ICOS IN BELGIUM AND EUROPE: A LEGAL PERSPECTIVE

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What's in a name?

The term ICO stands for 'Initial Coin Offering', a rather obvious reference to IPOs ('Initial Public Offering'). Like IPOs, ICOs can be described as a means of raising public funds. And quite a good one. Although numbers vary from one analyst to another, in 2017 alone, approximately USD 3 billion would have been raised through ICOs[1].

The key features of ICOs are that public money is raised via online-mediated offerings; investors are offered digital coins or tokens in exchange for cryptocurrencies (*e.g.* bitcoins, ether…) and the investment structure is organised on a blockchain. The assistance of traditional intermediaries such as banks can normally be avoided.

Although ICOs vary quite widely in design, they all start with a so-called white paper, a prospectus-like document that typically describes the project and the rights and obligations embodied in the tokens offered to the investors. The white paper will also often set the conditions precedent subject to which the offer is being made (*e.g.*, minimum and maximum investment thresholds, etc.) and in an ideal scenario also point out the risks related to the proposed investment. As the case may be, the effective launch of the ICO will be automated through a smart contract if and as soon as the applicable conditions will have been met.

Is this regulated?

Maybe. Apart from certain countries such as China or South Korea, which ban ICOs, ICOs tend not to be prohibited or regulated as such. This is why several investors and a portion of the public believe that ICOs represent an unregulated means to raise public funds, but this is not quite so. In fact, the regulation of an ICO (or lack thereof) typically depends on the underlying rights and obligations embodied in the tokens issued by the offeror.

Tokens have no legal meaning *per se* but can, in fact, represent any rights or obligations. In essence, depending on what these rights and obligations are, an ICO will or will not fall within the scope of a specific regulation.

Qualifying the tokens in light of applicable laws will normally be the first job of the issuer's legal advisor.

Traditionally, one distinguishes so-called 'security tokens', which qualify as securities and are likely to fall under IPO regulations, from 'utility tokens', which can represent any other right or obligation (*e.g.* a right to a future product or service of the

[1] Valuation is particularly tricky as it requires to convert highly volatile cryptocurrencies into a FIAT money at a given date.

issuer, a share in a good's ownership…). Possibilities are endless, and so are the potentially applicable regulations (*e.g.* distance selling regulations, consumer protection law, anti-money laundering...).

In Europe, the ESMA recently published its views on regulations likely to apply to ICOs[2]. In Belgium, the FSMA has released a similar statement regarding Belgian law specifically[3]. Both statements are strongly risk-oriented.

We also observe a tendency towards self-regulation as established service providers begin to subject their assistance to an ICO venture to certain conditions. For instance, our law firm adheres to the ICOCharter.EU[4]. Self-regulation can also be seen as a means to provide additional comfort to potential investors and potentially to supervisors, whose trust is often challenging to obtain and easy to lose.

Applicable law(s) and competent forum(s)

Other important legal aspects to consider are the applicable law(s) and competent forum(s). In this respect, ICOs represent a real challenge as they are carried out via the Internet (public blockchains), and investors from all over the world can normally embark on the project.

The answers to questions such as which law applies and which jurisdiction is competent will vary greatly and depend on several key questions such as whether tort and/or contract law is invoked, whether the transaction may qualify as a sale, the location of the parties…

Most of the time, different aspects of an ICO will be subject to different laws (*e.g.* corporate law of the issuer will depend on the location of its seat, 'token agreements' may normally incorporate a choice-of-law clause...). As regulations will vary from one jurisdiction to another, ICO issuers must handle conflict-of-laws and jurisdiction issues with great care.

Our two-cents

The legal framework of ICOs is extremely unclear but far from being inexistent. The lack of clarity in the regulation generates an important risk of which ICO issuers must be wary.

The wait for a consistent EU ICO regulation might be long. Still recently, the Chair of the Supervisory Board at the ECB declared that regulating ICOs was not "*very high on* [the ECB's] *to-do list*" [5]. The initiative could come from another EU institution (*e.g.* ESMA) but, in the meantime, ICO issuers need to carefully design their ICO with many potential regulations in mind.

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[2] https://www.esma.europa.eu/press-news/esma-news/esma-highlights-ico-risks-investors-and-firms

[3] https://www.fsma.be/sites/default/files/public/content/EN/Circ/fsma_2017_20_en.pdf

[4] http://www.icocharter.eu/

[5] https://cointelegraph.com/news/cryptocurrency-regulation-not-high-on-to-do-list-says-european-central-bank