Saklama sözleşmesi: İsviçre hukukunda temel hükümler

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İsviçre hukukuna tabi saklama sözleşmesinin her şeyden önce gelen tek bir görevi vardır: müvekkili SchKG/DEBA md. 242a kapsamına sokmak. Bu hüküm iki şart arar. Saklama kuruluşu kripto varlıkları her an müvekkilin emrinde tutmayı taahhüt etmiş olmalıdır. Varlıklar da ya müvekkile bireysel olarak tahsis edilmiş ya da bir topluluğa tahsis edilmiş olmalı ve bu durumda müvekkilin payı açıkça belirlenebilmelidir.[1] Sözleşmedeki diğer her şey bu taahhüde göre ikincildir. Taahhüdü sınırlayan her hüküm (kullanma hakkı, satışa izin veren bir hapis hakkı, pay atfı yapılmaksızın stake etme yetkisi) bu taahhüt ışığında okunmalıdır. Sözleşme ayrıca İsviçre Borçlar Kanunu (OR/CO) md. 394 vd. ve 472 vd. kapsamında bir saklama vekâleti olduğunu ve saklama kuruluşunun SRO'ya üye bir finansal aracı ya da lisanslı bir kuruluş olarak hareket ettiğini açıkça belirtmelidir. Zira ayrıştırmayı hangi denetim rejiminin gözeteceğini düzenleyici statü belirler.[2]

> **Undertaking to keep available.** The Custodian undertakes to hold the Crypto Assets for the Client and to keep them available for the Client at all times within the meaning of Art. 242a para. 2 of the Debt Enforcement and Bankruptcy Act. The Custodian shall not use the

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Crypto Assets for its own account, lend, pledge, stake, delegate or otherwise dispose of them except on the Client's written instruction given under clause [x].

Allocation. The Crypto Assets shall be held [in one or more distributed ledger addresses allocated exclusively to the Client] [in collective addresses together with crypto assets of other clients of the Custodian, in which case the Custodian shall maintain a ledger recording at all times the quantity of each Crypto Asset held for the Client, shall reconcile that ledger against the distributed ledger balances at least daily and shall make the reconciliation available to the Client and to its regulatory auditor on request]. The Client's share in collectively held Crypto Assets is the quantity so recorded.

Segregation in insolvency. The parties intend that the Crypto Assets are not part of the Custodian's estate in any bankruptcy, composition or restructuring proceeding and that the Client is entitled to their segregation. The Custodian shall structure its records and its arrangements with any sub-custodian so that this entitlement can be exercised without delay.

Forks and airdrops. Any crypto asset received by the Custodian by reason of a fork, airdrop or similar event in respect of the Crypto Assets shall be held for the Client under this Agreement. The Custodian may decline to support a fork or to claim an airdrop where doing so would in its reasonable opinion expose the Custodian or its clients to legal, security or operational risk, and shall notify the Client within [five] business days of the decision.

Keys. The Custodian shall hold the private keys controlling the Crypto Assets in accordance with its key management policy as notified to the Client and to [the SRO / FINMA], shall ensure that no single individual

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> can dispose of Crypto Assets alone, and shall keep at least [95] per cent of Crypto Assets by value in storage that is not connected to the internet.
>
> **Liability.** The Custodian is liable for loss of Crypto Assets caused by its failure to exercise the care of a professional custodian. The Custodian is not liable for loss caused by the inherent properties of the distributed ledger, by a protocol change or failure, or by instructions authenticated in accordance with clause [x], unless the Custodian knew or ought to have known that the instruction was not given by the Client. Liability for slight negligence is excluded to the extent permitted by Art. 100 CO.
>
> **Lien.** The Custodian has no lien, right of retention or set-off over the Crypto Assets except for fees due under this Agreement that are more than [sixty] days overdue, and then only to the extent of those fees.

En önemli şerh, hapis hakkı hükmüne ilişkindir. Pek çok saklama kuruluşunun standart koşulları, tüm alacaklar için tüm müşteri varlıkları üzerinde genel bir hapis hakkı tanır. İsviçre mahkemeleri böyle bir hapis hakkını, varlıkları her an hazır tutma taahhüdüyle bağdaşmaz sayabilir. Her hâlükârda böyle bir hak, müvekkilin ayrıştırma talebini çekişmeli bir talebe dönüştürür. Vadesi geçmiş ücretlerle sınırlı dar bir hapis hakkı, konu açıklandığında saklama kuruluşlarının çoğu için kabul edilebilir niteliktedir.

Notlar

1. SchKG/DEBA md. 242a f. 2; banka niteliğindeki saklama kuruluşları için BankG/BankA md. 16 b. 1bis, mevduat ayrıştırma rejimini aynı şekilde tutulan kripto varlıklara genişletir; bkz. D. Kısım, IV. Bölüm. ↩
2. Code of Obligations md. 394 vd. (vekâlet) ve md. 472 vd. (saklama); saklama ilişkisinin nitelendirilmesi D. Kısım, V. Bölüm'de ele alınmaktadır. ↩

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