HOW TO PULL F/X OUT OF A HAT: THE REVIVAL OF THE REPATRIATION OF EXPORT REVENUES AND THE FALLOUT OF AMENDMENTS MADE IN DECREE NO. 32 ON F/X CONTRACT PRICES

Before 2008, Turkey had a very stringent export proceeds repatriation regime. In the old exchange regime, Turkish exporters were obliged to repatriate their export revenues within 180 days of the date of shipment. If at least 70% of the foreign exchange revenues were repatriated within 90 days of the date of shipments, exporters were entitled to dispose of the remaining 30% freely (deposit it in f/x accounts in banks or keep it abroad). These repatriation restrictions were abolished on 8 February 2008 by an amendment under Article 8 of Decree No. 32 regarding the Protection of Turkish Currency ("**Decree No. 32**") as follows: *Export proceeds shall be freely disposed of. The Ministry is authorised to issue regulations related to the repatriation of export proceeds, as may be required*. In this respect, in the past 10 years, export revenues no longer needed to be converted into Turkish lira, and Turkish exporters were free to dispose of their proceeds under Turkish foreign exchange regulations.

In the past six months, the Turkish authorities have taken a number of measures to ease the recent f/x crisis and the sharp decrease in the value of the Turkish lira. In this regard, Communiqué No 2018-32/48 Regarding Decree No. 32 on the Protection of the Value of the Turkish Currency (Regarding Export Revenues) (the "**Communiqué on Export Revenues**") was issued on 4 September 2018 by the Ministry of Treasury and Finance (the "**Ministry**"), setting out a number of obligations for Turkish exporters concerning the repatriation of export revenues within definitive periods, and selling such f/x revenues to Turkish banks. This Client Alert aims to briefly summarise the novelties brought by the Communiqué on Export Revenues.

WHO IS RESPONSIBLE, AND FOR HOW LONG WILL THE COMMUNIQUE ON EXPORT REVENUES BE IN EFFECT?

While the intermediary banks only have a duty to monitor the transfer of such revenues and their conversion into Turkish Lira, Turkish exporters are responsible for the repatriation of export revenues within the time frames defined in the Communiqué on Export Revenues, for selling such f/x revenues to Turkish banks and for carrying out the necessary formalities to close the relevant export accounts. The Ministry will determine the responsible parties for the repatriation of such funds, if export receivables are assigned to the banks or factoring companies.

The Communiqué on Export Revenues will be in effect for six months from its publication date. Even after its expiry, it will remain applicable to exports that have actually been carried out during the term of its validity. However, please note that the Ministry explicitly emphasised that the Communiqué on Export Revenues will not be applicable to export transactions performed before 4 September 2018, where relevant export proceeds have not been collected yet by the exporters. In other words, Turkish exporters are free to dispose of the export revenues from their export activities prior to the Communiqué on Export Revenues entering into force.

WHAT IS THE DEADLINE FOR THE REPATRIATION?

In principle, exporters residing in Turkey (excluding exporters operating in free zones) are obliged to repatriate their export revenues into Turkey within a period of 180 days from the actual date of the exportation, and to sell at least 80% of their revenues to a Turkish bank. Although the main principle grants 180 days to Turkish exporters, the Communiqué on Export Revenues provides a number of different time limitations for specific types of exportation, such as:

- **365 days** regarding exports made by Turkish contractors (e.g. for the sale of heavy construction equipment by Turkish construction companies).

- **180 days** following (i) the definitive sale in consignment sales; and (ii) the closure of an international fair/exhibition, for goods sold during the event.

- **90 days** following (i) the expiry of the term or the sale of the goods subject to temporary exportation; and (ii) the due date of the relevant instalment in the event of sales on credit or leasing.

Apart from the cases mentioned above, where an f/x denominated price is paid in cash, the Communiqué on Export Revenues requires that the export transaction be performed within a period of 24 months. If the exporter fails to perform the export within that period, the funds will be characterised as pre-financing. Turkish exporters must be diligent in terms of their notifications/declarations to be made before the customs and their banks, in order to avoid possible payments to the Resource Utilisation Support Fund.

HOW CAN EXPORT ACCOUNTS BE CLOSED WHERE SOME OF THE REPATRIATED REVENUE IS MISSING?

As a matter of principle, exporters are obliged to take necessary actions to close their export accounts once the export revenues are transferred to their intermediary banks and sold to Turkish banks. The intermediary banks are obliged to notify the tax authorities within five business days if such accounts have been duly closed within these time periods. Having said that, the Communiqué on Export Revenues also provides for a certain level of flexibility for closing such accounts without waiting for the repatriation of the full export revenues.

- The account will be closed by the bank in the event that up to 10% of the exportation revenue is missing, provided that it does not exceed USD 100,000.

- Where force majeure events are involved, the tax authorities will decide on the closing of the accounts if up to 10% of the exportation revenue is missing, provided that it does not exceed USD 200,000.

- The Ministry will review and finalise the closing of such accounts if the missing portions exceed the USD 200,000 threshold.

CAN ANY DISCOUNTS BE APPLIED TO SUCH EXPORT REVENUES?

Turkish exporters are also entitled to request that such export revenues be set-off against a number of expenses to be made by the same exporters, such as expenses to be made in connection with freight, insurance, commissions, warehousing, custom activities, factoring, weight and quality discrepancies, and importation costs.

WHAT IS THE SANCTION FOR NON-COMPLIANCE?

Law No 1567 Regarding the Protection of Value of Turkish Currency provides for a number of fines for non-compliance with the Communiqué on Export Revenues. Accordingly, an exporter violating the time periods will be fined up to 5% of the current value of the export revenue. However, a grace-period is granted to the relevant exporter: If the revenue is repatriated to Turkey before the decision on the fine becomes definitive, the fine is reduced to an amount varying between TRY 3,000 - 25,000.

ARE THERE ANY GREY AREAS WITH RESPECT TO IMPLEMENTATION?

As there is no restriction in terms of the re-purchase of the export revenues, Turkish exporters are theoretically entitled to re-convert the amounts by applying the same f/x rates subject to their commercial relationships with their banks. On top of that, although the Communiqué on Export Revenues does not provide for any definition as to which exports should be considered within the scope of this legislation, it is highly questionable whether such obligations will also apply to the export of services generating f/x income. The Central Bank of the Republic of Turkey will issue the implementation principles for the Communiqué on Export Revenues. The Turkish exporters and banks hope that such secondary legislation will shed some light on the grey areas of implementing the provisions of this communiqué.

WHAT'S COMING NEXT?

On 13 September 2018, Decree No. 32 was amended in order to restrict f/x and f/x-indexed payments for certain Turkish resident-to-resident transactions as follows: contract prices and other payment obligations arising from contracts for (i) the sale of movable/immovable property, (ii) the lease (including financial leasing) of movables (including vehicles) and immovable property, (iii) employment, (iv) service and (v) construction, cannot be denominated in or indexed to a foreign currency, except for cases to be determined by the Ministry. Further, all prices denominated in a foreign currency under contracts already executed (falling within the scope of the restriction above) must be re-determined in Turkish Lira within 30 days following the introduction of this amendment, except for the cases to be determined by the Ministry. These amendments to Decree No. 32 may be followed by further amendments in the Capital Movements Circular, which may reiterate this restriction and/or provide further details with regards to the exceptional cases to be determined by the Ministry, which are yet to be announced. In our next client alert, we will cover the amendments made to Decree No. 32 to curb the use of f/x and f/x-indexed contract prices, as well as the exceptions that are likely to be brought by the Ministry. Stay tuned for more on this late-breaking story.

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

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