

Chambers and Partners Fintech 2023 Guide – Trends and Developments: Türkiye Chapter

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Cryptocurrencies Under Turkish Law

Introduction

Since their introduction in 2008 by Satoshi Nakamoto, cryptocurrencies are one of the most controversial topics discussed in the financial sector. Although central banks of many countries approached this technology with caution, today, many of them are looking at creating their cryptocurrencies just like Türkiye. Besides the arguments about whether cryptocurrencies can be accepted as money or not, the cessation of cryptocurrencies is not happening in the near future. Regulation of this area, therefore, is an essential need.

Blockchain is a decentralised, synchronised digital public ledger in a network, recording transactions by many peers. The distributed database ensures that each piece of information is recorded in blocks interconnected, with encryption methods. Once a transaction is recorded, it cannot be changed or deleted, therefore it is a safe means of recording transactions. As each participant maintains a copy of the records, blockchain technology will immediately identify and correct any unreliable information; thus, any malicious changes can be verified by other participants and corrected. This feature of blockchain enables the use of cryptocurrencies; as each transaction can be verified by several participants, and if the records are identical, the transaction is approved and recorded to the ledger. Although the use of blockchain started with cryptocurrencies, today it can be used for many purposes such as smart contracts, smart appliances, asset management, supply chain sensors, and many others.

Blockchain is not specifically regulated under Turkish law. A national professional standard is, however, recognised for the occupation of blockchain analyst under the Communiqué on National Professional Standards No 2022/10. Blockchain is defined as "a structure that provides a permanent record of transactions in a network and uses a decentralized ledger similar to a system database but instead of traditional end-to-end, allowing each participant in the network to have their own copy of the ledger and be able to see all transactions". Blockchain analyst is classified under ISCO:08 2511 (System Analysts).

Cryptocurrency, on the other hand, is a term to define decentralised digital/virtual encrypted currencies that are based on blockchain technology. Cryptocurrency is a digital currency that uses blockchain technology to verify and record transactions. As explained, when a cryptocurrency transaction is made, it is verified by all participants and, if completely verified, the transaction is recorded. Unlike traditional money transactions, there is no intermediary such as banks and money-wiring institutions for cryptocurrency transactions.

Many problems with prior experiences of digital money, such as the double-spending problem, are solved in cryptocurrencies. Unlike traditional money, cryptocurrencies are not issued by central banks; they are created by participants called "miners" by solving SHA256 hashes. Bitcoin is the first cryptocurrency and introduced blockchain technology. Now there are over 200 cryptocurrencies bought and sold in the world.

Different approaches to cryptocurrencies

As mentioned above, countries' approaches to the cryptocurrencies differ. However, it is clear that many countries, where cryptocurrencies have been grey areas before, now tend to regulate the area.

- European Union (EU) - Currently, there is no unified regulation for cryptocurrencies across the EU; however, member states may have their own. The European Commission is preparing to implement a comprehensive regulation, as stated under "EU's approaches to cryptocurrencies" below, which is not effective yet.
- UK - There is no specific regulation. Cryptocurrencies are only regulated for money laundering purposes. However, the Financial Conduct Authority has recently banned the sale of crypto derivatives to retail consumers. The ban is effective as of 6 January 2021. This regulation, on the other hand, does not ban the sale of cryptocurrency itself or ban the sale of crypto derivatives to anyone other than the retail consumers.
- USA - There is no specific regulation. Thus, cryptocurrencies are regarded as different legal institutions in different practices. The US Department of Treasury considers cryptocurrency as convertible digital currency while the Commodity Futures Trading Commission considers it as a commodity. According to the Internal Revenue Service, cryptocurrencies are defined as assets and will be taxed accordingly. There are also contradicting court decisions whether it can be regarded as digital money. Some stores such as Microsoft and Subway accept cryptocurrency as a payment method for their services while Facebook issues its own cryptocurrency. Despite all the discussions, almost all banks in the US have integrated crypto payment solutions into their systems.
- China - Cryptocurrencies are strictly regulated and mostly prohibited in China; however, China is preparing to issue its digital currency.
- Japan - In 2017, Bitcoin was accepted as a legitimate medium of exchange. However, due to its high risk to be used for illegal trade, certain measures are taken in order to verify the identity of the investor.
- Canada - Cryptocurrencies are accepted as a commodity; however, cryptocurrency exchange markets are expected to be registered under the Financial Transactions and Reports Analysis Centre of Canada and to notify suspicious transactions, keep certain records, and comply with other regulations.
- Australia - Treats cryptocurrencies as a foreign exchange; trade of cryptocurrencies and mining is allowed.
- Russia - A recent bill passed by the legislature provided legal status to cryptocurrencies, but it outlawed the use of cryptocurrencies as a payment method. However, actual laws regarding cryptocurrencies are expected to be passed by the legislative branch in the near future. Russia is also preparing to issue its cryptocurrency.
- Bolivia - Cryptocurrencies are prohibited.

Certain countries brought in clear regulations concerning cryptocurrencies. For example, Estonia recognised cryptocurrencies as a means of exchange or payment. Cryptocurrencies, cryptocurrency exchanges, and e-wallets are defined and regulated, and Estonia is the first country to regulate this area in the EU. Malta is another country that regulates cryptocurrencies. Malta has recently passed three bills to regulate cryptocurrencies, cryptocurrency exchanges, e-wallet providers, advisers, ICOs, brokers, and asset managers. Singapore also regulates cryptocurrencies and requires cryptocurrency businesses to obtain a licence.

As is clear, there is no common approach to cryptocurrencies among different countries. The general concern is, however, cryptocurrency being used for illegal trade activities. As it is not centralised, and no intermediary institution is required to execute a transaction, strict regulation by financial institutions can be (and has been) avoided if governments do not intervene. However, its advantages, such as ease of transaction, lower transaction fee, strong security, transparency and easier cross-border transactions, make it very preferable for legitimate purposes. Therefore, fully ignoring or banning it is not always the best choice for economies.

EU's approaches to cryptocurrencies

In October 2022, the European Council approved the Markets in Crypto-Assets Regulation (MiCA), one of the first attempts globally at comprehensive regulation of cryptocurrency markets since it covers issues such as money laundering, consumer protection and the accountability of crypto companies. Further to those stated, MiCA will cover several key areas including transparency, disclosure, authorisation and supervision of transactions. The Regulation applies to natural and legal persons and other undertakings that are engaged in the issuance, offer to the public and admission to trading of crypto-assets or that provide services related to crypto-assets in the EU.

As an approach, MiCA separates crypto-assets into three sub-categories, and applies different requirements to each. The three categories are as follows:

- E-money (electronic money) tokens - These are crypto-assets that aim to stabilise their value by referencing only one official currency.
- Asset-referenced tokens- These are crypto-assets that are not electronic money tokens and which purport to maintain a stable value by referencing to any other value or right or a combination thereof, including one or more official currencies. This category captures all crypto-assets which are not e-money tokens and whose value is backed by assets.
- All other crypto-assets - This covers all crypto-assets which are not e-money tokens or asset-referenced tokens. This would include utility tokens (ie, a type of crypto-asset that is only intended to provide access to a good or a service supplied by the issuer of that token).

MiCA does not apply to crypto-assets that are "unique and not fungible with other crypto-assets, including digital art and collectibles".

Considering the current Central Bank approach, it is the authors' opinion that, unlike the EU,NFTs will not be subject to secondary regulations as they are traded in high volume in Turkish markets.

Cryptocurrencies and financial crimes regulation

As briefly explained above, the first and common reflex towards cryptocurrencies among different states is to prevent money laundering and crimes committed by or targeting cryptocurrencies. Some examples of criminal activities concerning cryptocurrencies can be listed as money laundering, fraud, hacking, crypto thefts, and the use of cryptocurrencies as a medium of exchange for criminal purposes.

A major cryptocurrency-related criminal activity is the use of cryptocurrencies as a medium of exchange for criminal purposes. As no intermediary is required for cryptocurrency transactions to be accomplished, major criminal organisations use it instead of fiat money or commodity. According to the CT Report, criminally associated bitcoin addresses sent over USD3.5 billion worth of Bitcoin in 2020. These cryptocurrencies, however, should be laundered eventually.

According to Chainalysis Report, over the counter (OTC) brokers are mainly used for money laundering using cryptocurrencies. This is backed up by the fact that a small segment of accounts is taking in most of the illicit Bitcoin being sent to Binance and Huobi. The OTC brokers usually first exchange Bitcoin and other cryptocurrencies into stable currencies and then convert them into fiat money.

Taking these facts into consideration, many countries, even though they do not have a specific cryptocurrency policy, approach the issue from the criminal law aspect and include cryptocurrency crimes in their anti-money laundering policy.

With the same concern, certain rules apply to the use of bitcoin for illegal activities. The Financial Crimes Investigation Council (MASAK) has published criteria for cryptocurrency transactions. Until 11 September 2019, any money transfer from bank accounts for the purpose of purchasing Bitcoins (although the wording used was Bitcoin, it meant all cryptocurrencies) to the cryptocurrency intermediaries were regarded as a suspicious transaction and should have been reported by relevant banks to MASAK. With the amendments made in the guide, the definition of suspicious transactions was altered in favour of cryptocurrencies. In this respect:

- money transfers from the client's bank account to domestic or foreign cryptocurrency exchange markets or natural or legal persons, to purchase cryptocurrencies, in an unusual frequency and amount, and
- money transfers to the client's bank account from an unknown source or as a result of cryptocurrency sale suspected to be made incompatible with the financial profile of the client

are defined as suspicious transactions and obliged to be reported to MASAK by banks. After this amendment, certain banks started to allow cryptocurrency transactions through their mobile or web applications.

Thereafter, MASAK published a suspicious transaction reporting guide specific to crypto money platforms. As can be understood from this guide, there are no restrictions on the buying and selling of cryptocurrencies by Turkish citizens.

In the near past, MASAK announced that "a very serious inspection" would be carried out in the cryptocurrency exchange markets for the prevention of illegal gambling. A few months after this announcement, MASAK made another announcement that an international cryptocurrency transfer in the amount of TRY100 million had been blocked, and an investigation initiated.

Finally, in Decree No 3030 on Approval of Medium-Term Programme, published in Official Gazette No 31256 dated 29 September 2020, it is stated that a tracking mechanism will be established for the prevention of the use of digital assets, which can be bought, sold and transferred and represent a digital value, to finance terrorism.

Moreover, MASAK General Communiqué No 21 (the "Communiqué 21") was published on 17 November 2022. With Communiqué 21, politically exposed persons (PEP) have been regulated for the first time in the Turkish regulatory landscape. In this way, MASAK requirements come into line with Recommendations Nos 12 and 22 of the Financial Action Task Force (also known as FATF).

Pursuant to Communiqué 21, PEP are defined as "high-level real persons, members of the board of directors of international organizations, senior executives and other persons who have an equivalent duty, to whom an important public duty has been entrusted by election or appointment in the country or a foreign country." Thus, with Communiqué 21, relatives and close associates of PEP are defined as "people who have all kinds of social, cultural or economic closeness which can be considered as a combination of interests or purposes, such as being engaged, company partnership, being a company employee or kinship other than the first degree."

Communiqué 21 regulates that Financial Institutions, Crypto-asset Service Providers, and Designated Non-Financial Businesses and Professions are obliged to take necessary measures to determine whether the customer or real beneficiary is a PEP or not and sets the framework for the procedures and principles of the measures to be taken regarding PEPs.

In case of non-compliance with Communiqué 21, where an obliged party does not fulfil the KYC obligation, an administrative fine of between TRY40,860 and TRY5,448,000 will be imposed by MASAK. For breaching the suspicious transaction reporting obligation, an administrative fine of between TRY68,100 and TRY5,448,000 will be imposed.

Regulation of cryptocurrencies under Turkish law

In Türkiye, until very recently, there was no specific regulation regarding cryptocurrencies in Turkish law. Cryptocurrencies were mainly subject to anti-money laundering and terrorist financing laws, and capital market regulations were applicable to cryptocurrencies. Being unregulated, use of cryptocurrencies was neither prohibited nor restricted as a means of payment. Official Gazette No 31456, dated 16 April 2021, published the Regulation on the Use of Crypto-assets in Payments (the "Crypto-asset Regulation") and cryptocurrencies are regulated directly for the first time.

The Crypto-asset Regulation is the first direct legally binding document for the regulation of crypto-assets in Türkiye, and came into force on 30 April 2021. Crypto-asset is defined under Article 3 of the Regulation as "intangible assets that are created virtually using distributed ledger technology or a similar technology and distributed over digital networks but are not qualified as fiat money, dematerialized money, electronic money, payment instrument, security or another capital market instrument".

Article 3 of the Regulation prohibits the use of crypto-assets as a means of payment. As per Article 3, crypto-assets may not be used directly or indirectly in payments, and similarly, provision of services directly or indirectly for the use of crypto-assets as a means of payment. Only recently, Royal Motors had declared that they would accept cryptocurrencies (Bitcoin namely) as a payment option, becoming the first Turkish automotive company to accept cryptocurrencies as a payment method.

Article 4 of the Regulation prohibits payment service providers to develop business models or provide services regarding those business models where crypto-assets are used in the provision of payment services and issuance of electronic money. Article 4 also prohibits payment and electronic money institutions to mediate platforms and fund transfers from the platforms offering trading custody, transfer, or issuance services for crypto-assets.

E-money versus crypto

The status of cryptocurrencies has been one of the most problematic topics since their entrance to the Turkish market. There are two main approaches in the world as explained above: cryptocurrency as money and cryptocurrency as a commodity.

The term "money" is not defined under the Turkish Civil Code (TCC). However, under Decree No 32 on the Protection of the Value of Turkish Currency ("Decree No 32"), Turkish currency is defined as "money in circulation, and the money called in, but exchange term of which is still ongoing". As per Turkish law, the Turkish Republic Central Bank (TRCB) is the only authority to issue Turkish currency. In this regard, Turkish currency is only the money that is issued by TRCB and in circulation. Any cryptocurrencies that are not issued by the TRCB cannot be regarded as Turkish currency.

On the other hand, Decree No 32 also defines foreign currency as any kind of account, document or tool that enables payment with foreign money including money from foreign countries in the form of banknotes. Considering the definition, it is not clear whether cryptocurrencies can be regarded as foreign exchange. However, the classical approach to currency is to only regard money that is issued by the central bank of another country as currency. In this regard, it does not look very likely that cryptocurrencies will be regarded as currencies unless they are issued by central banks in the classical approach.

Cryptocurrencies have an economic value. Therefore, they should be accepted as part of a person's assets. However, it is not clear which provisions regarding property apply to cryptocurrencies. Immovable property is defined under the TCC *numerus clausus* and cryptocurrencies do not fall within the scope of immovable properties. Movable properties, on the other hand, are defined as "movable tangible properties and natural forces that are not defined as immovable property". Certain scholars argue that the scope of the movable property should not be interpreted narrowly, and the economic needs of the day should be taken into consideration. According to them, so long as control can be acquired on a thing that is not defined as immovable property, such property can be defined as movable property. If this approach is adopted, crypto coins can be regarded as movable property.

Türkiye has enacted the Law on Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions (the "e-Money Law") in June 2016 in order to regulate the procedures and principles regarding payment and securities settlement systems, payment services, payment institutions, and electronic money institutions. Electronic money is defined under the e-Money Law as:

"Monetary value that is issued on the receipt of funds by an electronic money issuer, stored electronically, used to make payment transactions defined in this Law and also accepted as a payment instrument by natural and legal persons other than the electronic money issuer."

If cryptocurrencies could be defined as electronic money, e-Money Law would apply to cryptocurrencies. In order to settle the potential conflicts on this issue, the Banking Regulation and Supervision Agency (BRSA) published a public statement in November 2013 assessing cryptocurrencies' legal status with respect to the e-Money Law. According to

BRSA, cryptocurrencies (Bitcoin in the public statement) cannot be regarded as electronic money since they are not issued by any official or private institution, and their intrinsic value is not reserved by the funds received by the issuer. It is also added in the public statement that cryptocurrencies' supervision and surveillance as per the e-Money Law is not possible.

The cryptocurrencies such as Bitcoin are not centralised and therefore not issued by an institution; instead, they are added to the system when participants solve hashes, in other words, "mined". They are also not backed by any money or commodity. Considering these properties of cryptocurrencies, they cannot be regarded as electronic money as defined under the e-Money Law and therefore it does not apply to cryptocurrencies.

As per Decree No 32, certain agreements between residents of Türkiye cannot be denominated in or indexed to foreign currency. In such a case, whether cryptocurrencies can be regarded as foreign currencies as per Decree No 32 should be determined.

Foreign currency is defined in Decree No 32 as any kind of account, document or tool that enables payment with foreign money including money of foreign countries in the form of banknote. Considering its nature, it is not very likely to regard cryptocurrencies like Bitcoin as foreign currencies. On the other hand, some cryptocurrencies are backed by a national currency (stablecoin) and they can be converted to national currencies with their actual values at any time. In such a case it is not clear how these cryptocurrencies would be treated.

In any case, if a cryptocurrency can be accepted as a foreign currency as described, executing certain agreements denominated in or indexed to said cryptocurrency between residents of Türkiye will not be allowed. On the contrary, if they are not regarded as foreign currencies, the agreements executed between residents of Türkiye may not be subject to Decree No 32.

Finally, as already explained, the Crypto-asset Regulation defines crypto-assets as intangible assets not qualified as fiat money, dematerialised money, electronic money, payment instrument, security or another capital market instrument. In this case, the Crypto-asset Regulation confirmed that cryptocurrency is an asset but does not qualify as an electronic or dematerialised money or a payment instrument.

In any case, since cryptocurrencies have an economic value, thus, they can be regarded as a part of a person's assets, and they can be inherited, or an attachment may be established on them. However, the lines are still grey in this area.

NFT regulation

As a relatively new concept, the legal framework of the NFT is generally unresolved and vastly argued. The NFTs are not specifically regulated under Turkish law; albeit the general principles of Turkish law, eg, the Turkish Civil Code, the Turkish Code of Obligations, and the Turkish Copyright Law, draw the lines for formation of related contracts, the legal title, transfer and use of NFTs.

The NFTs' legal classification in Turkish law is problematic as crypto-assets' legal status is controversial due to the lack of specific regulation. Although there is a tendency towards the qualification of crypto-assets as property, this opinion is criticised due to lack of any physical existence. It is problematic when digital assets such as artworks, videos, games or tweets are "sold" in NFT format. It is controversial whether they can be regarded as property under the Turkish Civil Code, thus, can be made subject to any legal title which would eventually lead to the possibility of transfer of such title.

Right to property is generally accepted to include any items that have an economic value as can be understood from the preamble of Article 35 of the Constitution. However, how its definition as "property" under the Turkish Civil Code will be applied to NFTs is controversial. As and when NFTs have an economic value, they can be subject to rights of property, which provide the rights to use, benefit and dispose. In this respect, NFTs can be subject to legal transactions based on right of property, such as sale or lease.

Just as with cryptocurrencies, NFTs are not specifically regulated under Turkish law. However, there are certain restrictions on the use of crypto-assets in various regulated sectors. For instance, payment and electronic money institutions are forbidden to provide services directly or indirectly for the use of crypto-assets as a means of payment, to develop business models, or provide services regarding those business models where crypto-assets are used in the provision of payment services and issuance of electronic money. Similarly, capital markets intermediary institutions are not allowed to conduct any derivative or spot transaction based on crypto-assets. In this regard, the use of NFTs in capital markets and payment services is not possible in Türkiye.

Furthermore, as per Article 2 of Law No 5549 on the Prevention of Laundering Proceeds of Crime, artwork merchants and intermediaries including auctioneers are defined as an obliged party, and they are obliged to make certain notifications. It is yet to be made clear whether the sale of NFT format artworks and videos, etc would be regarded as artwork trading by the Financial Crimes Investigation Board, as the tremendous sales values for an intangible asset and content make it very possible for the use for money-laundering activities.

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