

Digital Assets

techUK's response to the Law Commission's consultation on digital assets

October 2022

About techUK

techUK is a membership organisation launched in 2013 to champion the technology sector and prepare and empower the UK for what comes next, delivering a better future for people, society, the economy and the planet.

It is the UK's leading technology membership organisation, with more than 900 members spread across the UK. We are a network that enables our members to learn from each other and grow in a way which contributes to the country both socially and economically.

By working collaboratively with government and others, we provide expert guidance and insight for our members and stakeholders about how to prepare for the future, anticipate change and realise the positive potential of technology in a fast-moving world.

Key points

- techUK supports the creation on statute of a distinct category of asset, data object, which reflects the nuance between digital assets as both things in possession and things in action. This will reduce legal ambiguity whilst ensuring the law remains flexible enough to accommodate these new technologies.
- We support the creation of this new asset category through statute rather than through common law.
- We support the Law Commission's methodology of defining a 'digital asset'.

The issue; legal ambiguity

The UK operates under common law which has proved effective in many circumstances at creating precedent and establishing relative legal certainty.

Digital assets, including digital currencies, are a new technology which do not necessarily fit with existing legal frameworks. This has led to some instances where principles such as ownership have been tested in the courts, developing law in real-time for this new class of asset.

In the case of *Vorotyntseva v Money-4 Ltd* (2018), the court found "that cryptocurrency cannot be a form of property or that a party amenable to the court's jurisdiction cannot be enjoined from dealing in or disposing of it".

Further, in *Robertson v Persons Unknown* (2019), Mr Justice Bryan specifically held, on a without notice application, that cryptoassets were "property" for the purposes of granting proprietary or freezing injunctive relief. They meet the four criteria set out in Lord Wilberforce's classic definition of "property" in *National Provincial Bank v Ainsworth* (1965) as being:

- (i) definable,
- (ii) identifiable by third parties,
- (iii) capable in their nature of assumption by third parties, and
- (iv) having some degree of permanence.

Cryptocurrency accounts are wholly different from ordinary bank accounts, insofar as they are decentralised; i.e. not located in one place. Instead, they are held across a distributed ledger which is validated by others. This can lead to issues as there is no obvious party on whom to serve proceedings. Additionally, rules of private law which most commonly relate to tangible goods or property, are often *lex situs* in terms of governing law, at odds with a structure which is decentralised by its very nature.

Whilst judgements which establish case law can provide certainty in the specific cases, they may also offer some clarification in a broader sense. However, there are still

inconsistencies still be resolved in the legal approach to cryptocurrency, such when it is a thing in possession and a thing in action.

With this in mind, there is a clear need to establish certainty for this growing and increasingly important area of financial services. In many circumstances, the value of the asset at the centre of a dispute can be significant and fraud in this area is increasing; the number of cases of fraud in crypto has risen from 5,758 in 2020 to 9,458 in 2021¹.

We agree with the view of Master of the Rolls, Sir Geoffrey Vos that: “We should try to avoid the creation of a new legal and regulatory regime that will discourage the use of new technologies rather than provide the foundation for them to flourish”, We are further encouraged that the Law Commission also subscribe to his view and have adopted it in the approach with this consultation.

Cryptocurrency currently falls outside of the scope of many powers of the financial services regulators. However, that may change soon given recent amendments to the Financial Services and Markets Bill which afford the Financial Conduct Authority (FCA) new powers to oversee activity in this space. Conduct regulation should bring some certainty and comfort for consumers who trade or use cryptocurrency, and this is welcome, provided it does not stifle innovation and is proportionate.

Additional certainty through a legal framework alongside this is likely to bring further confidence, allowing the sector to grow and more people and organisations to take advantage of the benefits that such digital assets bring. It will also offer legal recourse for those whom there is no current avenue to pursue.

A new category of personal property

As referenced above, the law is not currently explicit when dealing with a variety of aspects concerning digital assets. It is therefore welcome that the Law Commission seeks to bring clarity to this area.

The development and application of digital assets is growing at a significant rate, with the FCA estimating there were 2.3m people owning a digital currency in 2021 (4.4% of the population), up from 1.9m the previous year².

However, common law is not evolving at the same rate, leaving many people potentially exposed until precedent is set.

¹ <https://www.moneymarketing.co.uk/news/crypto-investment-fraud-rose-by-64-in-2021/>

² <https://www.fca.org.uk/publications/research/research-note-cryptoasset-consumer-research-2021>

Therefore we support the creation on statute of a distinct category of asset, data object, which reflects the nuance between digital assets as both things in possession and things in action.

In creating a carefully considered, but limited statute rather than relying on common law, legal protections and certainty can be more swiftly afforded to the growing number of people owning or using digital assets in the UK.

The following criteria has been suggested by the Law Commission in defining whether an asset is a data object:

- (1) be composed of data represented in an electronic medium, including in the form of computer code, electronic, digital or analogue signals;*
- (2) exist independently of persons and exist independently of the legal system; and*
- (3) be rivalrous.*

We can see no issue with these criteria and also acknowledge that most, if not all, assets in this class would likely be divestible. Indeed, this has been the very subject of many cases before the courts relating to cryptocurrency. However, it is prudent to ensure that the law is 'future-proof' in terms of the development because of how technical development may progress in areas such as crypto-tokens.

We have chosen not to answer any points relating to crypto-tokens as these do not relate directly to the Financial Services programme at techUK.

For more information or to discuss this response further, please contact Andy Thornley, Head of Financial Services andy.thornley@techuk.org.