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Government attitude and definition

UK policy thinking in relation to cryptocurrencies is still actively developing. It was first set out by the UK Cryptoassets Taskforce in its Final Report[1] (the "**Taskforce Report**"), published in October 2018, and has subsequently been developed through further work by the Taskforce authorities (HM Treasury, the Bank of England and the UK Financial Conduct Authority ("**FCA**")).

The Taskforce Report identified cryptocurrencies as a subset of the broader category "cryptoasset". It defined the latter as "a cryptographically secured digital representation of value or contractual rights that uses some type of [distributed ledger technology ("**DLT**")] and can be transferred, stored or traded electronically".[2] Within this overarching category, the Taskforce Report identified three sub-categories and offered the following (non-legislative) definitions:

"A. **Exchange tokens** — which are often referred to as 'cryptocurrencies' such as Bitcoin, Litecoin and equivalents. They utilise a DLT platform and are not issued or backed by a central bank or other central body. They do not provide the types of rights or access provided by security or utility tokens, but are used as a means of exchange or for investment.

B. **Security tokens** — which amount to a 'specified investment' as set out in the Financial Services and Markets Act (2000) (Regulated Activities) Order […]. These may provide rights such as ownership, repayment of a specific sum of money, or entitlement to a share in future profits. They may also be transferable securities or financial instruments under the EU's Markets in Financial Instruments Directive II […].

C. **Utility tokens** — which can be redeemed for access to a specific product or service that is typically provided using a DLT platform."[3]

Although UK financial regulators have issued warnings in relation to investment in cryptoassets,[4] they are not subject to a blanket prohibition or ban in the UK. However, as indicated by the definitions set out in the Taskforce Report, some cryptoassets will be subject to financial regulation (see *Cryptocurrency regulation* below). UK payment services and electronic money regulation may also be relevant, and the UK anti-money laundering ("**AML**") regime has been extended to capture activities relating to most cryptoassets (including cryptocurrencies), regardless of whether they are otherwise subject to financial regulation (see *Money transmission laws and anti-money laundering requirements* below). Cryptoassets (including cryptocurrencies) are not considered money or equivalent to fiat currency in the UK.

As noted above, the Taskforce authorities have continued to conduct further substantive work in relation to cryptoassets since the publication of the Taskforce Report. In particular:

- The FCA consulted on[5] and published[6] regulatory guidance in relation to cryptoassets (including cryptocurrencies) (the "**FCA Guidance**"). It also consulted on[7] and introduced[8] from 6 January 2021 a ban on the sale, marketing and distribution of derivatives and exchange-traded notes referencing "unregulated transferable cryptoassets" in or from the UK to retail customers.
- At the time of writing, responses are expected to two consultations on cryptoassets by HM Treasury: the first relating to changes to the UK financial promotions regime with a view to bringing otherwise unregulated cryptoassets (including cryptocurrencies) into scope (see *Sales regulation* below); and the second relating to the UK regulatory approach to cryptoassets more generally, with a focus on stablecoins (see *Cryptocurrency regulation* below).
- Although it has not decided on whether to introduce a central bank digital currency ("**CBDC**"),[9] the Bank of England has published a discussion paper on what such a CBDC would look like and has jointly created a Central Bank Digital Currency Taskforce with HM Treasury to coordinate the exploration of a potential UK CBDC.[10]

Cryptocurrency regulation

As noted above, there is no blanket prohibition or ban on cryptocurrencies in the UK. Nor does the UK have a bespoke financial regulatory regime for cryptoassets (notwithstanding that certain elements of the UK AML regime apply specifically in relation to cryptoasset business). Accordingly, whether or not a given cryptocurrency is subject to financial regulation in the UK depends on whether it falls within the general financial regulatory perimeter established under the Financial Services and Markets Act 2000 ("**FSMA**") or, as discussed in *Money transmission laws and anti-money laundering requirements* below, within the UK AML regime or the payment services and electronic money regime established under the Payment Services Regulations 2017 ("**PSRs**") and the Electronic Money Regulations 2011 ("**EMRs**").

This is reflected in the cryptoasset "taxonomy" set out in the FCA Guidance, which broadly follows the definitions set out in the Taskforce Report, but which has been refined by the FCA as follows:

Taskforce Report taxonomy	FCA Guidance taxonomy[11]
Security tokens — which amount to a 'specified investment' as set out in the Financial Services and Markets Act (2000) (Regulated Activities) Order […]. These may provide rights such as ownership, repayment of a specific sum of money, or entitlement to a share in future profits. They may also be transferable securities or financial instruments under the EU's Markets in Financial Instruments Directive II […].	**Security tokens**: These are tokens that amount to a 'specified investment' under the Regulated Activities Order (RAO), excluding e-money. These may provide rights such as ownership, repayment of a specific sum of money, or entitlement to a share in future profits. They may also be transferable securities or other financial instrument under the EU's Markets in Financial Instruments Directive II (MiFID II). These tokens are likely to be inside the FCA's regulatory perimeter.
	E-money tokens: These are tokens that meet the definition of e-money under the Electronic Money Regulations (EMRs). These tokens fall within regulation.

Taskforce Report taxonomy	FCA Guidance taxonomy[11]
Exchange tokens — which are often referred to as 'cryptocurrencies' such as Bitcoin, Litecoin and equivalents. They utilise a DLT platform and are not issued or backed by a central bank or other central body. They do not provide the types of rights or access provided by security or utility tokens, but are used as a means of exchange or for investment.	**Unregulated tokens**: Any tokens that are not security tokens or e-money tokens are unregulated tokens. This category includes utility tokens which can be redeemed for access to a specific product or service that is typically provided using a DLT platform. The category also includes tokens such as Bitcoin, Litecoin and equivalents, and often referred to as 'cryptocurrencies', 'cryptocoins' or 'payment tokens'. These tokens are usually decentralised and designed to be used primarily as a medium of exchange. We sometimes refer to them as exchange tokens and they do not provide the types of rights or access provided by security or utility tokens, but are used as a means of exchange or for investment.

In summary, the FCA Guidance taxonomy splits cryptoassets into regulated and unregulated cryptoassets. The Taskforce Report definitions of exchange tokens and utility tokens are retained, and these two sub-categories of cryptoassets comprise "unregulated tokens" in the FCA Guidance taxonomy. Cryptoassets that constitute electronic money are split out from the Taskforce Report sub-category of security tokens, and are instead labelled as "e-money tokens", and these two sub-categories of cryptoassets (i.e., security tokens other than e-money tokens and e-money tokens) comprise "regulated tokens" in the FCA Guidance taxonomy.

The kinds of instruments that are regulated under FSMA are set out in an exhaustive fashion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("**RAO**"). These are known as "specified investments" and include instruments such as shares, bonds, fund interests and derivative contracts. Therefore, in order to determine whether a given cryptocurrency is subject to financial regulation in the UK, it is necessary to analyse whether it matches the definition of a specified investment in the RAO. Those cryptoassets that do are labelled "security tokens" in the FCA Guidance and will typically be subject to UK financial regulation.

As stated by the FCA: "Any tokens that are not security tokens or e-money tokens [as to which see *Money transmission laws and anti-money laundering requirements* below] are unregulated tokens."[12] In practice, this analysis proceeds predominantly on the basis of an "intrinsic" assessment of a given cryptocurrency, focused on the rights or entitlements granted to holders, rather than being based on "extrinsic" factors, such as the intended or actual use of the relevant cryptocurrency or other contextual factors relating to the cryptoasset (such as whether a platform to which the cryptoasset relates is currently operational or whether the network underlying the cryptoasset is decentralised).[13]

Although characterisation of cryptocurrencies in this way must be undertaken on a case-by-case basis in order to determine definitively whether they are subject to UK financial regulation, the FCA Guidance provides useful indicators of the likely outcome of any such analysis. "Classic" cryptocurrencies (such as Bitcoin, Litecoin and Ether), which are not centrally issued and give no rights or entitlements to holders, are labelled "exchange tokens" in the Taskforce Report and "unregulated tokens" in the FCA Guidance. As explained in the FCA Guidance, exchange tokens "typically do not grant the holder any of the rights associated with specified investments".[14] Accordingly, in the FCA's view:

> "Exchange tokens currently fall outside the regulatory perimeter. This means that the transferring, buying and selling of these tokens, including the commercial operation of cryptoasset exchanges for exchange tokens, are activities not currently regulated by the FCA.

> For example, if you are an exchange, and all you do is facilitate transactions of Bitcoins, Ether, Litecoin or other exchange tokens between participants, you are not carrying on a regulated activity."[15]

It is therefore clear that activities related to Bitcoin, Litecoin and Ether are currently unlikely to trigger licensing requirements in the UK (although registration under the recently extended UK AML regime may be required). Cryptocurrencies with substantially similar features (i.e., those that are not centrally issued and do not grant any rights or entitlements to holders) are also currently unlikely to trigger licensing requirements in the UK (although, again, registration under the UK AML regime may be required). The same is also true for utility tokens. The fact that these kinds of cryptoassets may be used for speculative investment purposes in addition to being used as a means of exchange or to redeem a service should not impact this conclusion.

Stablecoins are an increasingly popular type of cryptoasset that are typically more difficult to characterise for financial regulatory purposes than classic cryptocurrencies. Broadly, a stablecoin is a cryptoasset that by design seeks to maintain a stable market value, typically through pegging the value of the stablecoin to underlying assets or currencies (such as gold or USD). Often, stablecoins are primarily intended to be utilised as a means of exchange much like classic cryptocurrencies. Pegging the value of a stablecoin to an underlying asset or currency can be achieved in a variety of ways, and the precise structure adopted by a given stablecoin will determine whether it is classified as a specified investment in the UK. For example, a "fully collateralised" stablecoin issued by a central issuer that is pegged to an underlying reference asset through the issuer holding the relevant underlying reference asset is likely to constitute a specified investment (or, indeed, electronic money) if holders of the stablecoin have rights or entitlements in relation to the underlying reference asset. On the other hand, so-called "algorithmic" stablecoins, which seek to maintain a stable value through the use of algorithms to control supply without any backing by a reference asset, may be unregulated tokens.

HM Treasury is currently consulting[16] on potential changes to the UK financial regulatory framework to establish "a sound regulatory environment" for stablecoins. The potential changes proposed in the consultation constitute part of the UK government's "staged and proportionate approach" to cryptoasset regulation in the UK and HM Treasury notes that "[f]uture regulation of a potentially wider set of tokens and services" will be informed by the government's continuing strategic assessment of new and emerging risks in cryptoasset markets. For now, however, the potential changes are focused on seeking to ensure that cryptoassets that could be reliably used for retail or wholesale transactions are subject to minimum requirements and protections as part of a UK authorisation regime. The consultation is limited to defining the scope of the regulatory perimeter with respect to such stablecoins and establishing the high-level objectives and principles that should frame the detailed requirements that would be applicable to persons falling within the scope of the new authorisation requirement (the consultation states that the UK's financial services regulators will consult on detailed firm requirements should the government adopt the approach set out in the consultation). In-scope cryptoassets for the purposes of the new authorisation requirement would only include those stablecoins that rely on a link to underlying currencies or assets in order to stabilise their value. Exchange tokens, utility tokens and algorithmic stablecoins are therefore likely to remain outside the authorisation perimeter for the time being (but may nevertheless be subject to other aspects of UK financial regulation such as AML regulation or, if extended, financial promotions requirements – see *Money transmission laws and anti-money laundering requirements* and *Sales regulation*

below). Interestingly, the consultation suggests that the definition of in-scope cryptoassets for these purposes may not specify that DLT and cryptography are necessary features, which would be a significant departure from the definition of cryptoasset set out in the Taskforce Report and in UK AML regulation (see *Money transmission laws and anti-money laundering requirements* below). This may also give rise to potential overlap with the existing UK regulatory framework governing payments and electronic money under the PSRs and EMRs (and although this possibility is partially acknowledged in the consultation, it does not include any firm proposals on how this will be addressed). The activities relating to in-scope cryptoassets that the consultation envisages being subject to the new authorisation regime are: issuing, creating or destroying in-scope tokens; value stabilisation and reserve management (including providing custody services in relation to reserve assets); validation of transactions (which could include, for example, the activities of nodes or miners); providing services or support to facilitate access by participants to the network or underlying infrastructure; transmission of in-scope tokens; providing custody and administration of in-scope tokens for third parties; executing transactions in in-scope tokens; and exchanging in-scope tokens for fiat currency. Finally, the consultation also notes that the government is considering the possibility of expressly applying UK payment systems regulation to stablecoin networks that reach a systemically important scale. The potential changes included in the consultation therefore represent significant proposals to clarify and expand the application of the general UK financial regulatory perimeter to certain kinds of stablecoins.

Notably, even if a given cryptocurrency is not a specified investment other than electronic money (i.e., not a security token following the FCA Guidance), certain activities in relation to such cryptocurrencies can currently still be subject to UK financial regulation, and cryptoassets that constitute electronic money (i.e., e-money tokens following the FCA Guidance) are subject to regulation. For example, offering to enter into derivative contracts that reference unregulated cryptocurrencies as their underlying (such as cryptocurrency contracts for differences or Bitcoin futures) by way of business is likely to constitute a regulated activity in the UK for which a person would require authorisation from the FCA. Indeed, such derivatives are also the subject of the FCA ban on their sale, marketing and distribution to retail customers. Establishing, operating, marketing or managing a fund that offers exposure to unregulated cryptocurrencies by way of business may also be subject to UK financial regulation. Furthermore, money transmission laws and AML legislation may also apply to activities carried out in relation to unregulated cryptocurrencies (see *Money transmission laws and anti-money laundering requirements* below).

Sales regulation

The principal sales regulation that is potentially applicable to sales of cryptocurrencies in the UK falls into three broad categories: (i) UK prospectus requirements; (ii) the UK restriction on financial promotions; and (iii) consumer protection and online/distance selling legislation.

UK prospectus requirements

FSMA, in conjunction with the "onshored" UK version of the Prospectus Regulation, imposes requirements for an approved prospectus to have been made available to the public before: (a) transferable securities are offered to the public in the UK; or (b) a request is made for transferable securities to be admitted to a regulated market situated or operating in the UK.[17] Unless an exemption applies (public offers made to qualified investors or fewer

than 150 persons in the UK are, for example, exempt), a detailed prospectus containing prescribed content must be drawn up, approved by the FCA and published before the relevant offer or request is made.

However, these requirements only apply to offers or requests relating to transferable securities. Transferable securities for these purposes are anything that falls within the definition of transferable securities in the "onshored" UK version of the Markets in Financial Instruments Regulation, which captures, for example, shares, bonds and depository receipts (and instruments that give their holders similar rights or entitlements).

Therefore, in order to determine whether these requirements apply to the sale of a given cryptocurrency in the UK, it is necessary to determine whether the cryptocurrency is a transferable security. Referring back to the FCA Guidance, only cryptocurrencies that are security tokens (i.e., only those cryptocurrencies that amount to a specified investment under the RAO other than electronic money) may be transferable securities.[18] Classic cryptocurrencies (such as Bitcoin, Litecoin and Ether) and cryptocurrencies with substantially similar features to classic cryptocurrencies are likely to be regarded as exchange tokens, rather than security tokens. Accordingly, the UK prospectus requirements should not apply to the sales of such cryptocurrencies. Similarly, utility tokens should not amount to transferable securities.

UK restriction on financial promotions

FSMA contains a restriction on financial promotions that applies independently of the UK prospectus requirements. In summary, a person who is not appropriately authorised must not, in the course of business, communicate an invitation or inducement to engage in investment activity in a way that is capable of having an effect in the UK unless the communication is approved by an appropriately authorised person or an exemption applies. Following a consultation in July 2020,[19] HM Treasury has indicated that the government proposes to amend FSMA "when parliamentary time allows" so that in the future, unauthorised persons will only be able to communicate financial promotions that have been approved by an authorised person that has obtained consent from the FCA to provide such approval. Notably, however, the government does not intend this to apply to authorised persons approving the financial promotions of an unauthorised person within the same group, or to the approval of authorised persons' own promotions for communication by unauthorised persons.

For these purposes, the concept of engaging in investment activity is further defined by reference to "controlled activities" and "controlled investments", which are set out in exhaustive fashion in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 ("**FPO**"). Therefore, in order to determine whether the restriction on financial promotions applies to particular activities relating to a given cryptocurrency (including, for example, the sale of that cryptocurrency), it is necessary to determine whether the activities involve a controlled activity or a controlled investment by reference to the definitions of each that are set out in the FPO. Although distinct and subtly different, the controlled activities and controlled investments set out in the FPO closely resemble the list of specified activities and specified investments set out in the RAO (discussed in *Cryptocurrency regulation* above).

Typically, therefore, sales of classic cryptocurrencies (such as Bitcoin, Litecoin and Ether) and cryptocurrencies with substantially similar features to classic cryptocurrencies should not currently engage the UK restriction on financial promotions, although analysis of the sale in question must be undertaken on a case-by-case basis in order to determine definitively that this is the case (and related offerings, such as funds providing exposure to unregulated

cryptocurrencies, may well trigger the restriction). The same is also currently true for utility tokens (which, for the time being, are unlikely to constitute controlled investments) and e-money tokens (since electronic money is notably not a controlled investment, and so promotions in relation to electronic money are generally not within the restriction on financial promotions).

However, by way of a consultation in July 2020,[20] HM Treasury proposed to widen the regulatory perimeter by adding otherwise unregulated cryptoassets to the list of controlled investments and increasing the list of controlled activities to include activities relating to the buying, selling, subscribing for or underwriting of such cryptoassets. Although a response to this consultation from HM Treasury is still awaited at the time of writing, if these proposals are adopted, then marketing in relation to certain activities relating to otherwise unregulated cryptocurrencies would only be permissible if conducted by an authorised firm, if approved by an appropriately authorised person or if an exemption applies. With respect to the latter option, a number of potentially helpful exemptions exist, of which the most likely to be relevant are those relating to financial promotions given to investment professionals, sophisticated investors and high-net-worth individuals/entities.

General advertising, online/distance selling and consumer protection legislation

In addition to sales regulation that arises out of the UK financial regulatory framework, there is a raft of general advertising, online/distance selling and consumer protection legislation that is potentially applicable to sales of cryptocurrencies or the offering of services related to cryptocurrencies (such as exchange or wallet services) in or from the UK.

Some of this legislation, like the Consumer Rights Act 2015 or the Consumer Protection from Unfair Trading Regulations 2008, only applies in relation to consumers (typically defined as individuals acting outside of their trade, business, craft or profession), but where it does, provides consumers with significant statutory rights and remedies against supplies of goods, services and digital content and imposes restrictions on the kinds of contractual terms that can be enforced against consumers. Other legislation, like the Electronic Commerce (EC Directive) Regulations 2002, is of more general application and imposes requirements on businesses that offer or provide goods or services digitally. The application of such legislation may also depend on whether or not the business being conducted is subject to UK financial regulation.

Taxation

Currently, there are no bespoke UK tax rules applicable to cryptoassets (including cryptocurrencies). Therefore, existing tax principles and rules apply generally (although some uncertainty remains as to their application).

The UK tax authority HM Revenue and Customs ("**HMRC**") considers that cryptoassets are cryptographically secured digital representations of value or contractual rights that can be transferred, stored and traded electronically (i.e., the definition adopted by the Taskforce). HMRC has identified four types of cryptoassets: exchange tokens; utility tokens; security tokens; and stablecoins. However, HMRC will look at the facts of each case and apply the relevant tax provisions according to what has actually taken place. The classification of cryptoassets is not necessarily determinative of their tax treatment, which will depend on the nature and use of the cryptoasset in question.

Although there is no definitive policy for the taxation of cryptoassets (including cryptocurrency) in the UK, HMRC has published two policy papers, one relating to the taxation of cryptoassets for individuals, published in December 2018 (and updated in December 2019), and the other relating to the taxation of cryptoassets for businesses,

published in December 2019 (notably, the position in these papers may not be binding on HMRC). The positions set out in the policy papers, and HMRC's guidance in general in relation to the taxation of cryptoassets, are contained in HMRC's Cryptoassets Manual, which at the time of writing was last updated on 8 April 2021.

In the Cryptoassets Manual, HMRC states that the tax treatment of cryptoassets continues to develop due to the evolving nature of the underlying technology and the areas in which cryptoassets are used. As such, HMRC stresses that the facts of each case need to be established before applying the relevant tax provisions according to what has actually taken place (rather than by reference to terminology).

The policy papers and Cryptoassets Manual focus on the taxation of exchange tokens. For security tokens and utility tokens, the guidance may provide the starting principles, but different tax treatments may need to be adopted and further HMRC guidance may be published in due course.

Taxation of individuals

Cryptoassets: tax for individuals[21] sets out HMRC's views about how individuals who hold exchange tokens are to be taxed. This policy paper includes the following helpful general points:

- Capital gains tax ("**CGT**") and income tax ("**IT**") may apply to dealings in cryptocurrencies depending on the circumstances. HMRC has clarified that it does not regard cryptocurrencies as currency or money, and that it does not consider buying and selling cryptocurrencies to be the same as gambling (which largely rules out arguments that cryptocurrencies could be exempt from taxation). Cryptoassets are likely to be property for the purposes of inheritance tax.
- In most cases, HMRC expects that buying and selling of cryptocurrencies by an individual will amount to personal investment activity, meaning that individuals will typically have to pay CGT on any gains they realise upon disposal of the cryptocurrencies (which includes not only selling them for fiat currency but also using them to pay for goods and services, giving them away to another person and exchanging them for another kind of cryptoasset).
- If an individual is engaged in a trade of dealing in cryptocurrencies (an exceptional case, in HMRC's view, and one to be determined in accordance with the existing approach taken towards determining whether an individual is engaged in trading securities and other financial instruments for tax purposes), IT would take priority over CGT, being applied to the individual's trading profits.
- Individuals will be liable to pay IT and National Insurance contributions on cryptocurrencies that they receive as a form of payment from their employer. If the cryptocurrencies are considered readily convertible assets ("**RCAs**"), the IT liability will need to be accounted through Pay-As-You-Earn ("**PAYE**"), and employer National Insurance contributions will also be due. Cryptocurrencies that are not RCAs are still subject to IT and National Insurance contributions, but employers do not have to operate PAYE. The individual must declare and pay HMRC the IT due on any amount of employment income received in the form of cryptoassets. The employer should treat the payment of cryptoassets, which are not RCAs, as payments in kind for National Insurance contributions purposes, and pay any Class 1A National Insurance contributions to HMRC. Broadly, a cryptocurrency will be an RCA if trading arrangements exist, or if such arrangements are likely to come into existence.
- A charge to CGT may also arise if an individual subsequently disposes of cryptocurrencies received from their employer, or tokens received as a result of mining activity or airdrops (regardless of whether or not IT was payable on their receipt).

- A person who is not trading and receives tokens from mining must complete a self-assessment tax return (in pound sterling), treating those tokens as "other taxable income", unless they have received cryptoassets worth less than GBP 1,000 or other untaxed income of less than GBP 2,500.
- If a person is resident but not domiciled in the UK and claims the remittance basis of taxation, income and gains that have a source outside the UK are usually only taxed if they are remitted to the UK. HMRC has taken the view that throughout the time an individual is a UK resident, the exchange tokens they hold as beneficial owner will be located in the UK. As a result, UK resident individuals (whether UK or non-UK domiciled) will be subject to UK tax if they carry out a transaction with their tokens that is subject to UK tax.
- Notably, some cryptoasset exchanges may only keep records of transactions for a short period, or the exchange may no longer be in existence when an individual completes a tax return. The onus is therefore on the individual to keep separate records for each cryptoasset transaction, and these must include:
  1. the type of cryptoasset;
  2. the date of the transaction;
  3. whether the cryptoasset was bought or sold;
  4. the number of units;
  5. the value of the transaction in pound sterling (as at the date of the transaction);
  6. the cumulative total of the investment units held; and
  7. bank statements and wallet addresses, if needed for an enquiry or review.

Taxation of businesses

Cryptoassets: tax for businesses[22] sets out HMRC's views about how transactions involving cryptoasset exchange tokens that are undertaken by companies and other businesses (including sole traders and partnerships) are to be taxed. This policy paper includes the following helpful general points:

- As HMRC does not consider any of the current types of cryptoassets to be money or currency, any corporation tax ("**CT**") legislation that relates solely to money or currency does not apply to exchange tokens or other types of cryptoassets (e.g., the foreign currency rules, the Disregard Regulations relating to exchange gains and losses, and designated currency elections).
- Where the buying and selling, or mining, of exchange tokens amounts to a trade, the receipts and expenses of the trade will form part of the calculation of the trading profit of that business for CT purposes. For example, if a company carrying on a trade accepts exchange tokens as payment from customers, or uses them to make payments to suppliers, the token given or received will need to be accounted for within the taxable trading profits. Similarly, in respect of mining, if a business purchases a bank of dedicated computers to mine exchange tokens, as opposed to mining that uses excess home computer capacity, the mined cryptoassets will probably amount to trade receipts and be taxed in accordance with CT principles.
- If the activity concerning the exchange token is not a trading activity, and is not charged to CT in another way (such as the non-trading loan relationship or intangible fixed asset rules, both discussed below), then the activity may be the disposal of a capital asset. Any gain that arises from the disposal would typically be charged to CT as a chargeable gain. A disposal for these purposes includes not only selling tokens for fiat currency, but also using tokens to pay for goods and services, giving tokens away to another person and exchanging tokens for another kind of cryptoasset.

- Companies that account for exchange tokens as "intangible assets" may be taxed under CT rules for intangible fixed assets if the token is both an "intangible asset" for accounting purposes and an "intangible fixed asset". This requires that the relevant exchange token has been created or acquired by a company for use on a continuing basis. Exchange tokens that are simply held by the company, even when held in the course of its activities, will not meet this definition. If these conditions are met, the CT rules for intangible fixed assets (Corporation Tax Act 2009 Part 8) have priority over the chargeable gains rules.
- A company has a "loan relationship" if it has a money debt that has arisen from a transaction for the lending of money. HMRC does not consider exchange tokens to be money. In addition, there is typically no counterparty standing behind the token; as such, the token does not seem to constitute a debt. This means that exchange tokens do not create a loan relationship. If exchange tokens have been provided as collateral security for an ordinary loan (of money), a loan relationship exists, and the loan relationship rules will apply (whether the company is the debtor or creditor).
- Value-added tax ("**VAT**") is due in the normal way on any VAT-able goods or services sold in exchange for exchange tokens. The value of the supply of goods or services on which VAT is due will be the pound sterling value of the exchange tokens at the point the transaction takes place. However, no VAT will be due on the supply of the token itself (despite HMRC's prevailing view that cryptocurrencies are not currency or money for direct tax purposes). In addition, the exchange of traditional currencies for non-legal tender such as Bitcoin (and *vice versa*), as well as a supply of any services required for this type of exchange, constitute financial transactions that are exempt from VAT.
- Stamp duty and stamp duty reserve tax ("**SDRT**") will not usually be chargeable on the transfer of exchange tokens. HMRC's view is that existing exchange tokens are unlikely to meet the required definition of "stock or marketable securities" or "chargeable securities". However, each exchange token will need to be considered on its own facts and circumstances in the context of the definitions of "stock or marketable securities" or "chargeable securities".
- In terms of exchange tokens being given as consideration for purchases of "stock or marketable securities" or "chargeable securities", SDRT requires that chargeable consideration is "money or money's worth". Exchange tokens constitute "money's worth" and are therefore chargeable for SDRT purposes.
- Stamp duty land tax ("**SDLT**") will not be payable on transfers of exchange tokens, since HMRC does not consider such transfers to be land transactions. As with SDRT, chargeable consideration for SDLT purposes includes anything given for the transaction that is "money or money's worth". Accordingly, if exchange tokens are given as consideration for a land transaction, the tokens would fall within the definition of "money or money's worth" and would be chargeable to SDLT.

Money transmission laws and anti-money laundering requirements

Money transmission laws

The principal UK laws relevant to money transmission are the PSRs and EMRs. Together, the PSRs and EMRs establish a regulatory framework applicable to persons performing payment services (including, for example, money remittance) and issuing electronic money in the UK, which includes authorisation, organisational, regulatory capital, safeguarding and conduct of business requirements. Whether this framework applies depends on whether a service involves payment services or the issue of electronic money as defined by the PSRs and EMRs, respectively.

Payment services as defined by the PSRs necessarily involve funds. Cryptocurrencies are generally not considered funds for these purposes. Therefore, products and services involving only cryptocurrency (such as a crypto-to-crypto exchange) will not normally involve payment services. Important exceptions are products or services relating to what the FCA Guidance terms "e-money tokens". Take, for example, a stablecoin structured in a way that means it constitutes electronic money – issuing such a stablecoin would likely trigger the application of the EMRs, and providing wallet services in relation to such a stablecoin would likely trigger the application of the PSRs (since electronic money is a form of funds for the purposes of the PSRs).

Conversely, where fiat currency is involved (e.g., in the context of a fiat-to-crypto exchange) there will be funds, and so further analysis would need to be conducted to determine whether payment services are being provided and, if so, the precise application of the regulatory regime established by the PSRs.

Anti-money laundering requirements

UK AML requirements are principally contained in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("**MLRs**").

The MLRs implement the Fourth EU Money Laundering Directive in the UK and impose various requirements on businesses that are within their scope, including: the requirement to perform a firm-level AML risk assessment; organisational requirements relating to AML (including systems and controls and record-keeping requirements); customer due diligence obligations when establishing a business relationship with a customer or when transacting above a certain threshold; and ongoing monitoring obligations. The MLRs only apply to those businesses that have been identified as the most vulnerable to the risk of being used for money laundering or terrorist financing.

On 10 January 2020, the MLRs were amended to incorporate the Fifth EU Money Laundering Directive ("**MLD5**") into UK law. This change brought cryptoasset exchange providers ("**CEPs**") and custodian wallet providers ("**CWPs**") within the scope of the MLRs. As such, the MLRs impact any person conducting cryptoasset business of a kind that is captured by the new definitions of CEP or CWP in the UK (including, for example, existing UK authorised financial services firms that carry on relevant cryptoasset business).

For the purposes of the MLRs, CEPs, CWPs and cryptoassets are defined as follows:

- CEP: "a firm or sole practitioner who by way of business provides one or more of the following services, including where the firm or sole practitioner does so as creator or issuer of any of the cryptoassets involved, when providing such services—
  (a) exchanging, or arranging or making arrangements with a view to the exchange of, cryptoassets for money or money for cryptoassets,
  (b) exchanging, or arranging or making arrangements with a view to the exchange of, one cryptoasset for another, or
  (c) operating a machine which utilises automated processes to exchange cryptoassets for money or money for cryptoassets."
- CWP: "a firm or sole practitioner who by way of business provides services to safeguard, or to safeguard and administer—
  (a) cryptoassets on behalf of its customers, or
  (b) private cryptographic keys on behalf of its customers in order to hold, store and transfer cryptoassets,
  when providing such services."

- Cryptoasset: "a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored or traded electronically."

Significantly, a person may be a CEP or CWP regardless of whether they are otherwise regulated in the UK if they carry on cryptoasset business of a kind that is captured by the new definitions. As such, the requirements relating to cryptoasset business in the MLRs apply to both regulated and unregulated cryptoasset businesses in the UK. Notably, the definition of a CEP goes beyond the requirements of MLD5, capturing crypto-to-crypto exchange (in addition to crypto-to-fiat exchange). The CEP definition may also capture market participants that would not ordinarily be regarded as exchanges in the strict sense. For example, cryptoasset brokers that buy and sell cryptoassets for their customers or for their own account when executing client orders are likely to be captured by the definition, in addition to exchanges that facilitate interactions between buyers and sellers of cryptoassets. Issuers of cryptoassets may also be captured in certain circumstances.

Typically, providers of non-custodial cryptoasset wallet software will not be captured by the CWP definition.

CEPs and CWPs are required to register with the FCA before carrying on relevant cryptoasset business in the UK. The FCA clarified that existing UK authorised persons (including existing UK banks, investment firms, electronic money institutions and payment services businesses) undertaking relevant cryptoasset business must apply for registration. Registration must be completed via the FCA's online system, Connect, and applicants must provide a significant amount of information relating to their business and all staff who hold relevant functions to allow the FCA to assess whether or not the applicant is fit and proper. An applicant for registration must provide various information, including: a programme of operations; a business plan; a description of the applicant's structural organisation; a detailed guide to the applicant's IT systems and controls; and details of relevant individuals, beneficial owners and close links.

In addition to the ordinary AML requirements that apply generally to businesses within the scope of the MLRs (including CEPs and CWPs), there is a specific additional requirement that a business whose relevant cryptoasset activity does not fall within the scope of the Financial Ombudsman Service or the Financial Services Compensation Scheme must inform its customers of this fact before entering into a relevant business relationship or transaction. There are also specific reporting requirements that apply to CEPs and CWPs (see *Reporting requirements* below).

Relatedly, the Joint Money Laundering Steering Group[23] published sector-specific guidance relating to cryptoasset business in July 2020. The guidance clarified the scope of the MLRs in relation to cryptoassets, discussed the money laundering and terrorist financing risks pertinent to the sector, assessed these risks and provided guidance on how CEPs and CWPs might interpret the AML requirements under the MLRs (e.g., customer due diligence, transaction analysis, record-keeping and sanctions screening) as would be appropriate to the cryptoasset sector.

At the time of writing, HM Treasury is consulting[24] on the extension of the so-called "travel rule" (the requirement for financial institutions to send and record information on the originator and beneficiary of a wire transfer, and for this information to remain with the transfer or related message throughout the payment chain) to CEPs and CWPs. In its consultation, HM Treasury states that the government considers that "the time is now right" to begin planning for the implementation of the travel rule to cryptoasset transfers (tailored

where appropriate to reflect the nature of the underlying technology involved), after previously deciding to defer the implementation of the travel rule for such transfers in order to allow compliance solutions to be developed. However, the consultation acknowledges that "the process of integrating these requirements into a firm's business practices may take time", and that the government therefore proposes to allow firms a grace period after the amendments to the AML regime are made, to allow for the integration of compliance solutions. The length of this proposed grace period is not set out in the consultation, and respondents are invited to give their views on how long it should be. Legislation giving effect to the relevant changes is currently expected to be introduced in Spring 2022.

Promotion and testing

In November 2018, the FCA established an Innovation Division, which encompasses initiatives that the regulator has developed in recent years relating to innovation in financial services. Notably, the following areas fall under the Innovation Division in relation to promotion and testing:

- *The FCA's Regulatory Sandbox*, which allows both authorised and unauthorised businesses that meet certain eligibility criteria to test innovative financial services propositions in the market with real consumers. Firms that successfully apply to participate in the Sandbox may benefit from the various Sandbox "tools" that the FCA can deploy to facilitate real-world testing, such as restricted authorisation, individual guidance, informal steers, waivers and no-enforcement action letters.
- *The Global Financial Innovation Network*, which grew out of the FCA's proposal to create a global Sandbox. The Network seeks to provide a more efficient way for innovative firms to interact with regulators, helping them navigate between countries as they look to scale new ideas. The Network is for firms wishing to test innovative products, services or business models across more than one jurisdiction.
- *The FCA's Innovation Hub*, which offers direct support from the FCA to eligible innovative businesses by providing a dedicated contact for businesses that are considering applying for authorisation or a variation of permission, need support when doing so, or do not need to be authorised but could benefit from FCA support.

Ownership and licensing requirements

In the interests of improving legal certainty with respect to ownership and transfer of cryptoassets, the England and Wales Law Commission is in the process of consulting[25] on digital assets. The Law Commission's work will involve surveying the current state of English private law (i.e., not including regulatory, taxation, data protection, criminal, settlement finality or AML issues) relating to digital assets, as well as making recommendations as to possible changes to such law with respect to digital assets. The focus of the Law Commission's work is therefore on questions such as: whether and how cryptoassets can be characterised as personal property; whether cryptoassets should be amenable to concepts such as possession and bailment; whether and how security interests may be granted over cryptoassets; and how cryptoassets should be treated for the purposes of UK insolvency law. In this regard, the Law Commission endorses and intends to build on the Legal Statement[26] published by the UK Jurisdiction Taskforce ("**UKJT**") of the UK government's LawTech Delivery Panel in November 2019 covering similar topics. In its Legal Statement, the UKJT concluded that cryptoassets are capable of having all the legal characteristics of property under English law and are therefore capable of being treated as a form of property. Indeed, since the publication of the Legal Statement (which in itself is

not legally binding), it has been adopted by the High Court of England and Wales, which has held in more than one case that particular cryptoassets were capable of being a form of property.[27] The Law Commission also starts from the premise that the law will treat certain cryptoassets as property, where those cryptoassets satisfy the legal characteristics of property under English law.

As to licensing requirements, whether or not a person requires authorisation to perform their activities in relation to cryptocurrencies in the UK will depend on whether they are conducting "regulated activities" as defined by FSMA, or payment services/e-money activities that require authorisation under the PSRs or EMRs. The registration requirement for cryptoasset businesses under the MLRs must also be kept in mind. As noted in *Cryptocurrency regulation* above, a person's activities in relation to cryptocurrencies may still be subject to UK financial regulation even where the underlying cryptocurrency involved is not a specified investment. For example, establishing, operating, marketing or managing a fund that offers exposure to unregulated cryptocurrencies by way of business is the kind of activity that may well trigger licensing requirements in the UK. For the time being, cryptocurrencies are also unlikely to be permissible for inclusion in fund products (e.g., exchange-traded funds) that require approval from the FCA: the Taskforce Report makes clear that the FCA will not authorise or approve the listing of a transferable security or fund that references exchange tokens unless it has confidence in the integrity of the underlying market and that other regulatory criteria for funds authorisation are met.

Mining

Mining cryptocurrencies is permitted in the UK, and as noted above, there is no bespoke financial regulatory regime for cryptocurrencies in the UK that expressly regulates this activity. Mining of cryptocurrencies is also unlikely to fall within the existing UK financial regulatory perimeter (e.g., mining Bitcoin is not currently subject to UK financial regulation).

Border restrictions and declaration

There are currently no border restrictions or requirements to declare cryptocurrency holdings when entering the UK. Individuals carrying cash in excess of EUR or GBP 10,000 must declare this to HMRC upon entering the UK from certain countries, but cryptocurrencies are not regarded as cash for these purposes.

Reporting requirements

Depending on the nature of the cryptoasset and the business activity in question, general reporting requirements that arise as a result of existing financial regulation (e.g., transaction reporting) or AML legislation (e.g., the requirement to submit suspicious activity reports to the National Crime Agency) could apply in relation to cryptocurrency transactions.

In addition, the MLRs now contain a broad reporting requirement that applies to CEPs and CWPs, under which they must provide to the FCA "such information as the FCA may direct" relating to compliance with the MLRs or that is "otherwise reasonably required by the FCA in connection with the exercise by the FCA of any of its supervisory functions". Such reports must be made "at such times and in such form, and verified in such manner, as the FCA may direct". The FCA has consulted on[28] and extended[29] to CEPs and CWPs the requirement to provide an annual financial crime report, which previously only applied to certain authorised firms. Otherwise, no guidance has been forthcoming as to how the FCA intends to utilise its powers in relation to reporting by CEPs and CWPs under the MLRs, and so it remains to be seen what kinds of reports the FCA will require in this regard.

Estate planning and testamentary succession

There are no specific rules as to how cryptocurrencies are treated for the purposes of estate planning and testamentary succession; therefore, the normal relevant legal principles apply. Consequently, cryptocurrencies are likely to fall within the broad definition of property for the purposes of inheritance tax[30] and will likely be subject to taxation should a chargeable transfer arise. Prior to death, a testator will need to instruct their personal representative on how to obtain the relevant cryptographic keys and details of the wallet service provider (where relevant), as without such means of dealing with the cryptocurrency it will be rendered effectively worthless.

* * *

Endnotes

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