that differs from the public offering of securities regulated by Financial Instruments Market Act (ZTFI). Further, ATVP states that although certain coins/tokens have certain substantive characteristics of “transferable securities”, they are not covered by existing rules and fall outside the regulated environment. Therefore, ATVP warns that ICOs are highly risky and speculative investment. ATVP compares ICOs also to alternative investment funds (AIF) by stating that even though ICOs so far the purpose of issuing tokens was not to create a pooled return for investors, it is not possible to exclude the possibility that in the future some types of ICOs could be considered as AIFs. ATVP mentions that under certain conditions, tokens could be recognized also as (derivative) financial instruments.

<https://bit.ly/2I4AVOS>

Slovenian Central Bank (BS)

On 18 January 2018, the Slovenian Central Bank issued a statement that trading of virtual currencies in Slovenia is not systemically regulated and supervised. Pursuant to Foreign Exchange Act (ZDP-2) virtual currencies cannot be defined as foreign currencies as well as they do not

satisfy the criteria prescribed in Payment Services and Payment Systems Act (ZPlaSSIED) for an electronic money. They should also not be considered monetary assets or financial instruments. Nevertheless, BS states that it is legal to accept virtual currencies as a payment instrument in Slovenia.

<https://bit.ly/2GvxVxY>

Financial Administration of the Republic of Slovenia (FURS)

Over the last year, FURS has issued several guidelines on the tax treatment of virtual currencies. In its last opinion dated January 2018, FURS states that virtual currencies are not monetary assets nor financial instrument. Further, FURS claims that income related to sale of tokens (within the framework of ICO) or virtual currencies is in general subject to corporate tax. Pursuant to Value Added Tax Act (ZDDV-1), sale of virtual currencies can be considered as a financial transaction that is in general exempt from VAT.

FURS statement on tax treatment of operations related to virtual currencies

<https://bit.ly/2I5ifP8>

Slovenian Office for Money Laundering Prevention

Slovenian Office for Money Laundering Prevention has issued a formal statement stating that the AML regime should in general fully apply to the issuance and trading with virtual currencies.

<https://bit.ly/1lIC7XV>

Is revenue generated by the sale of tokens:

Subject to VAT?

Currency tokens: As a rule, sale of such tokens is not subject to VAT.

Asset and utility tokens: Depending on the rights embodied, transactions with such tokens can be subject to VAT, whereby taxation depends on the content of respective token and has to be assessed on case-to-case basis. If the issued tokens are specifically designated for the purchase of particular products/services, the issuance of tokens is subject to VAT.

Subject to corporate tax? Yes.



Spain

To what extent is a token sale (ICO) permitted?

On the 8th February 2018 the Spanish Securities Market Commission (CNMV) has issued a statement '*Consideraciones de la CNMV sobre 'criptomonedas' e 'ICOs' dirigidas a los profesionales del sector financiero*' (CNMV considerations on cryptocurrencies and ICO addressed to the financial sector professionals):

The CNMV is aware of a possible lack of adequacy of the regulatory framework to these sort of issuances, offerings and instruments as well as some new business models and digital collaboration. The difficulty of applying the rules in a digital and essentially transnational context also obliges an international coordination effort and the CNMV will be in contact and coordinated with other authorities, particularly, ESMA and other European regulators and supervisors.

Without prejudice to the foregoing, the CNMV considers that much of the transactions articulated as ICOs should be treated as issuances or public offers of financial instruments, and therefore subject to securities markets legislation and rules (MiFID, Transparency Regime, Prospectus regime). This is based, inter alia, on the broad concept of securities contained in article 2.1 ('*The right of patrimonial content, irrespective of its denomination, which by its own legal configuration and transmission regime, is susceptible to widespread and impersonal traffic in a financial market*') of the Securities Markets Act ('*Real Decreto Legislativo 4/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Mercado de Valores*').

In this respect, CNMV considers that the following description and features will make those tokens and offer fall under the Securities Markets Act:

- 'Tokens' that grant rights or expectations of participation in the potential revaluation or profitability of businesses or projects or, in general, that they present or grant equivalent rights or like those of the shares, obligations or other Financial instruments included in article 2 of the Securities Markets Act.
- 'Tokens' which give rights of access to services or to receive goods or products, which are offered by referring, explicitly or implicitly, to the expectation of

obtaining by the purchaser or investor a benefit due to or related to its revaluation or some remuneration associated with the instrument or mentioning its liquidity or possibility of negotiation in markets equivalent or purportedly like the securities markets subject to regulation.

In cases of ICOs that do not have the consideration of public offer (to be directed to less than 150 investors, to establish a minimum investment of 100.000 euros or to assume a total amount less than 5 million euros) article 35.3 of the Securities Markets Act will be of application and therefore: if the placement is carried out using any form of media communication or advertising a financial institution authorized to provide investment services (placement and or underwriting, as the case may be) must intervene for the purposes of marketing.

Finally, it is important to note that, irrespective of the place of issuance of the 'tokens', if the issue comprises those criteria (and therefore can be considered an issuance of negotiable securities and/or financial instruments as regulated definition) its active marketing in Spain (of what it may be indicative, for example, that the availability of Web pages in Spanish by offering the tokens) would also be subject to the securities markets laws and regulations. Please note that, up-to-date, no ICO has been registered yet nor authorised in Spain by CNMV and/or Bank of Spain and therefore in case of any already carried out it may not benefit of the protections or warranties granted by the EU and Spanish regulations.

CNMV has accompanied this statement with some warnings related to the risks of:

- The information attached to an ICO not being sufficient or appropriate.
- The difficulties to claim or resolve any controversies or to be resolved in Spain since several ICOs are offered on a cross-border basis; and
- Losing the investment and having liquidity and volatility problems upon subscribing an ICO.

Additionally, the CNMV has issued another statement warning about the different methods used to commercialise cryptocurrencies and the potential issues

related to those marketing methods and issuing some preliminary guidelines about ICOs in Spain.

This statement gathers a preliminary study carried out by the CNMV concluding that the CNMV considers that the tokens issued within the framework of an ICO should be treated as transferable securities pursuant to article 2 of the Spanish Securities Market Law.

Currency token/Payment token

The above rules shall apply.

Utility token

The above rules shall apply.

Asset token

The above rules shall apply.

Under what conditions do local laws apply to ICOs?

The above rules shall apply.

Statements from authorities and/or legislator

BoS and CNMV joint statement:

<http://bit.ly/2G5JBaf>

CNMV statement:

<http://bit.ly/2nTGk2G>

Is revenue generated by the sale of tokens:

Subject to VAT?

ASpanish authorities have not explicitly treated indirect taxation issues about sale of tokens.

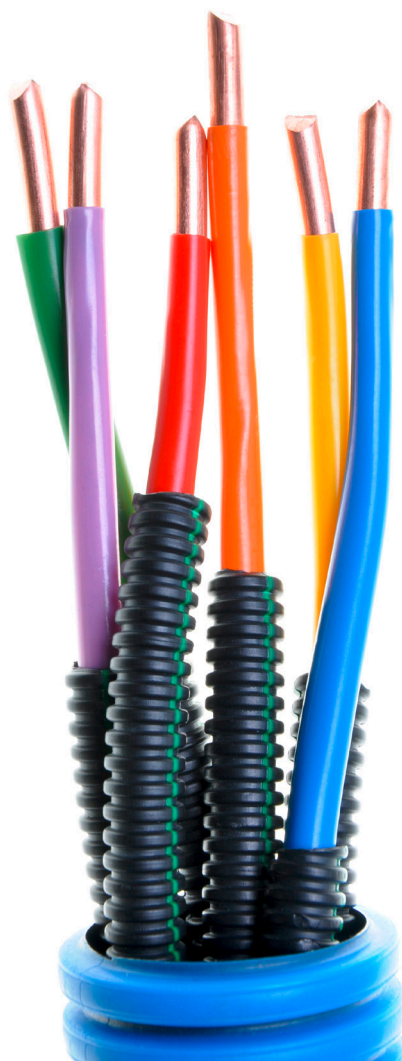
In accordance to the ECJ case C 264/14 Hedqvist, Spanish tax authorities consider that the exchange of legal currencies for bitcoin is exempt from VAT.

In that respect, this decision would likely be applicable to payment and asset tokens. However, sale of utility tokens could in principle be subject to VAT (supply of goods or services).

Subject to corporate tax?

Although the Spanish authorities have not explicitly treated direct taxation issues about sale of tokens, CIT should apply to the sale of tokens, except for tokens qualified as equity (asset token) or debt (payment token).

The applicable rate would be the CIT general rate of 25%.





Switzerland

To what extent is a token sale (ICO) permitted?

Generally speaking, Switzerland is an ICO friendly country. However, depending on (a) when the ICO takes place, i.e., when the token does not yet exist but the claims are tradeable ('Pre-phase') or only when the token exists ('Token phase'), (b) the type of the token, i.e., currency/payment token, utility token, or asset token, and (c) the function of the party involved, i.e., issuer or financial intermediary, ICOs may be subject to certain restrictions.

The following considerations are only of indicative nature. ICOs and tokens vary considerably, meaning that each ICO and each token must be looked at individually. For example, in some (rather rare) cases, in addition to the restrictions discussed below, an ICO may also fall under the Swiss Banking Act, the Swiss Collective Investment Schemes Act, or the prospectus duties under the Swiss Code of Obligations.

In the pre-phase, all types of tokens qualify as securities. Accordingly, as a rule, the financial intermediary involved in the ICO, if any, but not the issuer requires a securities dealer license under the Swiss Stock Exchange and Securities Trading Act. On the other hand, as a rule, the pre-phase does not fall under the Swiss Anti-Money Laundering Act ('AMLA').

Currency token/Payment token

Pre-phase: see above.

Token-phase: The tokens do not qualify as securities but fall under the AMLA. The requirements thereunder may be fulfilled by the financial intermediary involved, if any. Otherwise, they must be met by the issuer.

Utility token

Pre-phase: see above.

Token-phase: The tokens do not qualify as securities, if they are exclusively functioning utility tokens, but do qualify as securities if they have also (or only) an investment function. Depending on whether the tokens qualify as securities, the financial intermediary involved may or may not require a securities dealer license (whilst such requirement applies to the issuer only in exceptional cases). As a rule, the AMLA does not apply.

Asset token

Pre-phase: see above.

Token-phase: The tokens qualify as securities.

Accordingly, as a rule, the financial intermediary involved in the ICO requires a securities dealer license whilst such requirement applies only exceptionally to the issuer, i.e., where the tokens qualify as derivatives. As a rule, the AMLA does not apply.

Under what conditions do local laws apply to ICOs?

Roughly speaking, Swiss law applies when a party involved is domiciled or has a physical presence in Switzerland. Also, Swiss law may apply to cross-border offerings targeting Swiss investors.

Statements from authorities and/or legislator

FINMA

The Swiss Financial Market Supervisory Authority FINMA published in particular the following:

Guidance 04/2017 on the Regulatory Treatment of Initial Coin Offerings of 29 September 2017.

<http://bit.ly/2HG3oKR>

Guidelines for Enquiries Regarding the Regulatory Framework for Initial Coin Offerings (ICOs) of 16 February 2018.

<http://bit.ly/2BzA88M>

Is revenue generated by the sale of tokens:

Subject to VAT?

Currency tokens: As a rule, no.

Asset and utility tokens: Depending on the rights embodied, yes.

Subject to corporate tax?

As a rule, revenues derived from an ICO qualify as taxable income on the level of the ICO company. In most cases, the ICO company invests the funds in its own business and may therefore apply a tax deductible provision for R&D in the same amount (which will be offset against its future development costs). Consequently, the ICO would not trigger corporate income taxes at this stage.



United Kingdom

To what extent is a token sale (ICO) permitted?

Currency token/Payment token

Generally, currency tokens/payment tokens would not amount to a 'specified investment'. However, care should be taken to determine whether the token amounts to a type of 'e-money', in which case the token issuer is likely to need to be authorised/registered with the Financial Conduct Authority (FCA).

Utility token

It is possible to structure a utility token in such a way that a utility token would not amount to a 'specified investment' under UK law. In this case, an ICO relating to a utility token is unlikely to amount to carrying on any regulated activities.

Asset token

Depending on how they are structured, asset tokens are likely to fall within the definition of a 'specified investment'. If this is the case, firms involved in such an ICO may be conducting regulated activities, such as arranging deals investments.

Under what conditions do local laws apply to ICOs?

As mentioned in above, where the token amounts to a 'specified investment' then the UK financial services laws are likely to apply. In addition, the marketing rules may also apply to the ICO, such as the financial promotion regime and the prospectus rules.

Firms would also need to consider other legal requirements, such as in relation to anti-money laundering requirements.

Statements from authorities and/or legislator

Financial Conduct Authority (FCA)

The FCA has stated that whether an ICO falls within their regulatory boundaries or not would be decided on a case-by-case basis.

<http://bit.ly/2w4Bp6e>

Is revenue generated by the sale of tokens:

Subject to VAT?

The taxation of each transaction and cryptocurrency will

be considered by HM Revenue & Customs ('HMRC') on a case-by-case basis. HMRC's provisional position is set-out in *'Revenue and Customs Brief 9 (2014): Bitcoin and other cryptocurrencies'* which primarily focuses on Bitcoin. HMRC's provisional position is that the issue of tokens do not constitute an economic activity for VAT purposes, and therefore, no VAT will be chargeable on the issue or transfer of tokens.

VAT will be due in the normal way in respect of any supplies of goods or services sold or purchased in exchange for tokens. However, HMRC's provisional position is that no VAT will be due in respect of the transfer of the tokens themselves, as this would be an exempt supply.

Subject to corporate tax?

Again, the taxation of each transaction and cryptocurrency will be considered by HMRC on a case-by-case basis.

If the ICO is akin to a share subscription or bond issuance, being a form of fundraising by the company concerned, subscriptions received for the ICO are unlikely to be subject to UK corporation tax. However, if proceeds of the ICO constitute profits of a trade, such proceeds are likely to be subject to corporation tax. The tax treatment will therefore follow the accounting treatment in the first instance.

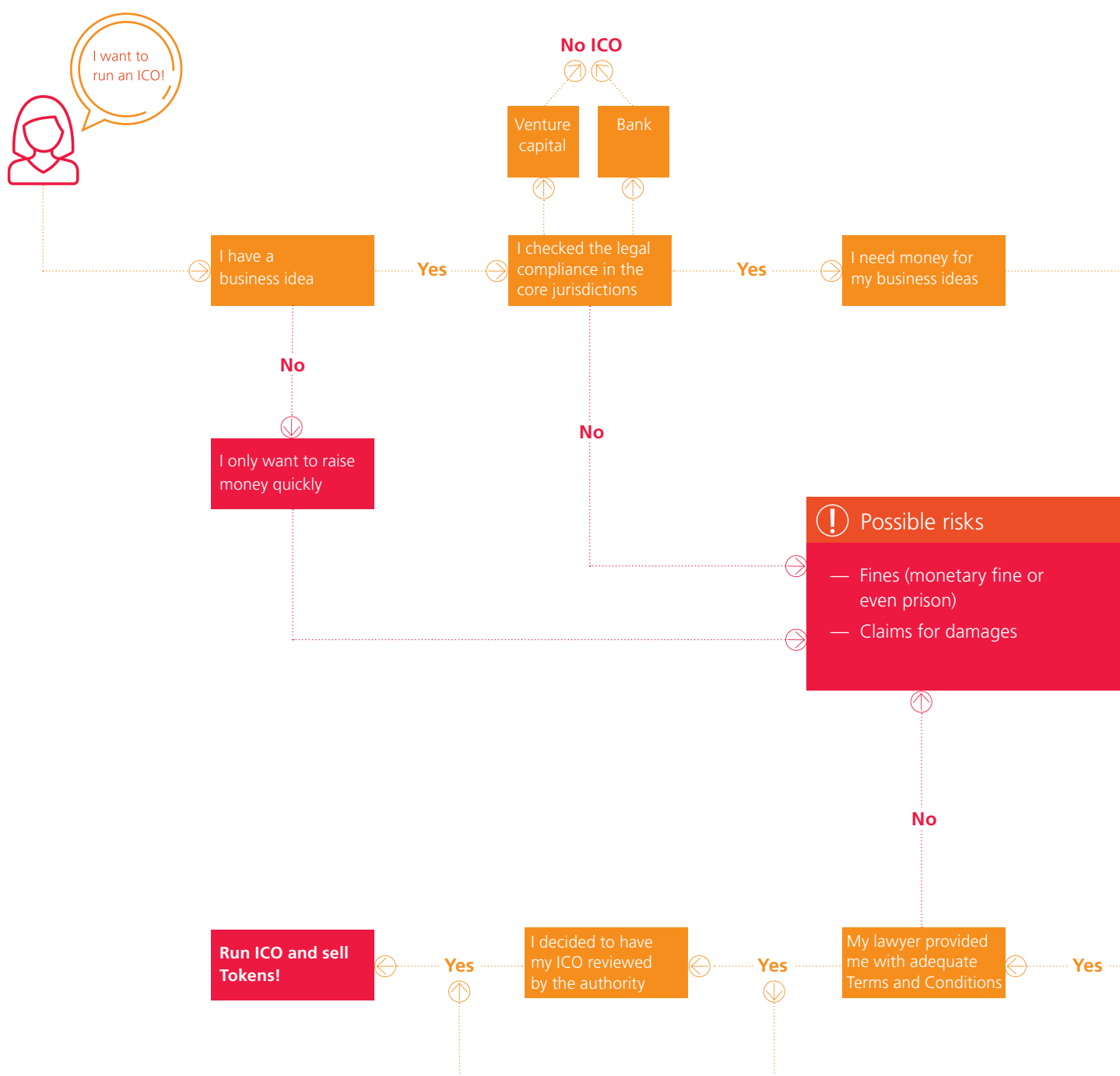
Pursuant to HMRC's Capital Gains Manual at CG12100 (*Introduction and computation: chargeable assets: Intangible assets: Cryptocurrencies*), we understand that HMRC will not recognise cryptocurrency tokens as the equivalent of a national currency. As such, transactions in which tokens are used as consideration given or received are likely to be treated by HMRC as *'barter transactions'* subject to corporation tax on chargeable gains.

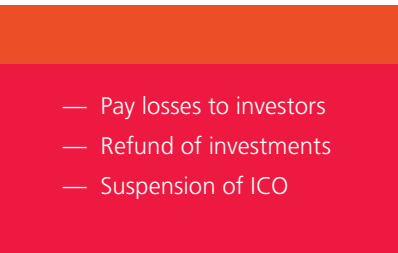
To the extent that a corporate entity holds tokens on its balance sheet, for example having received tokens in consideration for the supply of services, pursuant to HMRC Brief 9, any exchange movements against the company's functional currency are likely to be subject to the general rules on the taxation of foreign currencies and loan relationships.





How to successfully run an ICO from a lawyer's perspective







Delivering ICO advice

Experience shows that ICOs generally progress through several phases. Each phase needs careful consideration, because variations in the token design or the selection of the core markets have significant impacts on the legal qualification and legal documents. CMS delivers legal support in all phases.

Phase





Selected experience

In 2017 and 2018 CMS has advised more than 25 companies based in our jurisdictions about the regulatory, tax and civil law aspects of an ICO including the following:

Otonomos

Advised on Blockchain enabled virtual private share trading and cloud-based company administration services.

Large market player for learning and educational services

Advising on AI, Blockchain technology and ICO.

Zonafide

Advised the digital wallet platform on its ICO in 2018.

Evident

Advised this Blockchain, Ethereum and token-based service that turns data into proof of evidence chains on its ICO which launched Q1 2018.

Modex

Advised this Smart Contract Marketplace and app ecosystem on its ICO which launched Q1 2018.

LegalThings Netherlands

Advising on the introduction of tokens as digital representation of shares.

London Football Exchange

Advising on the establishment of this exchange and ecosystem which relates to the football industry, including its ICO and related matters.





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