

Crypto currencies and insolvency in Portugal: What does the future hold?

Portuguese scholars and courts have not yet dealt with the impact of crypto currencies and crypto assets in insolvencies and in pre-insolvency proceedings. There are certain issues that are likely to arise in insolvency cases that are bound to raise doubts among insolvency practitioners, of which these are examples:

Is the breach of a duty to transfer crypto currencies relevant for the purposes of applying for or assessing the insolvency of the debtor?

Under the Portuguese Insolvency Code, any debtor that is unable to fulfil its obligations as they fall due is considered to be in an insolvency situation (cash flow test). The same applies when the debts of the insolvent considerably outweigh its assets (balance sheet test).

There is no limitation on the breach of monetary or payment obligations. As such, it seems that the lack of recognition of crypto currencies as money or equivalent under Portuguese law will not prevent a breach of an obligation to transfer crypto assets from being considered when determining whether the debtor is insolvent under the cash flow test criterion.

However, at least at first glance, it is more difficult to conceive of an insolvency application filed by a creditor arguing that the debtor is insolvent under the balance sheet test following the increase or decrease in the market price of the cryptocurrencies the debtor holds. This is because there is a lack of supervision of the crypto assets market and therefore room exists for ample discussion regarding the asset value of the cryptocurrency.

Are cryptocurrencies part of the insolvent estate of a debtor? Theoretical and practical challenges

All assets belonging to the debtor form part of the insolvency estate, unless those assets are not subject

to attachment (*impenhoráveis*). Assets that are not subject to attachment represent a closed and restricted list of personal assets that are indispensable to ensure the debtor can live a decent life. This is naturally not the case of crypto currencies. Therefore, we believe the broad definition of assets belonging to the debtor would include crypto assets and crypto currencies.

In line with what is happening in other jurisdictions, the main issue, of a practical nature, relates to the taking over of crypto assets by the insolvency administrator following the opening of the insolvency proceedings against the debtor. First, the insolvency administrator would have to know that the debtor owns crypto currencies and, second, he or she would need access to the digital wallet where the crypto assets are stored and to the corresponding private key.

Pursuant to Portuguese law, the debtor is incentivised to cooperate with the insolvency administrator. The debtor is under an obligation to provide all information relevant to the proceedings and give any cooperation required. A breach of these duties may lead to the insolvency being classified as culpable, which may entail severe consequences. Portuguese law would also allow for the issue of orders by the judge assigned to the insolvency case in support of the takeover of assets requested by the insolvency administrator. In particular, the judge could order third parties to provide information for the purpose of determining the existence of assets belonging to the debtor (Article 55, no. 6 of the Portuguese Insolvency Code).

Is the insolvency administrator bound to liquidate the crypto currency, through its conversion into legal tender?

In regular insolvency proceedings, the insolvency administrator is

required to liquidate all the debtor's assets and use the proceeds to pay the creditors according to their ranking. As such, we believe the insolvency administrator is required to convert crypto currencies into legal tender, with all the disadvantages that this procedure may entail. These disadvantages include the inexperience of the insolvency administrator in trading crypto currencies, the timing of the conversion, etc.

Are transactions involving crypto currencies subject to claw-back actions under the portuguese insolvency code?

Pursuant to Articles 120 and following of the Portuguese Insolvency Code, provided that certain assumptions are met, the insolvency administrator is entitled to claw back detrimental acts carried out by the debtor up to two years before the filing of insolvency proceedings.

On the face of this, a transaction including crypto assets would be subject to claw-back as far as the legal requirements are met. Needless to say, the tracing of crypto currencies and the possible conflict of laws triggered may provide additional challenges to the success of such an action.

Final comment

Apart from the theoretical issues raised by the crypto currencies in an insolvency scenario, the main challenges that insolvency practitioners will face are those relating to the skills and tools made available to the insolvency administrators to deal with the insolvency proceedings of a debtor who owns crypto currencies. Tracing and accessing the crypto assets will be burdensome and costly, and the possibility that these assets are unavailable to creditors, in our view, is great. ■



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