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ICOs and Token Sales

Regulatory Framework in Various Jurisdictions

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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?

Malta allows and encourages ICOs and token sales to be conducted from and within the country. On 1st November 2018, Malta saw the entry into force of three main pieces of legislation aimed at creating a decentralised ecosystem providing legal certainty and a degree of investor protection whilst not stifling innovation, which is seen as being intrinsic to the sector regulated.

2 Does your country regulate ICOs and Token Sales?

Malta regulates ICOs, token sales, their issuers and related service providers mainly through the Virtual Financial Assets (VFA) Act (Chapter 590 of the Laws of Malta). The Malta Digital Innovation Authority (MDIA) Act (Chapter 591 of the Laws of Malta), on the other hand, sets out a new authority – the MDIA – specifically created to promote and develop the innovative technology sector in Malta through the proper recognition of relevant innovative technology arrangements and related services. The Innovative Technology Arrangements and Services (ITAS) Act (Chapter 592 of the Laws of Malta), deals with how the MDIA shall regulate and oversee certain innovative technology arrangements such as software, code, computer protocols and other architectures which are used in the context of DLT, smart contracts and related applications. The tripartite legal framework has been enacted with a view to offering a more complete and robust regulatory system.

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

ICOs, token sales, their issuers and related service providers are regulated by the sole financial regulator in Malta, the Malta Financial Services Authority (MFSA). However, innovative technological arrangements (ITA) which are used in the context of distributed ledger technology (DLT) and related applications are regulated by the newly set up Malta Digital Innovation Authority.

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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.

As explained above in section 2, the regulatory framework is composed of the VFA Act, the MDIA Act and the ITAS Act.

The VFA Act aims to ensure investor protection and market consistency through robust regulation, with specific relevance to the issuing of DLT assets and intermediaries providing VFA services. The VFA Act distinguishes tokens into (i) virtual tokens, (ii) virtual financial assets, (iii) e-money or (iv) financial instruments. The legislative framework provides that, for a VFA to be offered from or within Malta, the issuer must be a legal entity, and it shall apply for registration with the MFSA. Such application must be done through a VFA agent and shall also include a white paper which, inter alia, must contain a detailed description of the sustainability and scalability of the proposed project. The issuer of an initial VFA offer shall appoint and retain a VFA agent at all times, and the role of such agent shall be, inter alia, to act as a liaison between the MFSA and the issuer of the VFA. The VFA agent must also consistently monitor and supervise the issuer of the VFA to ensure that it is in compliance with all the regulatory requirements and obligations. A number of ongoing obligations also subsist on the issuer, including, inter alia, record keeping, submitting of annual compliance, AML/CFT, and systems audit report on an annual basis. The issuer shall also be required to appoint a money laundering reporting officer, a systems auditor (should the issuer have innovative technology arrangements in place), a VFA agent, an auditor and a custodian.

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

In terms of the VFA Act, a VFA is defined as 'any form of digital medium recordation that is used as a digital medium of exchange, unit of account, or store of value.' The VFA Act requires prospective issuers to undergo the financial instrument test (FIT) in order to determine the nature of the DLT asset which is going to be offered. If, through the FIT, the DLT asset is classified as a

VFA, then any issuer of an ICO or any issuer of a VFA seeking admission to trading on a DLT exchange must apply, through a Malta-registered VFA agent, for the registration of its white paper with the MFSA. Should the issuer determine the instrument as being classified as either a financial instrument, electronic money or a virtual token (i.e. a pure utility token), the relevant applicable regulatory regime shall be adhered to.

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.

The offering of virtual financial assets, or the admission to trading on a DLT exchange, in a country outside Malta shall be subject to the laws of that country. However, any issuer seeking to offer DLT assets in or from within Malta is bound by the above-mentioned regulations.

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

The legal nature of a crypto asset is to be determined on a case-by-case basis, upon conducting the FIT. Crypto assets, in terms of the VFA Act, fall into four categories: (i) a virtual (utility) token which falls outside the scope of the VFA Act; (ii) a financial instrument which is regulated by MiFID II and the Investment Services Act (Chapter 370 of the Laws of Malta); (iii) electronic money which is regulated by the Financial Institutions Act (Chapter 376 of the Laws of Malta); and (iv) virtual financial assets which are regulated by the VFA Act.

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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).

Not to our knowledge.

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).

Yes, to our knowledge a civil dispute has been registered in relation to a warrant of prohibitory in junction on crypto filed in the First Hall of the Civil Court in the names of Dr Paul Micallef Grimaud (ID 67579M) as a special mandatory of the British company Global Multimedia Investment (UK) Limited, as well as of Najib Abou Hamze, a Lebanese citizen (Lebanese passport number LR0198311) v Snapparazzi Limited (C86876) and Damien Larquey (French passport number 16CT48277) of 6 Lieu Dit Mouleyre, 33410 Cardan, France. Grimaud and Hamze (the plaintiffs) alleged that Snapparazzi and Larquey (the defendants), who were entrusted with information in relation to the plaintiffs' project entitled Moneycam, which project involved the issuance of an initial coin offering, acted in bad faith and misappropriated the idea behind the Moneycam project by proceeding with the issuance of their own project, Snapparazzi. Defendants, on the other hand, rebutted the allegations by claiming that there was no contractual or quasi-contractual relationship between themselves and the plaintiffs, that there were no fiduciary or any other obligations on the part of the defendants towards the plaintiffs ,and that Snapparazzi was a product which was developed independently of Moneycam, provided that the project Snapparazzi was set up in 2017, thereby prior to the alleged misappropriation of information

and/or property of Moneycam.
By virtue of the warrant, on 27th December 2018, the court inhibited the defendants from offering, issuing and assigning tokens to third parties in relation to the initial coin offering issued by the defendant company in relation to their product Snapparazzi. Furthermore, the court inhibited the defendants from publicising and commercialising further their product Snapparazzi or any other product which has similar functions thereto. In relation to the plaintiffs' product Moneycam, the court prohibited the defendants from using, usurping and/or distributing to third parties documentation obtained from the plaintiffs or in any other way violating their obligations as fiduciaries of the plaintiffs by accessing and/or transferring assets, including bank accounts, both physical and electronic accounts (including wallets) as well as money (fiat or e-money) in such accounts, which belong to the defendant company or any other benefits in connection to Snapparazzi.

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

According to the guidelines issued by the Inland Revenue Department, where a taxpayer accepts payment in cryptocurrency, such payment shall be treated, for income tax purposes, in the same manner as payment in any other currency. Payment made by the transfer of a financial or utility token shall be treated as a payment in kind.
The guidelines also provide for the income tax treatment on the following transactions.
Transactions in coins: profit realised from the business of exchanging coins is treated for income tax purposes in the same manner as profit realised from exchanging fiat currency, and any proceeds derived from the sale of coins held as trading stock in a business is taxed as ordinary income. Where the disposal of coins held as capital assets gives rise to capital gains, such gains fall outside the scope of capital gains taxation.
Return on financial tokens: where the owner of a financial

token derives a return on his holdings in a cryptocurrency or other currency, or in kind, such return is treated as income for tax purposes.

Transfers of financial and utility tokens: the tax treatment of proceeds from the transfer of a token depends on whether the token is held as a capital asset or whether it is held for the purposes of trading. Proceeds derived from the transfer of a token in the ordinary course of business are taxed as trading income. If a financial token is not considered as a trading transaction, it may still give rise to capital gains, provided such token satisfies the definition of a security in terms of article 5 of the Income Tax Act (Chapter 123 of the Laws of Malta). Transfers of utility tokens fall outside the scope of capital gains.

Initial offerings: where the initial offering of financial tokens involves the raising of capital, the proceeds of such issue are not treated as income of the issuer and the issue of new tokens is not treated as a transfer for capital gains purposes. In the case of utility tokens, the gains or profits realised by the issuer from the provision of the services or supply of goods to the token-holder represents income for the issuer.

Treatment of DLT Assets for Stamp Duty Purposes

In terms of the Maltese Duty on Documents and Transfers Act (Chapter 364 of the Laws of Malta) (DDTA), the amount of duty due (if any) is determined by the intrinsic nature and effects of the transaction to which it refers, regardless of the form or title. The guidelines outline that, where a transaction involves a DLT asset that has the same characteristics as marketable securities in terms of the DDTA, such transfer will be subject to duty in accordance with the provisions of the DDTA.

Treatment of DLT Assets for VAT Purposes

Coins: the Hedqvist decision (Case 264/14) established that payment in cryptocurrency is to be treated for VAT purposes in the same manner as traditional currency used as legal tender. Accordingly, the exchange of cryptocurrency against legal tender falls within the

exemption under item 3(4) of part two of the fifth schedule to the Malta VAT Act covering, inter alia, currency, banknotes and coins used as legal tender. The exchange of cryptocurrencies for other cryptocurrencies or fiat currency is also exempt from VAT.

Financial tokens: for VAT purposes, it is important to analyse what the investor gets in exchange for the token. Since the token gives rise to dividends or interest payments, one must examine whether the instrument falls within item 3 of part two of the fifth schedule to the VAT Act (Chapter 406 of the Laws of Malta) as an exempt without credit supply, which specifically states that 'transactions, including negotiation, excluding management and safekeeping, in shares, interest in companies or associations, debentures and other securities, is treated as an exempt without credit supply'. Where a financial token is issued to simply raise capital, such issue does not give rise to any VAT implications in the hands of the issuer, as the raising of finance does not constitute a supply of services or goods for consideration.

Utility tokens: utility tokens are largely associated with vouchers for VAT purposes, and their VAT treatment is regulated by part nine of the fourteenth schedule to the VAT Act. Where a voucher is regarded as a single-purpose voucher (i.e. the place of supply and VAT due (if any) of the ultimate goods or services is known at the time the voucher is issued), the consideration payable for that voucher represents a payment for the supply of the underlying good or service to which the voucher relates, and VAT will be due in accordance with the rules established in the fourth schedule to the VAT Act. Multi-purpose vouchers may only be subject to VAT upon the redemption of the voucher.

11 Separate from ICOs, does your jurisdiction regulate crypto trading

Separately from ICOs, the VFA Act defines a VFA service as 'any service falling within the second schedule of the Act when provided in relation to a DLT asset which has

or crypto exchanges? If so, please provide an overview of the regulation.

been determined to be a virtual financial asset'. The VFA regulations distinguish between four classes of licences in relation to the service sought to be provided.

VFA Class 1 Service

A class 1 VFA service provider licence granted by the MFSA would authorise the VFA service provider to provide one or more of the following services.

a) Reception and transmission of orders: the reception from a person of an order to buy, sell or subscribe to virtual financial assets, and the transmission of that order to a third party for execution.

b) Investment advice: giving, offering or agreeing to give, to persons in their capacity as investors or potential investors or as agent for an investor or potential investor, a personal recommendation in respect of one or more transactions relating to one or more virtual financial assets.

c) Placing of virtual financial assets: the marketing of newly issued virtual financial assets, or of virtual financial assets which are already in issue but not admitted to trading on a DLT exchange, to specified persons and which does not involve an offer to the public or to existing holders of the issuer's virtual financial assets.

VFA Class 2 Service

A class 2 VFA service provider licence granted by the MFSA would authorise the VFA service provider to provide the services listed in class 1, together with one or more of the following services.

a) Execution of orders on behalf of other persons: acting to conclude agreements to buy, sell or subscribe to one or more virtual financial assets on behalf of other persons.

b) Portfolio management: managing or agreeing to manage assets belonging to another person, if those assets consist of or include one or more virtual financial assets or the arrangements for their management are such that the person managing or agreeing to manage those assets has a discretion to invest any of those assets

in one or more virtual financial assets.

c) Custodian or nominee services: acting as custodian or nominee holder of a virtual financial asset and/or private cryptographic key, or the holding of a virtual financial asset and/or private cryptographic key as nominee, where the person acting as nominee is so doing on behalf of another person who is providing any VFA service under the second schedule of the VFA Act or on behalf of a client of such person, and such nominee holding is carried out in relation to such service.

VFA Class 3 Service

A class 3 VFA service provider licence granted by the MFSA would authorise the VFA service provider to provide the services listed in class 1 and class 2, together with the ability to deal on own account, resulting in trading against proprietary capital resulting in conclusion of transactions in one or more virtual financial assets.

VFA Class 4

A class 4 VFA service provider licence granted by the MFSA would authorise the VFA service provider to provide the services listed in all of the abovementioned classes, together with the ability to operate a VFA exchange.

All four licence classes posit a number of requirements on the potential licence-holder, including but not limited to the setting up of the applicant as a legal person in Malta and appointing a VFA agent for the purposes of applying for the relevant licence. The application for authorisation to operate a VFA service must contain, inter alia, any documents and information that the MFSA would require, including a programme of operations setting out the system; financial projections; and information on the fitness, properness and competence of the beneficial owners, directors and senior management of the applicant; as well as evidence in relation to substance requirements in that the VFA service provider shall be operating from Malta. A number of ongoing requirements shall also be placed on the licence-holder, including the

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submission of financial information, risk management processes, internal governance policies and procedures, the submission of a compliance certificate to the MFSA on an annual basis, and security mechanisms.

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.

Malta is one of the first and only countries offering clear and robust regulations on crypto focusing on safeguarding the investors and market integrity, together with providing a much-needed legal infrastructure that is and will continue to allow further development and expansion of this thriving industry.

13 Please identify a point of contact at your firm for cryptocurrency-related matters.

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