



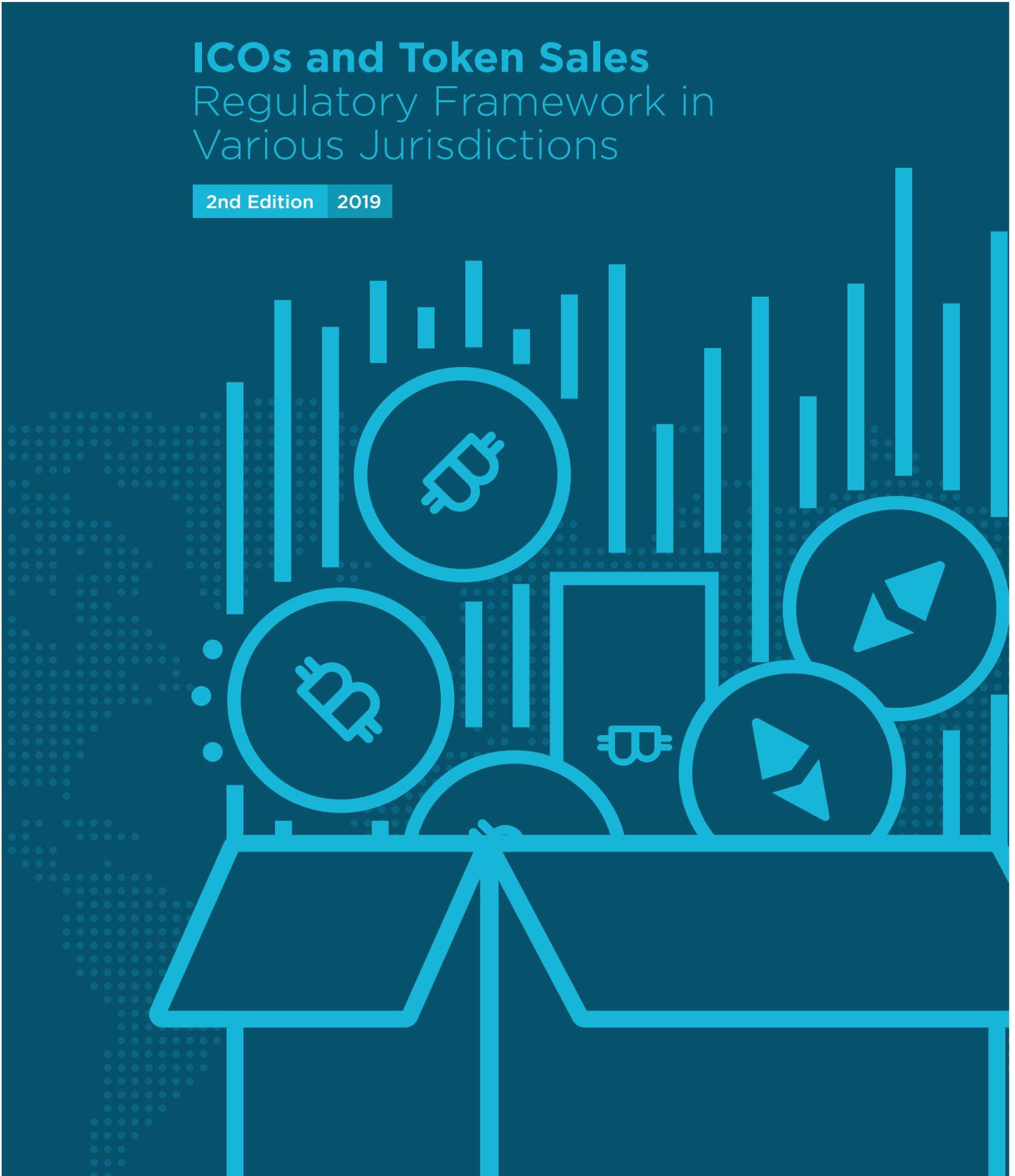
LEGALINK

INTERNATIONAL BUT PERSONAL

ICOs and Token Sales

Regulatory Framework in Various Jurisdictions

2nd Edition 2019



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THE **13** QUESTIONS WE ASKED

- 1 Does your country allow or prohibit ICOs and Token Sales?
- 2 Does your country regulate ICOs and Token Sales?
- 3 If your country regulates ICOs and Token Sales, what are the names of the government agencies responsible for regulating them?
- 4 If your country regulates ICOs and Token Sales, please provide a short summary of the regulatory framework. For example, do ICOs and Token Sales need to be registered or comply with any rules; or can they only be sold to certain types of purchasers/investors.
- 5 Please provide any additional information you feel is important to understanding ICO and Token Sale regulation in your country.
- 6 If a foreign entity conducts an ICO and offers tokens to residents of your country, will your government require the foreign entity to comply with any rules and regulations? If so, please provide an overview of how ICOs conducted by foreign entities are regulated by the government of your jurisdiction.
- 7 What is the legal nature of crypto in your country (for example, is crypto considered a security, commodity, currency etc.)?
- 8 Has the government of your country prosecuted, civilly or criminally, any ICO issuers, token developers or crypto exchanges for violating your country's laws? If so, please provide an executive summary of the most significant prosecution(s).
- 9 In your country, are there any significant commercial disputes or civil cases (non- government) involving crypto? If so, please provide an executive summary of the most significant dispute(s)/ case(s).
- 10 Does your jurisdiction tax crypto transactions? If so, please provide a basic explanation of how and at what rate they are taxed.
- 11 Separate from ICOs, does your jurisdiction regulate crypto trading or crypto exchanges? If so, please provide an overview of the regulation.
- 12 Does your country offer any unique or important benefit to crypto-focused companies (for example, clear regulatory guidance)? If so, please describe the unique/ important benefit.
- 13 Please identify a point of contact at your firm for cryptocurrency- related matters.

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1 Does your country allow or prohibit ICOs and Token Sales?

Whether or not the whole of any particular ICO or token sale process or activity is free of prohibition will depend on the circumstances and will need to be considered on a case-by-case basis.

ICOs (also called coin sales or token sales, particularly before 2017) can involve raising money from the public in return for issuing virtual currency (cryptocurrency) through blockchain technology (which is essentially a growing chain of digital records linked through cryptography). However, often there are other purposes as well. For example, there is increasing marketing to consumers of arrangements in futures contracts (also known as contracts for difference or CFDs), such as financial spread bets, whereby differences in settlement are made through issuing of cryptocurrency as opposed to cash payments or the delivery of physical goods or securities.

Therefore, whilst the issuing of cryptocurrency in its own right is technically permitted:

- If the ICO or token sale involves any linked 'regulated activity', or a 'financial promotion' (essentially a communicated invitation or inducement to engage in investment activity), then it will be prohibited under legislation generally known as FSMA unless it complies with applicable regulatory requirements.
- Other regulations and laws may also make some crucial aspect of the ICO or token sale a prohibited act (e.g. prospectus regime for transferable securities, rules around alternative investment funds, laws around criminal or fraudulent activity, laws around e-commerce and marketing, laws around data protection etc.).

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2 Does your country regulate ICOs and Token Sales?

It depends on the circumstances.

The actual issuing of cryptocurrency itself through blockchain technology is not directly regulated. However, linked activity that involves regulated activity or a financial promotion under legislation generally known as FSMA is regulated.

See answers to question 1 above, and the various questions below, for further information.

3 If your country regulates ICOs and Token Sales, what are the names of the government agencies responsible for regulating them?

The Financial Conduct Authority (FCA) – to the extent applicable in the ICO or token sale process.

The FCA replaced the Financial Services Authority (FSA), and its principal office is in London. It has published regulatory frameworks and guidance through something known as the FCA Handbook (accessible via <https://www.handbook.fca.org.uk/handbook>).

4 If your country regulates ICOs and Token Sales, please provide a short summary of the regulatory framework. For example, do ICOs and Token Sales need to be registered or comply with any rules; or can they only be sold to certain types of purchasers/investors.

There is no specific or overarching regulation dealing with an ICO or token sale in the UK. Accordingly, there is no registration requirement for an ICO or token sale or a direct restriction on who can be sold a cryptocurrency.

If applicable, the direct regulator is the FCA, but other regulators may also be involved depending on which entity is raising money from the issuing of cryptocurrency.

The FCA has stated that ‘crypto assets designed primarily as a means of payment or exchange would not generally sit within the scope of FCA authority.’ However, where applicable, the Financial Conduct and Markets Act 2000 (FSMA), laws made under that legislation, and the regulatory rules and guidance published by the FCA through the FCA Handbook, for example the Perimeter Guidance manual (PERG), would be a good starting point to determine if a crucial element of raising

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or using money from the issuing of cryptocurrency is prohibited or whether the cryptocurrency involves a regulated activity.

A regulated activity in an ICO or token sale context may, for example, involve any of the following, but the regulations will need to be considered on a case-by-case basis to see if an exemption applies:

- Accepting deposits of money;
 - Issuing electronic money;
 - Dealing in investment as a principal or agent;
 - Arranging deals in investments;
 - Establishing a collective investment scheme;
- or
- Advising on investments.

An investment covered by a regulated activity could be, for example:

- A deposit of money;
- Electronic money;
- Shares or stock in share capital of a company or other body corporate or a non-UK overseas unincorporated body;
- Options;
- Futures;
- Instruments creating or acknowledging indebtedness;
- Alternative finance investment bonds;
- Government or public securities;
- Instruments giving entitlement to investments; or
- Rights to or interests in other investments.

A financial promotion may typically involve an invitation or inducement in a flyer, pitch deck, presentation, correspondence, business plan, information memorandum, white paper or offering (or even a verbal communication over a telephone or video call or in a face-to-face meeting) for one or more of the above investments being acquired.

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Any person that carries on a regulated activity without an exemption applying or without due authority can face being convicted of a criminal offence, with the sentence involving a fine, imprisonment or both.

Therefore, it is important to look at the position from an overall perspective. Some questions to assist in the analysis:

- Who is raising the money, when and where?
- Who is the money being raised from?
- What is being said for or during the raising of money?
- What will the raised money be used for?
- Are you the seller, buyer or someone helping or advising the seller or buyer of the cryptocurrency/token?
- If any aspect of the activity amounts to regulated activity or a financial promotion under FSMA, then does an exemption apply or will someone with appropriate authority and credentials be carrying on the relevant activity to assist the party raising money by issuing cryptocurrency?

5 Please provide any additional information you feel is important to understanding ICO and Token Sale regulation in your country.

The FCA is generally cautious and has, amongst other things, warned that:

- The buyer of cryptocurrency is 'extremely unlikely to have access to UK regulatory protections like the Financial Services Compensation Scheme or the Financial Ombudsman Service'.
- There is a potential for fraud: some entities raising money from cryptocurrency sales 'might not have the intention to use funds raised in the way set out when the project was marketed'. In fact, the FCA has issued a 'Dear CEO' letter openly on crypto assets and financial crime (<https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-crypto-assets-financial-crime.pdf>).

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- The value of cryptocurrencies may be ‘extremely volatile - vulnerable to dramatic changes.’
- Documentation involved in an ICO may be ‘unbalanced, incomplete or misleading.’
- Typically ICOs, often based outside of the UK, are for projects that are in an early stage of development and ‘their business models are experimental’.

A suspected scam ICO can be reported to the FCA via <https://www.fca.org.uk/consumers/report-scam-unauthorised-firm>.

6 If a foreign entity conducts an ICO and offers tokens to residents of your country, will your government require the foreign entity to comply with any rules and regulations? If so, please provide an overview of how ICOs conducted by foreign entities are regulated by the government of your jurisdiction.

A non-UK entity seeking to conduct ICO or token sale activity in the UK would generally be in the same position as a UK entity. However, there are certain exclusions that apply to overseas persons involved in certain regulated activity under legislation made under FSMA often referred to as the Regulated Activities Order (RAO).

Other exclusions under the RAO etc. may also apply.

So the factual matrix of the project would need to be carefully considered to see if a regulated activity applies and, if so, whether the non-UK entity has the benefit of any exclusion(s).

7 What is the legal nature of crypto in your country (for example, is crypto considered a security, commodity, currency etc.)?

By itself, cryptocurrency is unregulated and treated as foreign currency. Accordingly, it can be taxable depending on the circumstances. For example, HMRC (the tax authority in the UK) has stated that ‘The profits or losses on exchange movements between currencies are taxable. For the tax treatment of virtual currencies, the general rules on foreign exchange and loan relationships apply. We have not at this stage identified any need to consider bespoke rules.’

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More generally, cryptocurrency can be considered as:

- an asset (in the sense of an item owned through acquisition or otherwise);
- a virtual/digital form of payment (but not legal tender);
or
- a combination of both.

Cryptocurrency does not give any voting, dividend or capital rights (or rights or options to acquire such rights) concerning entities that raise cash in issuing cryptocurrency or tokens (unless parties to a transaction seek to agree otherwise contractually).

8 Has the government of your country prosecuted, civilly or criminally, any ICO issuers, token developers or crypto exchanges for violating your country's laws? If so, please provide an executive summary of the most significant prosecution(s).

The issuing of cryptocurrency itself, as a stand-alone activity, is not known to have been prosecuted as it is not regulated or prohibited.

The FCA is known to have opened several investigations in the past into cryptocurrency businesses to determine whether they might be carrying on regulated activities that require FCA authorisation.

The action the FCA may take can be as follows:

- issuing a consumer alert through the FCA's own website, as a warning about a particular individual, activity or firm;
- taking civil court action to stop activity and freeze assets;
- pursuing insolvency proceedings;
- criminal prosecution; or
- a combination of the above.

The UK Crown Prosecution Service's proceeds of crime unit has also been reported to have secured confiscation orders for digital currency assets found to involve criminal conduct.

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A 26-year-old known as Charlie Shrem was convicted and imprisoned as he had 'knowingly transmitted money intended to facilitate criminal activity- specifically, drug trafficking on Silk Road'.

9 In your country, are there any significant commercial disputes or civil cases (non-government) involving crypto? If so, please provide an executive summary of the most significant dispute(s)/ case(s).

Commercial disputes and civil cases are likely to be private unless and until a UK court makes an order or conviction.

No particular order or conviction stands out as sufficiently significant to summarise here. However, on the facts, a circumstance for a particular client may be significant and so case-specific legal advice should be sought.

10 Does your jurisdiction tax crypto transactions? If so, please provide a basic explanation of how and at what rate they are taxed.

Please see answer to question 8.

11 Separate from ICOs, does your jurisdiction regulate crypto trading or crypto exchanges? If so, please provide an overview of the regulation.

There is no specific regulation of crypto trading unless it involves a regulated activity. See answers to above questions for more information.

12 Does your country offer any unique or important benefit to crypto-focused companies (for example, clear regulatory guidance)? If so, please

The FCA has set up a regulatory sandbox regime allowing technology businesses (as well as already FCA-authorized firms or unauthorised firms that require FCA authority concerning regulated activity) to test innovative propositions in the market with real consumers. A range of tools were provided to sandbox firms to facilitate the testing.

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describe the unique/
important benefit.

Typically each year the FCA has two windows for applications for the regulatory sandbox, but it is best to check with the sandbox team at the FCA on 0044 2070664488 or sandbox@fca.org.uk if there is an active window open for applications, or, if no window is then open, when the next window is likely to open.

In July 2018, for example, 11 of 29 businesses that were accepted concerned testing of crypto asset-related propositions

13 Please identify a
point of contact at your
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related matters.

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