

# Legal regulation of cryptocurrency and NFTs

The Netherlands





**PILnet** is a global non-governmental organization that creates opportunities for social change by unlocking law’s full potential. With programs in Europe & Eurasia, Asia, and at the global level, PILnet aims to reclaim and reimagine the role of law so that it works for the benefit of all. PILnet builds networks and collaborations of public interest and private lawyers who understand how law works when it serves the interests of the privileged and then it uses that knowledge to strengthen civil society and the communities they serve. PILnet not only obtains high-quality, free legal assistance for civil society organizations when they urgently need it but also helps organizations to capitalize on the full range of specialized legal expertise that can be provided by corporate lawyers, including against ongoing, or even yet-to-be-determined, challenges.

## Introduction

There is an increasing number of charities across the world that have started accepting cryptocurrency as donations, including **UNICEF** and the **Salvation Army**. New platforms like **The Giving Block** and **DoInGud** are helping nonprofits to raise funds with cryptocurrency and non-fungible tokens (“NFTs”).

To help charities better understand the opportunities and risks involved in working in this new context, PILnet with its partners launched a project about legal regulation of cryptocurrency and NFTs in different jurisdictions around the world.

The report below aims to consider:

- (a) The legality of cryptocurrency
- (b) Accepting cryptocurrency
- (c) Accepting NFTs and its proceeds
- (d) Issuing NFTs to raise funds

## Disclaimer

PILnet, and partners participating in this research are not liable towards third parties for the accuracy of the information contained in the research about Cryptocurrency and NFTs. The information contained herein cannot be considered as legal advice. The research was carried out in 2022-2023 and responds to the regulatory framework in effect during this time period.

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## 1. Is engaging in blockchain technology legal in this jurisdiction?

Yes

## 2. Is accepting cryptocurrency permitted for charities? If so, what legislation/regulation governs it?

Yes.

Although a cryptocurrency may fall within the scope of a product that is regulated under the Dutch Act on the prevention of money laundering and terrorist financing (*Wet ter voorkoming van witwassen en terrorismefinanciering*, **Wwft**) or the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, **DFSA**), the activity of accepting cryptocurrencies as a donation in principle is not a regulated activity under the Wwft and the DFSA.

From an AML/CFT perspective it is worth to note that in the most recent national risk assessment on anti-money laundering, money laundering via cryptocurrencies is identified as one of the largest money laundering risks. If a charity or NGO accepts cryptocurrency donations, we expect that a service provider of an NGO or charity that is subject to Dutch AML laws (e.g. a bank) will take this into account when assigning a risk profile to the NGO or charity as part of client due diligence. Also, if a service provider of the NGO or charity that is subject to Dutch AML laws marks a crypto donation as unusual transaction (*ongebruikelijke transactie*) the service provider will have to report the transaction to the FIU-Netherlands on the basis of the Wwft.

## 3. Is issuing NFTs to raise funds permitted for charities? If so, what legislation/regulation (if any) governs it?



Yes, but a licence or prospectus may be required.

NFTs as such are unregulated in the Netherlands. Depending on the characteristics of the NFT, the NFT may fall within the scope of a product that is regulated under the DFSA. If this is the case, a prospectus (disclosure document providing details about the investment offering (issuing NFTs) to the public) may be needed or a licence or registration requirement may apply to the NGO or charity for issuing the NFT.

Most importantly, an NFT may qualify as:

### (i) Security

For issuing a security, the NGO or charity must in principle publish a prospectus. A security, in short, is a transferable share, bond or convertible of which the most important characteristics are:

- a. transferable share: gives the right to participation in the capital of a company and the right to the return achieved with the invested capital.
- b. transferable bond: gives a right to repayment, interest or similar benefit.
- c. transferable convertible: gives the right to acquire a security referred to under (a) or (b) by exercising the rights attached to it or through conversion or cash settlement.

### (ii) E-money

For issuing e-money in principle a licence as electronic money institution is required, under which licence the Dutch AML/CTF requirements also apply. E-money, in short, is an electronic monetary value, which value represents a claim on the NGO or charity that is issued in return for legal tender and for the purpose of making payment transactions.

### (iii) Investment objects



For issuing investment objects (beleggingsobjecten,) the NGO or charity in principle requires a licence and must publish a prospectus. An investment object, in short, is a good (*zaak*) or a right to a return in cash or the proceeds of a good, which is obtained other than free of charge, to which the acquirer is promised a return in cash and the management of the good is carried out by someone other than the acquirer.

*Note: There is a high-risk that the answer to question 3 will change from the moment that the upcoming EU Regulation Markets in Crypto-assets (MiCAR) enters into effect.*

## 4. Are there tax implications for donations of cryptocurrency or NFTs? Are there obligations to pay tax for charities who sell NFTs for fundraising purposes?

### 4.1. Are there tax implications for donations of cryptocurrency or NFTs?

From a Dutch tax perspective, donations in the form of cryptocurrencies or NFTs are not treated differently from regular donations in cash or in kind. However, valuation implications may arise in

respect of the donations in cryptocurrencies or NFTs (which should be valued at fair market value at the moment of the donation).

In general, gifts of cryptocurrency or NFTs made by a (deemed) Dutch tax resident are subject to gift tax at rates between 10% - 40% of the value of the cryptocurrency respectively NFT received on the date of the gift. Subject to specific exemptions, the gift tax rate depends on the relation of the involved parties (the party making the gift and the recipient of the gift).

However, a foundation that has obtained a specific status from the Dutch tax authorities to be considered a so-called public benefit charitable institution (an "ANBI") may be exempt from paying Dutch inheritance tax or gift tax on inheritances. Individuals and legal persons who donate to an ANBI can generally deduct their gift from their Dutch personal income tax respectively Dutch corporate income tax.



#### **4.2. Are there obligations to pay tax for charities who sell NFTs for fundraising purposes?**

There is no specific guidance on the value added tax (VAT) treatment of NFTs. In general, any person who independently engages in economic activity, regardless of the purpose or result of that activity may be considered a VAT-entrepreneur (this applies to foundations as well).

Whether the issuance of NFTs leads to VAT-entrepreneurship should be assessed on a case-by-case basis. We can imagine that the issuance of NFTs on an occasional basis may not lead to VAT-entrepreneurship, but this depends on the facts and circumstances of the case and should be assessed on an individual basis.

In case the foundation is considered a VAT-entrepreneur, in our view the sale of NFTs should in principle be considered a supply of services subject to VAT (in which case it should be assessed whether a specific exemption applies in case of the issuance of the NFT depending on the NFT's underlying asset).

A specific decree issued for fundraising in respect of exceptional events with a charitable purpose provides that the fundraising (with a charitable purpose) may be out of scope from VAT for the gift part, subject to specific conditions set out in that specific decree. The issuance of NFTs may fall in scope of this specific decree on the basis of which the gift part of the issuance of the NFTs may be out of scope from VAT, but there is no guidance and certainty yet in this regard.

Generally, a foundation is exempt from Dutch corporate income tax, unless such foundation is conducting an enterprise or is in competition with other businesses. Whether the issuance of NFTs results in the foundation (a) conducting an enterprise or (b) entering into competition with other businesses should be assessed on an individual basis.

Based on the above and in light of the absence of specific guidance on NFTs/cryptos, it should be closely monitored whether and to which extent the foundation with an ANBI-status performs commercial activities in respect of the sale of NFTs given that the commercial activities may lead (a) to the loss of the ANBI-status and (b) to corporate income tax exposure for the foundation.



## 5. What is the best practice or guidance?



There is no tax- or financial regulatory related guidance issued by the the Dutch governmental or regulatory authorities on the acceptance and issuance of crypto currencies and NFTs by charities and NGOs.

From a financial regulatory perspective, the following information page of the Dutch Authority for the Financial Markets (AFM) on ICOs may be useful:

<https://www.afm.nl/en/sector/themas/digitalisering/initial-coin-offerings>.

## 6. Additional research findings worth noting

There is a - non- financial regulatory or tax-related - legislative act in preparation (the Act on the transpiration on civil society organisations, *Wet transparantie maatschappelijke organisaties*) that will amongst others govern that:

- a. on request of certain public bodies (e.g. the public prosecutor) civil society organisations must provide insight into the origin, purpose and size of donations from outside the EEA. For substantial donations, the public body may also decide to request personal data of such donations; and
- b. the obligation for foundations (*stichtingen*) to provide their balance sheet and statement of income and expenditure to the Dutch Chamber of Commerce (KvK)

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