

Digital assets and innovative technologies in Ireland

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Digital assets and innovative technologies have begun to occupy much more of the public's consciousness since late 2019, and as such have been a feature across the transactional and investment spheres with greater regularity. Predictably, they are becoming a focus from a legal standpoint and stands to one of the fastest growing and unique industries in Ireland over the coming years.

Here, we take a look at what digital assets and innovative technologies are, the place they currently hold in Ireland and what the opportunities and possibilities are from a corporate and legal perspective going forward.

What are digital assets and innovative technology commonly understood to mean?

Digital assets and innovative technologies are predominantly interpreted as meaning crypto assets, the most common example of which being Bitcoin. However, they cover a wide array of digital assets extending from crypto currencies (exchange tokens), security tokens, e-money tokens, stablecoins and non-fungible tokens (NFTs) seen as collectibles and to Central Bank Digital Currencies. The crypto assets or digital assets are distinct from the ledger or 'blockchain' in which they are recorded (together comprising distributed ledger technology or DLT).

Why Ireland is attractive as digital asset hub?

Ireland is a location of choice for international digital assets clients, being underpinned by a friendly, agile, and collaborative business environment, well-educated workforce and attractive corporate tax system - all with easy access to European markets.

Following Brexit, Ireland is the leading English-speaking and only fully common law jurisdiction in the EU, making it the most familiar to people and businesses from other common law countries.

It is also a natural geographical gateway to Europe from the United States and Canada. Ireland is consistently identified as one of the top three locations for US foreign direct investment in annual reports commissioned by the American Chamber of Commerce.

The Irish economy is enjoying a period of renewed growth and Ireland is already home to:

- the world's top 10 pharmaceutical companies
- nine of the world's top 10 global software companies
- 13 of the world's top 15 medical technology companies
- 60% of the world's top financial services companies, including half of the world's top 50 banks
- management of 50% of the world's fleet of leased aircraft.

Who's here?

The following are examples of some of the larger companies (all with increasing focus on digital assets and innovative technologies) and projects currently operating in Ireland:

Accenture, Arc-Net, Coinbase, ConsenSys (Ireland's largest Blockchain company), Deloitte Labs, Mastercard Labs, Citi Bank's Innovation Lab, JP Morgan's Interbank Innovation Network, Fidelity Labs, Circle, Infosys, Trade IX.

In addition to the above large players, there are numerous smaller blockchain technology companies active across Ireland.

Ireland is also an attractive location for digital asset and blockchain start-ups.

A discussion paper on Virtual Currencies and Blockchain Technology, published in March 2018 by the Irish Department of Finance, noted that 6.3% of the total venture capital invested in Ireland between 2012 and 2016 was channelled to Irish based blockchain businesses -representing the highest percentage of any northern European country.

There is certainly scope for this to rise and a clear regulatory framework will only make this more accessible (framework addressed in part two of this article). In 2018 alone, there were nearly 200 VC deals worth around €553m in blockchain start-ups in Ireland.

Although there are no clear updated figures available, it is presumed this has risen given the boom in Digital Asset investment and global coverage it has received from 2019 to the present. Irish tech start-ups received a record €1.3bn in VC investment in 2021, a 44% increase on 2020.

Even at a consumer level, digital assets are continuing to infiltrate the mainstream. Ten per cent

of Irish adults hold cryptocurrencies - a figure which was actually higher in 2021 at the apex of the previous 'bull market' for cryptocurrencies.

We will now briefly analyse Ireland's regulatory environment and level of readiness for a DAIT framework along with what are the potential future developments in the EU that will impact Ireland's legal response.

We will touch on the existing EU legislation and whether the current legal framework poses obstacles to the use of new digital financial instruments and to what extent it ensures that such new technologies and products fall within the scope of financial regulation and operational risk management arrangements.

Ireland's regulatory environment

Ireland is globally recognised as a technology hub and as having a robust financial services sector and for the most part, is considered to have a first class legal and regulatory environment, but regulation of cryptoassets is being driven at EU level.

Broadly, cryptoassets tend to be classified as security tokens, e-money tokens, utility tokens, exchange tokens and stablecoins/tokens. Existing regulation would apply to security tokens, e-money tokens and any stablecoins with the characteristics of either or both of those types of token. Utility tokens and exchange tokens themselves are not regulated, but certain activities in relation to those and other types of tokens are regulated, such as crypto asset custodian and exchange services, and advertising.

a) Investment services regulatory regime

Some crypto assets have rights attached that are the same or similar to existing types of investment instruments, so may be interpreted as 'security tokens', falling within the scope of the definition of a "financial instrument" (including but not limited to a "transferable security") under Irish laws implementing the second Markets in Financial Instruments Directive (MiFID2). Where a firm carries out "investment services or activities" in relation to "financial instruments" it may require authorisation as a MiFID investment firm, unless an exemption is available (ie certain pension funds, ESOPs and insurers).

The key requirement here is that most advisors and intermediaries in this space will require prior authorisation from the Central Bank of Ireland (CBI).

However, the definition of "financial instruments" under MiFID2 excludes "instruments of payment". As such, it's very likely that pure crypto currencies (referred to as 'exchange tokens'), utility tokens and some stablecoins may fall out of scope.

b) E-money regulatory regime

A cryptoasset will qualify as “electronic money” only if it satisfies all elements of the definition of “electronic money” as set out in the second Electronic Money Directive (EMD2) namely “electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions and which is accepted by a natural or legal person other than the electronic money issuer”.

Where a business model involves the issuance of electronic money, the issuer may require authorisation as an electronic money institution under EMD2, unless an exemption is available. An e-money institution is subject to CBI authorisation and Irish AML requirements.

Most forms of crypto assets (including pure cryptocurrencies) do not represent a claim on the issuer and so will fall outside the scope of the E-Money Regulations. This would appear to be in line with the views of the CBI which has emphasised that cryptocurrencies are 'unregulated'. Exceptions would be where an issuer structures the asset as e-money, or issues ‘stablecoins’ that are pegged to, and directly exchangeable for, one or more fiat currencies (as opposed to a collection of different other assets).

c) Payment services regulatory regime

Some services that may be provided in connection with cryptocurrencies that qualify as e-money will also be regulated payment services (e.g. execution of payment transactions or money remittance) under Irish regulations implementing the second Payment Services Directive (PSD2). Cryptoasset service providers may also be offering regulated e-money or payment services in the course of enabling customers to pay or receive payment for cryptoassets, or be subject to Irish laws governing money transmission. An entity carrying out regulated payment services may require authorisation as a payment institution under PSD2 (or depending on the business model as an electronic money institution under EMD2), unless an exemption from regulation is available.

d) Data Protection/General Data Protection Regulation (GDPR) regime

Cryptocurrency exchanges and blockchains may be subject to data protection/GDPR compliance because, although personal data may be encrypted as well as pseudonymised, true anonymity is becoming less frequent due to the increased application of customer due diligence and anti-money laundering requirements.

Also, while a blockchain may not contain names, addresses, telephone numbers, or any other personally identifiable information (that might directly identify an individual) studies have shown that it may still be possible, without too much effort, to indirectly identify an individual on a blockchain from an IP address. Service providers such as Chainalysis commonly offer tracing services to identify the holders of cryptoassets for the purposes of due diligence, transaction monitoring and asset recovery.

Likely future developments from a legal perspective

a) EU

In September 2020, the EU Commission released its Digital Finance Package. This contains a proposal for a new EU legislative framework for the Markets in Crypto Assets (MiCA). We've been covering the development of MiCA on the Ogier Leman Insights. MiCA will provide for regulatory obligations and requirements in respect of a broad range of services, including trading platforms for crypto-assets; the exchange of crypto-assets for fiat currency or for other crypto-assets; custody of crypto-assets etc.

The regulations will apply to anyone providing any of the above activities within the EU. In July 2022, it was agreed that MiCA will come into force in 2024 - its transposition into Irish law will likely follow thereafter.

b) MiCA continued

Many MiCA requirements will mirror those already in place for other financial services providers (in accordance with MiFID) including: having an EU presence; minimum capital requirements; rules regarding holding client funds; risk management; and having a range of policies and procedures in place governing the service offering, complaints, etc.

The stated goal of MiCA is to protect consumers against some of the risks associated with the investment in crypto-assets, and help them avoid fraudulent schemes. Currently, consumers have very limited rights to protection or redress, especially if the transactions take place outside the EU. With the new rules, crypto-asset service providers (CASPs) will have to respect strong requirements to protect consumers wallets and become liable in case they lose investors' crypto assets. MiCA will also cover any type of market abuse related to any type of transaction or service, notably for market manipulation and insider dealing.

Companies in the crypto-assets market will be required to declare information on their environmental and climate footprint. The European Securities and Markets Authority will develop draft regulatory technical standards on the content, methodologies and presentation of information related to principal adverse environmental and climate-related impact. Within two years, the European Commission will have to provide a report on the environmental impact of crypto assets and the introduction of mandatory minimum sustainability standards for consensus mechanisms, including the proof-of-work.

c) AML

Under the 5th Anti-Money Laundering Directive (5AMLD), member states are required to impose registration and AML requirements on fiat-to-virtual and virtual-to-virtual cryptocurrency exchanges and crypto asset custodian wallet providers operating in Europe. Those subject to

5AMLD must apply customer due diligence, monitor transactions, report suspicious transactions and have specific procedures in place to prevent money laundering and terrorist financing.

MiCA will require that the European Banking Authority will be tasked with maintaining a public register of non-compliant crypto-asset service providers. CASPs, whose parent company is located in countries listed on the EU list of third countries considered at high risk for anti-money laundering activities, as well as on the EU list of non-cooperative jurisdictions for tax purposes, will be required to implement enhanced checks in line with the EU AML framework. Tougher requirements may also be applied to shareholders and to the management of the CASPs, notably with regard to their localisation.

d) Any regulatory sandbox currently in Ireland?

There is currently no regulatory sandbox in operation in Ireland, nor are there any plans to establish one. There is, however, a fintech innovation hub (the Innovation Hub) which has been operated by the CBI since April 2018. The Innovation Hub engages with fintech firms involved in developing and deploying various innovative technologies, including blockchain. It also provides a direct and dedicated point of contact in the CBI for firms engaged in fintech innovation, allowing them to ask questions and engage with the CBI outside of existing formal regulator/firm engagement processes.

The Government and several Irish-based companies have also combined to establish Blockchain Ireland, an initiative led by IDA Ireland's Blockchain Expert Group, aimed at helping to promote and share information on blockchain in Ireland. Offshoot working groups have been established including a legal and regulatory group.

Conclusion

Giving credit to the EU Commission, they are reacting quickly to recent developments in the sector and have acknowledged the urgent need for an EU-wide regulation and response. It appears MiCA will better protect Europeans who have invested in these assets, and hope to curb the misuse of them, while being innovation-friendly to maintain the EU's attractiveness. The challenge for the nuance of the regulations will be whether they will indeed be successful in not hampering the innovation that the sector has largely been built on.

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Meet the Author



[Aaron Kelly](#)

Associate

[Ireland](#)

E: aaron.kelly@ogier.com

T: [+353 1 237 3087](tel:+35312373087)

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