

Group Briefing  
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# UK jurisdiction taskforce publishes legal statement on status of cryptoassets and smart contracts: Observations from Ireland

**Best Firm in Ireland 2019, 2018 & 2017**  
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**Ireland Law Firm of the Year 2019 & 2018**  
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**Ireland M&A Legal Adviser of the Year 2018**  
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**Ireland Client Service Law Firm of the Year 2018**  
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**Ireland Law Firm of the Year 2018**  
International Financial Law Review (IFLR) Europe Awards

**Advised on Equity Deal of the Year 2018 – Allied Irish Banks IPO**  
International Financial Law Review (IFLR) Europe Awards

**Ireland Law Firm of the Year 2017**  
Chambers Europe Awards

## 1. INTRODUCTION

- In May 2019, the UK Jurisdiction Taskforce (“UKJT”), a subsidiary of the UK’s LawTech Delivery Panel, issued a consultation paper on the status of cryptoassets and smart contracts in English private law (“**Consultation Paper**”). In his foreword to the Consultation Paper, Sir Geoffrey Vos, Chancellor of the High Court of England and Wales (the “**Chancellor**”) commented that “*perceived legal uncertainty*” was the reason for some lack of confidence amongst market participants and investors in cryptoassets and smart contracts.<sup>1</sup>
- On 18 November 2019, the UKJT published a legal statement on cryptoassets and smart contracts (“**Legal Statement**”).<sup>2</sup> As mentioned in the Chancellor’s opening address at the launch of the Legal Statement (the “**Opening Address**”),<sup>3</sup> the Legal Statement “*is something that no other jurisdiction has attempted. It is genuinely*
- According to the Chancellor, the objective of the Legal Statement is “*to provide much needed market confidence and a degree of legal certainty as regards English common law in an area that is critical to the successful development and use of cryptoassets and smart contracts in the global financial services industry and beyond.*”<sup>5</sup> It is not stated, but the subject matter of the Legal Statement, while not requiring blockchain or any other form of distributed ledger technology (“**DLT**”) to be utilised in commercial transactions, are being reviewed because of the suitability of, in particular, blockchain to act as host and facilitate transactions.
- The Legal Statement is not a treatise or academic paper. According to the Chancellor, the objective of the Legal Statement “*is to provide the best possible answers to the critical legal questions under English law.*”<sup>6</sup> The Legal Statement demonstrates the ability of the common law and English law to flexibly respond to new commercial mechanisms such as cryptoassets and smart contracts.

*ground breaking.*”<sup>4</sup>

<sup>1</sup> Page 4, paragraph 2 of Legal Statement.

<sup>2</sup> [https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056\\_JO\\_Cryptocurrencies\\_Statement\\_FINAL\\_WEB\\_111119-1.pdf](https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf)

<sup>3</sup> [https://www.judiciary.uk/wp-content/uploads/2019/11/LegalStatementLaunch.GV\\_2.pdf](https://www.judiciary.uk/wp-content/uploads/2019/11/LegalStatementLaunch.GV_2.pdf)

<sup>4</sup> Page 1, paragraph 2 of Opening Address.

<sup>5</sup> Page 2, paragraph 6 of Opening Address.

<sup>6</sup> Page 3 of Legal Statement.

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

5. It was not the intention of the drafters<sup>7</sup> of the Legal Statement to say how the law should develop in the future. However, the drafters hope that any proposals for law reform can build on the foundation of the Legal Statement.
6. We discuss here the Legal Statement, with reference both to its statements and its potential implications for those in Ireland with an interest in its subject matter. It is important to note that the Legal Statement is not law and does not hold any formal position under the law of England and Wales, or indeed under Irish law. It is, however, a welcome series of statements of first principles, written by four eminent barristers. It is a welcome statement and will be used as a basis for further and more detailed review of the areas in scope. It will likely be used to base arguments in court, and the involvement of the bar and bench in the UKJT and the drafting of the Legal Statement is noteworthy, although it will likely be supplemented by more detailed, sector-specific analysis in the future, as well as, potentially, specific legislation. We discuss next steps below.

## 2. SCOPE OF LEGAL STATEMENT

1. The scope of the Legal Statement is limited to a consideration of cryptoassets and smart contracts under English private law and the common law. In particular, the Legal Statement considers:
  - i. the legal status of cryptoassets and whether or not cryptoassets constitute ‘property’ in law; and
  - ii. whether or not smart contracts should be treated as contracts for legal purposes.
2. The Legal Statement is, by legal standards, short and sweet. It is deliberately quite specific and narrow in its focus, omitting multiple areas relevant to the

primary areas under review. For example, regulation of dealings in cryptoassets and the remedies available for infringement of proprietary rights in cryptoassets and smart contracts are out-of-scope, as are matters of taxation, criminal law, partnership law, data protection, intellectual property rights, consumer protection, settlement finality, regulatory capital, anti-money laundering and counter-terrorist financing. According to the Legal Statement, these other areas are “*best dealt with by other bodies or organisations*”.<sup>8</sup> In this regard, we may see such issues being dealt with by national or European Union (“EU”) bodies in the near future. Thus, the focus of the Legal Statement is quite narrow, focusing on what are essentially matters of first principles with reference to the in-scope topics.

## 3. LEGAL STATUS OF CRYPTOASSETS

1. The UKJT found that cryptoassets have “*all of the indicia of property*” and the fact that cryptoassets are intangible, use cryptographic authentication and distributed transaction ledgers, are decentralised and operate on the basis of rules by consensus as opposed to legal rules, does not “*disqualify them from being property*”.<sup>9</sup> In what may be considered a watershed for English law, the UKJT concluded that “*cryptoassets are therefore to be treated in principle as property*”.<sup>10</sup> This is a strong statement in and of itself. It is open to challenge this, or any other statement, in the Legal Statement.
2. Regarding the private key of a cryptoasset, however, the UKJT concluded that a private key “*is not in itself to be treated as property because it is information*.”<sup>11</sup>

<sup>8</sup> Page 5, paragraph 11 of Legal Statement.

<sup>9</sup> Page 7, paragraph 15 of Legal Statement.

<sup>10</sup> Page 7, paragraph 15 of Legal Statement.

<sup>11</sup> Page 22, paragraph 85(e) of Legal Statement.

## 4. CONSEQUENCES OF CHARACTERISING CRYPTOASSETS AS ‘PROPERTY’ IN LAW

1. As identified in the Legal Statement, classifying cryptoassets as property in law has important consequences for the application of legal rules, including those relating to succession on death, the vesting of property in bankruptcy, rights of liquidators in corporate insolvency, and in cases of fraud, theft and breach of trust.<sup>12</sup> These are examples of the type of issues which arise in respect of ‘property’, as historically understood, and, in particular, which occupy the courts.
2. While these consequences are not considered in the Legal Statement, it will be important for English law, as well as Irish law if cryptoassets are characterised as ‘property’ in this jurisdiction, to consider these consequences.
3. With reference to Ireland, according to section 10(1) of the Succession Act 1965 (the “1965 Act”), the “*real and personal estate*” of a deceased person shall on his/her death, notwithstanding any testamentary disposition, devolve on and become vested in his/her personal representatives.<sup>13</sup> “*Real estate*” is defined in section 4 of the 1965 Act and includes “*chattels real, and land in possession, remainder, or reversion, and every estate or interest in or over land (including real estate held by way of mortgage or security, but not including money to arise under a trust for sale of land, or money secured or charged on land)*”. Are cryptoassets real and/or personal estate and if not, should the 1965 Act be amended to provide for the devolution of cryptoassets upon death? Given that section 4 of the 1965 Act states that the definition of real estate “*includes*” the above rather than being limited to the above, it is arguable that the definition of “*real estate*” is not closed. This is an

<sup>12</sup> Page 7, paragraph 16 of Legal Statement.

<sup>13</sup> <http://www.irishstatutebook.ie/eli/1965/act/27/section/10/enacted/en/html#sec10>

<sup>7</sup> Lawrence Akka QC, David Quest QC, Matthew Lavy and Sam Goodman.

example of the type of more practical issues which lie behind the Legal Statement's broad statements of first principle.

4. Again, with reference to Ireland, according to section 44(1) of the Bankruptcy Act 1988 (the "1988 Act"), where a person is adjudicated bankrupt, then, subject to the provisions of the 1988 Act, all "property" belonging to that person shall on the date of adjudication vest in the Official Assignee for the benefit of the creditors of the bankrupt.<sup>14</sup> "Property" is defined in section 3 of the 1988 Act as including "money, goods, things in action, land and every description of property, whether real or personal" and "obligations, easements and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property". Again, given that section 3 of the 1988 Act states that the definition of property "includes" the above but is not limited to the above, it is arguable that the definition of "property" is not closed.
5. By way of comparison, the definition of "property" under the Insolvency Act 1986 in England and Wales (the "1986 Act") includes the same things as contained in the definition of "property" in section 3 of the 1988 Act in Ireland. Having considered the definition of "property" under the 1986 Act, the UKJT concluded in the Legal Statement that "that definition is very wide indeed"<sup>15</sup> and "since cryptoassets can be property at common law, we have no doubt that they can be property for the purposes of the Insolvency Act [i.e. the 1986 Act]."<sup>16</sup> Since the definition of "property" under the 1986 Act contains the same things as contained in the definition of "property" in the 1988 Act, it is strongly arguable that cryptoassets constitute "property" for the purposes of the 1988 Act in Ireland.
6. As companies continue to acquire and dispose of cryptoassets, consideration must be given to how, if at all, company law will respond to these transactions. In Ireland, the relevant legislation is the Companies Act 2014 (the "2014 Act").  
Section 238 of the 2014 Act provides that subject to section 238(4) and (5) of the 2014 Act, a company (the "relevant company") shall not enter into an arrangement under which (a) a director of the relevant company or of its holding company, or a person connected with such a director, acquires or is to acquire, one or more "non-cash assets" of the requisite value from the relevant company; or (b) the relevant company acquires or is to acquire, one or more "non-cash assets" of the requisite value from such a director or a person so connected, unless the arrangement is first approved (i) by a resolution of the relevant company in general meeting; and (ii) if the director or connected person is a director of its holding company or a person connected with such a director, by a resolution of the holding company in general meeting.<sup>17</sup>  
Under section 238(2) of the 2014 Act, a "non-cash asset" is of the "requisite value" if at the time the arrangement in question is entered into its value is not less than €5,000 but, subject to that, exceeds €65,000 or 10% of the amount of the relevant company's relevant assets.<sup>18</sup>  
According to the Legal Statement, cryptoassets are intangible assets which cannot be physically

possessed.<sup>19</sup> They are purely virtual.<sup>20</sup> Cryptoassets are not cash. Therefore cryptoassets are highly likely to constitute "non-cash assets" for the purposes of section 238 of the 2014 Act. Moreover, cryptoassets are highly likely to be non-cash assets of the "requisite value" because the value of some cryptoassets are not less than €5,000 and exceed €65,000. Indeed, some cryptoassets may even exceed 10% of the amount of the relevant company's relevant assets.

7. The above are intended as examples of the type of complex, more detailed issues which underlie the type of broad principle issues addressed in the Legal Statement.

The problems of ensuring that legal definitions are not outstripped by technological and entrepreneurial developments is not, of course, a new one, but this admirable Legal Statement, produced by distinguished legal practitioners, provides a timely reminder that lawyers and legislators should be ever willing to react to such developments. One of the most persistent difficulties in this area is the failure to alter the legal definitions that surround concepts such as the transfer of property and assets generally. Words such as 'sale' and 'goods' are part of the building blocks of contracts but what do they mean? For criminal law theft purposes, the definition of 'property' was amended by the Oireachtas in 2001 by the Criminal Justice (Theft and Fraud Offences) Act 2001 so as to include intangible property but this amendment did not cover all criminal law offences involving property. Regrettably, the Oireachtas has failed to amend concepts of 'sale' or 'goods'. Consequently, the law still requires that a transfer of 'goods' via a contract involves a physical transfer of something. For example, Irish law, like English law, still views

<sup>14</sup> <http://www.irishstatutebook.ie/eli/1988/act/27/section/44/enacted/en/html>

<sup>15</sup> Page 22, paragraph 108 of Legal Statement.

<sup>16</sup> Page 22, paragraph 109 of Legal Statement.

<sup>17</sup> <http://www.irishstatutebook.ie/eli/2014/act/38/section/238/enacted/en/html#sec238>

<sup>18</sup> <http://www.irishstatutebook.ie/eli/2014/act/38/section/238/enacted/en/html#sec238>

<sup>19</sup> Page 7, paragraph 17 of Legal Statement.

<sup>20</sup> Page 7, paragraph 17 of Legal Statement.

the transfer of a computer program directly to a buyer or licensee by download as being a contractual transaction but it is not a sale of 'goods'.<sup>21</sup> With respect, this is not a commercially acceptable position and, ironically, the courts in sharing this view have also started from first principles. If there is one criticism that can be levelled against the Legal Statement it is that the drafters are perhaps too sanguine in their view that the English judiciary share their view of what first principles are.

## 5. TREATMENT OF SMART CONTRACTS FOR LEGAL PURPOSES

I. Given that smart contracts are automatic and the way in which computer code operate are mechanistic, it has been suggested that smart contracts should be treated differently from conventional contracts. The UKJT disagrees and correctly notes that "*English law does not normally require contracts to be in any particular form.*"<sup>22</sup> This is also true in Irish law. The general rule is that a contract does not have to be in writing before it can be enforced.<sup>23</sup> By way of example, in *Pernod Richard & Comrie PLC v FII (Fyffes) plc*,<sup>24</sup> an oral agreement for a multi-million pound take-over was enforced. The decision was subsequently upheld on appeal by the Supreme Court of Ireland.<sup>25</sup>

21 See *Computer Associates UK Ltd v Software Incubator* [2018] EWCA Civ 518. The Court of Appeal of England and Wales held that for the purposes of Directive 86/653/EC of December 1986 on the co-ordination of the laws of Member States relating to self-employed commercial agents (the "Commercial Agents Directive"), software sold and delivered by digital download is not a sale of 'goods'. The UK Supreme Court has referred this case to the Court of Justice of the European Union.

22 Page 32, paragraph 137 of Legal Statement.

23 Paul A. McDermott, *Contract Law*, (Butterworths (Ireland) Ltd 2001, Reprinted 2004) page 189, paragraph [4.01].

24 (21 October 1988, unreported), High Court of Ireland (Costello J).

25 (11 November 1988, unreported), Supreme Court.

2. The Legal Statement discusses smart contracts, but more granularly it discusses smart legal contracts, a sub-set of smart contracts. The drafters of the Legal Statement tend not to dwell on complex and generally narrow definitions but rather focus on first principles. A smart contract is, in summary, a computer protocol (running on blockchain, or other DLT) intended to digitally enforce or verify the negotiation of an agreement, without third party intervention. It is automated enforcement and execution of a pre-agreement. It may be as simple as 'if X then Y' or may not involve a contract, as understood under common law. A smart legal contract is a form of contract consisting of computer code, which can automatically monitor, execute and enforce a legal agreement. A contract, whether in whole or in part, is represented as computer code. There are many types of smart legal contract. In many ways, smart legal contracts are not new and the execution of contracts have been represented in code for some time now, including, for example, in electronic-data-interchange arrangements where traditionally paper-based transactions are codified and exchanged electronically. An example is electronic order management. Again, the Legal Statement avoids getting bogged down in definitions and travelling down by-roads. It sticks to first principle issues.

3. The UKJT states that the requirements for formation of a contract are the same for all contracts, whether a conventional contract or a smart contract, namely that:

- i. agreement has, objectively, been reached between the parties as to terms that are sufficiently certain;
- ii. the parties intended, objectively, that they would be legally bound by their agreement; and
- iii. unless the contract is made by deed, each party to it must

give something of benefit (i.e. consideration) because a gratuitous promise in return for nothing is not generally enforceable.

4. Regarding the first requirement, there will be agreement if A offers terms to B, and B accepts those terms by words or conduct. Agreement is generally found in, or evidenced by, a written document bearing signatures of A and B but, as explained above, writing or signature is not a necessary precondition to the enforceability of a contract.
5. Regarding the second requirement, an intention to be legally bound will be presumed unless A or B proves that there was no such intention.
6. Regarding the third requirement, A and B will give something of benefit (i.e. consideration) in the conventional manner. The 'smart' nature of the contract, being the embedding of the terms of the contract in a networked system that executes and enforces performance using various techniques such as cryptographic authentication, decentralisation or consensus, does not preclude A and B from giving each other something of benefit.

## 6. THE DIFFICULTIES IN INTERPRETING SMART CONTRACTS DOES NOT MEAN THEY ARE NOT CONTRACTS

I. In general, conventional contracts are interpreted by focusing on the meaning of words. As identified by the UKJT, "*the modern approach to interpretation of commercial contracts is very much focused on the language*"<sup>26</sup> It may therefore be reasonable to assume that a smart contract, existing purely in code, is not susceptible to the exercise of contractual interpretation because interpretation is about ascribing meaning to natural language and code is not natural language to judges, lawyers or the reasonable person.

26 Page 35, paragraph 149 of Legal Statement.



2. The UKJT disagrees and submits that “a smart contract consisting solely of code with no natural language element can in most circumstances be seen as an extreme example of a contract whose language is clear, with the result that there is no justification to depart from it.”<sup>27</sup> The Legal Statement provides that a judge’s task when interpreting a smart contract, then, is to determine, looking at the contract as a whole and the admissible evidence, what the parties objectively intended their obligations to be.<sup>28</sup>
3. Where a smart contract is exclusively in code, and such code is ambiguous, a judge may need to rely upon extrinsic evidence, expert evidence or exceptions to the parol evidence rule. Since code is more ambiguous than human language, if smart contracts are ultimately found to constitute contracts in the conventional sense under English or indeed Irish law, one is likely to witness a rise in reliance upon extrinsic evidence, expert evidence, and exceptions to the parol evidence rule to aid in the construction of, or explain the circumstances surrounding the conclusion of, smart contracts. To a certain extent, the difficult questions under the subject matter reviewed in the Legal Statement and the difficult decisions based on such questions will fall to the courts. This applies whether or not a bespoke form of alternative dispute resolution arrangement is applied by operators of blockchain or other DLT, platforms on which applications are built, or the application providers themselves. Under the common law, direct reference to the courts, or appeal in specific circumstances, is a right. This ultimate judicial decision-making is a given under the common law and is one of its strengths. It is notable that the UKJT is strongly represented by the bench and bar

<sup>27</sup> Page 35, paragraph 150 of Legal Statement.

<sup>28</sup> Page 35, paragraph 152 of Legal Statement.

of England and Wales and that the Legal Statement was written by four barristers.

4. To a large extent, this section of the Legal Statement is the most interesting for practitioners, as it is before the courts that assumptions, understandings and contracts, between commercial parties by reference to their legal advisors, will be put to the test. Some will, inevitably, be put to the sword.
- 7. CONTRACTS CONCLUDED BY ANONYMOUS OR PSEUDO-ANONYMOUS PARTIES ARE CAPABLE OF GIVING RISE TO BINDING LEGAL OBLIGATIONS**
1. The UKJT have “no doubt” that a smart contract between anonymous or pseudo-anonymous parties is capable of giving rise to binding legal obligations because there is no requirement in English law for parties to a contract to know each other’s “real identity”.<sup>29</sup> This submission is a strong statement and may, we believe, be stated too strongly in the Legal Statement, as it only provides support for contracts between pseudo-anonymous parties and not anonymous parties. Again, the Legal Statement is written at a certain level of extraction, dealing with matters of first principle only.
2. Moreover, the Legal Statement provides that “many contracts are formed in circumstances in which (at least) one party does not know the real identity of the other party”.<sup>30</sup> The examples provided in support of this submission are an auction sale to the highest bidder and where an agent contracts on behalf of a principal whose identity has not been made known.<sup>31</sup> Again, this submission may be stated too strongly in the Legal Statement, as

<sup>29</sup> Page 36, paragraph 156 of Legal Statement.

<sup>30</sup> Page 36, paragraph 156 of Legal Statement.

<sup>31</sup> Page 36, paragraph 156 of Legal Statement.

the examples provided only provide support for the establishment of binding legal obligations where one party to the contract is anonymous. The examples do not support the conclusion of contracts that give rise to binding legal obligations where both parties to the contract are anonymous. These are examples of the type of issues which will need to be focused on now that the Legal Statement has usefully assisted in providing statements in respect of certain primary issues and questions.

3. There remains, we believe, some degree of uncertainty regarding whether or not a smart contract concluded between two anonymous parties is capable of giving rise to binding legal obligations.

## 8. A STATUTORY SIGNATURE REQUIREMENT CAN BE SATISFIED BY USING A PRIVATE KEY

1. In the UKJT’s view, a statutory signature requirement is “highly likely” to be capable of being satisfied by using a private key, because an electronic signature which is intended to authenticate a document will generally satisfy a statutory signature requirement, and a digital signature produced using public-key cryptography is a particular type of electronic signature.<sup>32</sup>
2. Section 12(1) of the Electronic Commerce Act 2000 in Ireland (the “2000 Act”)<sup>33</sup> provides that if by law or otherwise a person or public body is required or permitted to give information in writing, then, subject to certain conditions in section 12(2), the person or public body “may give the information in electronic form, whether as an electronic communication or otherwise”. Section 13(1) of the 2000 Act provides that if by law or otherwise the signature of a person or public body is required

<sup>32</sup> Page 37, paragraph 158 of Legal Statement.

<sup>33</sup> <http://www.irishstatutebook.ie/eli/2000/act/27/enacted/en/html>.

or permitted, then, subject to certain conditions in section 13(2), “*an electronic signature may be used.*”<sup>34</sup>

3. Interestingly, the 2000 Act sets out a number of procedural requirements for the use of electronic signatures, including consent. This is an example of one requirement of the (prior) smart legal contract. Note that under the 2000 Act, there are a range of subject matter to which electronic signatures do not apply, which continues to be the case notwithstanding a potential new category of electronic signatures.

### 9. A STATUTORY ‘IN WRITING’ REQUIREMENT CAN BE SATISFIED BY SMART CONTRACTS COMPOSED PARTLY OR WHOLLY OF COMPUTER CODE

1. Requirements that a contract be ‘in writing’ or ‘evidenced in writing’ are very rare in English law and indeed Irish law. However, they do exist.<sup>35</sup> The UKJT note that the mere fact that a smart contract is in electronic form does not mean that it cannot satisfy a statutory ‘in writing’ requirement. The only question is whether there is something intrinsic to computer code, as opposed to human language, that could lead to a different conclusion.
2. According to Schedule 1 of the Interpretation Act 1978 (the “**1978 Act**”) in England and Wales, “*writing*” is defined as including “*typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.*”<sup>36</sup>

34 The enactment of the 2000 Act demonstrates that Government and Departmental action can be successfully taken when there is cross-party support and the proposed legislation is innovative and positive for Irish business.

35 See section IV of the Statute of Frauds (1677) and section II of the Statute of Frauds (Ireland) 1695.

36 <http://www.legislation.gov.uk/ukpga/1978/30/schedule/1>

3. The UKJT’s view is that, to the extent the relevant code can (i) be said to be representing or reproducing words; and (ii) be made visible on a screen or printout, it is “*likely to fulfil*” a statutory ‘in writing’ requirement.<sup>37</sup>
4. According to the Schedule, Part 1 of the Interpretation Act 2005 in Ireland (the “**2005 Act**”), “*writing*” is defined more broadly than under the 1978 Act and includes “*printing, typewriting, lithography, photography, and other modes of representing or reproducing words in visible form and any information kept in a non-legible form, whether stored electronically or otherwise, which is capable by any means of being reproduced in a legible form.*”<sup>38</sup>
5. It is arguable that the words “*and any information kept in a non-legible form, whether stored electronically or otherwise, which is capable by any means of being reproduced in a legible form*” in the Schedule, Part 1 of the 2005 Act is more capable of providing support for the proposition that code found within smart contracts can satisfy a statutory ‘in writing’ requirement than the definition of “*writing*” in Schedule 1 of the 1978 Act because code is, to judges, lawyers and lay persons, in a non-legible form but critically, is capable of being reproduced in a legible form for comprehension by judges, lawyers and lay persons through the assistance of extrinsic evidence, expert evidence or exceptions to the parol evidence rule.
6. It is arguable, therefore, that a statutory ‘in writing’ requirement can be more easily satisfied by smart contracts composed partly or wholly of computer code under Irish law than under English law.

37 Page 38, paragraph 164 of Legal Statement.

38 <http://www.irishstatutebook.ie/eli/2005/act/23/schedule/enacted/en/html#sched-part1>

### 10. CONCLUSION

1. The Legal Statement provides a preliminary and accessible view on the legal status of cryptoassets and smart contracts under English law. With a plausible, albeit provisional, explanation for the legal foundation of cryptoassets and smart contracts now circulated, if not formally established, uncertainty should begin to dissipate, and it should be possible in the near future for regulators, whether domestic or European, to consider what regulatory measures, if any, are needed and for the courts to consider, where appropriate, what remedies may be available in respect of transactions involving the transfer and securitisation of cryptoassets. The Legal Statement does not, we believe, establish law. Rather, it presents a well-argued view on the law.
2. In going against the trend found in other jurisdictions which begins from the standpoint of regulation and remedies and works backwards, the objective of the UKJT was “*to start from basic legal principles and work forward to regulation and remedies.*”<sup>39</sup> This is a logical and sensible starting point because, in the words of the Chancellor in the Opening Address, “*there is no point in introducing regulations until you properly understand the legal status of the asset class you are regulating.*”<sup>40</sup> Moreover, you cannot consider what remedies are available for a particular asset class until you understand the legal status of the asset class you are regulating. The authors agree with this approach.
3. As the Chancellor noted in the Opening Address, the next step is for the Law Commission of England and Wales (the “**Law Commission**”) to consider “*whether any legislation*

39 Page 2, paragraph 5 of Opening Address.

40 Page 2, paragraph 5 of Opening Address.

*might be desirable in this area*.<sup>41</sup> The Chair of the Law Commission, Sir Nicholas Green, observed the UKJT and therefore observed the development of the Legal Statement from its inception to publication. The role of the Law Commission is to review and recommend law reform. It is up to Government to consider and act on recommendations, by way of legislation. What action, if any, the Law Commission may take remains to be seen.

4. Although the Legal Statement is founded in English law, many questions were framed and answered on the basis of common law and there is much similarity between the common law of England and Wales and that of Ireland. While the UKJT is comprised of lawyers, who have produced a legal output, the background here is the desirability of providing legal certainty in an area of commercial activity and, in particular, one with considerable scope for development. On that basis, the interests of the UK and Ireland are both aligned and non-aligned. There is an element of commercial competition between Ireland, England and Wales, but, perhaps more importantly, as neighbouring common law jurisdictions there is alignment of interest. The common law of both jurisdictions is perhaps uniquely suited to providing a basis for both facilitating contracting on DLT and, perhaps more importantly, resolving resulting disputes.
5. A number of options present themselves to Ireland:
  - a. **Do nothing and rely on the Legal Statement for indirect application**  
For a variety of reasons, this is not, we believe, advisable, not least due to the gaps between the laws of Ireland and the laws

of England and Wales. On this basis, the Legal Statement would require gap-filing, which is not an easy process to undertake; or

**b. Use the Legal Statement as the kick-off point for achieving a degree of legal certainty under Irish law**

A similar consultation exercise could be performed in Ireland, perhaps going broader in scope than the UK exercise to include matters such as taxation and audit treatment. A formal legal statement would not be required and a less formalistic report would suffice to state the findings of the consultation exercise. This could then be presented to the Law Reform Commission of Ireland for the purposes of review from the standpoint of Irish law and consider whether any Irish legislation, EU Directives or Regulations might be desirable in the areas of cryptoassets and smart legal contracts.

6. An Irish consultation exercise could involve a range of potentially interested parties, such as the Revenue Commissioners, the Central Bank of Ireland or the Department of Finance (the “**Department**”). For example, the Department may be interested in the Legal Statement and any consultation exercise carried out in Ireland, given that in March 2018, the Minister for Finance and Public Expenditure and Reform announced the creation of an internal working group (the “**Intra-Departmental Working Group**”) to monitor further developments in the areas of virtual currencies and blockchain technology.<sup>42</sup> Moreover, one of the aims of the Intra-Departmental Working Group is to consider Ireland’s IFS2025 Strategy and foster opportunities in international financial services by building on

Ireland’s strengths in technology, research and financial services.<sup>43</sup>

7. Reviewing Irish law in the areas covered by the Legal Statement, along with potentially other areas such as taxation and audit, would improve market confidence in Ireland as a jurisdiction (which is soon to become the major common law jurisdiction and English speaking member of the EU) that is open for business in cryptoassets and smart contracts. Such a review would also provide a degree of legal certainty as regards Irish law in areas that are critical to the successful development and use of cryptoassets and smart contracts in the global financial services industry.
8. Having conducted such a review, it is submitted that, depending on the recommendations, the legislative route is the most appropriate course of action for Ireland to take in order to address the legal status of cryptoassets and smart legal contracts. It would be unreasonable to assume that an Irish court, if faced with the same issues and questions as those posed in the Legal Statement, would necessarily conclude that Irish law is identical to the views expressed by the drafters of the Legal Statement in respect of English law.
9. The Legal Statement is a timely and influential document from an Irish law perspective. It occupies a particular legal status and is perhaps more relevant as a series of well-thought-out arguments than any sort of binding statement of the law. It is not, however, without potential disagreement from an Irish law perspective. Given the similar legal systems and the natural competition between neighbouring economies, it is necessary for Ireland to consider appropriate domestic action.

<sup>41</sup> Page 3, paragraph 10 of Opening Address.

<sup>42</sup> <https://www.gov.ie/en/publication/67039d-b/>.

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