CRYPTO OVERVIEW – IRELAND

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Ireland looks to be well positioned to emerge as a leading crypto-hub as the pan-European Markets in Crypto-Assets Regulation (MiCA) gradually comes into full force across the EU. MiCA partially entered into force in June 2023 and will apply fully from December 2024. Once fully in force, MiCA will provide a harmonised regulatory framework across the EU single market which covers authorisation, transparency and disclosure requirements, operational and governance obligations, and a penalties regime for both crypto-asset issuers and crypto-asset service providers.

Crypto firms established in Ireland prior to MiCA have been regulated by the Central Bank of Ireland (CBI) and this will continue to be the case after MiCA comes into full force. Due to supervisory expectations, the vast majority of crypto firms established in Ireland have been registered and authorised by the CBI as virtual asset service providers (VASPs) and electronic money institutions (EMIs). Major industry players already authorised as both VASPs and EMIs include Coinbase and Gemini.
Looking into the future, Ireland is particularly well placed to become a jurisdiction of choice for crypto firms seeking to enter the single market. In addition to a thriving domestic fintech ecosystem, Ireland is home to many international fintechs including leading crypto exchanges. Ireland's mature tech sector provides a deep pool of young, educated, and engaged talent which will appeal to crypto exchanges looking to quickly scale their European operations.

MiCA

MiCA defines a crypto asset as a digital representation of value or rights which may be transferred and stored electronically. Crypto assets are designated into categories:

1.Electronic Money Token (EMT):

An EMT is a crypto asset which aims to stabilise its value by referencing only official currency. In this way it functions in a similar way to electronic money under the Second Electronic Money Directive, and consequently the rules and prudential requirements which apply to EMIs apply equally to EMTs and EMT issuers must be authorised either as a credit institution or EMI.

The increased likelihood of EMTs being used for payments attracts additional safeguarding requirements for funds received in exchange for EMTs, and significant EMTs will be subject to additional oversight by the European Banking Authority.

2.Asset Referenced Token (ART):

An ART is a token which aims to maintain a stable value by referencing one or more assets. ARTs are expected to be the most widely traded type of crypto asset and therefore MiCA imposes additional regulatory requirements on them. In addition to having to be authorised under the MiCA, issuers of ARTs are subject to governance obligations, and must maintain a recovery plan and hold reserve assets under certain conditions.

3.Other tokens;

Tokens other than EMTs and ARTs are subject to lesser regulatory requirements. In some cases, there is no need for providers of services related to these tokens to be authorised as Crypto-Asset Service Providers (CASPs), for example where the tokens are issued for free or are only offered to limited group of qualified investors. This derogation is to be welcomed as it paves the way for start-up issuers to safely enter limited markets without incurring the costs of authorisation.

When making a public offer of crypto assets or when seeking admission to a crypto asset trading platform, Irish domiciled crypto-asset issuers will be required to notify the CBI and produce "a crypto-asset white-paper" which details certain mandatory information relating to the issuer and the token offered. This mandatory disclosure requirement is a welcome investor protection innovation in MiCA. There is also, however, a welcome derogation from this requirement where the token is offered for free or only to a limited group of qualified investors.

This is a positive recognition of the need to minimise regulatory costs on issuers dealing with professional investors and aligns with the CBI's stated desire not to unnecessarily stifle potentially beneficial crypto products.

Crypto-Disputes in Ireland

As Ireland grows in prominence as a crypto hub, we can expect a corresponding increase both in frequency and scale of crypto related disputes. Traditionally the primary legal question for courts in crypto disputes has been to determine whether crypto assets constitute 'property' for the purposes of granting proprietary remedies. While the issue hasn't been directly addressed in Ireland as it has in the UK,[(1)] crypto assets have been included in the scope of asset seizure[(2)] and freezing[(3)] orders made by Irish courts. It seems therefore that parties can seek proprietary reliefs from Irish courts in respect of crypto disputes relating to assets held by Irish domiciled exchanges.

Perhaps of greater interest to crypto exchanges established in Ireland is the willingness of Irish courts to grant "Norwich Pharmaceutical Orders" in relation to stolen crypto assets. A Norwich Pharmaceutical Order is used to discover the identity of a wrongdoer from a third party to the litigation. The practical effect of this order is that an Irish incorporated exchange could be directed to disclose details of accounts to which misappropriated crypto assets have been traced.

Additionally, issuers of ARTs can (but are not obliged to) provide details of any dispute resolution mechanism or redress procedures established by them in their crypto-asset white paper which accompanies a public offer of a token or admission to a public exchange.

Regulatory Outlook

The CBI is supportive of financial innovation, including by crypto firms. In 2018 it established an Innovation Hub to promote direct engagement with the regulator by innovating fintech firms and by 2022 crypto and blockchain had become the biggest sector contributors.[(4)] The CBI is broadly open to allowing the Irish fintech ecosystem to harvest the benefits of innovative crypto assets for consumers, investors and the wider economy. In a recent speech Gerry Cross (Director of Financial Regulation, Policy & Risk at the CBI) reaffirmed this position while expressing the wary approach the regulator will take to riskier crypto assets such as 'unbacked' crypto – assets which derive their value solely from what customers are willing to pay for them such as NFTs.

This broadly welcoming regulatory approach will be appreciated by leading exchanges which find themselves the subject of regulatory enforcement actions elsewhere. Indeed Coinbase specifically cited the expertise and outlook of the CBI in its announcement of its decision to locate its MiCA hub in Ireland.[(5)]

Ultimately, a balance should be struck by the regulators in creating a regime that provides firm legal safeguards which will protect consumers, while also remaining flexible enough to allow this innovative space to continue to develop.

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(1) AA v Persons Unknown (2019) EWHC 3556.
(2) Criminal Assets Bureau v Mannion (2018) IEHC 729.
(3) Trafalgar Developments Ltd v Mazepin & ors (2019) IEHC 7.
(4) CBI, Innovation Hub Update 2022, itc.
(5) Coinbase, https://www.coinbase.com/blog/announcing-ireland-as-our-eu-mica-entity-location.