GIDE
GIDE LOYRETTE NOUEL

ÖZDİREKCAN DÜNDAR ŞENOCAK
AVUKATLIK ORTAKLIĞI

newsletter

MONTHLY LEGAL UPDATE | TURKEY NOVEMBER 2015

This newsletter aims at providing a brief outlook on the main legislative changes which occurred in Turkey in the course of October 2015. You may also find previous publications issued by our firm by visiting our website.

CONTENTS

BANKING & FINANCE

In 2013 and 2014, the Banking Regulation and Supervision Authority ("BRSA") made several amendments to its regulations and communiqués as regards equity, capital adequacy, liquidity, leverage and capital buffers. These amendments were made in the context of the compliance process with the Basel-III Accord, which aims to strengthen banks' capital requirements by way of increasing bank liquidity and decreasing bank leverage. Within the framework of the Regulatory Consistency Assessment Program ("RCAP") of the Basel Committee on Banking Supervision, Turkey's compliance review process was initiated in the last quarter of 2015 and is expected to be completed by the end of first quarter of 2016. In light of the non-compliances revealed in the EU's RCAP Report, BRSA conducted a study on the applicable regulations and communiqués. In this respect, BRSA has amended a number of regulations and communiqués and has issued a new regulation on the capital adequacy requirements of banks and a number of related communiqués in order to ensure the implementation of the adopted Basel-III standards.

The significant updates made to the regulations and communiqués of BRSA, published in the Official Gazette on 23 October 2015, can be summarised as follows.

Updated Regulations and Communiqués

- **Regulation on the Principles and Procedures concerning the Supervision to be conducted by the Banking Regulation and Supervision Authority**: concentrations, securitisations, off-balance sheet accounts and valuation executions have been listed as risk sources subject to assessment and determination of a risk profile under the relevant regulation.

- **Regulation on Internal Systems and Internal Capital Adequacy Assessment Processes of Banks:** in light of the new amendments, banks shall be required to periodically review a minimum of determined factors, including risk profiles. Accordingly, bank board of directors shall be held responsible for the adequacy of the specific chosen risk control and calculation methods, which are associated with their capital value, against possible risks for each business line.
- **Regulation on the Procedures and Principles for Accounting Practices and Retention of Documents by Banks:** according to the amendments made under Article 10 of this regulation, the scope of the year-end financial reports of banks has been extended in order to include explanations regarding risk management. All information required by the BRSA, shall be included to the appendices of financial statements related to year-end and independent audit reports. Interim financial reports shall also be prepared in line with the aforementioned, including all information required by BRSA. Such interim financial reports shall include the considerations of the chairman of the board of directors and general manager of the bank.
- **Regulation on Equity of Banks**: in addition to the definition of characteristics of various equity classifications, such as share capital, additional share capital and supplementary capital that have already been provided for under the regulation, new deduction components have been added to the calculation of those capitals, consisting mainly of cash grants, debt instruments via securitisations authorised by the applicable legislation.
- **Regulation on Financial Holding Companies**: the communiqué has been updated in order to extend the scope of responsibility of financial holdings. Indeed, financial holdings will henceforth calculate the amount of capital necessary to compensate the losses for possible risks on a consolidated basis. In addition, provisions of the "Regulation on Internal Systems and Internal Capital Adequacy Assessment Processes of Banks" shall also be applicable as regards the responsibility of the financial holding companies. Furthermore, financial holding companies shall be required to calculate their equity based on the methods provided under a number of regulations and communiqués that have also been updated in line with the Basel-III standards.
- **Communiqué on the Financial Statements to be Publicly Disclosed by the Banks and Relevant Explanations and Footnotes**: the statements regarding the capital adequacy standard ratio have been replaced by detailed information related to the equity of banks. Provisions related to market risk, operational risk, securitisation positions, credit risk reduction techniques and risk management aim and policies have been removed from this communiqué.
- **Communiqué on the Preparation of the Consolidated Financial Statements of the Banks**: new amendments have been introduced to ensure that consolidated financial reports, including the reports of affiliates qualifying as financial institutions, are prepared as a sole business report by each year-end and at the end of each quarterly period in accordance with Turkish Accounting Standards. Additionally, parent banks must present consolidated financial reports including those of their affiliates, regardless of whether they are financial or credit institution. These reports must be prepared each year-end and at the end of the second quarter in accordance with Turkish Accounting Standards. All reports must also be published on the relevant bank's website within four months following the relevant accounting period.
- **Communiqué on Credit Risk Reduction Techniques**: a number of modifications have been made to the wording of this communiqué to clarify the meaning of the provisions regulating the principles and procedures about credit risk reduction techniques. Accordingly, the scope of Article 4 on the consideration of credit risk reduction has been reviewed and extended.

Furthermore, new requirements have been introduced on securities such as mortgages, pledges on commercial receivables, counter-guarantees, and physical securities other than mortgages.

- **Communiqué on Calculation of Amount Subject to Operational Risk with Advanced Measurement Approach**: this Communiqué partially amends formerly adopted principles regarding operational risk measurement. Accordingly, the legislation now requires that (i) the credit quality rate given by the Credit Rating Agency to an insurance provider corresponds to second or higher credit quality level ("third level" under the previous Communiqué) according to Annex 1 of the Capital Adequacy Regulation for banks; and (ii) said insurance provider holds a valid licence for insurance or reinsurance (as applicable). In addition, according to sub-paragraph 3 (a) of Article 6 of the said communiqué, internal data pertaining to a minimum observation period of five years shall be used to measure operational risk. Pursuant to a new temporary article introduced in this communiqué, the historical data pertaining to a period of three years as of 01/01/2015 may be retrospectively taken into consideration as regards the implementation of the said provision. Such period of data shall be increased by adding each year's data until the afore-mentioned five-year data-period is reached.
- **Communiqué on Calculation of Capital Requirement for Market Risk Arising from Options with Standard Method**: according to new amendments, the delta, gamma and vega values shall henceforth be calculated according to the option pricing method prepared specifically by and for the relevant bank. Moreover, the use of a scenario planning method, introduced by the new amendments, shall depend on (i) the approval of the BRSA and (ii) the availability of the elements necessary in the analysis based on this method.

Newly Issued Regulation and Communiqués

- **Regulation on Measurement and Assessment of Capital Adequacy of Banks**: amendments made to this new regulation have broadened the definition of potential risks. It is further stipulated that, in the calculation of the amount subject to market risk, option transactions predisposed to one or more of those risks are to be added to capital requirement, and that the BRSA shall have right to bring further capital requirements to the banks whose risk quantification models are considered to be insufficient. Provisions regulating specific risks and standard calculation methods of such risks have been grouped together under separate chapters.
- **Communiqué on the Public Disclosures to be made by Banks relating to Risk Management**: this new communiqué aims to determine the procedures and principles regarding public disclosures made by the banks as to the consolidated and unconsolidated risk management information. Accordingly, banks must organise and disclose the unconsolidated statements as well as consolidated risk management information, benefitting from the statements regarding consolidated risk management charts and templates presented in the said communiqué. Furthermore, the communiqué provides a number of new provisions as regards the quantitative explanations completing the statements and information about sample charts and templates.
- **Communiqué on the Calculation of Amount Subject to Credit Risk with Internal Rating Based Approaches**: this new communiqué aims to regulate the procedures and principles regarding the calculation of amounts subject to credit risk with an approach based on internal ratings. The provisions of this communiqué shall also be applicable to banks using an internal rating system permitted by another audit authority. In addition, new and comprehensive conditions will be applied on the classification of risks based on the internal rating approach. Moreover, the calculation of the risk-weighted amount and exceptions in the use of the internal-rating approach have been also amended. Furthermore, the communiqué introduced a new provision for the calculation of the amount of expected loss.

- **Communiqué on Calculating Risk-Weighted Amounts concerning Securitisation**: conditions for credit risk transfer, the assumption regarding the transfer of a substantial part of the credit risk in traditional securitisations and synthetic securitisations have been updated under the new communiqué. Further, the misuse of discretionary funds has been clearly defined. A new provision regarding repurchase agreements has been included in the communiqué in order to determine its implementation conditions. New conditions have been incorporated into the communiqué as regards the exemptions for early redemption.
- **Communiqué on the Calculation of Market Risk with Risk Measurement Models and Assessment of Risk Measurement Models**: usage of the inherent and standard models is added to the new communiqué. Moreover, the principles determined for the use of more than one risk model have been introduced. In line with the above, the provisions related to the inclusion of specific risk in the calculation of value at risk, comprehensive risk capital liability, added risk capital liability and model inherent validation standards have been carefully reviewed and revised by BRSA.

CAPITAL MARKETS

Amendments in Communiqué No. III-59.1

On 20 October 2015, the Capital Markets Board of Turkey amended its Communiqué on Covered Securities (No. III-59.1) ("**Communiqué No. III-59.1**") to include derivative instruments in the cover asset pool. The modifications made in the Communiqué No. III-59.1 enable the contracting parties to include a unilateral termination provision in the agreement on derivative instruments when (i) the issuer fails to fulfil its total liabilities or the cover assets do not match the issuer's total liabilities; (ii) there is impossibility of performance, illegality under the applicable law, or material change of law applicable to derivative instruments; (iii) early redemption of covered securities, or (iv) failure to register or mistaken deregistration of the derivative instruments from the cover register.

New Communiqué No. III-45.1 on Principles Regarding Record Keeping and Documentation in Investment Services and Activities and Ancillary Services

The Communiqué on Principles Regarding Record Keeping and Documentation in Investment Services and Activities and Ancillary Services No. III-45.1, published in the Official Gazette on 22 January 2015 ("**Communiqué No. III-45.1**"), entered into force on 1 October 2015. This communiqué combines all relevant provisions regarding record-keeping and documentation of derivatives, leverage procedures and share market transactions in a same document. The following significant new provisions have been introduced by Communiqué No. III-45.1: (i) the period for record-keeping has been increased to 10 years for investment institutions; (ii) specific provisions are included for record-keeping and documentation of over-the-counter transactions such as swaps and forwards; and (iii) investment institutions are required to post the account statements of their clients within 7 days following the end of each month.

ENERGY

Regulation on the Technical Assessment of Applications related to Wind Power Generation

A Regulation on the Technical Assessment of Applications related to Wind Power Generation (the "**Regulation**") entered into force via the Official Gazette No. 29508 dated 20 October 2015 that rescinds the former regulation on the same subject matter (published in the Official Gazette No. 27049 dated 9 November 2008).

The Regulation was issued to clarify the following:

- Use of wind energy as a more efficient and productive method of power generation;
- Technical assessment of applications related to pre-licensed, licensed and non-licensed wind power generation;
- Issuance of *certificates of conformity* with amendment requests (*e.g.* location coordinates modification, capacity increase and technical specificities of wind turbines) for pre-licensed, licensed and non-licensed wind power generation projects that had already obtained approval following the technical assessment.

The major change in the Regulation is the addition of the procedure and principles regarding the technical assessment of *pre-licensed* wind power generation applications. There is also a new annex providing the details to determine the wind farm's borders.

For the applications related to pre-licensed wind power generation, the Regulation requires that the wind farm RGY/RÖİ (*wind power density in wind measuring units*) value should not be lower than 150W/m². An exception has nonetheless been included for all applications made and/or to be made prior to 3 November 2016, where said requirement would not be applicable. Similarly, the minimum required SSKGY (*wind farm installed power density*) value will be 0.6 MW m/km² for the aforementioned applications made prior to 3 November 2016 instead of 2 MW m/km², the new requirement implemented by the Regulation.

As regards the technical examination of licensing applications before the entry into force of this Regulation, Technical Arrangement Reports are to be regulated in compliance with the principles of this Regulation, provided that:

- The system connection right remains valid;
- Wind turbines remain within the wind farm's border (as determined in the first licence application); and
- Wind turbines within the wind farm's border (as determined in the first licence application) do not interact with turbines located in other wind farms.

This concerns applications for which (i) the technical examination was not carried out because all turbine location coordinates (mentioned in the application) are located within intersected/overlapped licensed wind farm fields, and (ii) a notification has been submitted to the Energy Market Regulatory Authority in this respect.

INSURANCE

The Undersecretariat of Treasury (the "**Treasury**") has recently issued secondary legislations as regards the IT infrastructure required for annuity insurance, actuarial reporting principles for life insurance, as well as the nature of guarantees to be provided for insurance companies.

The main elements of the above legislations are as follows:

Sectorial Announcement on Preparations for the IT Infrastructure in Annuity Insurance No. 2015/35

Published on 29 September 2015, the Announcement stipulates that those insurance companies willing to apply to the Treasury to conclude annuity insurance agreements must prepare their IT infrastructure system for the issuance of state bonds for the annuity products and comply with the requirements set out under the *Circular on Application Principles of the Articles of the Regulation on Annuity Insurance*, together with the provisions of the *Regulation on Annuity Insurance* itself, which became effective on 1 October 2015.

Circular on Actuarial Reports of Life Group Insurances No. 2015/38

The Circular was published by the Treasury on 16 October 2015 with immediate effect. Pursuant to its provisions, Life Insurance Actuarial Reports shall be prepared in accordance with the information and terms provided in the template attached to the Circular, and shall be sent electronically to the Insurance Information and Monitoring Centre.

The actuarial assessment as regards illness/health and accident insurance branches shall be made in accordance with the provisions of this Circular and be inserted into the Actuarial Report under the group (i.e. life or non-life) the company is active in.

Circular on Assets to be admitted as Securities No. 2015/39

As mentioned in our recent Client Alert on insurance regulations, the provisions of the Financial Structure Regulation were amended to allow the Treasury to expand the existing list of assets that can be accepted as securities. The Circular published on 19 October 2015 brings additional assets to the list, such as lease certificates, certain gold deposit accounts and participation bank accounts, funds invested in government bonds and bills, funds and receivables of reverse repo transactions arising therefrom under condition of absence of encumbrance.

CONSUMER LAW

A Regulation on Comparative Advertisement and Unfair Trade Practices (the "**Regulation**") entered into force via the Official Gazette No. 29232 dated 10 January 2015 in replacement of the Regulation on Practice Principles and Policies for Commercial Advertisements and Publications dated 2003 (the "**Former Regulation**"), and of the Communiqué on Principles and Practices regarding the Usage of Subtitles and Footnotes on Commercial Advertisements (published in the Official Gazette No. 27873 dated 13th March 2011).

The Regulation was issued on the basis of the relevant articles of Code No. 6502 on the Protection of Consumers (the "**Code**"), which regulates commercial advertisement and unfair trade practices, in order (i) to determine the principles and assessment criteria that are binding for advertising agencies, media organisations and any person, entity and/or association carrying out the advertising and/or commercial activity; and (ii) to protect consumers from unfair trade practices.

In this respect, the Regulation provides new and more detailed categories for the specific types of advertisements. For instance: *"*Advertisements Incentivising Sales*"* regulates advertisements with special offers, discounts or gifts under Article 8 of the Former Regulation, and has been expanded under several new articles of the Regulation (*i.e.* Advertisements with Price Information *(*Article 13*),* Advertisements of Sales with Discounts (Article 14), Advertisements with Draws, Contests and Promotions (Article 15) etc.) with specific types of restrictions/limitations per type of advertisement determined.

The key novelty of the Regulation is that is allows comparative advertisements ***through the statement of information related to the rival product and/or service***, under certain conditions. The use of comparative advertising was already introduced in Article 61, paragraph 5, of the Code. The new Regulation adds specific conditions under which comparative advertising is allowed, setting forth the information (*i.e.* name, trademark, logo or other distinguishing mark) of rival products and services.

The cumulative conditions pertaining to comparative advertising through the statement of information related to the rival product and/or service are listed as follows:

- The information must not be deceptive or misleading,
- The information must not lead to unfair trade,
- The compared products or services must have the same qualification and meet to the same requirement or need,
- The aspect compared must benefit the consumer,
- The comparison must be objective and concern one or more material, essential, verifiable and typical features of the compared products or services,
- Claims must be based on objective, measurable, numerical data that can be supported with documents or reports,
- The comparison must not denigrate or discredit the rivals' intellectual property rights, commercial name, company name, distinguishing marks, products, services, activities or other characteristics,
- The comparison must not lead to confusion between the trademark, commercial name, company name or another distinguishing mark of the advertiser's products or services and those of its rival(s).

As an exception, the Regulation forbids the comparative advertisement of food supplements.

It should be noted that although the Regulation entered into force on 10 January 2015, the specific Article of the Regulation that governs comparative advertisement through the statement of the information related to the rival product and/or service, will enter into force on 10 January 2016.

As regards the concept of ***Covert Advertising***, in addition to the covert advertising ban regulated by the Code, the Regulation introduces a precise definition and the principles/conditions to be taken into consideration in the assessment of any covert advertising.

Lastly, a new chapter of the Regulation is dedicated to ***Unfair Trade Practices***, which provides an annex listing a total of 23 model implementations for (i) *Deceptive Trade Practices*, which includes deceiving legal rights and potential risks to the consumer (*i.e.* asserting that a certain product or service makes it easier to win at gambling); (ii) *Deceptive Negligence,* which involves hiding essential information from the consumer (*i.e.* refusing to show the product and/or service for which both the consumer and the seller are agreed on the determined price with the aim of marketing another product and/or service) and (iii) *Offensive Trade Practices*, which concerns any act considerably affecting the consumer's freedom to choose a product or service, using methods that include harassment, physical force, unfair influence, forcing the consumer to enter a legal relationship with the seller that he/she would not normally accept (*i.e.* creating the impression that the consumer cannot leave the retail outlet until he/she accepts to commit to a legal relationship with the seller).

LABOUR

The Communiqué on Employer Implementation published in the Official Gazette No. 28398 of 1 September 2012 was amended by the Communiqué published by the Directorate of Social Security Institution in the Official Gazette No. 29526 of 8 November 2015.

The amendment simplifies the wording of Article 2.3.1., paragraph 5 of the Communiqué, which highlights the details of the application as regards the E-Insurance system.

Article 3.3., paragraph 3, of the Communiqué has been repealed as of 1 October 2008. As a consequence, the monthly minimum wage of employers falling within the scope of Article 4.1(b) of the Social Security and General Health Insurance Law as basis to the premium has been removed.

In addition, Article 4.5 of the Communiqué and its subtitles have been amended as regards premium payment obligations, calculation of the general health insurance premium and insurance premium for the civil servants who are on leave of absence without pay, delivery method, timing and payment of the premium, and calculation of the general health insurance of civil servants who returned to their duties after being dismissed.

According to the new amendment, calculation errors in the examples and calculation formulas indicated in sections 7.7.1 (Food Allowance), 7.7.2 (Child Allowance), 7.7.3 (Family Allowance) of the Communiqué have been corrected.

PROCEDURAL LAW

According to the Decision of the Ministry of Justice published in the Official Gazette No. 29525 of 7 November 2015, six new Regional Courts of Justice will be established in the Provinces of Antalya, Gaziantep, Kayseri, Sakarya, Trabzon and Van as per Article 25 of the Law No. 5235. The locations were chosen for geographical and workload reasons.

The jurisdictions of the Regional Administrative Courts in the Provinces of İstanbul, Bursa, İzmir, Ankara, Konya, Samsun are defined as follows by the above-mentioned Decision of the Ministry of Justice:

- The Regional Administrative Court of Istanbul includes the Provinces of İstanbul, Kırklareli, Edirne, Tekirdağ, Kocaeli and Sakarya;
- The Regional Administrative Court of Bursa includes the Provinces of Bursa, Çanakkale, Balıkesir Bilecik, Kütahya, Yalova and Eskişehir;
- The Regional Administrative Court of İzmir includes the Provinces of İzmir, Manisa, Uşak, Denizli, Aydın and Muğla;
- The Regional Administrative Court of Ankara includes the Provinces of Ankara, Çankırı, Kırıkkale, Çorum, Kırşehir, Yozgat, Nevşehir, Sivas, Kayseri, Kastamonu, Karabük, Bartın, Zonguldak, Düzce and Bolu;
- The Regional Administrative Court of Konya includes the Provinces of Konya, Adana, Karaman, Niğde, Mersin, Aksaray, Antalya, Burdur, Isparta and Afyonkarahisar;
- The Regional Administrative Court of Samsun includes the Provinces of Samsun, Sinop, Amasya, Tokat, Ordu, Giresun, Trabzon and Rize;
- The Regional Administrative Court of Erzurum includes the Provinces of Erzurum, Artvin, Ardahan, Gümüşhane, Bayburt, Kars, Iğdır, Ağrı, Erzincan, Tunceli, Bingöl, Muş, Bitlis, Van and Hakkari;
- The Regional Administrative Court of Gaziantep includes the Provinces of Gaziantep, Osmaniye, Kahramanmaraş, Hatay, Kilis, Malatya, Elazığ, Adıyaman, Şanlıurfa, Diyarbakır, Mardin, Batman, Siirt and Şırnak.

The newly established Regional Courts of Justice and the jurisdiction of the Regional Administrative Courts will enter into force on 20 July 2016.

ENVIRONMENT

Communiqué on Mechanical Sorting, Biodrying, Biomethanisation Facilities and Fermented Products Management

The Communiqué on Mechanical Sorting, Biodrying, Biomethanisation Facilities and Fermented Products Management ("**Communiqué**") was published in the Official Gazette dated 10 October 2015 and entered into force on the same date.

The Communiqué defines the principles and requirements for:

- Managing Biodegradable waste, without harming human health and the environment,
- The technical requirements of mechanical sorting, biodrying and biomethanisation facilities,
- The quality criteria for fermented products produced by biomethanisation facilities,
- The technical specifications and standards that waste processing facilities must meet,
- Characteristics of products that result from processing biodegradable wastes and biomethanisation.

The Communiqué also states that the authorities responsible for managing biodegradable waste are:

- The Ministry of Environment and Urban Planning: take required administrative measures, evaluate pre-feasibility reports and application projects, issue environmental licences and generally conduct inspections.
- Provincial Directorates: cooperate and conduct inspections.
- Local Administrations, legal and real entities and operators: prepare pre-feasibility reports, take the necessary measures and take other protective and preventive measures.

The facilities established and operational before the effective date of the Communiqué shall comply with the physical conditions indicated in the Communiqué within one year.

The administrative fines provided for under Articles 12 and 20 of the Environmental Law No. 2872 and Article 12 of the Law relating to the Preparation and Implementation of the Technical Legislation on Products No. 4703 are applicable in the event of failure to comply with the Communiqué.

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

CONTACTS

MATTHIEU ROY
roy@gide.com

ALEV BAYRAKTAR YILANLIOĞLU
bayraktar@odsavukatlik.com