Legal regulation of cryptocurrency and NFTs

Spain

PILnet
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.

© 2023 by PILnet and Partnering Law Firms
Contents

Introduction .................................................................................................................................................. I

Contents ..................................................................................................................................................... II

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

2. Is accepting cryptocurrency permitted for charities? If so, what legislation/regulation governs it? .... 1

3. Is issuing NFTs to raise funds permitted for charities? If so, what legislation/regulation (if any) governs it? ................................................................................................................................................ 7

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? ......................................................................................... 10

5. What is the best practice or guidance? .................................................................................................... 12
From a Spanish law perspective, and for the purposes of this advice we will assume that an NGO / a charity means either:

(a) A foundation as defined by Article 2(1) Law 50/2002, of 26 December, on Foundations (hereinafter, the “Spanish Foundations Law”). Or

(b) An association as described by Article 1(2) Organic Law 1/2002, of 22 March, developing the Right of Association (hereinafter, the “Spanish Association Law”).

Spanish law would not specifically regulate the cases where an NGO engages in blockchain technology. Thus, it would currently be legal for NGO to engage in blockchain technology, but future developments may change this position.

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

2.1 What limits and restrictions exist in terms of the types of cryptocurrencies that a charity can accept? (For example: Is there a prohibition or restriction on Bitcoin (BTC), Ethereum (ETH) and/or stablecoins (e.g. USDT)? Is there any restriction on the amount of cryptocurrencies that a charity and NGO can accept?)

As above, we consider that an NGO may qualify as either a foundation or an association from a Spanish law perspective.

Foundations

In the case of foundations, the Spanish Foundations Law sets out that foundations shall initially be funded with sufficient and adequate funds to meet their foundational purposes, whose funds may consist of goods and rights of any nature. For the purposes of these comments / notes, by “initially funded” we refer to the initial funds of a foundation at the time of its constitution (in Spanish, dotación). Initial funds may be provided by founders or third parties in the form of contributions or donations. The Spanish Foundation Law envisages that foundations initially funded with -at least- an equivalent economic value of EUR 30,000 would be deemed to have sufficient funds to meet their foundational purposes. For foundations with lower funds than the stated threshold, the founder shall justify the
adequacy and sufficiency of the initial funds in relation with the foundation’s foundational purposes by providing a so-called “first actuation programme”, together with an economic assessment of the viability of the foundation exclusively using the initial funds.

In this sense, please note that the Spanish Foundations Law would not provide for restrictions in the form of the initial funds and therefore the initial funds can be provided in a cryptocurrency without any specific limitations. In any event, in the case of non-monetary contributions / donations, the public deed constituting the foundation shall be accompanied with a value appraisal from an independent expert. Under Spanish law, cryptocurrencies would not be considered as widely accepted means of payment, currency or electronic money (specially taking into account their high volatility and fluctuation), and a contribution in a cryptocurrency would most likely be considered as a non-monetary contribution and would have to meet the above requirement. Therefore, we are of the view that a contribution / donation in a cryptocurrency would be impractical.

The Spanish Foundations Law would not set out specific restrictions on the form of contributions or donations once the foundation has been constituted (i.e. in addition to its initial funds).

Associations

The Spanish Association Law would not establish requirements re the form / nature of the funds of an association. Therefore, similar to the case of foundations, no restrictions would apply in relation to non-monetary contributions / donations such as cryptocurrencies. In any event, please note that associations are obliged under the Spanish Association Law to keep updated records that give a true and fair view of the economic value of the association’s assets and funds. In light of the high volatility and fluctuation of cryptocurrencies, we also understand that a contribution / donation in a cryptocurrency would be impractical if the association is obliged to keep updated records of the economic value of its funds.

2.2 Are there any prescribed processes or restrictions in realising the value of cryptocurrencies?

2.2.(a). Is a charity or NGO permitted to open its own wallet(s) and exchange account(s) for receipt of donations in cryptocurrencies?

Yes.

2.2.(a).(i). What exchanges are permitted and/or prohibited? (e.g., Coinbase, Crypto.com)

No restrictions are applicable.

2.2.(b). Can a charity or NGO manage its own wallet(s) and exchange account(s) and the cryptocurrencies therein?

Yes.
2.2.(c). If a charity or NGO cannot directly manage cryptocurrencies, how are charities and NGOs able to convert cryptocurrencies to fiat? (For example: Does the charity or NGO need to engage with a third-party vendor/intermediary?)
N/A

2.2.(d). Can a charity or NGO use cryptocurrencies directly for its transactions?
Yes.

2.2.(e). Can cryptocurrencies be used as payment for goods or services provided by the charity or NGO?
Yes.

2.2.(f). How should the charity or NGO record and account for the digital assets held?
Digital assets/cryptocurrencies are recorded as movable assets/inventories.

2.3. Do the company’s governance documents allow the charity or NGO to deal with crypto assets?

2.3.(a). Is dealing with cryptocurrencies and NFT’s consistent with the charity or the NGO’s charitable purpose?
Yes.

2.3.(b). Does an officer of a charity or NGO need to seek any approval or obtain any authority to open and manage the charity or NGO’s wallet(s) and exchange account(s)?
No, unless the charity conducts activities re exchanging cryptocurrencies for fiat currencies, in which case a registration obligation with the Bank of Spain may apply.

2.3.(c). Do the existing governance documents provide sufficient oversight for the management of digital assets?
This is to be assessed in respect of the governance documents of the respective NGO.

2.3.(d). Does the charity or NGO need to report digital assets in audits and financial reports?
No reporting obligations would apply, but please note that if the NGO or charity adopts the form of an association under the Spanish Association Law, it would be obliged to keep updated records that give a true and fair view of the economic value of the association’s assets and funds.
2.4 How does the jurisdiction’s anti-money laundering/counter-terrorism financing (AML/CTF) regime (if any) address cryptocurrency donations?

As a preliminary note, please be advised that the Spanish AML/CTF laws set out that foundations and associations qualify as an obliged entity and should comply with the obligations set out therein.

As an additional requirement with respect to other obliged entities, please note that foundations and associations are obliged under the Spanish AML/CTF laws to keep records of all the people who provide donations / contributions during a period of 10 years.

2.4.(a). Does the receipt of cryptocurrencies by a charity or NGO need to be reported in compliance with the AML/CTF regime of your jurisdiction?

If the receipt of cryptocurrencies raises suspicion to the charity or NGO that it may be related to money laundering / terrorism funding activities (i.e. a suspicious transaction), the transaction should be reported to the Spanish FIU (Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias). The Spanish FIU enables obliged entities to comply with their obligation to report suspicious transactions either (a) by submitting a hard copy of the relevant form for suspicious transactions to the Spanish FIU’s address, or (b) by submitting electronically the referred form through the Electronic Register of the Bank of Spain.

Please note that foundations and associations do not need to comply with the systematic reporting obligations set out in the Spanish AML/CTF laws, and would only need to report suspicious transactions.

In addition, if a donation either entails (i) the entry or leave -in relation with the national territory of Spain- of “payment means” that are equal to or exceed the economic value of EUR 10,000, or (ii) operations within the national territory of Spain of “payment means” that are equal to or exceed the economic value of EUR 100,000, the natural person making the donation would be obliged to report the donation in accordance with the Spanish AML/CTF laws.

According to the Spanish AML/CTF laws, “payment means” would be the following:

(a) Paper money and coins, whether national or foreign.

(b) Negotiable instruments or bearer means of payment. These are instruments which, on presentation, give their holders the right to claim a financial amount without the need to prove their identity or their entitlement to that amount. This includes traveller’s cheques, cheques, promissory notes or money orders, whether made out to bearer, signed but omitting the name of the payee, endorsed without restriction, made out to the order of a fictitious payee or otherwise by virtue of which title passes on delivery, and incomplete instruments.

(c) Prepaid cards, defined as non-nominative cards which store or provide access to monetary values or funds that can be used to make payments, purchase goods or services, or for obtaining cash, where such cards are not linked to a bank account.

(d) Commodities used as highly liquid stores of value, such as gold.
In principle, cryptocurrencies would not fit the definition of "payment means" set out by the Spanish AML/CTF laws and no reporting obligation would apply in that regard.

2.4.(a).(i). Can donations be made anonymously? If not, what disclosure requirements are present in relation to donor identity and the donations value?

No. As flagged above, foundations and associations are obliged under the Spanish AML/CTF laws to keep records of all the people who provide donations / contributions during a period of 10 years. No specific disclosure requirements apply, but obliged entities are required to identify and ensure, by means of supporting documents (e.g. ID), donors / contributors.

2.4.(a).(ii). If a donation exceeds a certain amount, does the charity or NGO need to do due diligence? If so, how?

Yes. Due diligence obligations apply to all transactions regardless of the amount of the contribution or donation, in compliance with the Spanish AML/CTF laws. Due diligence obligations under the Spanish AML/CTF laws are quite extensive, but some of these include -by means of mere non-exhaustive examples- obtaining a formal identification from the donor / contributor, or having an onboarding procedure policy in place.

2.5. Is accepting NFTs permitted for charities and NGOs? If so, what legislation/regulation (if any) governs it?

Yes, it is permitted. There is no specific legislation.

2.5.(a). What limits exist in terms of the proceeds that can be derived from the sale of NFTs donated? (For example: Can proceeds be converted to cryptocurrencies (e.g. BTC, ETH or stablecoins), or is conversion confined to your jurisdiction’s own digital or fiat currency?)

No limits are set by law and proceeds can be converted into cryptocurrencies and fiat currencies.

2.6. Does the receipt of NFTs by a charity or NGO need to be reported in compliance with the AML/CTF regime of your jurisdiction?

If the receipt of NFTs raises suspicion to the charity or NGO that it may be related to money laundering / terrorism funding activities (i.e. a suspicious transaction), the transaction should be reported to the Spanish FIU. The Spanish FIU enables obliged entities to comply with their obligation to report suspicious transactions either (a) by submitting a hard copy of the relevant
form for suspicious transactions to the Spanish FIU’s address, or (b) by submitting electronically the referred form through the Electronic Register of the Bank of Spain.

Please note that foundations and associations do not need to comply with the systematic reporting obligations set out in the Spanish AML/CTF laws, and would only need to report suspicious transactions.

In addition, if a donation either entails (i) the entry or leave -in relation with the national territory of Spain- of "payment means" that are equal to or exceed the economic value of EUR 10,000, or (ii) operations within the national territory of Spain of "payment means" that are equal to or exceed the economic value of EUR 100,000, the natural person making the donation would be obliged to report the donation in accordance with the Spanish AML/CTF laws.

According to the Spanish AML/CTF laws, “payment means” would be the following:

(a) Paper money and coins, whether national or foreign.

(b) Negotiable instruments or bearer means of payment. These are instruments which, on presentation, give their holders the right to claim a financial amount without the need to prove their identity or their entitlement to that amount. This includes traveller’s cheques, cheques, promissory notes or money orders, whether made out to bearer, signed but omitting the name of the payee, endorsed without restriction, made out to the order of a fictitious payee or otherwise by virtue of which title passes on delivery, and incomplete instruments.

(c) Prepaid cards, defined as non-nominative cards which store or provide access to monetary values or funds that can be used to make payments, purchase goods or services, or for obtaining cash, where such cards are not linked to a bank account.

(d) Commodities used as highly liquid stores of value, such as gold.

In principle, NFTs would not fit the definition of “payment means” set out by the Spanish AML/CTF laws and no reporting obligation would apply in that regard.

2.6.(a). Can donations be made anonymously? If not, what disclosure requirements are present in relation to donor identity and the NFTs value?

No. As flagged above, foundations and associations are obliged under the Spanish AML/CTF laws to keep records of all the people who provide donations / contributions during a period of 10 years. No specific disclosure requirements apply, but obliged entities are required to identify and ensure, by means of supporting documents (e.g. ID), donors / contributors.

2.7. Are there any prescribed processes and/or restrictions in realising NFTs and converting it to fiat?

No.
2.7.(a). If a charity can auction/sell NFTs themselves, how can this process be legally undertaken?

2.7.(a).(i). Are there restrictions on how NFTs can be held by a charity or NGO, including in particular the length of holding of the NFT?

No.

2.7.(a).(ii). What platforms can NFTs be sold on? Are there any prohibited sites/mediums?

There are no restrictions.

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

3.1. Are there any restrictions on how a charity or NGO can create and sell NFTs or NFT collections?

No specific restrictions apply.

3.1.(a). Are charities and NGOs able to collaborate with third party partners to create NFTs?

Yes.

3.1.(b). What functions and features can a charity or NGO include in the NFTs they create and sell (for example, functions and features that resembles that of securities/ investment contracts)?

NFTs are not expressly regulated under Spanish law. Consequently, the regulatory regime implications of NFTs having functions and features that resemble that of securities/ investment contracts are unclear under Spanish law.

In February 2018, the CNMV issued a statement with considerations on cryptocurrencies and ICOs addressed to market professionals. In that document, the CNMV identified various forms of commercialisation of these assets and the obligations (or potential obligations) attached to each one of them, which may be equally relevant for legally qualifying NFTs. Those considerations could be summarised as follows:

- Direct commercialisation: obligations related to this modality would vary depending on the
actual nature of the operation, as in some cases the investors do not actually own a crypto-asset, but a right before the relevant platform instead. AML regulations should be taken into special consideration in this case.

- Contracts for differences (CFDs): entities offering these products should be authorised by the CNMV to provide investment services and meet all the obligations related to the provision of this type of service.
- Futures, options and other derivatives: active marketing of these types of products under a public offering by market professionals among unqualified (retail) investors might require a prospectus approved by the National Securities Market Commission (CNMV) or by another European Union authority (in the context of “passporting”).
- Specific investment funds or other collective investment vehicles: this type of investment vehicles should be authorised by the CNMV. Funds that may be able to legally invest in crypto-assets may not be offered to unqualified investors as a general rule.
- Structured bonds whose underlying asset is a crypto-asset: marketing under a public offering regime of this type of security requires the approval by the supervisors of an explanatory prospectus.

The most common manner in which NFTs would be marketed in the Spanish territory would be direct commercialisation, which would not be regulated nor require a license. In any event, please be aware that the marketing of NFTs that permit the exchange of crypto-assets for fiat currencies may fall within the activities covered by the Spanish AML/CTF laws and be subject to specific obligations (e.g. to register with the Bank of Spain).

3.1. (c). Can charities and NGOs design their NFTs so that they have real-world benefits?

Yes.

3.2. What proceeds are charities and NGOs able to accept from issuing and selling their own NFTs?

**Foundations**

According to the Spanish Foundations Law, foundations may engage in economic activities provided that they are related to their foundational purposes or they are supplementary or accessory to said purposes.

**Associations**

The Spanish Association Law does not provide for limitations or restrictions to associations re the developing of economic activities. In any event, any benefits or revenue obtained from said economic activities should be allocated and exclusively used to meet the purposes of the association.
3.2.(a). Can charities and NGOs only accept proceeds from the initial sale of the NFT?

No, although doing so would not be prohibited by law. Where charities are allowed to engage in economic activities, as explained above, charities may also accept proceeds from subsequent sales of the NFT.

3.2.(b). Are charities and NGOs permitted to gain royalties from subsequent sales of NFTs by third parties?

Yes, subject to the limitations set out above for the development of economic activities by foundations and associations.

3.3. Do NFTs sales need to be reported by a charity or NGO in compliance with the AML/CTF regime of your jurisdiction?

No, unless the NFT sales are executed as part of a business activity of the NGO.

If the marketing of NFTs raises suspicion to the charity or NGO that it may be related to money laundering / terrorism funding activities (i.e. a suspicious transaction), the transaction should be reported to the Spanish FIU. The Spanish FIU enables obliged entities to comply with their obligation to report suspicious transactions either (a) by submitting a hard copy of the relevant form for suspicious transactions to the Spanish FIU's address, or (b) by submitting electronically the referred form through the Electronic Register of the Bank of Spain.

Please note that foundations and associations do not need to comply with the systematic reporting obligations set out in the Spanish AML/CTF laws, and would only need to report suspicious transactions.

However, if the marketing of NFTs may be related to the exchange of cryptocurrencies for fiat currencies, the charity or NGO may be subject to the Spanish AML/CTF laws as a crypto exchanger as well. Unlike mere foundations and associations, crypto exchangers would need to comply with systematic reporting obligations. In this sense, obliged entities need to systematically report the transactions that may be related to money laundering or terrorist financing activities on a monthly basis, or every six months if they do not come across any suspicious activity in the Spanish market. The systematic reporting of transactions shall be carried out through a certain software application (the "DMO application").

3.3.(a). Are initial and subsequent purchasers of the NFT issued able to remain anonymous?

No. As flagged above, foundations and associations are obliged under the Spanish AML/CTF laws to keep records of all the people who provide donations / contributions during a period of 10 years.
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. Has the tax authority in your jurisdiction issued any guidance about the taxation of digital assets, including cryptocurrencies and NFTs?

No.

4.2. Is a donation of digital assets to charities or NGOs considered a taxable event for the donor in your jurisdiction?

Yes, between the difference between the acquisition price and the market value of the donated asset.

4.2.(a). Are tax deductions available for the donor in respect of donations of digital assets?

Yes, there is a 35%/40% tax deduction on the value of the donation.

4.2.(b). Is there a requirement for the donor to keep certain records or obtain valuations regarding the donations of any digital assets?

Yes, see above.

4.3. Are there Capital Gains Tax (CGT) or other tax implications arising at the time of donation for the charity or NGO in your jurisdiction?

As regards direct taxation, there are two regimes applicable to non-profit entities. The one established under the Law on Non-Profit Entities, applicable when the charity meets certain requirements, and a second one for those charities not fulfilling such requirements -regulated by the Corporate Income Tax (“CIT”) Law.

Both regimes provide that donations to support the purposes of the charity will be exempt from CIT (regardless of whether they are donations of digital assets).

4.3.(a). Is there a requirement for the charity or NGO to record donations of digital assets received?

Yes, charities shall record the donation in their financial statements.
4.3.(b). Is the charity or NGO required to value the digital assets, including NFTs, at the time of donation? If so, are there any prescribed valuation methods?

The donation shall be valued at market value.

4.3.(c). Is there a requirement for the charity or NGO to issue receipts or written recognition to donors? If so, is there an established process that must be adhered to or information which must be disclosed (for example, the date of receipt, the number and type of asset received, and the market value at the time of receipt)?

In order for the donors to be able to apply the tax deduction, charities qualifying for Non-Profit Entities Law must issue a certificate stating certain information (details of the donor, amount of the donation, the irrevocable nature of the donation,…).

4.4. Are there any CGT or other tax implications for the charity or NGO arising in your jurisdiction, if the charity or NGO plans to dispose of or transact with the digital asset subsequently?

When the charities sell for fundraising purposes the NFTs previously donated to them or they themselves create the NFTs, since the Spanish Directorate of Taxes consider the sale as a supply of services, the charity will be taxed on the profits obtained. For charities qualifying for Non-Profit Entities Law, the income obtained will be taxed at 10% rate, while for other charities, pursuant to the CIT Law, the onerous transfer of NFTs (based on the assumption that it is a supply of services) will be taxed at 25% rate.

Some charities may give services or goods to donors (with no VAT and being exempt for CIT purposes). However, the value of the services or goods received by the donor should not be significant enough to jeopardise the nature of the donation.

Regarding indirect taxation, the corresponding VAT must be charged, provided the transaction is located in Spain at 21% rate.

In addition, if the charities sell NFTs they will be presumed to perform an economic activity and Business Activity Tax may be levied.
5. **What is the best practice or guidance?**

5.1. **Is there non-binding guidance (if any) issued by any regulatory or government authority or industry association in your jurisdiction in relation to best practices relating to acceptance and issuance of cryptocurrencies and NFTs?**

No,

5.2. **What resources are available for entities and individuals to seek further guidance?**

There would not be a specific portal to submit consultations. A charity or NGO should address their queries to the relevant competent authority depending on the nature of the query.

For the legal qualification of cryptocurrencies / NFTs, we understand that the most appropriate authority to which the consultation should be sent is the CNMV. For consultations with the CNMV, please access the following link.

For consultations re the Spanish AML/CTF laws, we recommend to send consultations to the Spanish FIU (please fill out the F60 form -- and send it through the following link) if the query is related to the enforcement of these laws or to the Public Treasury if the query is related to the interpretation of these laws.

For consultations related to the registration obligation with the Bank of Spain of crypto exchangers, please submit the relevant consultation to the Bank of Spain through the following link.

5.2.(a).(i). **Is there a system for public and/or private rulings and decisions?**

For tax purposes, the Spanish Directorate of Taxes ("Dirección General de Tributos") has issued several binding rulings on the tax treatment applicable to certain specific issues.

5.2.(a).(ii). **If so, are these decisions binding on the relevant authority (for example, the Commissioner)?**

The binding rulings of the Spanish Directorate of Taxes are not binding for the Spanish Tax Authorities, but only for the particular case of the taxpayer making the consultation.
5.3. Has there been any recent legal cases or other guidance that can help interpret how cryptocurrencies and/or NFTs are treated in accordance with your jurisdiction’s existing regulatory framework?

Yes. As flagged, the CNMV has published statements (some of the in collaboration with the Bank of Spain) re the legal qualification of cryptocurrencies and alerting about the risks of these.

5.3. (a). If so, what do the judgment(s) suggest?

Please see our answer to question 3.1. (b). of this questionnaire for more information.