

INSOL Europe Insolvency Tech & Digital Assets Wing

This new section of eurofenix will bring you the most relevant news in the field of insolvency tech and digital assets.

To contribute an article to a future edition, please send your proposal to:

insolvencytech@insol-europe.org

or the individual Chairs:

Dávid Oršula david.orsula@bnt.eu

José Carles j.carles@carlescuesta.es

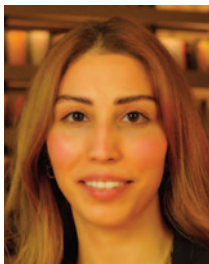
Laurent Le Pajolec lp@exco.pl

Cryptocurrency Exchange Developments

This month we look at two cases regarding cryptocurrency exchange developments – The Thodex case in Turkey, plus BitMarket and Coinroom in Poland



BURAK BAYDAR
Partner, Moroglu Arseven,
Turkey



CEYLAN NECİPOĞLU
Senior Associate, Moroglu
Arseven, Turkey

Turkey: Thodex

On 18 April 2021, the Cryptocurrency exchange platform Thodex went offline, shaking Turkey with its first large-scale cryptocurrency fraudulent case and causing the loss of around \$2-billion worth of crypto-coin belonging to cryptocurrency investors.

Cryptocurrencies are still unregulated in Turkey. Consequently, cryptocurrency exchange platforms are not subject to any incorporation conditions, such as financial strength and minimum capital requirements, and they are not subject to any supervision by regulatory authorities, such as the Banking Regulation and Supervision Agency or the Capital Markets Authority. Their activities are also unregulated and no state warranty applies to cryptocurrency investors.

The cryptocurrency exchange platforms can be considered as intermediary platforms that facilitate the trading of cryptocurrencies and gain commission from each transaction under Law No. 6563 on Regulation of Electronic Commerce. Although intermediary service providers have several information duties arising from this Law, they are also unregulated and not subject to the

supervision of regulatory authorities, such as the BRSA and the CMA.

In the Thodex case, no peer-to-peer transfer was being made on the platform, but all the coins or their value were kept solely by the platform, which made it possible for the CEO to control and transfer all the coins and the fiat money. The Prosecution Office is running the investigation on the ground of aggravated fraud and establishing a criminal organization. As per Article 157 of the Turkish Criminal Code (TCC), fraud is defined as deceiving another with fraudulent behaviour and securing gain. As per Article 158 of the TCC, fraud by “using electronic data processing systems, a bank or lending institution as an instrument” is considered aggravated fraud requiring aggravated sanction. Establishing a criminal organization is also criminalized under Article 220 of the TCC.

As Thodex managers collected money and crypto coins by fraudulent acts from cryptocurrency investors using an electronic system and gained benefit from these fraudulent acts, aggravated fraud can be assessed in this case. Also, as an organization consisting of at least three people was established to commit a crime, establishing a

criminal organization is present in the case. The CEO, managers, and employees acting with intent to commit the crime of aggravated fraud, establishing a criminal organization, and gaining a benefit from the crime can be prosecuted and are liable for the crime.

After the Thodex scandal, some amendments were made to the relevant legislation on 1 May 2021, according to which crypto-asset service providers are included within the scope of the anti-money laundering obligations. In this regard, all crypto exchange platforms are also obliged to comply with know-your-customer and notification obligations in which Turkish customers are included or transacted with. A separate guide is expected to be published by the Financial Crimes Investigation Board (MASAK) on how to implement this obligation for companies that are not based in Turkey.

MASAK has a long arm which would have extraterritorial reach. Nevertheless, the rules and regulations in respect of the powers of MASAK and consequences of any violation of the provisions of law vis-à-vis its powers, as well as the laws in relation to the laundering of proceeds of crime, are all regulated under criminal

laws. The territorial scope of the TCC is determined in such a way that it applies to any crimes which are partly or fully committed in Turkey. Accordingly, so long as any results of a crime occur in Turkey, it would be considered that the crime is committed in Turkey, which would lead to the jurisdiction of Turkish public prosecutors and judiciary. It would indeed be arguable whether or not MASAK would be able to enforce its powers outside Turkey. Let alone, if the requirements under the respective regulations are violated, criminal sanctions would be triggered and MASAK and Turkish prosecutors would have the authority and jurisdiction in Turkey. Besides, even if MASAK or the Turkish prosecutors have no extraterritorial reach, the authority they hold may suffice to halt the operations of any non-complying crypto asset trader by way of eliminating internet access to the relevant platform and even blocking the transfer of funds by Turkish banks to its accounts.

At this stage, there is no indication or precedent as to how MASAK will approach these new powers, specifically as concerns crypto asset traders located abroad, which makes our assessments very conservative.

Poland: BitMarket and Coinroom

The Polish Act on Counteracting Money Laundering and Terrorist Financing, which recently entered into force,¹ defines virtual currency as a digital representation of value which (i) is convertible in economic transactions into legal tender and accepted as a medium of exchange; (ii) may be stored or transferred by electronic means or the subject of electronic trading; and (iii) is not:

- 1) legal tender issued by the National Bank of Poland, foreign central banks, or other public authorities;
- 2) an international unit of account established by an international organisation and accepted by individual countries belonging to, or cooperating with, that organisation;
- 3) electronic money;

- 4) a financial instrument; or
- 5) a bill of exchange or cheque.

Regarding the insolvency law aspects of cryptocurrencies, it is important to recall the increasing number of cryptocurrency exchanges which have gone bankrupt. Such entities may go bankrupt for a number of reasons, including the loss of funds or liquidity, hacking, their owners engaging in “exit scams”, poor regulation or lax governance and management. The number of reasons is as numerous as the ever-growing number of cryptocurrency exchanges which collapse. Focusing on the Polish market, there have been two major exchange collapses: BitMarket and Coinroom.

BitMarket, one of the oldest Polish cryptocurrency exchanges and established in 2014, unexpectedly ceased all activities on 8 July 2019.

More than two thousand investors lost the immense funds deposited on the exchange and it remains uncertain whether any of them will be compensated at all. Although the public prosecutor’s investigation into this case is still ongoing, one of BitMarket’s co-owners has been charged with acting to the detriment of clients in the amount of at least BTC 23,000 (or approx. PLN 100 million), for which he faces up to 10 years’ imprisonment. According to Polish cryptocurrency expert Professor Krzysztof Piech: *“A principle which the whole cryptocurrency community has promoted for years comes to mind: do not keep your money on exchanges, but only enough funds to make the current transaction. This is because they are the weakest link in the whole digital currency system.”*²

The other important example is the bankruptcy of Coinroom, which, on 2 April 2019, terminated the contracts of all users overnight, giving them **1 day** in which to withdraw their funds. Notwithstanding the short notice, many customers reported problems with recovering their deposited funds and it remains difficult to determine how many of them were successful in their withdrawals. Coinroom eventually informed its users that it had begun liquidating the company. On 5 August 2019, it filed a

bankruptcy petition, which includes the option for the liquidation of its estate and covers all of its creditors, i.e., including those customers who have yet to receive their funds held on the exchange. For such customers (i.e., those who have yet to receive their funds), it is significant that the company’s list of creditors includes all Coinroom users who are owed funds by the exchange. While this, of course, does not mean that all of the funds are guaranteed to be recovered, it is an important step in the process.

Unfortunately, many of the exchange’s participants have still not been reimbursed their funds and are faced with the prospect of long civil and criminal proceedings that will likely drag on for many years.

In connection with the numerous collapses of cryptocurrency exchanges and a desire to protect small investors, on 12 January 2021, the Polish Financial Supervision Authority (the “KNF”) issued a KNF Warning on the risks associated with the acquisition and trade of cryptocurrencies (including virtual currencies and cryptocurrencies). In its publication, the KNF notes that entities active in the cryptocurrency market or otherwise engaged in crypto-related activities, which are not subject to a legal duty to comply with certain regulatory requirements, often do not provide mechanisms to safeguard investors’ interests.³

It should be emphasised that one should not be afraid of investing in the cryptocurrency market, but rather that one should be extremely cautious when making such investment, only depositing the funds necessary for a given transaction on one’s wallet, since there are few mechanisms available in the Polish legal order, as it currently exists, which can protect against the loss of all or some of the secured funds. ■

Footnotes:

- 1 Act of 1 March 2018 on counteracting money laundering and terrorist financing, Journal of Laws of 2018, item 723, as amended.
- 2 See <<https://biznes.radiozet.pl/News/BitMarket-Upadla-polska-gielda-kryptowalut-Klienci-mogli-stracic-60-mln-zl>>
- 3 See <https://www.knf.gov.pl/knf/pl/komponenty/ing/Ostrzezenie_UKNF_o_ryzykach_zwiazanych_z_nabywaniem_oraz_z_obrotem_kryptoaktywami_72241.pdf>



“
Cryptocurrency exchanges...may go bankrupt for a number of reasons, including the loss of funds or liquidity, hacking, their owners engaging in “exit scams”, poor regulation or lax governance and management
”