ICOS IN BELGIUM: INITIAL CONSIDERATIONS ON FINANCIAL, ACCOUNTING AND TAX LAW IMPLICATIONS

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Abstract

Initial Coin Offerings or, in short, 'ICOs' can be considered a synergy between crowdfunding and distributed ledger technology. To date, however, there are no specific rules with respect to ICOs in Belgium. This lack of legislation and legal certainty may discourage companies or organisations to set up their ICO in Belgium. If the legislator refuses to act, Belgium risks to be left out while companies go elsewhere. This paper wants to highlight some potential legal implications of setting up an ICO in Belgium.

The structure of the paper is as follows: first, a classification of different kind of tokens is created. Second, after this classification, a high-level analysis from a financial, accounting and tax law perspective is made, and potential legal implications are indicated. The paper concludes with some general remarks.

This research shows that there is no such thing as "the ICO" since most tokens derived from ICOs have different characteristics. There are almost as many types of tokens as there are ICOs. This may explain why regulators seem to be reluctant to provide clear guidance on the topic. Furthermore, the paper shows that no regulation was specifically created with ICOs in mind. Therefore, applying current rules on ICOs leaves us with several legal uncertainties. As most ICOs are very similar to IPOs and most tokens that are issued through an ICO usually embody an investment aspect, it is very likely that token issuers will have to comply with financial law obligations such as prospectus, anti-money laundering and market abuse legislation. The same approach is used in the US. Moreover, the paper shows that the interpretations of these regulations are not always clear and some special regimes, such as the crowdfunding regime may apply as well. Lastly, the accounting and tax regime of ICOs is rather ambiguous as well. With this paper, we try to provide an introduction to prospecting token issuers on the potential legal implications of setting up an ICO in Belgium.

Keywords: ICO, tokens, securities, accounting, taxation

Introduction

In 2017, more than US$ 5.6 billion was raised through initial coin offerings[2] ("ICOs"). This number is expected to be even higher in 2018.[3] The growing rates of ICOs show that the time has come for regulators to provide guidance for this new way of raising funds.

The ICO process goes as follows: a legal or natural person, or even a factual organisation, issues "coins" or "tokens" (see below for a distinction between both terms) that are created with blockchain technology. These tokens are mostly sold for cryptocurrencies such as Bitcoin or Ether, or, in other cases for fiat currency, such as USD and EUR. As the aim of this paper is to dive deeper into this new way of obtaining corporate funding, we will only focus on ICOs that are set up by corporations.

A comparison is often made between ICOs and IPOs (Initial Public Offerings). Although they are both ways to raise funds, ICOs are a more flexible way to raise money since (i) the company does not trade its digital tokens on regulated stock markets, (ii) there is no requirement of involvement of investment banks and (iii) no strong track record is needed to have a successful ICO. Furthermore, companies are

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[2] According to F. Ventures, "The State of the Token Market report', a VC fund with a focus on Fintech, and TokenData (https://www.tokendata.io/), a platform that tracks data on token sales and ICOs, https://static1.squarespace.com/static/5a19eca6c027d8615635f801/t/5a73697bc8302551711523ca/1517513088503/The+State+of+the+Token+Market+Final2.pdf. Other tracking platforms, like CoinSchedule, report a lower number of US$ 3.8 billion, https://www.coinschedule.com/stats.html?year=2017, accessed on 10 April 2018.

[3] 'Cryptocurrency ICO Stats 2018', https://www.coinschedule.com/stats.html?year=2018, accessed on 10 April 2018.

free to choose the rights and obligations that their tokens will embody. When token characteristics of recent ICOs are studied, almost as many different types of tokens as there are ICOs can be distinguished. Some of them grant token holders access to a digital platform or give them a discount on the platform access fees. Other tokens grant their holders the right to purchase certain services or products that the token issuer will provide with the proceeds of the ICO. Furthermore, there are tokens with rights and obligations, which are akin to regular shares or bonds. These rights, obligations and other characteristics of a token are usually described in a "whitepaper", a document that is made publicly available prior to the ICO.

It is often argued in the media that ICOs are not subject to any regulation. [4] This may give companies the wrongful impression that everything is allowed. Even though there are no specific regulatory provisions regarding ICOs in Belgium at the moment, many existing regulations are formulated in a very general way or contain some kind of catch-all clause, so that ICOs may in fact fall in their scope.

Given that the current legislative framework is rather uncertain as far as ICOs are concerned, clarification is needed. The purpose of this paper is therefore to guide potential token issuers and investors in their efforts to set up or invest in an ICO in Belgium. The topic will be dealt with from a Belgian legal perspective. Due to many uncertainties, it is important for regulators to take action in order to create a stable and healthy environment for ICOs in Belgium.

The structure of the paper is as follows. Before diving into the legislative framework, a classification of tokens is made. Second, we analyse possible pitfalls of ICOs in the current legislative framework. Various issues are highlighted from a financial, accounting and tax law perspective. To conclude, some general remarks will be set out.

1. Cryptocurrencies? Coins? Tokens? Quid?

Since ICOs are a new phenomenon, we will firstly define the different concepts and terms. So far, there is no generally accepted terminology available.[5] Therefore, it is rather difficult for legislators to make nuanced decisions on ICOs. A clear conceptual framework, however, is important in order to create some degree of uniformity. Moreover, some degree of standardisation should, in fact, be implemented on a EU level.

The first concept that needs to be defined is "Cryptocurrency". This term is often (mis)used as an umbrella term for all "crypto-assets" (i.e. "cryptocurrencies" or "coins" and "tokens"). Crypto-assets rely on Distributed Ledger Technology (hereinafter referred to as "DLT"). The most famous example of a cryptocurrency is Bitcoin. Bitcoin uses DLT to make payment transactions that are secured by cryptography, hence the name "crypto-"currency.[6]

There is, however, a distinction to be made between different types of crypto-assets. On the one hand, there are 'Cryptocurrencies' or 'Coins'. These are crypto-assets that are used as a general-purpose medium of exchange, a store of value and a unit of account.[7] All constituent elements of a regular currency are present. The goal of cryptocurrencies is to provide for a peer-to-peer mechanism to conduct payments, without having to rely on trusted third parties.

On the other hand, there are so-called 'Tokens'. Tokens have an extra functionality. Other than a currency, they are no general-purpose medium to transfer value.[8] They constitute the embodiment of some kind of claim against the issuer of the token.[9] This claim can have various forms. Some tokens represent a claim against future cashflows of the issuing entity, others give right to future products or

[4] E.g., see R. Mooijman, 'Opgepast voor oplichting met crypto-munten' [2017] De Standaard, http://www.standaard.be/cnt/dmf20171113_03183447.

[5] T. Euler, 'The Token Classification Framework' [2018], http://www.untitled-inc.com/the-token-classification-framework-a-multi-dimensional-tool-for-understanding-and-classifying-crypto-tokens/.

[6] 'IFRS – Accounting for crypto-assets' [2018] EY, p. 4, http://eyfinancialservicesthoughtgallery.ie/wp-content/uploads/2018/03/EY-IFRS-Accounting-for-crypto-assets.pdf.

[7] 'Virtual Currencies' [2012] ECB, p. 10, https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf.

[8] 'IFRS – Accounting for crypto-assets', *Ibid.*, p. 7.

[9] 'Statement in Connection with the 2017 AICPA Conference on Current SEC and PCAOB Developments' [2017] SEC, https://www.sec.gov/news/speech/bricker-2017-12-04.

services of the issuer. The rights and obligations attached to such a token are, as we pointed out earlier, listed in a detailed whitepaper from the issuer.

The above-mentioned distinction is important from a legal perspective, as both crypto-assets have different legal implications. In order to facilitate the decision-making processes of legislators, it is important that a framework is used where no ambiguities exist.

Since we are interested in this new means of raising funds for companies, this paper focusses solely on Tokens. The term 'ITO' or 'Initial Token Offering' is therefore more appropriate.

As stated above, tokens can embody different rights and obligations. Hence, a one-size-fits all solution is impossible to provide. One must look on a case-by-case basis to assess the legal implications of each ITO and the tokens that come forth from them.

It is, however, possible to distinguish two main Token archetypes: (i) Investment Tokens and (ii) Utility Tokens.[10]

1.1. Investment Tokens

The first type of tokens is the 'Investment Token'. These tokens are very similar to regular securities such as shares, bonds or hybrid products. They represent in other words an economic interest in the issuing entity. When purchasing Investment Tokens, the investor expects a future cashflow, comparable with interests or dividends, and hopes to generate a capital gain when selling them.

One could argue that the only innovative feature of these tokens is the technology behind them. By using DLT, transactions can be executed and registered instantaneously. The legal implications will be analogous to the implications regular products carrying similar rights and obligations entail (see below).

1.2. Utility Tokens

The second token class consists of so-called 'Utility Tokens'. These tokens give their holders a right to purchase (future) services or products of the issuer, or they give access to a specific platform.[11] The revolutionary aspect of these tokens is that they allow interaction between the users and the company through a platform. In this way, certain user behaviour can be rewarded with tokens, while token holders can also benefit from the value creation within the network.[12]

Utility tokens are a lot more challenging to approach from a legal perspective, as there are so many possibilities. The main difference with Investment Tokens is that Utility Tokens are – initially – not meant to generate cashflows for their investors.[13] The value of Utility Tokens stems from the functional aspect they embody.

To assess Tokens from a legal point of view, it is – in our opinion – important to consider the economic reality behind these tokens. It seems that a lot of Utility Tokens are bought merely for trading purposes. This reality might have severe implications from a financial law perspective.

In the next chapter, we will look into potential financial law implications of setting up an ITO in Belgium.

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[10] Different distinctions are possible, depending on the point of view. For the different options to classify tokens, we refer to T. Euler, 'The Token Classification Framework' [2018] http://www.untitled-inc.com/the-token-classification-framework-a-multi-dimensional-tool-for-understanding-and-classifying-crypto-tokens/.

[11] T. Sameeh, 'ICO basics – security tokens vs. utility tokens' [2018], https://www.cointelligence.com/content/ico-basics-security-tokens-vs-utility-tokens/.

[12] J. Stauffer, 'The Coming Crypto Utility Token Economy: Definitions, Examples, and Why It Matters' [2018], https://medium.com/@jaredstauffer/the-coming-crypto-utility-token-economy-definitions-examples-and-why-it-matters-521f9390be69.

[13] T. Sameeh, 'ICO basics – security tokens vs. utility tokens' [2018], https://www.cointelligence.com/content/ico-basics-security-tokens-vs-utility-tokens/.

2. Potential financial law implications

To date, apart from some warnings of the Belgian Financial Services and Markets Authority ("FSMA")[14], no specific regulatory guidance has been provided regarding ITOs in Belgium. Depending on the rights and obligations embodied in tokens, ITOs may trigger financial law obligations.

2.1. Do tokens fall within existing financial law categories?

Depending on the facts and circumstances, tokens may qualify as regulated 'instruments' within a Belgian financial law context. Two main categories of instruments can be distinguished. The first category consists of 'financial instruments' as defined in the "Financial Supervision Law".[15] The same term is used in both the "Investment Services Law"[16], as well as in the "MiFID II Law" [17] (which transposes the MiFID II Directive[18]). When a token can be regarded as a financial instrument, the issuer will have to comply with different licensing obligations.

The second important category comprises 'investment instruments' as defined in the "Belgian Prospectus Law".[19] When tokens fall within this category, token issuers are obliged to fulfil prospectus requirements. In practice, many token issuers attach some kind of functionality to their tokens to qualify them as Utility Tokens, hoping to fall outside of the scope of the prospectus law. We are, however, very sceptical about this approach and stress the need to look at the economic reality. In most cases, we doubt that token issuers will escape these legal consequences.

Other qualifications may exist. However, since the main goal of an ITO is acquiring funds, the two above-mentioned categories are the most important ones to consider.[20]

2.1.1. When can tokens be considered to be financial instruments?

A definition of 'financial instruments' can be found in the Financial Supervision Law.[21] Article 2, 1° of this law contains a limitative list of different categories of instruments that can be regarded as a "financial instrument" within its context. Tokens as such, are nowhere to be found in this list. However, one could argue that some tokens (mostly Investment Tokens) can fall within the scope of the category 'transferable securities' of the Financial Supervision Law, which is a subcategory of financial instruments.[22]

Article 2,1° a) of the Financial Supervision Law defines transferable securities as "those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

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[14] 'Initial coin offerings (ICOs)' [2017] FSMA, https://www.fsma.be/sites/default/files/public/content/EN/Circ/fsma_2017_20_en.pdf. The FSMA endorsed prior statements of the ESMA (European Securities and Markets Authority); See: 'Statement firms' [2017] ESMA, https://www.esma.europa.eu/sites/default/files/library/esma50-157-828_ico_statement_firms.pdf and 'Statement Investors' [2017] ESMA, https://www.esma.europa.eu/sites/default/files/library/esma50-157-829_ico_statement_investors.pdf.

[15] "Financiële instrumenten"/"instruments financiers" as defined in the Belgian Law of 2 August 2002 on the supervision of the financial sector and on financial services [4 September 2002] Belgian Official Gazette 39121.

[16] Law of 25 October 2016 on the access to the investment services company and on the legal status and supervision of portfolio management and investment advice companies [18 November 2016] Belgian Official Gazette 76915.

[17] Law of 21 November 2017 on the infrastructures for markets in financial instruments and transposing Directive 2014/65/EU [7 December 2017] Belgian Official Gazette 107933.

[18] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61.

[19] "Beleggingsinstrumenten"/"instruments de placement" as defined in the Belgian Law of 16 June 2006 on the public offering of investment instruments and on the admission of investment instruments to trading on a regulated market [21 June 2006] Belgian Official Gazette 31352.

[20] For a more in-depth analysis, see: A. Snyers and K. Pauwels, 'ICOs in Belgium: down the rabbit hole into legal no man's land?' (Part 1)' [2018] ICCLR, in press.

[21] *Cf.* Art. (4)(1)(17) / Section C Annex I European Parliament and Council Directive (EU) 2004/39/EC on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L145/1 (MiFID I Directive), replaced by art. (4)(1)(15) / Section C Annex I European Parliament and Council Directive (EU) 2014/65 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349 (MiFID II Directive).

[22] "Effecten"/"valeurs mobilières", see art. 2 1° a) of the Financial Supervision Law.

- shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
- bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
- any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures" (own emphasis added).[23]

Since Investment Tokens are usually – apart from the technology used – very similar to regular bonds or shares, they ought to fall within the scope of transferable securities and should give rise to the same regulatory consequences of analogous instruments such as bonds and shares. Furthermore, most Investment Tokens are indeed 'transferable' as most of them are sold on 'crypto-exchanges' (i.e. a secondary market where crypto-assets are traded) and thus 'negotiable on the capital market'. Moreover, tokens issued by one issuer usually share the same features. Hence, one might say that they are 'standardised'.[24]

Utility tokens, on the other hand, are normally not meant to generate cashflows for their holders, as their functional aspect prevails. Generally, they are not considered to be transferable securities. However, this view needs to be nuanced. Utility Tokens are usually created with the only intention to grant the holder a discount on a specific service or product or access to a crypto-platform. Nevertheless, if one considers the economic reality, one must conclude that most of these Utility Tokens are purchased with the sole intention of reselling them at a higher price and thus realising a capital gain. Similar to Investment Tokens, Utility Tokens are actively traded on crypto-exchanges. This suggests that most Utility Tokens are just Investment Tokens dressed up as a Utility Token.

Therefore, we are convinced an alternative approach is needed. In our opinion, there is no reason to argue that Utility Tokens that are actively traded on secondary markets should be treated in a different way from other transferable securities. We believe they ought to fall within the scope of the concept 'financial instruments'. However, we are aware of the fact that there are Utility Tokens that are not listed on secondary markets and do have a fixed price. They are more akin to vouchers. This way, they are to be distinguished from 'regular' financial instruments. We have opted to call them 'Pure Utility Tokens'.

It might be a good idea to implement a 'financial instrument test'[25] to determine if a token constitutes de facto a financial instrument. A similar test is applied by the SEC (the "Securities and Exchange Commission") in the United States: the so-called 'Howey-test'[26]. In summary, there are four elements to determine whether an investment contract constitutes a security. The investment contract should be a contract where (i) a money investment is made into (ii) a normal enterprise, (iii) from which profits are expected (iv) that are derived from the managerial or entrepreneurial efforts of others.[27] Investment Tokens meet these requirements. If we look at the economic reality, most Utility Tokens grant their investor the expectation of profits, which are usually (partly) derived from the managerial efforts of the token issuer. Therefore, the SEC considers most Utility Tokens to be securities as well.[28]

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[23] Art. 2, 31° Financial Supervision Law (*cf.* art. 4(1)(18) MiFID I Directive, replaced by art. 4 (1)(44) MiFID II Directive).

[24] P. Hacker and C. Thomale, 'Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law' [2017] SSRN, https://ssrn.com/abstract=3075820, pp. 20 *et seq.*

[25] A similar test was suggested by the Malta Financial Services Authority, see: 'Discussion Paper on Initial Coin Offerings, Virtual Currencies and Related Service Providers' [2017] MFSA, p. 8, https://www.mfsa.com.mt/pages/readfile.aspx?f=/files/Announcements/Consultation/2017/20171130_DiscussionPaperVCs.pdf.

[26] This test refers to case in the US where criteria were adopted to determine if an investment contract can be qualified as a security See: SEC v. W.J. Howey Co., 328 U.S. 293 [1946].

[27] SEC v. W.J. Howey Co., 328 U.S. 293 [1946] 301. See also: United Housing Found., Inc. v. Forman, 421 U.S. 837 [1975] 852-853; *SEC v. Edwards*, 540 U.S. 389 [2004] 393.

[28] *E.g. s*ee in this respect: SEC, In the Matter of Munchee Inc., Order (11 December 2017) p. 8.

2.1.2. When can tokens be considered to be investment instruments?

A definition of 'investment instruments' can be found in the Prospectus Law. Article 4 of this law lists the different categories of rights and values that can be qualified as 'investment instruments'. Since ITOs are a relatively new phenomenon, tokens are nowhere to be found in this list. This list, however is not intended to be limitative and contains two catch-all clauses. Therefore, all agreements that represent rights on investment instruments other than securities[29], and all instruments that – regardless of their underlying assets – make a financial investment possible[30], are considered to be investment instruments.

When considering both clauses, all tokens that are traded on an exchange ought to be regarded as investment instruments. All of them (with an exception for Pure Utility Tokens) embody an investment aspect since they are tradable on a crypto-exchange and can be subject to speculation. Hence, we argue that they fall within the scope of these catch-all clauses.

Therefore, token issuers in spe, should – for the sake of certainty – provide a prospectus and comply with prospectus rules before setting up an ITO. The question remains of course, whether this is desirable. Further regulatory guidance on the matter would be most welcome. To date, most token issuers provide a whitepaper – a less bulky alternative for a prospectus – to inform potential investors.[31] Although some whitepaper standards are being developed in the crypto-space, they are not yet regulated. It might be useful to consider the option to regulate these whitepapers so they can serve as a prospectus "light", and create a special regime, specifically tailored to ITOs.

2.2. What other financial law regimes are to be considered?

To conclude this financial regulatory perspective, we will briefly touch upon other financial law regimes like crowdfunding, the market abuse and the anti-money laundering regime. Furthermore, the UCITS[32] and the AIF[33] regime ought to be considered as well when setting up an ITO. These two regimes, however, fall outside the scope of this paper.

2.2.1. Crowdfunding regime

Depending on the facts and circumstances, an ITO could be set up to fall within the scope of the more advantageous Belgian crowdfunding regime.[34] ITOs constitute de facto a new way of crowdfunding.[35] In our opinion, the option of adapting crowdfunding rules to tokens should be explored, in order to give the issuers of tokens more leeway. One could, for instance, raise the current cap of EUR 300,000[36], which is the maximum amount that can be raised under this regime, to EUR 1,000,000. Belgium has, after all, the authority to raise the cap on the amount of funds that can be raised under an exemption.[37] Further guidance on this topic would be desirable.[38]

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[29] Art. 4, §1, 9° of the Prospectus Law.
[30] Art. 4, §1, 10° of the Prospectus Law.
[31] E.g. see various whitepapers in the Whitepaper Database, http://whitepaperdatabase.com.
[32] Law of 2 August 2012 on undertakings for collective investment that comply with the conditions set out in Directive 2009/65/EG and undertakings for investment in debt claims [19 October 2012] Belgian Official Gazette 63652.
[33] Law of 19 April 2014 on alternative investment funds and their managers [17 June 2014] Belgian Official Gazette 45353.
[34] Belgian Law of 18 December 2016 on the recognition, delineation and definition of crowdfunding and containing various financial provisions, [20 December 2016] Belgian Official Gazette 87668.
[35] One could call it 'crowdfunding 2.0'. See: J. Baukema, 'Initial Coin Offerings (ICO's): crowdfunding 2.0?' [2018] TFR (NL) p. 113-121.
[36] Art. 18 of the law of 18 December 2016 on the recognition, delineation and definition of crowdfunding and containing various financial provisions, [20 December 2016] Belgian Official Gazette 87668.
[37] Art. 1(3) of the European Parliament and Council Directive (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L168/12.
[38] The FSMA has already issued a FAQ (see: https://www.fsma.be/nl/crowdfunding-1, accessed on 2 April 2018) and a statement (see: 'Statement on Crowdfunding' [2017] FSMA, https://www.fsma.be/nl/file/49564/download?token=lm9iQG2r) on the regulatory requirements for crowdfunding in Belgium, which could be supplemented with a section on ITOs.

2.2.2. Market abuse regime

As most tokens will probably qualify as financial instruments, one has to look into the possibility of being subject to the Market Abuse Regulation[39].[40] The purpose of this regulation is to minimize insider trading and to counter market manipulation on exchanges. Again, further guidance on the application of these rules on ITOs would be most welcome.

2.2.3. Anti-money laundering regime

The European Commission recently proposed the fifth Anti-Money Laundering ("AML") Directive. This directive aims to, inter alia, minimize the risks that arise when dealing with virtual currencies.[41] Of particular relevance for ITOs, is that this directive defines 'virtual currencies'. Moreover, it brings both custodian wallet providers, as well as providers of exchange services between fiat currencies and virtual currencies, within the scope of the AML legislation

However, the European legislator did not go far enough with its new directive, since platforms where virtual currency can be exchanged for other virtual currency fall outside the scope of the new AML Directive and most token issuers sell their tokens in exchange for cryptocurrencies.[42] Generally speaking, most investors have acquired their cryptocurrencies at some place in time and should thus be identifiable. This may, however, not be the case when their cryptocurrencies were mined.[43]

3. Potential accounting and tax law implications

Tokens resulting from an ITO constitute in fact a new asset class. As is the case for most regulations, the Belgian GAAP (i.e. the Generally Accepted Accounting Standards), nor the Belgian tax law were designed with crypto-tokens or ITOs in mind. This leads to uncertainty which is exacerbated by the fact that, to date, no official guidelines have been issued on the accounting and tax treatment of tokens.

Pending further guidance, one should consider the existing general principles first. Given the fact that there are countless characteristics a token can embody, it is impossible to provide a one-size-fits-all analysis. Therefore, all ITOs should be assessed on a case-by-case basis.

3.1. Some general remarks regarding the accounting treatment of tokens

A problem that might occur when an entity is planning an ITO is how the sale of tokens must be recorded in its accounts. The accounting treatment will – of course – depend on the token that is issued.

When considering an Investment Token, it is very likely that the accounting treatment is analogous to the accounting treatment of more conventional instruments, such as shares, profit participating certificates or bonds. [44]

The difficulties arise when considering the accounting implications of Utility Tokens. Different approaches are conceivable. Some Utility Tokens resemble vouchers and should be treated the same

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[39] European Parliament and Council Directive (EU) 596/2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1.

[40] The Belgian FSMA recently pointed out that token issuers may indeed have to comply with MAR. See: 'Initial coin offerings (ICOs)' [2017] FSMA, p. 2, https://www.fsma.be/sites/default/files/public/content/EN/Circ/fsma_2017_20_en.pdf.

[41] COM/2016/0450, 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC' [2016] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0450&qid=1523358551244&from=EN.

[42] A. Bal, 'Blockchain, Initial Coin Offerings and Other Developments in the Virtual Currency Market' [2018] Derivatives & Financial Instruments, Journals IBFD Volume 20, No. 2, p. 8. See also: N. Vandezande, 'Virtual currencies under EU anti-money laundering law' [2017] Computer Law & Security Review, No. 33, p. 351.

[43] Not all virtual currencies can be mined (*i.e.* they are already pre-mined).

[44] 'IFRS – Accounting for crypto-assets [2018] EY, p. 8, http://eyfinancialservicesthoughtgallery.ie/wp-content/uploads/2018/03/EY-IFRS-Accounting-for-crypto-assets.pdf.

way.[45] Therefore, when considering for example a Pure Utility Token, where the holder will merely acquire a right to purchase a product or access a service, the accounting treatment will likely be similar as a revenue earned in the context of a voucher. Others may share more characteristics with prepaid income for services or products and should thus be treated equally.[46] There are also Utility Tokens that have similar characteristics to so-called 'contracts-in-progress' ('sell first, create afterwards') and should be treated as such.[47]

3.2. Some general remarks regarding the tax treatment of tokens

3.2.1. Income Tax

When income derived from an ITO is considered to be revenue from an accounting perspective, it will be subject to corporate income tax in the taxable period in which the revenue is recognised. The issuance of Investment Tokens will probably not constitute a taxable event, whereas the issuance of Utility tokens will most likely trigger income taxes when the proceeds thereof are recognised in the accounts.

Another question that should be tackled is the treatment of the proceeds that stem from Investment Tokens. They may resemble regular dividends, or interest payments, etc., and may be treated as such. Also, capital gains on tokens (regardless whether they are considered to be Investment Tokens or Utility Tokens) will most likely be treated analogously to capital gains that are realised on other assets such as shares and bonds. An in-depth analysis of the tax treatment of both the proceeds derived from tokens and the capital gains of the sale of tokens falls outside the scope of this paper.[48]

Furthermore, it is important to consider different tax incentives, such as the notional interest deduction[49], which can reduce the company's tax base. The potential tax implications ought to be analysed on a case-by-case basis. Token issuers should consider the different tax incentives when drawing up the whitepaper of the ITO to optimize the tax treatment.[50]

3.2.2. VAT

To analyse the VAT implication(s) of an ITO, each case should be considered individually as well.

When an entity issues Investment Tokens, it is unlikely that this event an sich will trigger VAT, as most of these tokens can be regarded as (transferable) securities from a financial regulatory perspective (see above). This same qualification should be applicable for VAT purposes as well. Transactions with respect to such securities are exempt from VAT.[51] As Investment Tokens may be considered as securities and ITOs are the high-tech pendants of Initial Public Offerings, we are convinced that both types of fundraising will be treated equally in a VAT context.

When an entity issues Utility Tokens, the proceeds thereof might be considered as a consideration for (electronic[52]) services from the token holder to the issuer. Hence, the ITO might be subject to VAT in Belgium.[53] However, if one looks at the economic reality, it is clear that, at the time of the ITO, the event is merely used to acquire funding to develop a product, a service or a platform in the future. Therefore,

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[45] *Cf.* 'Advice 148-1 on agreements providing staggered or successive supplies' [1984] CBN, http://www.cnc-cbn.be/files/advice/link/NL_148-01.htm.

[46] *Cf.* 'Advice 132/6 on prepayments' [1993] CBN, http://www.cnc-cbn.be/files/advice/link/NL_132_06_Herzien_advies.pdf.

[47] "Bestellingen in uitvoering"/"commandes en cours d'exécution".

[48] For a more in-depth analysis on this topic, see: K. Pauwels and A. Snyers, 'ICOs in Belgium: down the rabbit hole into legal no man's land? (Part 2)' [2018] ICCLR, in press.

[49] Art. 205bis *et seq.* Belgian Income Tax Code.

[50] M. Langer and S. Valenta, 'Taxation of Cryptocurrency and Blockchain-Based Companies in Liechtenstein' [2018], Tax notes international p. 172.

[51] Art. 44, §3, 10° of the Belgian VAT Code.

[52] A. Bal, 'Blockchain, Initial Coin Offerings and Other Developments in the Virtual Currency Market' [2018] Derivatives & Financial Instruments, Journals IBFD Volume 20, No. 2, p. 6.

[53] Art. 2 Belgian VAT Code.

we argue that, in many cases, the ITO-event itself, should not be considered as a taxable event.[54] Of course, when the Utility Tokens are used for their real purpose (traded for a product or service), these transactions will be subject to VAT. Arguing that ITO itself is to be considered as a taxable event would result in a double taxation. Firstly, VAT would be triggered at the time of the token issuance and secondly at the time the token is used for its actual purpose.

Furthermore, it is possible that some Utility Tokens could fall within the scope of the VAT regime regarding 'multi-purpose vouchers'.[55] The multi-purpose vouchers will only trigger VAT at the time of "the actual handing over of the goods or the actual provision of the services in return for a multi-purpose voucher accepted as consideration or part consideration by the supplier shall be subject to VAT".[56]

3.2.3. Miscellaneous taxes

ITOs and tokens may also be subject to other Belgian taxes. When considering setting up an ITO or investing in tokens, one must take these taxes into account. Two specific examples are the Belgian stock exchange tax[57], which is levied when securities are transferred, and the annual tax on Belgian and foreign securities accounts[58], which is levied when one is holding securities worth at least EUR 500,000 in a security account. The question remains whether the different kind of tokens will fall within the scope of these taxes.

Conclusion

As we pointed out in this paper, a lot of uncertainty remains with respect to ITOs. In some cases, the tokens fall perfectly within the scope of the existing regulatory framework, whereas other tokens are more difficult to classify and consequently, their legal implications remain rather uncertain.

The main conclusion is that one should always take into account the economic reality behind all ITOs. This reality shows that most investors buy tokens purely with the intention to realise capital gains, no matter whether the token can be qualified as a Utility Token or an Investment Token.

Regulators who are willing to tackle the regulatory issues arising from ITOs will have a difficult task. We hope they will manage to regulate ITOs in a neutral way, so that the blockchain technology can evolve, without being hampered by an over-regulating regulator. Belgium could follow the example of countries such as Estonia[59], Switzerland[60], Liechtenstein[61] and Belarus[62] and implement a lenient approach with respect to ITOs. These countries attract a lot of token issuers and, in doing so, they attract a lot of capital. In the Belgian system, several challenges remain with regards to ITO regulation.[63] We are, however, convinced that it is worth to provide regulatory guidance, so the digital economy can thrive.

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[54] To strengthen this reasoning, one may say that there is also no 'direct link' between the consideration received and the services provided by the service provider, which is a constitutive element to trigger VAT. E.g., see: Coöperatieve Aardappelenbewaarplaats, Case 154/80 [1981], §12; *Tolsma*, Case C-16/93 [1994] ECJ, § 13; GFKL Financial Services, Case C-93/10 [2009] ECJ, §19.

[55] Council Directive (EU) 2016/1065 amending Directive 2006/112/EC as regards the treatment of vouchers [2016] OJ L177/9.

[56] Article 30b of VAT Directive.

[57] "Taks op de beursverrichtingen en de reporten"/"taxe sur les opérations de bourse et les reports", see art. 120 et seq. of the Belgian Code of Miscellaneous Rights and Taxes.

[58] "Taks op de effectenrekeningen"/"taxe sur les comptes-titres", see art. 152 et seq. of the Belgian Code of Miscellaneous Rights and Taxes.

[59] R. J. Witismann, 'Estonia to become a global ICO hub' [2018] https://medium.com/@Incorporate_ee/estonia-to-become-a-global-ico-hub-6a4a53863719.

[60] S. Ozelli, 'Why Switzerland is Becoming a "Crypto Nation" with a Flourishing ICO Market: Expert Take' [2018] https://cointelegraph.com/news/why-switzerland-is-becoming-a-crypto-nation-with-a-flourishing-ico-market-expert-take.

[61] M. Langer and S. Valenta, 'Taxation of Cryptocurrency and Blockchain-Based Companies In Liechtenstein' [2018] Tax notes international p. 172.

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[63] E.g.,see: K. Pauwels and A. Snyers, 'ICOs in Belgium: down the rabbit hole into legal no man's land? (Part 2)' [2018] ICCLR, in press.

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