

Crypto Regulation is Finally Here!

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Dear Clients, Colleagues and Friends,

The Turkish code on crypto assets and crypto asset service providers amending the Capital Markets Law numbered 6362 (the “**CML**”) was published in the Official Gazette dated 2 July 2024 and numbered 32590 and entered into force on the same date (the “**Amendment**”). Through this long-awaited amendment, various issues such as the nature of crypto assets, trading platforms, issuance of capital market instruments as crypto assets, and the activities and liability regimes of service providers have been introduced under Turkish law. While secondary regulations are further expected to be published in this regard, the Amendment is an important step in terms of defining the place of crypto assets in capital markets law and the authorisations of the Capital Markets Board (“**CMB**”).

The main legal framework introduced by the Amendment on crypto assets is summarised below.

1. Nature of Crypto Assets and Definition of Platform Services

1.1. Crypto assets are not qualified as capital market instruments.

In the preamble of the Amendment, crypto assets are stated to be significantly different from existing financial instruments in terms of their nature, the possibilities provided by blockchain and encryption technologies, and the ability to carry out transfer transactions without the need for a central authority. Hence, crypto assets are defined as “intangible assets that can be created and stored electronically through distributed ledger technology or a similar technology, which can be distributed over digital networks and can represent a value or right”. Thus, it has become clarified that crypto assets are not considered as capital market instruments.

Although it is accepted that crypto assets may provide rights similar to capital market instruments, the principles regarding the issuance of capital market instruments as crypto assets have not yet been set out by

the Amendment. The details in this regard will be regulated by the secondary legislation to be issued.

1.2. The concepts of “Platform” and “Wallet” are defined.

As per the Amendment;

- Platform refers to the entities where one or more of the crypto asset trading, initial sale or distribution, clearing, transfer, custody required thereof and other transactions that may be determined are carried out;
- Wallet refers to software, hardware, systems or applications that enable the transfer of crypto assets and the online or offline storage of these assets or private and public keys related to these assets.

1.3. “Trading” and “custody” services are defined as two different services.

As per the Amendment, “service provider”, which is subject to various legal requirements including the CMB’s authorisation, includes (i) platforms, (ii) entities providing crypto asset custody services, and (iii) other entities to be determined to provide services in relation to crypto assets, including the initial sale or distribution of crypto assets according to the regulations to be made.

“Crypto asset custody service” mentioned in the above definition refers to the storage and management services of clients’ crypto assets on the platforms or private keys that provide right to transfer these assets from wallets, and other custody services to be determined by the CMB. Thus, trading and custody of crypto assets are defined as two different services and their scope will be further clarified by secondary legislations and CMB decisions.

2. Regulatory Bodies

2.1. The CMB is the regulatory body for the issuance of capital market instruments as crypto assets.

As per the additional provision under Article 13 of the CML regarding the dematerialisation of capital market instruments, the CMB is authorised to determine the principles regarding the issuance of capital market instruments as crypto-assets and their dematerialisation in the electronic platform provided by the service providers where they are issued and stored, instead of their dematerialised issuance and monitoring by the Central Registry Agency (“CRA”) under the provisions of the referred article.

Furthermore, in case of issuance of capital market instruments as crypto-assets, the records in the electronic platform where they are issued and stored will be taken as basis for monitoring, exercising and transferring the rights to third parties, and the CMB may require integration between the records in this electronic platform and the CRA system.

Therefore, in the event that capital market instruments are issued as crypto-assets, the integration between the records of service providers and the CRA system will be clarified by the CMB at a later stage.

2.2. Duties and authorities of institutions and organisations other than the CMB arising from other legislation are reserved.

Considering the technological developments and the rights and benefits granted to purchasers, it is stated both in the preamble and in the Amendment that although the CMB is the regulatory body for issuances of capital market instruments as crypto assets, duties of institutions and organisations other than the CMB

arising from other legislation are reserved in terms of other types of crypto assets that may be issued, such as utility crypto assets or electronic money crypto assets.

2.3. The principles in relation to service providers and platforms will be determined by the CMB through secondary regulations.

Establishment and operation of crypto asset service providers is subject to authorisation to be obtained from the CMB, and these service providers are only allowed to conduct activities to be determined by the CMB.

In addition to the regulations concerning the scope of operations of service providers, the Amendment introduces certain preconditions for the shareholders, board members and/or persons authorised to represent the service provider which are in line with the banking and intermediary institutions regulations.

The CMB will determine the detailed principles regarding (i) establishment and commencement of operations, (ii) shareholders, managers, personnel, organization (iii) capital and capital sufficiency, (iv) liabilities, (v) information systems and technological infrastructure, (vi) share transfers, (vii) activities that service providers may conduct, (viii) temporary or permanent suspension of their activities, and (ix) other principles and requirements that service providers must comply with during their operations. As per the Amendment, the share transfers of the crypto asset service providers are subject to the authorisation of the CMB, and the records of the share transfers made in the share ledger without such authorisation are null and void.

In addition, it is stated that crypto asset service providers are obliged to make arrangements, take measures and establish internal control units and systems in order to manage their systems securely, and in order for the establishment and/or commencement of operations of crypto asset service providers to be permitted by the CMB, compliance with the criteria to be determined by the Scientific and Technological Research Council of Türkiye (“**TÜBİTAK**”) regarding their information systems and technological infrastructure is required.

Furthermore, procedures and principles regarding trading and sale of crypto assets through platforms and initial sale or distribution, clearing, transfer and custody of crypto assets will be regulated by the CMB.

The Amendment also introduces an obligation for platforms to establish written procedures. Accordingly, platforms are required to establish a written listing procedure regarding the determination of the crypto assets to be traded or to be initially sold or distributed and the termination of their trading. Principles and grounds in this regard may be regulated by the CMB.

2.4. The CMB is authorised to adopt regulations regarding crypto assets providing rights specific to capital market instruments.

The Amendment authorises the CMB to adopt regulations, take special and general decisions, and impose measures and sanctions in relation to crypto assets that provide rights specific to capital market instruments. In addition, it is regulated that the CMB may determine principles for the sale or distribution of crypto assets other than crypto assets that provide rights specific to capital market instruments on platforms without being subject to the provisions of the CML regarding capital market instruments, and may request technical reports from TÜBİTAK or other public institutions and organisations affiliated, related, associated institutions and organisations of ministries and other public institutions in order to make an assessment in terms of technical criteria while determining crypto assets to be subject to these principles.

2.5. Additional regulations will be introduced regarding investment advisory and portfolio management services for crypto assets.

Details on investment advisory and portfolio management services for crypto assets are not covered in the Amendment. Therefore, secondary regulations to be issued by the CMB are awaited for the clarification of the related principles.

2.6. Platforms are obliged to make annual payments to the CMB and to TÜBİTAK.

Platforms are required to pay 1% of their revenues, excluding interest income from the previous year, to the budget of CMB and 1% to the budget of TÜBİTAK to be used in the development of blockchain and related information technologies until the end of may of the relevant year. The timing and amounts of the payments to be made according to this provision will be determined separately.

3. Principles of Crypto Asset Transactions

3.1. A requirement of form for agreements between crypto asset service providers and their clients, and distance agreements have been introduced.

Agreements signed between crypto asset service providers and their clients may be executed in writing or by distance through use of remote communication tools, or by means of methods that the CMB determines to be a substitute for the written form, whether distance or not, and they need to (i) be carried out through an information or electronic communication device and (ii) allow the verification of the client's identity.

In addition, it is regulated that any agreement terms that eliminate or limit the liability of crypto asset service providers to their clients are invalid and platforms are obliged to establish internal mechanisms to effectively resolve their clients' objections and complaints regarding their transactions.

3.2. Crypto asset transfers should be traceable.

Various regulations have been made in the Amendment in order to make crypto asset transfer transactions traceable. Accordingly, the records regarding the wallets where clients' crypto asset transfers are made and the accounts where fund transfers are made should be kept by crypto asset service providers in a secure, accessible and traceable manner.

3.3. Clients are required to keep crypto assets in their own wallets.

It is regulated that platform clients are required to store their crypto assets in their own wallets. However, it is also possible for clients to obtain custody services for crypto assets that they do not prefer to keep in their own wallets. Accordingly, custody services will be provided by banks authorised in accordance with the regulations to be issued by the CMB and approved by the Banking Regulation and Supervision Agency or other institutions authorised by the CMB. It is regulated that the crypto assets kept by the banks and the cash belonging to the clients within this scope are not subject to the provisions of the insurance of deposits and participation funds regulated under the Banking Law numbered 5411. Therefore, the banks and institutions that will provide custody services for crypto assets are expected to be determined by secondary regulations.

3.4. The clients' cash and crypto assets are distinct from the assets of crypto asset service providers.

As per this provision introduced by the Amendment, clients' cash and crypto assets in the custody of crypto asset service providers and the assets of crypto asset service providers cannot be sequestered for the debts

of each other in any manner whatsoever, even if it is for public receivables, cannot be pledged, cannot be included in the bankruptcy estate, and cannot be subject to interim injunction.

3.5. Prices on platforms are set independently and the platforms are responsible for the supervision of possible market disruptive actions.

Except for the transactions related to crypto assets listed in foreign markets and whose price is also formed in foreign markets, it is regulated that the provisions of Article 104 of the CML regarding market disruptive actions shall be applied by comparison for the actions and transactions that cannot be explained with a reasonable and economic justification and that may disrupt the safe, transparent and stable operation of the transactions on the platform.

Platforms are authorised to determine the principles of orders and transactions in order to ensure that transactions are carried out in a reliable, transparent, efficient, effective, stable, fair, honest and competitive manner and to identify, prevent and avoid the recurrence of disruptive actions and transactions. In addition, the main obligations of platforms with regards to market disruptive actions are also regulated.

3.6. Crypto assets are not subject to investor indemnification provisions.

The Amendment states that the investor indemnification provisions regulated under Article 82 of the CML shall not apply to crypto assets.

4. Liability for Crypto Assets

4.1. Crypto asset service providers are liable for damages arising from their unlawful acts and technical malfunctions.

Crypto asset service providers are liable for (i) damages arising from failure to fulfil cash payment and/or crypto asset delivery obligations due to their unlawful activities and (ii) crypto asset losses arising from the operation of information systems, any cyber-attacks, information security breaches, or any behaviour of their personnel.

In the event that the damages cannot be or clearly will not be compensated by the crypto asset service providers, members of respective crypto asset service providers shall be liable to the extent that the damages and losses can be attributed to them according to their faults and the circumstances of the case, and the provisions of Article 110/B of the CML regarding personal liability shall be applicable.

4.2. Authorised persons of crypto asset service providers are personally liable for transactions considered as embezzlement.

Under Article 110/A which is introduced by the Amendment, the resolutions and transactions considered as embezzlement are specified, and under Article 110/B, the personal liability regime regarding these resolutions and transactions is regulated. Accordingly, the chairman and members of the board of directors, other personnel and real person shareholders of the crypto asset service provider, who have the legal or de facto management or control of the crypto asset service provider, are personally liable as limited to the damages incurred to the clients. Furthermore, in this case, it is regulated that the court may directly decide on the personal bankruptcy of these persons upon the request of the CMB, which is a new exception that has been introduced to make it possible for real persons to be subject to bankruptcy.

5. Unauthorised Activities and Sanctions

5.1. Unauthorised crypto asset service provider operations are subject to criminal sanctions.

As per Article 109/A introduced by the Amendment, natural persons and authorized persons of legal entities which are detected to conduct unauthorised crypto asset service provider activities shall be sentenced to imprisonment from three years to five years and to a judicial fine from five thousand days to ten thousand days.

5.2. Platforms located outside of Türkiye are not allowed to provide crypto asset services to persons residing in Türkiye.

The Amendment regulates that the activities carried out by platforms located abroad which targets the residents in Türkiye will be considered as unauthorised crypto asset service provision. Accordingly, it is accepted that in the event that platforms located abroad open a workplace in Türkiye, create a website in Turkish, or carry out promotional and marketing activities directly or through persons or institutions residing in Türkiye, the activities will be considered to be targeted to residents in Türkiye.

5.3. The CMB may take measures with respect to the financial capability of crypto asset service providers.

In the event that it is detected that crypto asset service providers are unable to fulfil their cash payment and crypto asset delivery obligations or will not be able to fulfil them in a short period of time, or that their financial structures have been seriously weakened independently of these, the CMB is authorised to request the enhancement of the financial structures of the crypto asset service providers within an appropriate period of time not exceeding three months, to temporarily suspend the activities of the crypto asset service providers directly without giving any deadline, to revoke their operating authorisation or to limit and revoke the signature authorisations of the persons identified to be responsible.

5.4. Crypto asset service providers shall be audited by independent audit entities to be determined by the CMB.

Pursuant to this requirement introduced by the Amendment, the financial audit and independent audit of information systems of crypto asset service providers must be performed by independent audit entities which are included in the list to be announced by the CMB.

6. Transitional Provisions

As per temporary Article under Amendment;

- The entities operating as crypto asset service providers as of the effective date of the Amendment are obliged to submit a declaration that they will apply to the CMB with the documents to be determined by the CMB within one month following the effective date of the Amendment and that they will make the necessary applications to obtain an operating licence by meeting the conditions stipulated in the secondary regulations to be issued or that they will take a liquidation decision within three months without damaging the rights and interests of the clients and that they will not accept new clients during the liquidation process.
- The entities wishing to begin operations after the effective date of the Amendment are required to submit a declaration that they will apply to the CMB prior to commencement of their operations and

that they will make the necessary applications to obtain an operating licence by fulfilling the conditions stipulated in the secondary regulations.

- Failure to fulfil the above-mentioned obligations constitutes the criminal offence of unauthorised service provision.
- Crypto asset service providers resident outside of Türkiye are required to terminate their activities towards Turkish residents within three months as of the effective date of the Amendment.
- The activities of ATMs and similar electronic transaction devices located in Türkiye that allow clients to convert crypto assets into cash or cash into crypto assets and to transfer crypto assets are required to be terminated within three months following the effective date of the Amendment.

In conclusion, the crypto assets are not considered as capital market instruments, but have been subjected to a similar regime. Furthermore, the CMB has become authorised to regulate the procedures and principles regarding crypto assets, and the secondary regulations are expected to clarify the issues that are not regulated in the Amendment. Therefore, following the amendment to the CML, it is expected that additional regulations on many issues such as the activities of service providers, investment advisory and portfolio management activities related to crypto assets will be issued back-to-back.

Please do not hesitate to contact us for any further information on this briefing.

Kind regards,



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