Digital Assets
Interim Update
Digital Assets Project - Interim Update

BACKGROUND TO CALL FOR EVIDENCE

1.1 We refer to our digital assets call for evidence, available at https://www.lawcom.gov.uk/project/digital-assets/ which closed to respondents on 30 July 2021.

1.2 The call for evidence asked respondents to provide evidence on existing practical issues arising from applying the law of England and Wales to digital assets, and how market practice attempts to resolve those issues.

1.3 The call for evidence asked respondents to consider potential implications of a reform to expand the concept of possession to (some) digital assets. The call for evidence noted that this would require a change to the law and could have significant practical consequences. The call for evidence also invited respondents to suggest comparator jurisdictions and to identify other areas of law that could be affected by law reform.

1.4 The purpose of the call was to gather evidence to inform the Law Commission’s proposals for law reform which we will put forward in our consultation paper on digital assets. We received 36 responses to the call for evidence from a range of stakeholders including practising lawyers, academics, technologists, and commercial entities. We are grateful to all those who submitted a response.

1.5 In the call for evidence, we said that our aim was to publish a consultation paper on digital assets at the end of 2021. We said that we expected in our consultation paper to make proposals for law reform to make (some) digital assets possessable.

1.6 This interim update paper provides an update to our work and expected timeline based on the responses received from respondents and additional work completed by the Law Commission.

INTERIM UPDATE

1.7 Our work seeks to support and facilitate the development of digital assets, including cryptoassets, but it remains neutral as to the advantages and disadvantages of any particular digital asset, cryptoasset, protocol or system.¹

The scope of the definition of “digital assets”

1.8 The call for evidence used the term “digital assets” in an intentionally broad sense. However, many respondents suggested that the next phase of our work should distinguish between different sub-categories of digital assets.

¹ Our work is not “technology neutral” in that it necessarily considers existing technology required for and related to digital assets.
1.9 The responses suggested that the consultation paper should consider the following broad sub-categories of digital asset:

(1) Digital files which are valuable for their information (such as a database).

(2) Digital files which are valuable for their information but have a specific function (such as software).

(3) Digital records as evidence of other personal property rights or personal rights.²

(4) Domain names.

(5) Cryptoassets.³

(6) Digital assets or things that rely on, or are created under, the terms of end user licence agreements, such as certain in-game assets or certain email accounts.

(7) Other intangible things that might be the object of property rights (such as carbon credits (EUAs) and milk quotas).

1.10 We recognise that “digital assets” is an extremely broad term that requires further subdivision. We also recognise that certain digital assets are idiosyncratic and that analogies with existing concepts of personal property may not be wholly applicable. This is particularly true of cryptoassets.

1.11 Our consultation paper will apply underlying legal principles of private law and any proposals for law reform to different broad sub-categories of digital assets, using examples where appropriate.

A potential “third category” of personal property

1.12 Many respondents suggested that it would be useful to resolve the ambiguity as to the legal categorisation of certain digital assets. Specifically, whether certain digital assets should be categorised as:

(1) things in action;

(2) things in possession (potentially by virtue of law reform); or

(3) belonging to a third category of personal property which is neither a thing in action nor a thing in possession.

1.13 Based on responses to the call for evidence and further work completed by the Law Commission, we recognise that this is an important area of legal uncertainty that requires further consideration.

² We note that some digital records may use a distributed digital ledger or digital structured record in which consensus as to the state of the distributed digital ledger or digital structured record is achieved in accordance with certain specified system or protocol rules.

³ Including different sub-categories of cryptoassets.
1.14 Our consultation paper will consider whether it would be most appropriate for the law of England and Wales to recognise that certain digital assets could fall within a new “third category” of personal property. That category of personal property would be distinct from both things in action and things in possession, more accurately reflecting the idiosyncrasies of digital assets.

1.15 We recognise the argument that certain digital assets are factually different from, and operate in different ways to, both things in action and things in possession. These differences might mean that the automatic application of legal rules developed for assets that fall within the two existing categories of personal property would be unsuitable in the context of those digital assets. In our consultation paper, we will consider whether a “third category” of personal property would better allow the law to reflect the particular features of certain digital assets.

Indicia for a “third category” of personal property

1.16 We agree with the views of respondents that there are many different types of digital asset. We recognise that it is not appropriate for all types of digital asset to fall within a “third category” of personal property. We also recognise that pure information is, in general, not capable of being the object of property rights.

1.17 For those reasons, our consultation paper will consider whether the indicia set out in the call for evidence, or a variation on them, could be used to determine whether or not a digital thing falls within a “third category” of personal property. Those indicia are set out below.

(1) That the digital thing has an existence independent of both persons and the legal system.

(2) That the digital thing is rivalrous – the use or consumption of the thing by one person, or a specific group of persons, inhibits use or consumption of that thing by others.

(3) That the digital thing is fully divestible on transfer.

1.18 We will develop and explain those indicia in the consultation paper, and the consultation paper will test different sub-categories of digital assets against those indicia.

1.19 Our initial view is that not all of the sub-categories of digital asset listed above would satisfy the indicia.

Recognition and protection regime for digital assets

1.20 Respondents suggested that the legal regime of recognition and protection of certain digital assets necessarily would be different to the regimes applicable to things in possession or to things in action.

1.21 From the responses to the call for evidence, we have identified the following principal areas to consider/address:
(1) Acquisition, disposition, derivative transfer of title and competing claims in relation to digital assets.

(2) The taking of security over digital assets.

(3) Custody relationships in respect of digital assets.

(4) How legal remedies or actions can protect digital assets.

1.22 We recognise that, when considering digital assets, there will be circumstances in which it is appropriate to draw analogies between existing concepts of personal property law and existing types of personal property (including both things in action and things in possession). Such analogies are likely to be informative but not wholly applicable, given the idiosyncrasies of digital assets (and in particular, cryptoassets).

1.23 We also recognise that any suggested law reform should aim to be as consistent with international legal developments as is possible. We think this is particularly important given the global nature of many digital assets (particularly those based on permissionless, decentralised networks).

NEXT STEPS

1.24 Our timeline to publication of our digital assets consultation paper will be extended so that we can cover the issues outlined above in more detail.

1.25 That extended timeline will also give the Law Commission the opportunity to work with other bodies involved in international legal developments in this area and to draw on that work.

1.26 We now anticipate publishing our digital assets consultation paper in mid-2022.