

CLIENT ALERT

BANKING & FINANCE | TURKEY |

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THE CONUNDRUM OF F/X RESTRICTIONS: NEW COMMUNIQUE ON DECREE NO.32

As you may recall from our earlier [Client Alert](#), Decree no. 32 on the Protection of the Value of the Turkish Currency ("**Decree no.32**") was amended on 13 September 2018 in order to restrict f/x and f/x-indexed payments for certain Turkish resident-to-resident transactions. In accordance with the amendments made in Decree no. 32, all prices denominated in a foreign currency under contracts already executed and falling within the scope of the restrictions were to be re-determined in Turkish Lira within 30 days following the introduction of the said amendment (i.e. 13 October 2018), except for cases to be determined by the Ministry of Treasury and Finance (the "**Ministry**").

The Ministry further issued Communiqué no. 2018-32/51 amending Communiqué no. 2008-32/34 regarding Decree no. 32 dated 6 October 2018 ("**Communiqué no. 2018-32/51**") to introduce a number of exceptional cases for the restrictions provided under Decree no. 32. Moreover, in order to explain the implementation of the exceptions/restrictions, the Ministry issued a list of FAQs and its official interpretations/answers to clarify the exceptional cases provided under Communiqué no. 2018-32/51.

Recently, the Ministry issued Communiqué no. 2018-32/52 amending Communiqué no. 2008-32/34 regarding Decree no. 32 dated 16 November 2018 ("**Communiqué no. 2018-32/52**") in order to restate the exceptional cases for the restrictions provided under Decree no.32 by way of (i) keeping "as is" a number of provisions previously provided under Communiqué no. 2018-32/51; (ii) introducing new exceptions in addition to the ones provided under Communiqué no. 2018-32/51; and (iii) amending certain exceptions that were provided earlier under Communiqué no. 2018-32/51.

As the f/x restrictions were introduced as an emergency measure to stabilize the value of Turkish Lira, the legal texts were prepared in a rush to meet the urgent needs of the Turkish economy and later required a number of clarifications from the Ministry. Even though Communiqué no. 2018-32/52 appears to reflect the concerns of a number of Turkish sectors and market participants, several provisions may require further clarifications related to their implementation.

This Client Alert aims to summarize recent amendments introduced under Communiqué no. 2018-32/52, by referring to earlier versions of such restrictions where necessary.

SALE AND LEASE AGREEMENTS FOR IMMOVABLE PROPERTY

Conversion of sale and lease agreements for immovable property into TRY was the genesis block of the foreign currency restrictions. While most of the restrictions remained the same under Communiqué no. 2018-32/52, it also provided some flexibility by introducing several exceptions for specific contracting parties and for specific types of agreements to use a foreign currency (indexed on foreign currency):

- Sale and lease agreements where the following **contracting parties** are acting as **buyer** or **lessee**:
 - persons residing in Turkey who do not have Turkish citizenship;
 - foreign-resident persons' branches, offices, representative offices, liaison offices that are located in Turkey;
 - Turkish companies with a share capital owned at 50% or more by foreign-resident persons;
 - Turkish companies jointly or individually controlled by foreign-resident persons; and
 - Turkish companies conducting business activities in free trade zones owned by foreign-resident persons.
- Sale and lease agreements in relation to immovable property located in free-trade zones;
- Lease agreements for duty-free shops; and
- Lease agreements for the purposes of management of accommodation facilities certified by the Ministry of Culture and Tourism.

SALE AND LEASE AGREEMENTS FOR MOVABLE PROPERTY

Vehicles, including construction machinery, were the only type of movable property excluded from the scope of exemptions granted for the sale and lease agreements in relation to movable property. While the sale and lease of vehicles shall remain subject to f/x restrictions, as the reference to the "*construction machinery*" has been removed from the wording of Communiqué no. 2018-32/52 it would be reasonable to conclude that a carve-out is granted for sale and lease agreements pertaining to construction machinery under Communiqué no. 2018-32/52.

Moreover, vehicle lease agreements, including leases of heavy construction equipment, concluded before 13 September 2018 (date of entry into force of the amendments made by Presidential Decree no. 85) were excluded from the conversion requirement which was previously provided under Communiqué no. 2018-32/51. In addition to the said exception, Communiqué no. 2018-32/52 provided that **sale agreements pertaining to commercial vehicles used for passenger transportation** (e.g. buses, minibuses, cars to be used as taxis) concluded before 13 September 2018 shall also be exempt from foreign currency restrictions.

FINANCIAL LEASE AGREEMENTS

The exemptions provided for financial lease agreements entered into within the scope of Articles 17 and 17/A of Decree no. 32 and in relation to the financial leasing of ships, shall also be applicable under the new regime of Communiqué no. 2018-32/52. In addition, financial lease agreements in relation to movable and immovable property concluded before 13 September 2018 shall also be exempt from the TRY conversion requirements under Communiqué no. 2018-32/52.

SERVICE AGREEMENTS

Communiqué no. 2018-32/52 introduced a number of amendments and new exceptions to the list of specific service agreements. In the interests of consolidation, you may find below an up-to-date list of exemptions, including previous ones which are still in effect.

- In principle, the list of service agreements (including consultancy, agency and transportation) concluded by and between Turkish residents and which are exempted from the scope of f/x restrictions, is as follows:
 - Service agreements where persons who do not have a Turkish citizenship act as a contracting party;
 - Service agreements relating to export, transit trade, sale/deliveries considered as export, F/X-generating services and activities;
 - Service agreements concluded within the scope of business activities carried out abroad by Turkish residents; and
 - Service agreements (concluded by and between Turkish residents) which involve services (i) originating in Turkey and ending abroad, (ii) originating abroad and ending in Turkey, or (iii) originating in and ending abroad (please note that this exemption was previously granted only for electronic communication services).
- The exemption granted to the following **contracting parties** with respect to service agreements, has been rearranged and limited to service agreements where they act as either **owner** (*hizmet alan*) or **employer** (*işveren*).
 - foreign-resident persons' branches, offices, representative offices, liaison offices that are located in Turkey;
 - Turkish companies with a share capital owned at 50% or more by foreign-resident persons;
 - Turkish companies jointly or individually controlled by foreign-resident persons; and
 - Turkish companies conducting business activities in free trade zones owned by foreign-resident persons.

In other words, Communiqué no. 2018-32/52 introduced a carve-out for the service agreements concluded by the said parties where they act as contractor or service provider.

- It is also possible to agree on an indexation to oil prices with respect to transportation services agreements.

INFORMATION TECHNOLOGY-RELATED AGREEMENTS

Even though no major exceptions are introduced in terms of IT-related agreements, Communiqué no. 2018-32/52 clarified that the following specific types of agreements shall not be subject to f/x restrictions:

- Sale agreements of software developed abroad; and
- License and service agreements (in addition to the above-mentioned ones) of hardware and software produced/developed abroad.

EMPLOYMENT AGREEMENTS

The previous exemptions provided under Communiqué no. 2018-32/51 regarding employment agreements shall remain in effect under Communiqué no. 2018-32/52, together with two additional exceptions as follows:

- Employment agreements concluded by Turkish companies as employers, which are jointly or individually controlled by foreign-resident persons; and
- Employment agreements, concluded by and between Turkish residents, signed with the ship's crew members (N.B. the exception introduced for employment agreements to be concluded by and between Turkish residents and performed abroad shall remain in effect under Communiqué no. 2018-32/52).

CONSTRUCTION AGREEMENTS

Unlike the previous regime under Communiqué no. 2018-32/51 which only provided an exception for construction agreements regarding the construction, repair or maintenance of ships, new Communiqué no. 2018-32/52 provides that all construction agreements that involve costs in foreign currency shall be exempt from the scope of f/x restrictions. However, as there is no clear indication on how the "*cost involvement in foreign currency*" requisite should be interpreted under Communiqué no. 2018-32/52, it is reasonable to expect further clarifications/explanations under a new set of FAQs to be published by the Ministry.

CONTRACTS EXECUTED BY PUBLIC AUTHORITIES FOR THE PERFORMANCE OF PUBLIC TENDERS, AGREEMENTS AND INTERNATIONAL TREATIES

Communiqué no. 2018-32/52 rearranged the exception granted to agreements concluded by the awarded bidders or the contractors with respect to the performance of f/x-denominated or f/x-indexed public tenders, agreements or international treaties executed with public entities and institutions. Under the new regime, except for sale agreements for immovable property or employment agreements, the agreements concluded by awarded bidders or the contractors (even those concluded by their subcontractors) are exempt from f/x restrictions (N.B. under the previous regime of Communiqué no. 2018-32/51, lease agreements for immovable property were not included among the exceptions).

AGREEMENTS EXECUTED WITHIN THE SCOPE OF THE LAW NO. 4749 ON THE REGULATION OF PUBLIC FINANCE AND DEBT MANAGEMENT

All agreements relating to transactions performed under Law no. 4749 on Regulating Public Financing and Debt Management, and all agreements concluded by banks in relation to such transactions, shall be exempt from f/x restrictions.

NEGOTIABLE INSTRUMENTS

Negotiable instruments to be drawn for the performance of agreements subject to the f/x restriction shall be also subject to the same f/x restrictions. Nonetheless, those negotiable instruments which were drawn and circulated by such drawer before 13 September 2018 shall not fall within the scope of such f/x restrictions.

IMPACTS ON THE ONGOING LEASE AGREEMENTS

The conversion requirement set out for lease agreements shall not be applicable to the security deposits given within the scope of lease agreements pertaining to immovable property or to negotiable instruments drawn before 16 November 2018 for the performance of such agreements.

NO MORE OPTIONAL RIGHTS FOR CONVERSION

One of the most controversial provisions of Communiqué no. 2018-32/51 was the optional conversion right conferred to one of the contracting parties (which was also clarified in the FAQs). Accordingly, upon request of such contracting party, the contract price and payment obligations needed to be converted into TRY even for new agreements or on-going agreements where an exemption was provided for only a specific contracting party (and not the specific type of agreement).

Due to the revocation of such option right under Communiqué no. 2018-32/52, even if a contracting party is granted with such an exemption, those contracts could be converted into TRY by way of mutual consent between both contracting parties.

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In compliance with Turkish bar regulations, opinions relating to Turkish law matters that are included in this client alert have been issued by Özdirekcan Dündar Şenocak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.

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