

# Cryptocurrency – Nascent Regulation and Challenges for Romania

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**ABSTRACT:** This article aims at presenting the strengths and weaknesses of the Romanian legislation towards cryptocurrencies. While starting from legal acceptances of cryptocurrencies from the US and EU, the article moves on to an analysis of Romanian legislation that treats cryptocurrency fiscally and criminally. Concluding, legislators around the world are falling behind regulation the mysterious new digital age of finance and cryptography-and-distributed-ledger-based assets. Also, one can remark that non-fungible tokens and cryptocurrency are the basis of a more complex and prominent legal construct that is “smart contract”.

**KEYWORDS:** Cryptocurrency, fintech, non-fungible tokens, digital ledger, blockchain

## **Introduction**

The legal world is faced with new challenges as cryptocurrency and crypto-assets have created a new digital wild-west. Blockchain technology, on which every cryptocurrency is based on, facilitated the rise of a new consumer and investment market. States have long observed this phenomenon ever since the creation of Bitcoin in 2009 by Satoshi Nakamoto, even if with reluctance at first. Now states are trying to mitigate legal uncertainty on a market recently valued at over 2.6 trillion USD (Financial Stability Board 2022).

### **1. Key legal acceptances relating to crypto-assets that stem from the US and EU**

Cryptocurrencies are digital assets based on cryptography that are meant to be used as payment method. The novelty of cryptocurrencies stems from the lack of a central authority that oversees or regulates it. The process of recording the transactions and issuing new cryptocurrency units is usually established by an open-source software. This software uses advanced cryptography to record a certain transaction and distribute the information between all its nodes thus building data blocks and attaching them to the data chain (blockchain). Blockchain represents a distributed ledger held by every crypto-asset owner and updated with every transaction.

Decentralization, as it was observed in Narayanan et al. (Narayanan et al. 2016), may be the essence of distributed ledger technology but de facto concentration of market by few crypto service providers may hinder this. Email, for example, is based on Simple Mail Transfer Protocol, an open standard but the market is covered by few mail service providers.

Juridically speaking, in any jurisdiction cryptocurrencies may obtain the status of currency only by recognition of law – having legal tender. Without dedicated regulation, cryptocurrencies, just like non-fungible tokens, may be considered simple crypto-commodities.

According to the Romanian law Bitcoin, or any other cryptocurrency, does not hold the status of legal currency as it does in El Salvador for example (New York Times 2021). Art. 14 of Law no. 101/1998 regarding the National Bank of Romania’s Statute expressly stipulates that the national currency of Romania is “Leu” (RON).

As per US Financial Crimes Enforcement Network (“FinCEN”)’s regulation, 31 CFR § 1010.100(m), currency means “the coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and

accepted as a medium of exchange in the country of issuance”. Cryptocurrencies do not fall under the previous definition.

In the US, there is yet to be a “one-size fits all” legislative solution to address the plethora of different cryptocurrencies. There are three types of cryptocurrencies: unbacked cryptocurrencies (e.g., Bitcoin), backed cryptocurrencies (e.g., stablecoins – cryptocurrency backed by fiat money) and decentralized finance (DeFi) and other platform on which crypto-assets are traded. US acceptations of cryptocurrency is more diverse and in dependence to the activity that involves crypto-assets.

The US Securities and Exchange Commission does not see Bitcoin or any other cryptocurrency as securities but certain tokens received in a crypto-based venture led by capital raising entities making use of distributed ledger technology may be regarded as such (SEC, 2017). For example, an enterprise may be created with the scope that it would offer tokens in exchange for cryptocurrencies, assets that would fund certain profit-generating activities. The owners of the tokens would share the earnings from said activities as a return on their investment.

According to the US Securities Act of 1933, sec. 2(a)1 defines securities also to mean “investment contract”. Being a catchall term, “investment contract” was held in *SEC v. Howey Co.*, 328 U.S. 293 (1946) to mean *a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise*. Focusing on the object of the investment (money) in the ruling it was later held in *Useton v. Commercial Lovelace Motor Freight, Inc.*, that *“in spite of Howey’s reference to an “investment of money”, it is well established that cash is not the only form of contribution or investment that will create an investment contract. Instead, the “investment” may take the form of “goods and services”, or some other “exchange of value”*.

Based on section 1(a)9 of the US Commodity Exchange Act, “commodity” includes all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in. According to the Commodity Futures Trading Commission (CFTC), cryptocurrencies fall under this notion (CFTC, 2015). Thus, any traders, agents or crypto fund managers have the obligation to register with the CFTC. The US Internal Revenue Service (IRS) treats virtual currency as property and not as currency that could generate foreign currency gain or loss for U.S. federal tax purposes.

Of much importance to Romania is that on 14 March 2021 the final form of the proposed Markets in Crypto-assets (MiCa) Regulation was adopted by the European Union Parliament’s Committee on Economic and Monetary Affairs (CEMA), as part of Europe’s Digital Finance package. From a procedural standpoint now, the proposal is awaiting Parliament’s position in 1st reading. (Zetzsche et al. 2020)

MiCa underlines 3 types of crypto-assets: i) stablecoin (it’s an asset-refference token based on the value of one or more fiat currency, commodity, or crypto-assets); ii) utility tokens (they ensure access to different assets or services); iii) e-money tokens (their value is in refference to fiat currency that have legal tender).

According the the regulation ‘crypto-asset’ means a digital representation of a value or a right that uses cryptography for security and is in the form of a coin or a token or any other digital medium which may be transferred and stored electronically, using distributed ledger technology or similar technology.

There was cause for concern relating to a possible ban on mining for crypto due to their non-environmentally sustainable consensus mechanisms, but in the end CEMA didn’t include said provision. Proof of work consensus mechanism, an energy-intensive process, is used to validate transactions on a blockchain. MiCa defines ‘proof-of-work’ to mean a consensus

mechanism that requires all miners that are participants to the DLT to solve complex mathematical puzzles to validate a new transaction, adding a block to the chain and permanently and irreversibly recording a new transaction.

One key aspect to the legal regime of trading in cryptocurrency was the application or nonapplication of VAT. The European Court of Justice, in *Skatteverket v David Hedqvist Case C-264/14*, has decided that the exchanges of fiduciary currencies for units of the bitcoin virtual currency are exempt from VAT in application of article 135 (1)(e) of the EU VAT Directive; article 135 (1)(e) establishes an exemption for “transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors’ items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest” (Blemus 2018).

## 2. Fiscal regime of cryptocurrency in Romania

According to Romanian Fiscal Code, corroborating art. 10 and art. 114 para. 2 pt. m), incomes that stem from transfers of cryptocurrency (“virtual currency”) are taxable incomes as per the provisions set out in chapter X “Income from other sources”; furthermore, taxable income includes income in fiduciary currency and / or in kind. In the case of income in kind, its value shall be determined based on the quantity and market price for the goods or services concerned.

The income a natural person realizes during a fiscal year must be declared and submitted, until 25<sup>th</sup> of May of the following year, through the Single Declaration on income tax and social contributions due by individuals.

Income tax due is calculated by the taxpayer through the aforementioned declaration by applying the 10% rate on the gain on the transfer of virtual currency, determined as a positive difference between the selling price and the purchase price, including the direct costs of the transaction. Earnings below the level of 200 lei / transaction are not taxed provided that the total earnings in a fiscal year do not exceed the level of 600 lei.

According to art. 170 para. 1 and 2 of the Fiscal Code, taxpayers who earn income from other sources owe the contribution of social health insurance if they estimate for the current year income whose cumulative value is at least equal to 12 national gross minimum wages, in force at the time of filing the declaration.

For income from other sources obtained from abroad, individuals are required to complete the return and to calculate and pay the tax due, taking into account the double taxation method provided for in the double taxation convention. According to art. 131 of the Fiscal Code, if the respective agreement provides as a method of avoiding double taxation i) the credit method, they have the right to deduct from the income tax due in Romania the tax paid abroad, within the limits provided by law; ii) if the exemption method is applicable, the respective income will be exempt from tax in Romania.

Regarding the fiscal regime of juridical persons that trade in crypto, according to art. 13 and 14 of the Fiscal Code, Romanian entities or foreign entities that deal in/from Romania must pay capital gains tax whether the activities were concluded in Romania or abroad. The fiscal duties are calculated by applying 16% on the taxable profit, determined in accordance with the provisions of art. 19 of Fiscal Code.

Not declaring taxable income (including from crypto transactions) constitutes a crime and, according to art. 9 para. 1 pt. b) of Law nr. 241/2005 is punishable by fine or 2-8 years in prison. If the prejudice is set to a sum greater than 100,000 EUR that the mandatory minimum of imprisonment is increased by 5 years. If the prejudice exceeds 500,000 Eur then both the minimum and maximum time for imprisonment is increased by 7 years. In case of committing tax fraud, if in the course of criminal prosecution or judgment, the damage caused is fully covered, and its value does not exceed EUR 100.000 in the equivalent of the national currency,

a fine punishment may be applied. If the damage caused and recovered under the same conditions is up to EUR 50,000, in the equivalent of the national currency, the fine is mandatory to be applicable and not imprisonment. If the prejudice does not exceed 100,000 euros, in the equivalent of the national currency, and during the criminal prosecution or in the course of judgment until a final judgment, its increased by 20% of the calculation basis, to which it adds interest and penalties, and is completely covered, the deed is not punished.

Fiscally, in Romania a question arises in case a person pays in commercial dealings for commodity or service in cryptocurrency. Is the respective transfer taxed?

There are two situations depending on which the answer differs:

- i) If the payment is made transforming crypto into fiduciary money and then transmitting the fixed sum, then the obvious answer is yes. So, in this case we must pay income tax (from the transfer of cryptocurrency into fiduciary money) and also VAT.
- ii) If the payment is made by transferring crypto from the sender's wallet to the receiver wallet, then a question of legality might be up for discussion. Again we must differentiate between transfers between natural persons and juridical persons:
  - a) transfers of cryptocurrency between natural persons is possible because if the consideration of the sender refers to the gaining of property right or to benefit from a service, then this qualifies as an exchange contract, as regulated by the Civil code;
  - b) the transfer of cryptocurrency between juridical persons or from a natural person to a juridical person, according to art. 1 of National Bank of Romania's Regulation nr. 4/1994, is not possible: "On the territory of Romania, the receipts, payments, compensations, transfers, credits, as well as other financial and capital transactions between the resident legal entities and between them and the resident natural persons are made only in the national currency".

### **3. Cryptocurrencies through the perspective of the Romanian Criminal Code**

Romania has undertaken active steps to prevent criminal activities relating to crypto-assets. Implementing EU norms, Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, Romania ensures that payment transactions carried out with any kind of cashless payment instrument either physical (bank cards) or (payments made through mobile payment applications), are included in the scope of the crimes when these operations are carried out by fraudulent use of cashless payment instruments (obtained by theft, misappropriation or forgery) or by computer fraud.

Law nr. 207/2021 offers some useful definitions but only concerning Romanian Criminal legislation and procedures:

- i) A non-cash payment instrument means a device, object or registration, protected or protected, material or intangible, material or immaterial, or a combination thereof, other than a currency of circulating value. and which, alone or in combination with a procedure or set of procedures, allows the holder or user to transfer money or monetary value, including by electronic currency or virtual currency.
- ii) An electronic payment instrument means an instrument that allows cash withdrawals, the loading and unloading of an electronic money instrument, as well as transfers of funds other than those ordered and executed by financial institutions.
- iii) Electronic money means the electronically stored monetary value, including magnetic, representing a claim on the issuer, issued upon receipt of funds for the purpose of conducting payment operations and which is accepted by a person other than the electronic money issuer.

- iv) Virtual currency means a digital representation of value that is not issued or guaranteed by a central bank or public authority, is not necessarily linked to a legally established currency and does not have the legal status of currency or money, but it is accepted by natural or legal persons as a medium of exchange and may be transferred, stored and traded electronically.

## Conclusions

Legislators around the world have been falling behind regulating the mysterious new digital age of finance and cryptography-and-distributed-ledger-based assets, but strides are being made. One can remark that non-fungible tokens and cryptocurrency are the basis of a more complex and prominent legal construct that is “smart contract”. The next step in the evolution of cryptocurrency and blockchain technology is the wide adoption of “smart contracts”, a topic that I will be addressing in a later paper. To date, the most popular use of a smart contract is the creation of NFTs but the potential is for so much more. The earliest definition of smart contracts found was elaborated by Szabo (1994): “a computerized transaction protocol that executes terms of a contract. The general objectives of smart contract design are to satisfy common contractual conditions (such as payment terms, liens, confidentiality, and even enforcement), minimize exceptions, both malicious and accidental, and minimize the need for trusted intermediaries. Related economic goals include lowering fraud loss, arbitrations and enforcement costs, and other transaction costs.”

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