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Attributes and criminal risks of crypto assets

The rise of blockchain and other innovative technologies has led to the proliferation of cryptocurrencies and digital collectibles, collectively known as crypto assets. This article aims to clarify the classification and attributes of crypto assets, as well as examine the legal regulation and potential criminal risks associated with these assets.

An NFT auction photo: TUCHONG

Classification, attributes

Crypto assets can be categorized as fungible assets, such as Bitcoin, or non-fungible assets, such as digital collectibles. Fungible crypto assets can be categorized into three main types based on their primary function. The first type, referred to as payment assets, functions as a medium of exchange and a unit of account. The second type, known as utility assets, is used to access particular blockchain-based goods and services, or to provide incentives for participants within the system. The third type, termed security assets, serves to confer specific or implicit investment interests to the owner.

When analyzing the characteristics of crypto assets, it is essential to consider five key aspects: data, commodity, asset, money, and currency.

First, as crypto assets exist within computer networks, they inherently represent a form of data. Consequently, fraudulent activities involving crypto assets can be construed as acts of data tampering.

Second, using Bitcoin as an example, the process of "mining" was initially the sole method of acquiring Bitcoin, thereby imparting it with both use value and exchange value, which are fundamental attributes of a commodity.

Third, "commodity" and "asset" are conceptually similar, but the former is more often used in the context of trading, and the latter is more often used in the context of investment.

Fourth, crypto assets assume the characteristics of money only when they operate as a medium of exchange. It is therefore necessary to analyze the particular usage scenario to determine whether a crypto asset constitutes money.

Fifth, crypto assets are not explicitly recognized as legal tender in almost all countries, and banned outright in some, including China. This stance is expressed in the announcements on preventing the risks of cryptocurrency issued by the Chinese government in 2013, 2017, and 2021.

Regulatory strategies

The field of crypto assets has been rapidly growing for over a decade with increasing impact, while simultaneously posing regulatory challenges. In response, governments have adopted four distinct approaches.

The first approach is explicit prohibition. Over fifty countries and regions around the world have enacted prohibitive regulations on crypto assets. The second approach is to expand existing systems, which involves fine-tuning related systems to regulate crypto assets under existing frameworks. The third approach is standalone legislation, which entails enacting departmental law or adding standalone chapters to existing laws. The fourth is the laissez-faire approach that neither prohibits nor encourages the development of crypto assets.

To prevent and mitigate systemic financial risks and maintain financial stability, China has adopted the strictest regulatory stance on crypto assets, banning the industry almost entirely. However, policies on the digital economy cannot remain static. Instead, they must keep pace with the times and the advances in digital technology.

In the future, what kind of legal regulatory framework for crypto assets should be established in China? In terms of civil law, the status of crypto assets as virtual property can be further clarified on the basis of the Civil Code. In terms of administrative law, comprehensive financial regulatory measures should be introduced to cover various aspects such as currency, securities, banking, insurance, trust, and trade. In terms of criminal law, cross-border issuance, exchange, use, and redemption of crypto assets must comply with relevant financial laws and regulations in China.

Criminal risks

While Bitcoin is not accepted as legal tender in the regulatory documents issued by the Chinese government, its financial functionality is not explicitly denied. Since holding crypto assets is not defined as an illegal act, it should be protected by criminal law. Infringement on other people's crypto assets through theft, fraud, and robbery should be considered as property crime based on the property attributes of crypto assets. Criminal risks associated with crypto assets largely fall into three categories: issuance risk, risk of money laundering, and risk of intellectual property crime.

Firstly, currently in China, unauthorized and illegal launch of ICO projects could constitute the crime of illegally absorbing public deposits. Using authentic or fake crypto assets as a medium and raising funds by recruiting members who pay high membership fees can be regarded as an illegal pyramid scheme.

Secondly, crypto assets are pseudonymous, encrypted, and can be traded across borders, presenting challenges for anti-money laundering and foreign exchange control efforts. Blockchain-based crypto assets have provided a more convenient means of money laundering for terrorist activities.

Thirdly, the minting of existing non-NFT works into NFTs could conflict with the original creator's rights, such as the right to adapt, reproduce, display, screen, broadcast, and distribute their works.

The development of asset digitalization may lead to changes in the theory of property crime, and even in the basic theories of criminal law. The academic and professional communities of criminal law should therefore step up their research and aim for consensus. The Amendment (IX) to the Criminal Law of the PRC has laid the groundwork for a cybercrime legal system. China can further contribute to global digital governance by building a digital criminal law system in the future.

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Ensuring the public nature of public services

In accordance with the distinction between public and private law, public services, as important functions of the government, usually take on a public organizational form. In practice, however, the entities responsible for undertaking administrative tasks have taken on various forms, transcending the framework of the public-private dichotomy.

Subsidiarity

Subsidiarity is the primary organizational principle of public service, indicating that government-provided public services are only necessary when individuals cannot efficiently access them through personal efforts or social assistance.

It should be noted that, firstly, while the government is the main provider of basic public services, it is not the only provider. The basic function of public service is to serve the public interest. Education and health care provided by non-government entities also contribute to the common good as they meet public needs. Therefore, serving the public interest does not necessarily require a public organizational form.

Secondly, while public services are typically provided by the government in cases of market failure, there are other grounds for the provision of public services. For instance, the market's inability to efficiently provide public goods on its own, natural disasters and other emergencies may cause personal hardship, and uneven resource allocation leads to inequality.

Thirdly, subsidiarity only applies to shared authority and is not applicable when certain functions, due to their inherent attributes or by law, constitute the exclusive authority of specific organizations or individuals.

The public nature of public service is manifested in its universality and equality. Universality stems from the fact that public services are accessible to all citizens and mostly provided by the government for free. Equality refers to the responsibility of the state to promote the development of public services and reduce resource imbalances across regions and groups.

Public nature

The basic principle guiding the design of public service organizations is to enhance the operational efficiency and service quality in the most appropriate manner according to the nature of the specific service, which ensures administrative transparency. The public nature of an organization is traditionally determined by three factors.

The first is legal status. The owner of an organization is ultimately responsible for its performance. In this regard, public organizations are owned collectively by all citizens. The second factor is source of funding. While public service fees are usually paid by taxpayers, users pay for the service in some cases. The third factor is the degree to which an organization is subject to political authority rather than market forces. The public sector can exercise direct control through prior approval, quality standards, and final decision-making, or exert indirect influence through fiscal support and personnel assignment.

In general, public service has never operated beyond the control of the administration, and its public nature remains despite the privatization of its organizational form. As a procedural feature, public nature is not necessarily associated with specific types of organization.

At present, external governance of public institutions is particularly important. This can be achieved through quality assessment of public services by independent evaluation committees, social supervision of public services, and regular information disclosure by state-owned enterprises and public institutions, including annual financial statements and reports on business performance. When the government cooperates with other social organizations to provide public services, they can clearly define the performance standards of public services, public participation, third-party supervision and certification by means of contract.

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