

BANKING REGULATION AND SUPERVISION AGENCY’S GUIDANCE: How to Deal with Global Players and Bitcoin in Turkey?

Author: Gönenç Gürkaynak, Esq., ELIG, Attorneys-at-Law

It is safe to say that electronic money and payment services are creating one of the fastest growing markets worldwide. Given the high degree of public acceptance of these products, they are considered as potential replacements for cash-based payments.¹ In order to establish an EU-wide single market for payments, the European Commission had adopted the Directive on Payment Services² (“PSD”) setting forth the rules applicable to all payment services in the European Union and is currently expecting to welcome a legislative reform through the new Payment Services Directive - PSD2.

As for Turkey, *the Law on Payment and Securities Settlement Systems, Payment Services and Electronic Fund Institutions* (“Law”) structuring the details of payment systems and electronic money and payment services, *the Regulation on Payment Services and Electronic Money Issuance and Payment Institutions and Electronic Money Institutions* (“Regulation”) and *the Communiqué on the Management and Audit of Payment Institutions and Electronic Money Institutions’ Data Systems* (“Communiqué”), introduced by the Banking Regulation and Supervision Agency (“BRSA”), provide the legal foundation for non-cash payment services. The Law, as is clearly seen from its context, can be described as a major transposition of the PSD. That said; despite of the presence of the PSD as guidance, the Turkish market still seeks direction in various aspects concerning the implementation of the Law.

To perhaps serve this purpose, BRSA has published a Q&A on its website on June 23rd, 2015³ (“Guidance”), which sheds a light on certain grey areas regarding the interpretation and implementation of both the Law and its secondary legislation. While others are searching for a needle in a haystack on different discussions, BRSA, with the Guidance, has touch-based two different concerns that have not been clearly visited by the Law: (i) status of foreign based payment service companies and (ii) the Bitcoin.

Status of global players in Turkey

Considering the data breaches and security problems, the electronic payment sector has been on a roller-coaster ride during the last decade. But so far, nothing could stop the fast-growth

¹ Committee On Payment And Settlement Systems: Payment Systems In Turkey, January 2000 accessible at <http://www.tbb.org.tr/english/cpss36.pdf>

² The European Commission released its proposal for the new Directive on Payment Services (“PSDII”) on July 24th 2013 and on June 2nd, 2015, published its final compromise text. PSDII awaiting to be formally adopted by the European Parliament and the Council.

³ BRSA’s guidance accessible at June 23rd, 2015.

of the sector and innovative developments therein. In United States, for example, Starbucks has launched a mobile order program which allows customers to place their orders and make their payments using the pre-paid system.

With the inevitable popularity of the technology, legislators are forced to build a balanced, well-structured and coherent legal base for the practices in daily life. With this structure at hand, monitoring is crucial. In order to establish the monitoring mechanism, Article 14 and Article 18 of the Law, in parallel with the PSD, brought the obligation for companies operating as payment service providers in Turkey to obtain license from BRSA.

When it comes to global players in the sector, Turkey as a non-EU country, while adopting the regulations under the PSD, brings foreign companies under BRSA's control and supervision mechanism. In this respect, as strictly specified by BRSA in the Guidance, payment institutions based outside Turkey and fully registered under the PSD will have to go down the same road and (i) after being established as a joint stock company, (ii) will apply for license to operate as a payment institution in Turkey.

BRSA's stance remains the same for e-money issuers. As put forward in the Guidance, foreign electronic money institutions duly registered under their applicable jurisdiction, are not allowed to distribute the e-money they have issued abroad through their contracted distributors in Turkey. Similar with the payment institutions, BRSA requires electronic money institutions (i) to be established as joint stock companies in Turkey and (ii) to obtain a license from BRSA.

Status of Bitcoin

The controversial Bitcoin, created by a computer programmer using the pseudonym Satoshi Nakamoto, is a digital and self-directed currency under no authority's or legal entity's domination, allowing holders to benefit from "peer-to-peer electronic cash system". The system which can be used by downloading free and open-source software by computer users, creates and grants new Bitcoins to users who solve pre-specified mathematical problems. As of October 2015, one Bitcoin is worth approximately USD 239⁴ and currently total number of Bitcoins has reached 14,677,775⁵.

On November 25th, 2013, BRSA has published a press release as to the potential risks of Bitcoin usage and indicated that lack of authentication of the parties during transactions with Bitcoin or similar virtual currencies creates "*a suitable environment for these virtual monies to be used in illegal activities*".⁶ BRSA further discouraged the Bitcoin usage arguing that

⁴ See the website <http://bitcoincharts.com/markets/currencies/>

⁵ See the website <http://www.bitcoinwatch.com/>

⁶ A copy of the press release accessible at https://www.bddk.org.tr/websitesi/turkce/Duyurular/Basin_Aciklamalari/12574bitcoin_hk_basin_aciklamasi.pdf

Bitcoin's extremely volatile market value, threats of digital wallet robberies and disappearances as well as nonreversible nature of Bitcoin transactions paves the way to risks of facing operational failures and abuse.

It is well known that Bitcoin is commonly used to promote illegal activities from drug dealing and money laundering to numerous schemes that comes to light every other day. Further to globally known Bitcoin scandals such as "Silk Road"⁷ and "MT Gox"⁸ as well as Chinese Government's mandatory censorship on the Global Bitcoin Summit⁹, the world's approach against Bitcoin usage remains unsettled; with some countries restricting its usage, some explicitly allow its usage and trade. Turkey itself has a Turkish Lira based Bitcoin exchange provider called BTCTurk, a KKTC based Bitcoin stock market website¹⁰. After all, it does not prevent BRSA from acting conservative when the subject matter is providing an explicit legal status to Bitcoin.

Long time after the press release in 2013, BRSA has addressed Bitcoin usage once again in the Guidance. Its approach remains the same. Under the Guidance, BRSA, disconcerted by the untraceable nature of Bitcoin, explained that the Bitcoin is not considered as electronic money under the scope of the Law and added the following.

"Bitcoin, known as a digital currency which is not issued by any official or private institution and is not reassured in exchange, with its current structure and functioning, is not considered as electronic money under the Law. Therefore, its surveillance and audit in scope of the Law does not seem possible."

Article contact: Gönenç Gürkaynak, Esq.

Email: gonenc.gurkaynak@elig.com

(First published in Mondaq in October 2015)

⁷ In United States FBI has discovered and seized a website in October 2013, offering drug trafficking using Bitcoins. The website's owner Ross Ulbricht was arrested and charged with a number of crimes including money laundering and distributing controlled substances.

⁸ One of the biggest Bitcoin exchange providers, MT Gox, a Tokyo based company, went bankrupt after approximately 774,000 Bitcoins - worth nearly \$ 410m – went missing in February 2014.

⁹ In May 2014, Chinese media outlets have been issued censorship instructions by government authorities, mandating that no coverage be provided for the Global Bitcoin Summit 2014, a Beijing-based digital currency conference.

¹⁰ Website accessible at <https://www.btcturk.com/>