

## Eurofenix Edition 87 - Spring 22: Cryptocurrency Exchange Developments

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On 18 April 2021, the Cryptocurrency exchange platform Thodex went offline, shaking Turkey with its first large-scale cryptocurrency fraudulent case and causing the loss of around \$2-billion worth of crypto-coin belonging to cryptocurrency investors.

Cryptocurrencies are still unregulated in Turkey. Consequently, cryptocurrency exchange platforms are not subject to any incorporation conditions, such as financial strength and minimum capital requirements, and they are not subject to any supervision by regulatory authorities, such as the Banking Regulation and Supervision Agency or the Capital Markets Authority. Their activities are also unregulated and no state warranty applies to cryptocurrency investors.

The cryptocurrency exchange platforms can be considered as intermediary platforms that facilitate the trading of cryptocurrencies and gain commission from each transaction under Law No. 6563 on Regulation of Electronic Commerce. Although intermediary service providers have several information duties arising from this Law, they are also unregulated and not subject to the supervision of regulatory authorities, such as the BRSA and the CMA.

In the Thodex case, no peer-to-peer transfer was being made on the platform, but all the coins or their value were kept solely by the platform, which made it possible for the CEO to control and transfer all the coins and the fiat money. The Prosecution Office is running the investigation on the ground of aggravated fraud and establishing a criminal organization. As per Article 157 of the Turkish Criminal Code (TCC), fraud is defined as deceiving another with fraudulent behaviour and securing gain. As per Article 158 of the TCC, fraud by "using electronic data processing systems, a bank or lending institution as an instrument" is considered aggravated fraud requiring aggravated sanction. Establishing a criminal organization is also criminalized under Article 220 of the TCC.

As Thodex managers collected money and crypto coins by fraudulent acts from cryptocurrency investors using an electronic system and gained benefit from these fraudulent acts, aggravated fraud can be assessed in this case. Also, as an organization consisting of at least three people was established to commit a crime, establishing a criminal organization is present in the case. The CEO, managers, and employees acting with intent to commit the crime of aggravated fraud, establishing a criminal organization, and gaining a benefit from the crime can be prosecuted and are liable for the crime.

After the Thodex scandal, some amendments were made to the relevant legislation on 1 May 2021, according to which cryptoasset service providers are included within the scope of the anti-money laundering obligations. In this regard, all crypto exchange platforms are also obliged to comply with know-your-customer and notification obligations in which Turkish customers are included or transacted with. A separate guide is expected to be published by the Financial Crimes Investigation Board (MASAK) on how to implement this obligation for companies that are not based in Turkey.

MASAK has a long arm which would have extraterritorial reach. Nevertheless, the rules and regulations in respect of the powers of MASAK and consequences of any violation of the provisions of law vis-à-vis its powers, as well as the laws in relation to the laundering of proceeds of crime, are all regulated under criminal laws. The territorial scope of the TCC is determined in such a way that it applies to any crimes which are partly or fully committed in Turkey. Accordingly, so long as any results of a crime occur in Turkey, it would be considered that the crime is committed in

Turkey, which would lead to the jurisdiction of Turkish public prosecutors and judiciary. It would indeed be arguable whether or not MASAK would be able to enforce its powers outside Turkey. Let alone, if the requirements under the respective regulations are violated, criminal sanctions would be triggered and MASAK and Turkish prosecutors would have the authority and jurisdiction in Turkey. Besides, even if MASAK or the Turkish prosecutors have no extraterritorial reach, the authority they hold may suffice to halt the operations of any non-complying crypto asset trader by way of eliminating internet access to the relevant platform and even blocking the transfer of funds by Turkish banks to its accounts.

At this stage, there is no indication or precedent as to how MASAK will approach these new powers, specifically as concerns crypto asset traders located abroad, which makes our assessments very conservative.

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