



client alert

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ANOTHER BRICK IN THE NEW F/X REGULATIONS: BRIEF OVERVIEW OF THE NEW CIRCULAR ON CAPITAL MOVEMENTS

Following the amendments made in Decree No. 32 on the Protection of the Value of the Turkish Currency ("Decree No. 32") and the introduction of a new monitoring mechanism by the Central Bank of the Republic of Turkey ("Central Bank") under the Regulation on the Implementation and Principles regarding Monitoring of the Transactions Affecting Foreign Exchange Position by the Central Bank of the Republic of Turkey, all players in the Turkish financial market were waiting for the Central Bank to make the necessary changes in its circular on capital movements to clarify recent protectionist measures in Turkish foreign exchange regulations. As expected, the Central Bank issued its new circular on capital movements ("Circular on Capital Movements") on 2 May 2018, which was also the date determined as the date of entry into force of the amendments made of Decree No. 32.

Unlike its established practice under the Circular on Capital Movements No. 2002/YB-1, updated in the past 15 years by way of reference to letters of the Undersecretariat of Treasury and several other state administrations, the Central Bank adopted a new approach by issuing a completely new circular which consists of 9 main sections and 53 articles.

This Client Alert aims to briefly review significant changes brought in the Circular on Capital Movements as regards changes in Turkish foreign exchange regulations, and highlight certain issues which are not regulated in detail under Decree No. 32.

WHAT IS CONSIDERED AS "F/X INCOME"?

As mentioned in our previous Client Alert (accessible [here](#)) on the new amendments in the Decree No. 32, one of the main rules for using f/x loans is "having f/x income" under the new Turkish currency regime. According to the new definition provided in Decree No. 32, "f/x income" means receivables obtained from exports, transit trade, sales and deliveries that are deemed to be exports, as determined by the relevant legislation and foreign exchange earning services and activities. The circular on Capital Movements further clarifies this definition:

- (i) Except f/x income generated from sales and deliveries which are deemed to be export and f/x earning services and activities under Communiqué No. 2017/4, f/x payments received from Turkish individuals residing in Turkey shall not be considered as f/x income.
- (ii) TRY incomes generated from export, transit trade, sales and deliveries that are deemed to be export and f/x earning service and activities received from foreign residents, and incomes generated from other commercial activities approved by the Ministry (where the Treasury is affiliated), shall be included in the f/x income of the relevant entity.

- (iii) F/x income obtained by entities performing export transactions through their intermediary exporters, agencies or off-shore representatives, or performing export-basis conditional sales, shall be qualified as f/x income of the relevant Turkish entity, conditional on (i) written approval of the intermediary performing the export, (ii) relevant customs declaration or a copy of relevant invoice as certified by a public accountant, (iii) a copy of relevant invoices or e-invoices certified by a public accountant supporting the related export transactions are submitted to the related financial institution.
- (iv) Incomes generated from export and transit trade made to the free trade zones shall be considered as f/x income on the condition that re-selling of such merchandise to a third country is demonstrated.

HOW CAN TURKISH ENTITIES DECLARE THEIR F/X INCOME?

F/x income for the last three financial years shall be evidenced to financial institutions by submitting a report prepared and certified by an accountant (certified or sworn-in) based on unconsolidated financial statements, together with an F/X Income Declaration Form attached the Circular on Capital Movements. Such form shall be submitted by each company even if such company is a member of a group of companies or a holding company. The company's accountant must confirm whether or not f/x income under the financial statements complies with the above-mentioned f/x income conditions of the Circular on Capital Movements.

HOW WILL THE EXCEPTION ON PROSPECTIVE F/X INCOME BE IMPLEMENTED?

- (i) Prospective f/x income shall be evidenced by (i) the agreement, the customs declaration or pro forma invoice, or (ii) a Tax, Duties and Fees Exemption Certificate (in Turkish, *Vergi Resim Harç İstisnası Belgesi*) or an Inward Processing Permission Certificate (in Turkish, *Dahilde İşleme İzin Belgesi*).
- (ii) The term of the f/x loan shall not exceed 24 months. If such loan is taken out on the basis of a Tax, Duties and Fees Exemption Certificate or an Inward Processing Permission Certificate, the term of such f/x loan shall not exceed the term (validity date) of the relevant certificate.
- (iii) In the event that a Turkish resident entity borrows f/x loans under this exception, such entity shall not be entitled to borrow f/x loans on the basis of the same exception within the following three years.

HOW WILL THE EXCEPTION ON THE INVESTMENT INCENTIVE CERTIFICATE BE IMPLEMENTED?

The amount of the f/x loan obtained under an investment incentive certificate shall not exceed the loan amount stated in the foreign funds section of the investment incentive certificate. If the loan amount under the investment incentive certificate is determined in TRY, the TRY equivalent of the f/x loans shall be calculated based on the selling exchange rate of the Central Bank.

WHAT ADDITIONAL EXCEPTIONS ARE INTRODUCED UNDER THE CIRCULAR ON CAPITAL MOVEMENTS?

Three additional exceptions to the main rule of having f/x income are introduced with respect to the f/x loans borrowed within Turkey and abroad:

- (i) F/x loans to finance investments in renewable energy resources pursuant to the Law on Use of Renewable Energy Resources for the Purposes of Generating Electricity (Law No. 5346 and dated 10 May 2015) that benefit from a government purchase guarantee;
- (ii) F/x loans borrowed by those who are awarded privatization tenders pursuant to the Privatization Law No. 4046 and public tenders with a contract price denominated in foreign currency; and
- (iii) F/x loans borrowed by Turkish SPVs which are established for the sole purpose of acquiring shares of a company and do not have any other activity.

WHAT WILL BE NOTIFIED TO THE RISK CENTRE?

Turkish banks and financial institutions providing f/x loans, or Turkish banks acting as intermediary for f/x loans obtained from abroad, shall notify the Risk Centre of the Banks Association of Turkey ("Risk Centre") of such f/x loans and f/x income declarations made by such borrowing entities. Such f/x income declarations shall not be requested in the event of credit facilities extended within the scope of exceptions listed under the Circular on Capital Movements. Such "exceptional" f/x loans shall be included in the credit balance of the relevant entity and relevant exceptions shall be specified in the notification. Likewise, repaid portions of the loans shall be deducted from the credit balance of the relevant entity and notified to the Risk Centre.

WHAT TO BE CAREFUL ABOUT WHILE MONITORING LOANS

As regards f/x loans borrowed from abroad, Turkish banks shall review SWIFT messages in relation to money transfers from abroad to their Turkish resident customers' f/x accounts. Turkish banks acting as intermediary for the purpose of f/x loans are responsible for controlling the compliance of their customers with the new f/x borrowing rules. They are also required to monitor the repayment of such f/x loans. In this respect, intermediary banks shall request a copy of the loan agreement, which includes relevant information on the loan such as term, interest rate, repayment plan etc.

As regards domestic f/x loans, as Turkish resident entities are only allowed to borrow f/x loans from Turkish banks and financial institutions (in other words, intra-group f/x loans are not permitted by and between two Turkish resident companies), Turkish entities breaching this rule by way of bridge loans or similar transactions shall be reported by Turkish banks and financial institutions to the Undersecretariat of Treasury.

HOW ARE HOLDING COMPANIES AND COMPANIES PART OF A GROUP OF COMPANIES TREATED UNDER THE NEW REGIME?

Until introduction of further legislation with respect to the companies whose credit balance exceeds USD 15 million as of the utilisation date, a special regime shall be applied to holding companies and the companies part of a group of companies:

- (i) F/x income and credit balance of all companies within the same group of companies shall be taken into account while calculating the amount of f/x income and credit balance of a holding company and the companies within the holding group.
- (ii) While borrowing f/x loans, a holding company or the companies operating in the holding group shall provide to the Turkish bank or financial institutions all relevant documents evidencing that such companies are operating within the same holding company, as well as a written declaration listing the holding company and all companies operating in the holding group.
- (iii) F/x income pertaining to the last three financial years shall be evidenced through the F/X Income Declaration Form attached the Circular on Capital Movements, together with the accountant's report prepared on the basis of solo financial statements of each company within the holding group.
- (iv) In the event that the credit balance of the holding company and companies operating in the same holding group is above USD 15 million as of the utilization date, the borrowing entity will be free to utilize f/x loans within the scope of exceptions listed in the Circular on Capital Movements.
- (v) However, in the event that said total credit balance is lower than USD 15 million as of the utilization date, the sum of the current credit balance and the amount of the loan planned to be used by the borrower cannot exceed the total amount of its f/x income in the past three financial years.

In compliance with Turkish bar regulations, opinions relating to Turkish law matters which 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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