

Cryptocurrency Regulation in a Robust Market

The Vietnamese Approach

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Abstract

The Vietnamese market has consistently demonstrated impressive levels of grassroots adoption of cryptocurrencies and, therefore, is always a prospective market for cryptocurrency development. This is one of the driving factors behind the need for effective cryptocurrency regulation in the country, so that investors and consumers are properly protected. However, as is the case with all new elements of the economy, regulating cryptocurrencies is a delicate process of balancing between economic development and protection of parties with limited leverage. If laws are too strict, then the market momentum is stifled and an economic opportunity is missed. Conversely, if laws are too lax, then the market is poorly regulated and fraud may become widespread and cause severe damages. This article aims to demonstrate the overall Vietnamese position on cryptocurrency regulation, including how it is being executed and how it might be executed in the foreseeable future.

Keywords: cryptocurrency, regulation, Vietnam.

On 14 September 2022, Chainalysis published their latest annual Global Cryptocurrency Adoption Index. In their words, the goal of the Global Cryptocurrency Adoption Index is to demonstrate ‘where the most people are putting the biggest share of their money into cryptocurrency’¹ as opposed to simply measuring where the most cryptocurrency activity is happening. Thus, Chainalysis measures something that they called ‘grassroots adoption of cryptocurrency’. This Index ranks 146 countries over five sub-indexes:

- On-chain cryptocurrency value received at centralized exchanges, weighted by purchasing power parity (PPP) per capita;
- On-chain retail value received at centralized exchanges, weighted by PPP per capita;
- Peer-to-peer (P2P) exchange trade volume, weighted by PPP per capita and number of internet users;

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1 Chainalysis Team, ‘The 2022 Global Crypto Adoption Index: Emerging Markets Lead in Grassroots Adoption, China Remains Active Despite Ban, and Crypto Fundamentals Appear Healthy’. Report dated 14 September 2022. The report is available at: <https://blog.chainalysis.com/reports/2022-global-crypto-adoption-index/>.

- On-chain cryptocurrency value received from DeFi protocols, weighted by PPP per capita; as well as;
- On-chain retail value received from DeFi protocols, weighted by PPP per capita.

In all of these sub-indexes, Vietnam is consistently within the top 10 among the ranked countries, something that no other country has managed.² This outstanding performance translates to the pole position in overall index ranking, which means that according to Chainalysis, Vietnam has the greatest measure of ‘grassroots adoption of cryptocurrency’ worldwide. This being Vietnam’s second year in the top spot, edging out established markets like India, China and even robust emerging markets like Pakistan or Nigeria shows the country’s remarkable appetite for cryptocurrency at the grassroots level despite significant levels of risk. Though overall adoption of cryptocurrencies has levelled off worldwide in 2021, Vietnam shows extremely high purchasing power and population-adjusted adoption across centralized, DeFi and P2P cryptocurrency tools.³ Behind these impressive adoption capabilities are diverse numbers of trading platforms for Vietnamese people to interact with cryptocurrencies, such as Binance, Coinbase, Bitstamp and so on. Furthermore, the success of Axie Infinity, the NFT-based online videogame developed by the Vietnamese company Sky Mavis, presented not only a lucrative option for cryptocurrency trading in play-to-earn video games but also inspired other Vietnamese start-ups to replicate its success and pour even more effort into propagating cryptocurrency-related products.⁴

A Current Position of the Vietnamese Government on Cryptocurrency Regulation

I Introduction

Despite active market movements and quick cryptocurrency adoption among the Vietnamese populace, the Vietnamese government has shown strict reservations against adoption of cryptocurrencies. Cryptocurrencies are a completely new type of asset not covered by any Vietnamese piece of written legislation. Therefore, they have attracted their fair share of criminal activities like unlicensed gambling, money laundering, securities fraud and pyramid investment schemes. What’s more, seeing how cryptocurrencies are unregulated in Vietnam, the monetary value lost in criminal activity could be very difficult to trace and even more difficult to retrieve.⁵ Therefore, the consensus among Vietnamese state agencies is that there needs to be cryptocurrency regulation. However, the agencies are yet to come up with a unifying approach to regulating this new market. They regularly disagree

2 *Ibid.*, Section: The 2022 Global Crypto Adoption Index Top 20.

3 *Ibid.*, Section: Vietnam holds on to top spot, U.S. jumps to fifth, China back in top ten.

4 Grady McGregor, “‘The Beginning of Something Very Big’: How One Blockchain Unicorn Turned Vietnam into the World’s Most Surprising Crypto Startup Hotspot’ Fortune, 4 May 2022. Available at: <https://fortune.com/2022/05/04/axie-infinity-sky-mavis-vietnam-crypto-blockchain-startups/>.

5 Thanh Chung, ‘Vietnam Is a Large Cryptocurrency Market, with Risks of Money Laundering through Cryptocurrency’, Tuoi Tre Article, 7 September 2022. Available at: <https://tuoitre.vn/viet-nam-la-thi-truong-choi-tien-ao-lon-nguy-co-rua-tien-qua-tien-ao-20220907150824875.htm>.

on (1) what constitutes a cryptocurrency, (2) how do cryptocurrencies fit into the existing Vietnamese legal structures and (3) how can cryptocurrency trading activities best be integrated into the Vietnamese economy at large.

The persisting disagreement does not mean that there have been no efforts to resolve these three questions. In fact, state-level ministries and prominent legal research institutions in Vietnam have come forward with proposals for cryptocurrency regulation since 2018. Vietnam as a jurisdiction has been working on cryptocurrency regulation since 2017, which was kick-started by Decision 1255/QĐ-TTg by Prime Minister Nguyen Xuan Phuc. Following this decision, prominent legislation research institutions under the Ministry of Justice have produced extensive reports on cryptocurrency regulation and economic prospects around it. However, similar to other countries and international organizations such as the International Standards Organization (ISO) and the European Central Bank (ECB), Vietnamese researchers have differing opinions on cryptocurrency regulation, sometimes even on the same issue. This article attempts to collate and summarize the findings of these agencies, as well as document the current official Vietnamese approach to cryptocurrencies.⁶

In a report by Hanoi Law University (the HLU Report), the researchers synthesized various definitions of cryptocurrency put forth by the ECB, different institutions in the US Federal government and the Japanese, Swedish and other governments to define cryptocurrency as follows:

a product of value that exists in digital form, issued by an individual or an organization, is not a fiat currency issued by a Government of a country, has usage value in an internet community or may be used for trade with and pay for other goods and services.⁷

By contrast, in a report by the Ministry of Justice (the MOJ Report), the researchers referenced the definitions put forth by ISO, the intergovernmental Financial Action Task Force (FATF), as well as the definition in Directive 2018/843 dated 30 May 2018 of the European Parliament and Council. Even though the MOJ Report does not propose its own definition of cryptocurrencies, it adopts the ECB definition for the relevant parts of the report.⁸ To be precise, the MOJ Report adopts the ECB's definition of 'virtual currency', because to the MOJ the terms cryptocurrency and virtual currency are interchangeable.⁹ Therefore, the MOJ Report defines cryptocurrency as 'a digital representation of value, not issued by a central bank, credit institution or e-money institution, which, in some circumstances, can be used as an alternative to money'. Therefore, based on the

6 See Ministry of Justice, 'On the Comprehensive Review and Assessment of the Legal Status and Practice of Virtual Assets in Vietnam and Internationally; Identify and Propose Improvement Directions'. Report No. 255/BC-BTP, 29 October 2018 (MOJ Report). *See also* Hanoi Law University, 'Legal Aspects of Cryptocurrency: Practices of Several Countries and Key Takeaways for Vietnam'. Ministry-level Research, June 2018 (HLU Report).

7 HLU Report, p. 40.

8 See MOJ Report Part 1, Chapters II and III.

9 MOJ Report, p. 10.

above definitions, we conclude that from a legislative point of view in Vietnam, cryptocurrencies can be defined as

a digital representation of value which exists only in the cyberspace, which is issued by private persons, the value of which is not insured by a sovereign and is not backed by a lender of last resort.

II Cryptocurrency Is Not 'Currency' Under Vietnamese law

Cryptocurrency is not recognized as a store of value under Vietnamese law. This is due to how Vietnamese law recognizes value to be stored in either money or assets. Because of how these types are stipulated in the laws, cryptocurrency cannot fit the definition of either.

Cryptocurrency is certainly not Vietnamese money since Vietnamese money is solely issued by the State Bank of Vietnam (SBV).¹⁰ However, cryptocurrencies cannot be defined as foreign exchange either because under Vietnamese laws, foreign exchange is only one of either (a) money of other states (including the Euro); (b) debt instruments including but not limited to cheques, credit cards, bills of exchange, promissory notes; (c) bonds and securities denominated in money of other states, (d) gold in international payment (and State international reserves); or (e) Vietnamese currency in international payments.¹¹ Even though cryptocurrency could fit in category b above, considering the wording of the term, it is important to note that Vietnamese law does not recognize an operational definition of either 'money' or 'payment instrument'. Therefore, if an instrument is not explicitly named in the category, whether it is or is not foreign exchange, is entirely at the discretion of state agencies. In this regard, the SBV has made it clear that 'Cryptocurrencies in general and Bitcoin, Litecoin in specific are not currencies and are not legal payment instruments under the laws of Vietnam'.¹² This position is accepted and shared by other state agencies, among them the General Department of Taxation: 'Per current regulations on banking and currencies, Bitcoin [inter alia] are not currencies and are not legal payment instruments in Vietnam.'¹³ Therefore, Vietnamese law does not have a way to integrate cryptocurrencies into its current framework, and the Vietnamese state agencies are unilaterally against considering them money.

III Currently, Cryptocurrencies Are Also Not 'Assets' Under Vietnamese Law

Cryptocurrencies cannot be considered assets under Vietnamese law either. Vietnamese civil laws determine 'assets' to be one of four types: (1) money, (2)

10 Law No. 46/2010/QH12 dated 16 June 2010 on the State Bank of Vietnam (SBV Law), Article 17.1.

11 Ordinance No. 28/2005/PL-UBTVQH11 dated 13 December 2005 on Foreign Exchange Control (Foreign Exchange Ordinance), Article 4.1.

12 Official Letter No. 5747/NHNN-PC dated 21 July 2017 by the State Bank of Vietnam regarding answers to motions brought by Mr Vu Thai Ha on designing computer centres for Bitcoin, Litecoin and other cryptocurrencies.

13 Official Letter No. 5612/TCT-CC dated 28 December 2015 by the General Department of Taxation regarding determination of tax duties on sale and purchase of cryptocurrencies (OL 5612).

objects, (3) valuable papers and (4) property rights.¹⁴ Money is, of course, only Vietnamese money or foreign exchange, as demonstrated above. The term ‘objects’, while not defined in a legislative sense, is determined to only refer to “tangible objects, [...] those that exist apart from human perception.¹⁵” Valuable papers, while not explicitly classified like assets above, are defined in the context of discounting valuable papers of SBV for foreign credit organizations to be:

evidence of the confirmation of debt payment obligations between the issuer of valuable papers with the owner of valuable papers in a certain time, interest conditions and other conditions.¹⁶

However, the Circular 01 containing this definition does not have universal application and does not represent an encompassing view of cryptocurrency. Rights to properties are rights that can be valued by money, which include intellectual property rights and land use rights and the like.¹⁷

Now, while cryptocurrencies cannot be considered money or object, whether it could be considered valuable papers or a right to property is not explicit in the laws. However, the chances of cryptocurrency being adopted as either of the above among Vietnamese legislators are slim. Regarding rights to properties, while it is true that rights to properties under Vietnamese law is loosely defined as rights that can be valued by money, such right has to be ‘similar’ to land use rights and intellectual property rights in order to be considered assets. The common conception in Vietnam regarding this requirement is that, for a right to be considered an asset, it has to have value that does not come solely from the process of trade. A land use right is considered right to property because its value can be determined by the value of the land, and the land has value because it can generate income from farming or creating businesses on it, both of which do not concern selling the land. Likewise, an intellectual property right can have its value determined by determining the value of the intellectual property to which the rights are granted, and such intellectual property can be profited from by selling copies of it or to grant copyrights, both of which yield value based on the desirability, practicality or innovative qualities of that intellectual property, which are all independent from selling it outright. Conversely, cryptocurrencies do not hold the same type of values as demonstrated above because value from cryptocurrencies cannot be gained from any other way than buying and selling it, at least for the time being. Furthermore, it is important to understand the essence behind this sort of classification and the legislators’ understanding of it, which is as follows:

14 Law No. 91/2015/QH13 dated 24 November 2015 Civil Code (Civil Code), Article 105.1.

15 See Assoc. Prof. Nguyen Van Cu, Assoc. Prof. Tran Thi Hue, ‘Scientific Commentary of the 2015 Civil Code of the Socialist Republic of Vietnam, December 2016’, p. 203.

16 Circular 01/2012/TT-NHNN dated 16 February 2012 on the discount of valuable papers of the State Bank of Vietnam for foreign credit organizations and bank branches (Circular 01), Article 2.1.

17 Civil Code, Art. 115.

assets need to exist independently from the human perception of itself; on top of that, for a thing to be an asset, humans have to be able to possess, control and influence it.¹⁸

Therefore, while it may seem possible to make arguments that cryptocurrencies can be considered valuable paper or property rights, the fact is that such arguments will not become acceptable to Vietnamese legislators because cryptocurrencies are inherently disqualified by the above understanding, being only representations of value in the cyberspace.

IV. Due to Cryptocurrency Being Neither Currency or Asset, It Could Not Be Regulated Under Commerce Laws, and Is Also Not Taxable

The 2005 Law on Commerce¹⁹ determines goods to include all species of assets that are not land, including assets to be formed in the future. At face value this might seem like an argument could be made for it to also include virtual properties like cryptocurrencies, which hold derivative or extrinsic value and can be traded. However, as established above, the established sentiment against considering cryptocurrency demonstrated above means that unless there is a comprehensive change to the Vietnamese legal system to implement cryptocurrency, the current position would still be that *cryptocurrency is not a type of goods*. Additionally, the Vietnamese Ministry of Industry and Trade (MOIT) has recently remarked that ‘Bitcoin does not have the fundamental characteristics of a goods or a service. Therefore, Bitcoin is neither a goods nor a service’.²⁰ This led to MOIT’s denying all registrations of Bitcoin trade platforms in Vietnam. It is important to stress that this is the view of the Vietnamese state and not of Vietnamese laws.

Similarly, cryptocurrency could not be considered a subject of taxation in any sense under the current situation under prevalent Vietnamese taxation law. This would mean that traders’ proceeds in cryptocurrency trading will not be subject to personal income tax. Also, under current laws on value-added tax,²¹ because cryptocurrency is currently neither a goods nor a service, it could not be subject to value-added tax (VAT). To solidify the above view, it is possible to take reference from a court case on one of the taxation cases regarding cryptocurrency that actually made headlines around the country. In 2016, Ben Tre Tax Department tried to define cryptocurrencies as ‘rights to properties’ to collect ‘back taxes’ from Mr Nguyen Viet Cuong, a cryptocurrency trader, on his crypto trading proceeds from 2008 to 2013. Mr Cuong then filed a lawsuit against Ben Tre Tax Department²² to the People’s Court of the Province of Ben Tre. The court ruled that tax departments cannot determine cryptocurrencies as a species of asset because laws

18 See Assoc. Prof. Nguyen Van Cu, Assoc. Prof. Tran Thi Hue, ‘Scientific Commentary of the 2015 Civil Code of the Socialist Republic of Vietnam’, December 2016, p. 205.

19 Law No. 36/2005/QH11 dated 14 June 2005 on Commerce (Law on Commerce), Article 3.2.

20 OL 5612, p. 2.

21 See Law No. 13/2008/QH12 dated 3 June 2008 on Value Added Tax, Article 3.

22 Phuong Loan, ‘First Lawsuit on Bitcoin Taxation’, HCMC Law Newspaper Article, 21 September 2017. Available at: <https://plo.vn/vu-kien-dau-tien-ve-truy-thu-thue-tien-dien-tu-bitcoin-post453704.html> (last accessed January 2023).

on cryptocurrencies are in the drafting process and, hence, the collection of back taxes by Ben Tre Tax Department is unlawful.²³ This ruling expresses the common sentiment among the Vietnamese state agencies that they will not try to incorporate cryptocurrencies into its preceding view of assets and rather pass a new law to determine that explicitly.

B The Vietnamese Approach to Cryptocurrency Regulation, Going Forward

I On the Form of Cryptocurrency Legislation

The ruling issued by People's Court of Ben Tre is a notable example for Vietnamese legislators' approach to regulating cryptocurrencies: refuse to integrate it into the existing legal system, and devise entirely new laws specifically to regulate it. Concurrently, MOJ proposes three separate approaches to new cryptocurrency laws:²⁴

- a Government shall draft a propositional decree to govern investment conditions to crypto assets only. A decree is lower than a law in authority but has wider usage and is meant as a way to interpret and dictate usage of laws. For things that the Vietnamese state doesn't know if there should be a law or not, government usually tests the water with a decree first and see how it goes; hence 'propositional'.
- b Government shall draft an out-and-out decree to govern crypto businesses as a conditional business line under current laws. This is different because the decree above tries to regulate from the ground up – creating laws that have not applied to anything before; whereas the decree here is trying to regulate as a new type of business line, which is an established system already.
- c National Assembly shall ratify new laws to govern cryptocurrency in all aspects (including but not limited to legality, regulation of trading platforms, investment registration, ICOs) and comprehensively. This approach is explicitly recommended against by MOJ.

II On the Content of Cryptocurrency Regulation

In conjunction with proposals for form of legislation coming from MOJ as above, HLU would make proposals to the rules and clauses to be contained in such form. HLU Report proposes five separate issues that the new laws need to address:

- a There needs to be a uniform definition of cryptocurrency: This suggestion seeks to achieve two tasks: (1) define the scope of application for the law and (2) manifest the uniform understanding among state agents about cryptocurrency in a legal sense. The definition would have to differentiate between cryptocurrency and virtual currency, as well as weed out elements such as promotional tokens in consumer platforms like retail chains or videogames. Given the reservations against cryptocurrencies that Vietnamese

23 Phuong Loan, 'Court Reaches Verdict on Bitcoin Taxation Case', HCMC Law Newspaper Article, 21 September 2017. Available at: <https://plo.vn/toa-tuyen-an-vu-thu-thue-tien-dien-tu-bitcoin-post453848.html> (last accessed: January 2023).

24 MOJ Report, pp. 119-121.

legislators demonstrate as above, it is not surprising when HLU and MOJ concur that the ECB definition on cryptocurrency (as cited above) is referenced for legislators to either adopt or develop on.

- b Cryptocurrency needs to be integrated as a new type of asset with specified conditions: Per the contributors to HLU Report, this suggestion seeks to achieve several tasks. However, among them are two notable tasks: (1) establish a basis for state regulation upon cryptocurrency-related activities (such as conditions to establish and maintain trading platforms, regular financial disclosures, know-your-customers, taxation on both platforms and traders, etc.) and (2) integrate cryptocurrency-related activities into the existing criminal law system. When cryptocurrency is recognized as a new type of asset under Vietnamese law, and when such integration was with the above two aims in mind, cryptocurrency regulations in Vietnam will develop in a defined direction, one that could protect against frauds, pyramid schemes and money laundering that use cryptocurrency as a shell. As a side benefit, if cryptocurrency is legislated as asset, cybersecurity attacks on crypto wallets or platforms would be removed from the grey area and be prosecuted as a criminal offence under existing criminal laws.
- c Taxation: Given the current lack of appropriate taxation schemes upon cryptocurrencies, and considering the Nguyen Viet Cuong lawsuit as demonstrated above in this article, taxation would indeed be a focal point in the new cryptocurrency legislation. When cryptocurrency is an asset under Vietnamese law, holders will be subject to personal income tax and VAT. With personal income tax, cryptocurrency being assets would mean proceeds from cryptocurrency trading fits seamlessly into the current tax system, and cryptocurrency traders are subject to the same treatment as traders of other types of valuables. However, with VAT, the new laws would need to legislate cryptocurrency so that it is a 'goods' that could be subject to current VAT laws. MOJ Report proposes that cryptocurrency as an asset can receive a 0% VAT incentive, as has been done in a similar fashion in the EU and Australia.
- d Cryptocurrency is not to be legislated as a currency or a payment method: All developed cryptocurrencies, as of the time of writing, still lack most elements that make up a proper currency: a sovereign to insure its own value, a central bank to control its flow, and a lender of last resort to stabilize its value. It is still a speculative asset issued by private parties and may time and again face volatile valuations. With such a type of valuable at hand, it is always more profitable to hold on to the coins and profit off of their volatility instead of actually using them for other goods and services. On a macroeconomic scale, if such an instrument as cryptocurrency is adopted by Vietnamese legislators as a currency or even a payment method, the Vietnamese financial system will be severely strained. Cryptocurrency's inherent volatility and speculative nature would destabilize exchange rates between them and fiat currencies, leading to either severe inflation or liquidity shortages. Therefore, even with cryptocurrency regulation being a future prospect, it would still be improbable for Vietnam, or as is the case with most countries around the world, to adopt cryptocurrency as a currency.

- e Initial Coin Offerings (ICOs) are to be regulated if they are legalized as an investment funding channel: ICOs can be a fundraising channel for start-ups, where they issue their own cryptocurrency as a stand-in for shares. Procedures will vary between businesses, but most would publicize a white paper to demonstrate the start-up project, road map to demonstrate its development, and elements that pertain to the blockchain as well as the cryptocurrency. The coins function in the same way as stocks, but their value is supposedly more responsive to the success of the start-up project. In the event that cryptocurrencies are legislated as an asset under Vietnamese law, then they could also be considered securities under current securities law.²⁵ This would result in Vietnamese securities laws having to amend to legislate ICOs, including financial conditions to ICO, ICO registration, ICO profile dossiers, public disclosures, among other elements. In order to prevent fraud, pyramid schemes and other criminal activities using cryptocurrency as a shell, it is important that ICOs be legislated with these in mind.
- f Cryptocurrency trading platforms are to be regulated via licences and conditions: A common sentiment among the Vietnamese people who are concerned with cryptocurrency in any way is that cryptocurrencies are better off in their dedicated trading platforms, instead of being integrated to existing markets. This sentiment is based on the fact that cryptocurrencies only exist in the cyberspace, developed from blockchain which is a new technology, which translates to a need for infrastructure, technology and labour that is inherently different from those already employed in maintaining the markets in operation. Therefore, it is important that these dedicated platforms are regulated under the new laws. Drawing precedents from Vietnamese laws on securities as well as enterprise and investment, Vietnamese legislators can (1) regulate trading platforms by setting conditions to establish platforms – one of them can be a stringent screening process for clients when they register for trading accounts, (2) platforms must register with state agencies to trade, (3) trade volume must be recorded and reported to authorities regularly and (4) outbound trade is conditional upon years established.

Cryptocurrency is a young venture among the Vietnamese, and cryptocurrency regulation could be considered one of the pioneering efforts of Vietnamese legislators to regulate the country in industrial revolution 4.0. Vietnamese legislators face the challenge to walk the fine line between over-regulation and under-regulation; the former kills the market momentum and risks having the Vietnamese left behind by other countries in cryptocurrency development, and the latter leaves cryptocurrency development run rampant and in turn becomes exploited by criminals. In response to the current situation, the Vietnamese approach is to research and pass a statute dedicated to cryptocurrency regulation, which aims to (1) define and regulate cryptocurrency as a special type of asset, (2) regulate cryptocurrency intermediary service providers such as trading platforms via licences and conditions of eligibility, (3) to police ICOs under a regime similar

²⁵ Law No. 54/2019/QH14 dated 26 November 2019 on Securities, Article 4.1.

to domestic securities regulation, (4) impose VAT and personal income tax on proceeds from cryptocurrency as goods and assets. For the time being, cryptocurrency will remain largely unregulated under the law but would face attrition from state agencies in adoption of any kind. Additionally, cryptocurrency would not be considered currency or a valid form of debt instrument in the future in Vietnam, as things stand.