

New E-Money Legislation Up and Running

Turkey: New E-Money Legislation Up and Running

On 27 and 28 June 2014, almost exactly one year after having enacted a brand new regime governing electronic money, the Turkish legislator has issued the secondary legislation completing this new legal regime and published it in the Official Gazette. The secondary legislation mainly includes the Regulation on Payment Services Issuance of Electronic Money and Payment Institutions and Electronic Money Institutions (“E-Money Regulation”), the Communiqué on Payment Institutions and Governance and Supervision of Information Systems of Electronic Money Institutions, the Regulation on Activities of Payment and Security Settlement Systems, and Regulation on Supervision of Payment and Security Settlement Systems.

1. Background

On 27 June 2013, Turkey enacted the Law No. 6493 on Payment and Security Settlement Systems, Payment Services and Electronic Money Institutions (“E-Money Law”) which sets out the principles and procedures regarding payment and security systems, payment services and electronic money institutions and which is the first regulation dedicated to electronic money and payment services in the Turkish legislative history.

Although the E-Money Law was published in the Official Gazette with the number 28690¹ and became officially effective, the E-Money Law was not implemented in practice, since the secondary legislation was not prepared yet and the Provisional Article 2 of the E-Money Law required the system operators and the institutions that are already conducting commercial activities within the scope of the E-Money Law to comply with the obligations and requirements stipulated under the E-Money Law within one year as of publication of the secondary legislation by the Central Bank of Republic of Turkey (“Bank”)² and the Banking Regulation and Supervision Agency (“BRSA”)³.

1 Original text available at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2013/06/20130627.htm&main=http://www.resmigazete.gov.tr/eskiler/2013/06/20130627.htm>.

2 Bank Official Website: [http://www.tcmb.gov.tr/wps/wcm/connect/tcmb+en/tcmb+en](http://www.tcmb.gov.tr/wps/wcm/connect/tcmb/en/tcmb+en).

2. General Similarities to the EU-Regime

The Turkish legislation on electronic money, payment and settlement systems include quite similar provisions compared to EC Directives such as Directive 2009/110/EC⁴ on electronic money, since they constitute the basis of the Turkish electronic money legislation. For instance, the Directive 2009/110/EC defines electronic money as electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions and which is accepted by a natural or legal person other than the electronic money issuer. Almost identical to that, the E-Money Law defines electronic money as “*the monetary value issued on receipt of funds, stored electronically, used for the purpose of making payment transactions described in this law and accepted as a payment instrument by natural and legal persons other than the electronic money issuer*”.

Having said that, the E-Money Law excludes the pre-paid instruments that can only be used within the electronic money issuer’s own network of stores, for purchasing only certain goods or services or that can only be used within a network of services as a result of an agreement from its scope of application⁵. This raises questions with respect to applicability of electronic money regulations to pre-paid cards and loyalty programs that are used within a network of stores but which are widely used in almost every store and has a great transaction volume potential. This question is expected to be answered in practice, with the future implications of the BRSA when the E-Money Law becomes actually effective and when the BRSA renders decisions on the matter.

3. Definition of “Payment Services”

The E-Money Law also defines the “payment services” as *numerus clausus*⁶. The payment services listed in the E-Money Law are parallel

3 BRSA Official Website: <http://www.bddk.org.tr/WebSitesi/English.aspx>.

4 Full text available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:267:0007:0017:EN:PDF>.

5 Article 18/5 of the E-Money Law.

6 Article 12 of the E-Money Law.

to the ones indicated in Directive 2007/64/EC⁷ on payment services, except for the “*services for mediating invoice payments*”, which is indicated as one of the payment services in the E-Money Law. These services refer to companies, which pay bills and deposit money on behalf of people in return of a commission fee. The payment services regulated under the E-Money Law aims to provide people with the opportunity to make payments without awaiting long queues and travelling long distances to pay their bills or keeping track of their debts.

The E-Money Law and, especially the E-Money Regulation, also regulate the payment service agreements, protection of funds, payment orders and amounts, rights and obligations of the payment service providers, users, exemptions and exceptions with respect to payment services in detail. Nonetheless, the legislation does not provide any payment systems that ease the payment services beyond Turkish borders, such as the single Euro payments area regulation⁸ in the European Union (“EU”).

4. Obligatory Authorisation

The E-Money Law provides obligations for the payment and security system operators, payment service providers and electronic money institutions. According to E-Money Law, payment and security system operators, payment service providers and electronic money institutions are obliged to obtain authorization in order to conduct activities within the scope of the E-Money Law. However, as also indicated above, there is a transition period of one year for the operators and institutions, in terms of the law, to comply with the E-Money Law and obtain necessary authorizations.

5. Applicability to Bitcoin?

One of the most problematic issues related to electronic money regulations in many jurisdictions is the applicability of the electronic money regulations to crypto-currencies such as Bitcoin, which is a complete-

7 Full text available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:319:0001:0036:EN:PDF>.

8 “Simple and efficient cross-border payments”, European Parliament Press Release of February 14, 2012, available at <http://www.europarl.europa.eu/news/en/news-room/content/20120214IPR37986/html/Simple-and-efficient-cross-border-payments>.

Resolution of the Italian Data Protection Authority on the Use of Cookies

ly decentralized, free open source peer-to-peer electronic cash system⁹. This issue is clarified by BRSA's declaration of 25 November 2013¹⁰ in Turkey which clearly stated that Bitcoin is not within the scope of the E-money Law and warned the public of the risks that may arise in using Bitcoin, similar to the practices of many of the world's central bank authorities in countries such as Germany, Estonia, Belgium, Mexico and Hong Kong¹¹. However neither

⁹ Edwin Jacobs, "Bitcoin: a bit too far?", June 25, 2011, available at <http://www.timelex.eu/nl/blog/detail/bitcoin-a-bit-too-far>.

¹⁰ BRSA Press Release About Bitcoin of November 25, 2013, No: 2013/32, available at https://www.bddk.org.tr/websitesi/turkce/Duyurular/Basin_Aciklamalari/12574bitco_in_bk_basin_aciklamasi.pdf.

Bitcoin, nor similar crypto-currencies are illegal in Turkey and they are commonly used based on a Turkish Lira – Bitcoin exchange (BTCTurk), which was launched in July, 2013¹².

6. Evolving Legal E-Money Regimes

The E-Money Law is evidently a big step forward for the regulation of electronic money transactions in Turkey but is still quite distinct from the regulatory regimes in the United States or in the member states of the EU. Turkey has established its fun-

¹¹ "Is Bitcoin Legal?" available at <http://www.coindesk.com/information/is-bitcoin-legal/>.

¹² Library of Congress, Regulation of Bitcoin in Selected Jurisdictions, available at <http://www.loc.gov/law/help/bitcoin-survey/>.

damental legal framework for electronic money and payment systems oriented on the EU's Directives while the European Commission seriously discusses making a reform on these Directives¹³. Nevertheless the E-Money Law is expected to bring in new players to the electronic money business and establish a confidence among the public, which may rally the volume of electronic money transactions conducted in Turkey in the near future.

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¹³ European Credit Research Institution, "Commission tables proposal for new e-money directive", available at <http://www.eri.eu/new/node/94>.

Italy: Resolution of the Italian Data Protection Authority on the Use of Cookies

On 8 May 2014 the Italian Data Protection Authority ("Garante") issued a resolution on cookies compliance, the "*Simplified Arrangements to Provide Information and Obtain Consent Regarding Cookies*," published on the Official Journal of the Italian Republic on June 3, 2014 (the "Resolution"). The Resolution was preceded by a public consultation launched by the Italian Data Protection Authority on 22 November 2012 and takes into account the positions and suggestions of stakeholders, such as consumers associations, marketing companies associations, website owners, etc.

The Resolution sets out simplified ways to provide information and to collect users' consent for the use of profiling cookies (i.e. cookies used for behavioural advertising purposes). It also addresses the liabilities of both the owner of the website visited by the user and third parties installing cookies via the website ("Third Parties") for compliance with the relevant requirements.

Cookies are small text files that are sent to users' terminal equipment, such as their computer or mobile device, by visited websites; they are stored in the users' device to be then re-transmitted to those websites on the users' subsequent visits.

1. Types of Cookies

The Garante sets out a distinction between the following kinds of cookies:

(a) "*technical*" cookies, which are used to perform *technical operations* such as authentication, monitoring session or storage of certain users' information. Usually technical cookies are placed by the owner of a website. Technical cookies include:

navigation or session cookies which allow users to navigate and use a website (for instance those used to purchase items online or authenticate to access users' account areas);

analytics cookies used by the website owner to collect aggregate information on the number of visitors and on the use of the website;

functional cookies, which allow navigation of users based on certain selected criteria (for instance, language preference cookies, users' basket; etc.);

(b) *profiling cookies*, aimed at creating user profiles based on the pages the users have visited and used for *behavioral advertising* purposes.

2. Obtaining User Consent

The Resolution clarifies that users' *prior* consent shall not be obtained to place *technical cookies* in accordance with the Article 29 Data Protection Working Party's Opinion

WP194 on Cookie Consent Exception¹ and Section 122 of the Italian Data Protection Code. The website owner shall only provide users with a notice providing the minimum set of information as indicated by the Italian Data Protection Code in the manner that the website owner considers most appropriate.

In contrast, the use of *profiling cookies* is only allowed with users' *prior consent* ("opt-in"). In addition, users shall be provided with a notice about their use through the *simplified procedure* set out by the Resolution. Use of profiling cookies shall also be notified to the Garante.

a) Use of Third Party Cookies

As far as *profiling cookies* are concerned, the Resolution makes a difference between first party's and Third Party's cookies. In particular, the Garante clarifies that it would be disproportionate to place on website owners an obligation to provide information and collect consent in relation to Third Parties' cookies: in fact, website owners do not have any control over these cookies. For this reason, the Garante has suggested an alternative solution in relation to the modalities in which website owners shall provide information on Third Parties' cookies (see below).

¹ Article 20 Working Party's Opinion 4/2012 on Cookie Consent Exception adopted on 7 June, 2012 (http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/index_en.htm).