ERYÜREKLİ

BRIEFING NOTE

CAPITAL MARKETS & SECURITIES 02 JULY 2024

# TURKIYE AND CRYPTOASSET REGULATION: FREE ECOSYSTEM, PROTECTED INVESTORS, DEVELOPING CAPITAL MARKETS

**Law Amending the Capital Markets Law (the "Law") determining the framework of the cryptoassets in Turkish legislation entered into force by being published at the Official Gazette dated 2 July 2024 and numbered 32590. A positive step has been taken for the development of the Turkish capital markets with the Law, through regulating the trading of cryptoassets which are based on blockchain technology at platforms, establishment and activity conditions of such platforms, and additional matters intended to protect investors and market.**

## 1. Cryptoassets in Turkish Legislation

In 2013, the Banking Regulation and Supervision Agency ("**BRSA**") considered that Bitcoin is not an electronic money within the scope of the Law on Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions with the characterization of *"Bitcoin, which is known as a virtual currency that is not issued by any official or private institution and for which no guarantee is given for its value".*

In 2017, the Capital Markets Board of Türkiye (the "**Board**"), stated that "*there is neither regulation nor definition regarding virtual currencies in our country and virtual currencies are not included in the elements that can form the underlying of derivative instruments within the scope of the Capital Markets Law*" and delivered an opinion that spot or derivative transactions based on virtual currencies shall not be carried out for customers.

In 2019, with the Eleventh Development Plan approved by the Parliament, under the title of Stable and Strong Economy and under the subheading Financial Markets, blockchain technology and digital money were included in the development plan with the statement of "*Blockchain-based digital central bank money will be put into practice.*".

In 2021, by the Central Bank of the Republic of Turkey, By-law on the Non-Use of Cryptoassets in Payments was promulgated, and it was restricted to use cryptoassets as a payment means.

In 2021 and 2022, with the Regulation on Measures Regarding Prevention of Laundering Proceeds of Crime and Financing of Terrorism ("**Proceeds of Crime Regulation**"), Cryptoasset Service Providers ("**CASPs**") were listed among the obligors in terms of the implementation of the Law on Prevention of Laundering Proceeds of Crime, but CASPs ware not defined. The Financial Crimes Investigation Board ("**MASAK**") has published an Implementation Guide and Suspicious Transaction Notification Guide for CASPs.

Finally, on 6 May 2024, by indicating that distributed ledger technologies and cryptoassets created by utilizing these technologies has become widespread, pointing out the existence of regulatory activities in the legislation of different countries, international institutions, and umbrella organizations; remarking that around 10 million people in Türkiye have experienced the purchase and sale of cryptoassets, the legislator acknowledged the requirement for a regulation in this field. In this context, the Law, which entered into force after being published in the Official Gazette dated 2 July 2024 and numbered 32590, determined the core framework for the cryptoasset ecosystem in Türkiye and authorized the Board for secondary regulations regarding the market.

## 2. Cryptoassets within the Scope of the Law

The legislator stated that cryptoassets can be classified as (a) securities cryptoassets, (b) electronic money cryptoassets, (c) cryptoassets that develop distributed ledger technology or a similar technology, whose value cannot be separated from these technologies, (d) utility cryptoassets, and cryptoassets that constitute proof of ownership (e.g. non-fungible token - NFT), which can be included in this class. In addition, depending on the criterion of whether it is intended to peg its value to the value of another asset, it can be also classified as (i) stable cryptoassets and (ii) unstable cryptoassets.

Within this framework, cryptoassets are defined in the Law as "*intangible assets that can be created and stored electronically using distributed ledger technology or a similar technology, that can be distributed over digital networks, and that can represent value or rights*"; and the Board is authorized to regulate (a) cryptoassets that provide rights specific to capital market instruments and (b) cryptoassets that are created through the development of distributed ledger technology or a similar technological infrastructure and whose value cannot be separated from this technology. Besides, the Board is authorized to request technical reports from the Scientific and Statistical Research Council of Türkiye ("**TUBITAK**") or other relevant institutions, organizations and public institutions for the purpose of technical evaluation regarding the determination of such cryptoassets. Other cryptoassets are excluded from the scope of the regulations introduced by the Law.

## 3. Trading and Custody of Cryptoassets

The Law does not explicitly regulate the issuance of crypto-assets; *platforms*, which are defined as entities that will carry out one or more of the crypto-asset trading, initial sale or distribution, clearing, settlement, transfer or custody and other transactions that may be determined, are obliged to establish a written listing procedure for determining the crypto-assets to be initially sold or distributed and for the termination of their trading. In addition, the Board is authorized to determine the principles and guidelines for these procedures, taking the opinions of TUBITAK and other institutions when required. In cases where capital market instruments are issued and custodied as cryptoassets instead of being issued in dematerialized form at the Central Registry Agency ("**CRA**"), the principles regarding the dematerialization of capital market instruments in the electronic environment to be provided by service providers will be determined by the Board.

Regarding the custody of crypto-assets, it is understood that the legislator, who distinguishes between online wallets (hot wallets) and offline wallets (cold wallets), has a positive attitude towards keeping the crypto-assets of individuals in environments where the access keys are kept by them, in accordance with the basic philosophy of the cryptoasset ecosystem. As a rule, the principle that customers shall keep their cryptoassets in their own wallets is taken as a basis; for customers who do not prefer to keep cryptoassets in their own wallets, it is regulated that custody services may be provided by banks authorized by the Board and deemed appropriate by the BRSA or other institutions that will be authorized by the Board to custody cryptoassets. In any case, it is obligatory to keep the

cash belonging to customers in banks. However, it is stated that cash and cryptoassets kept at banks shall not benefit from the provisions on the insurance of deposits and participation funds.

Similar to the customer assets held by investment institutions, cryptoassets and cash assets of customers will be considered separately from the assets of CASPs and will be subject to the provisions of the "segregation rule".

The segregation rule has been strengthened with additional provisions introduced for investment institutions and CASPs, and it is regulated that customer cash held with banks will be kept in individual accounts or accounts to be opened separately from the relevant investment institution and CASP account.

## 4. Cryptoasset Service Providers

As an umbrella definition in the Law, CASPs are defined as platforms, institutions that will provide cryptoasset custody services, and institutions that may provide other cryptoasset services in consequence of secondary regulations; and will not be subject to other provisions of the Capital Markets Law ("**CML**") except for the explicitly referenced provisions in CML. However, the matters not sufficiently clear in the regulations or where the practice needs to be guided are left to the authority of the Board, and it is regulated that if the Board will issue regulations imposing obligations on banks, the opinion of the BRSA shall be obtained.

The rules introduced by the Law with respect to CASPs are presented below under the sections of (i) establishment and activity conditions, (ii) shareholders, board members, and representatives, (iii) measures, supervision, and sanctions, and (iv) penal provisions.

### 4.1. Establishment and Activity

Within the framework of the principles to be determined by the Board regarding the shareholders, managers, personnel, organization, capital, liabilities, information systems and technological infrastructure of the CASPs, the CASPs are required to obtain permission from the Board for their establishment and activities, and they are also required to be a member of the Turkish Capital Markets Association. In terms of technical infrastructure, CASPs are obliged to establish the required internal control units and systems to ensure the secure operation of their

systems, and compliance with the criteria to be determined by TUBITAK regarding information systems and technological infrastructures will be sought to be permitted by the Board for establishment and commencement of activities.

The contracts to be signed by the CASPs with their customers shall be in writing or through the methods that the Board has determined to be equivalent to the written form and that allows the verification of the customer identity; and the mentioned contracts shall not include provisions that limit the liability of the CASPs to the customers. Likewise, the relations between platforms and their customers are subject to general provisions and it is clearly stated that cryptoassets are not covered by investor indemnification provisions.

Records of customers' cryptoasset transfers shall be kept by the CASPs in a secure, accessible and traceable manner and the transfer transactions shall comply with the regulations issued by MASAK. On the other hand, platforms are obliged to establish effective internal mechanisms to resolve customer objections and complaints.

Acts and transactions on the platforms, that cannot be explained by a reasonable and economic reason, and that may disrupt the operation of the transactions on the platform in trust, clarity, and stability, shall be subject to the provisions of "market disruptive acts" regulated under Article 104 of the CML; however, since the residency principle may not be applied in the cryptoasset markets and considering the decentralized structure of the market, transactions related to cryptoassets, where price formation also takes place in foreign markets are excluded from the scope of the mentioned regulation.

### 4.2.Shareholders, Board members, and Representatives

The Law imposes various requirements on the shareholders of CASPs with respect to their financial status, criminal record, and transaction history in financial markets:

a) Not being bankrupt, have not declared concordat, and not having an approved application for restructuring through reconciliation,
b) No postponement of bankruptcy decision about the shareholders,
c) Not being a shareholder with significant influence in financial institutions that are subject to liquidation or whose operating licenses have been cancelled,

d) Not being sentenced to imprisonment for five years or more for intentionally committing various offences defined under the Turkish Criminal Law, the Anti-Terrorism Law and the Law on the Prevention of Financing the Proliferation of Weapons of Mass Destruction,
e) Not having any definitive convictions for offences within in the CML,
f) Not being temporarily or permanently prohibited from trading in exchanges due to information misuse and market fraud,
g) Having the necessary financial strength and the honesty and reputation required by the business, and
h) Transparency and clarity of the shareholding structure of the shareholders.

Whereas the members of the board of directors and persons authorized to represent without being a member of the same are obliged to meet the all the conditions except the one related to financial power, real persons who have the right to receive more than half of the distributable profit alone or to elect or nominate more than half of the number of members of the board of directors are obliged to meet all the conditions listed for shareholders.

The shareholders with significant influence of legal entities that are shareholders of CASPs are partially or completely subjected to. It is regulated that the shareholders of the CASPs shall transfer their shares within six months in case of loss of the specified qualifications

### 4.3. Measures, supervision, and sanctions

CASPs will fundamentally operate subject to the supervision and auditing of the Board. Within this framework, the Board is authorized and responsible to supervise the CASPs' activities, financial structures, publications and other announcements, advertisements and disclosures made through the internet, unlawful activities and transactions constituting unauthorized capital market activities in general, and to take required measures within the framework of the provisions of the CML regarding supervision and measures.

Platforms resident abroad will not be able to operate towards Turkish residents; Turkish residents on the other hand, are not prohibited from obtaining services from platforms resident abroad on their own will.

### 4.4.Penal Provisions

In case of unauthorized CASPs activities, the relevant natural persons and officers of entities can be sentenced to imprisonment from three to five years and a judicial fine from five thousand days to ten thousand days.

In addition to unauthorized activities, the crime of embezzlement is regulated with details in the Law. In this framework, the members of the CASPs who embezzle money or documents substituting money, other goods or cryptoassets that are entrusted to the CASPs due to their duties or obligation to protect, keep and supervise, will be sentenced to imprisonment from eight to fourteen years and a judicial fine of up to five thousand days, and the CASPS will be sentenced to compensate the damages arising from this crime.

## 5. Other Considerations

Substantial provisions other than the matters explained above are presented below for your information:

a) Stating that cryptoassets should be evaluated within the scope of the 'principle of independence from the instrument', the legislator has regulated that, in the context of this principle, collecting money from the public with the promise of partnership in any company and giving ordinary paper, verbal declaration in return will be considered as an improper public offering, and making this transaction by giving cryptoassets in return will not change the essence of the business.

b) It has been regulated that 1% of all revenues excluding interest income of the platforms obtained in the previous year shall be recorded in the budget of the Board, and 1% in the budget of TUBITAK, to be utilized in the development of blockchain and related information technologies, and that 2% deduction shall be paid by the end of May of the following year. Principles regarding accruement and payments in this context shall be determined by the Board.

c) The operations of the ATMs and similar electronic devises resident in Türkiye that allow convert cryptoassets into cash or vice versa shall be terminated within the three months following the entrance into force of the Law.

## 6. Conclusion

The Law, which can be interpreted as the application of the basic principles applied to investment institutions in the capital markets legislation and aimed at protecting investors by adapting them to the CASPs and their customers, has given confidence that the basic philosophy of blockchain technologies is understood, enabled the free development of these technologies and brought the opportunity to both monitor and supervise these developments by TUBITAK.

The Law, expected to constitute a more predictable market for all market stakeholders, including Turkish capital markets, CASPs and investors, is anticipated to become more effective through regulatory actions and decisions that will guide its implementation in the process.

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