

GEDİK & ERAKSOY

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A Synopsis on the Recent Amendments to the Turkish Foreign Exchange Regime

➤ Speed Read

The significant volatility in the Turkish currency over the last couple of years, combined with the high rate of foreign currency denominated borrowings by the Turkish borrowers, have led the Turkish Government to take a series of preventive measures so as to mitigate risks which, in particular, individuals and small and mid-sized enterprises (SMEs) are exposed to in the foreign exchange market.

On 25 January 2018, certain amendments in relation to the Decree No.32 on Protection of the Value of the Turkish Currency (Decree No. 32) and the Communiqué No. 2008-32/34 regarding the Decree No.32 (Communiqué) were published in the Official Gazette, which amendments were followed by the publication of the revised Circular on Capital Movements (Circular, together with the Decree No. 32 and the Communiqué, FX Legislation) on the website of the Central Bank on 27 April 2018 (Amendments), introducing significant novelties to the Turkish foreign exchange regime.

The Amendments, which came into effect as of 2 May 2018, envisage a tightened foreign exchange regime with a view to provide efficient protection against foreign exchange risk, by placing certain restrictions on legal entities resident in Turkey (Corporate Borrowers) in respect of their foreign currency denominated borrowings, in addition to imposing a blanket prohibition in respect of foreign currency indexed loans (FX Indexed Loans) and foreign currency denominated loans (FX Loans) on the individuals resident in Turkey (Individual Borrowers, together with the Corporate Borrowers, Turkish Borrowers).

➤ Highlights

(a) **FX Indexed Loans**

(i) **Pre-Amendments**

Prior to the Amendments, Turkish Borrowers could obtain FX Indexed Loans from or outside of Turkey regardless of being subject to any restriction in terms of tenure or amount, provided, in each case, that such FX Indexed Loans were utilised for commercial or

business-related purposes. Therefore, only the Individual Borrowers qualifying as consumers were not able to obtain FX Indexed Loans.

(ii) Post-Amendments

With the Amendments, which impose a blanket prohibition in respect of FX Indexed Loans, Turkish Borrowers will no longer be permitted to obtain FX Indexed Loans in any manner whatsoever. In this regard, neither the lenders in Turkey nor the foreign lenders will be allowed to extend FX Indexed Loans to a Turkish Borrower.

(b) FX Loans

(i) Individual Borrowers

(A) Pre-Amendments

Prior to the Amendments, Turkish banks were allowed to provide FX Loans to Individual Borrowers under certain circumstances which include, among others, loans with a term of more than one year and with an amount of, at least, the equivalent of USD 5 million. However, Individual Borrowers were not allowed to obtain FX Loans from abroad.

(B) Post-Amendments

The Amendments set forth a blanket prohibition on the utilisation of FX Loans by the Individual Borrowers. Accordingly, Individual Borrowers will, under no circumstances, be able to obtain FX Loans from or outside of Turkey.

(ii) Corporate Borrowers

(A) Pre-Amendments

I. Domestic Borrowings

Prior to the Amendments, Turkish banks were permitted to extend FX Loans to Corporate Borrowers under certain circumstances which include, *inter alia*, the following loans to be obtained:

- for funding export, transit trade, sales and deliveries considered as export (*ihracat sayılan satış ve teslimler*) and foreign currency generating activities (*döviz kazandırıcı hizmet ve faaliyetler*);
- within the framework of investment incentive certificate (*yatırım teşvik belgesi*) and for financing investment goods;
- by the Corporate Borrowers who conducted their business abroad or otherwise were engaging in a business relating to international tenders held in Turkey or defence industry projects approved by the Undersecretariat of Defence Industry (*Savunma Sanayi Müsteşarlığı*); or
- with a term of more than one year and with an amount of, at least, the equivalent of USD 5 million.

II. Foreign Borrowings

Subject to certain notification and solicitation requirements, the Corporate Borrowers were permitted to obtain FX Loans from a foreign lender, provided that the relevant loan proceeds, principal repayments, interest and other payments are transferred through a locally licensed bank in Turkey (**Turkish Intermediary**).

(B) Post-Amendments

Pursuant to the FX Legislation, as amended by the Amendments, Corporate Borrowers will – save for certain exceptions – only be extended FX Loan if they have foreign currency-denominated revenue, which is defined as "the revenue derived from export, transit trade, sales and deliveries considered as export and foreign currency generating activities (**FX Revenue**). Please note that, as per the Circular, when determining whether a revenue denominated in foreign currency constitutes FX Revenue within the context of the FX Legislation, the activity which the revenue is derived from must either (i) fall within the scope of activities (*i.e.*, export, transit trade, sales and deliveries considered as export or foreign currency generating activities) set out under Article 6(3) of the Communiqué No. 2017/4 regarding Exemption of Tax, Duty and Charges on Export, Transit Trade, Sales and Deliveries considered as Export or Foreign Currency Generating Activities; or, (ii) be so considered by the Ministry, where the Undersecretariat of Treasury is organized under (*i.e.*, currently the Prime Ministry of Turkey) (**Ministry**), upon certifying that the revenue has been collected from residents in foreign countries.

In addition, the Amendments introduce a key term in terms of distinguishing the Corporate Borrowers who are eligible to obtain FX Loan, named as credit balance, which is defined as "the unpaid sum of the debt incurred due to FX Loan obtained within or outside of Turkey (**Credit Balance**).

In this regard, domestic and foreign borrowings by the Corporate Borrowers will mostly rely on these new concepts, and further sub-sections aim to dwell thereon.

I. Domestic Borrowings

Borrowings by the Corporate Borrowers with no FX Revenue:

As per the Amendments, the Corporate Borrowers who do not have FX Revenue will not be permitted to obtain FX Loans within Turkey. However, FX Revenue requirement will not apply to the following FX Loans to be obtained:

- by public institutions, banks and factoring, financial leasing and financing companies resident in Turkey – note that before the Amendments factoring, financial leasing and financing companies resident in Turkey could only obtain FX Loans from lenders in Turkey by meeting the amount (*e.g.*, USD 5 million) and maturity (*e.g.*, one year) criteria. The Amendments introduce a specific exemption for the factoring, financial leasing and financing companies resident in Turkey in that such companies will not be subject to any criteria for their domestic foreign exchange borrowings;

- by the Corporate Borrowers with a Credit Balance of, at least, USD 15 million as at the date of utilisation;
- within the framework of investment incentive certificate (*yatırım teşvik belgesi*) and for financing certain equipment and devices;
- by those who are awarded with an international tender held in Turkey or who are contractors of defence industry projects approved by the Undersecretariat of Defence Industry;
- by those who conduct public private partnership projects;
- by the Corporate Borrowers with no FX Revenue in the last three financial years, provided that (i) such borrowers certify their relationship with export, transit trade, sales and deliveries considered as export and foreign currency generating activities and their probable FX Revenue (*muhtemel döviz geliri*); and, (ii) FX Loans to be obtained by such borrowers do not exceed their certified probable FX Revenue; or
- by certain Corporate Borrowers with the approval of, and under the circumstances set forth by, the Ministry.

Please note that the Circular has recently clarified certain aspects of the foregoing exemptions. Accordingly:

- in the case of FX Loan extension to a Corporate Borrower with an investment incentive certificate, the maximum amount to be utilised by such Corporate Borrower must not exceed the foreign funding/source amount set forth by the relevant investment incentive certificate;
- in the case of FX Loan extension to a Corporate Borrower who is awarded with an international tender held in Turkey or who is contractor of a defence industry project approved by the Undersecretariat of Defence Industry, (i) the original copies of the relevant pages of the underlying project agreement including the provisions with respect to parties, subject, consideration, date and signatures, and the written approval to be obtained by the relevant public institution must be submitted to the Turkish Intermediary; and, (ii) the maximum amount to be utilised by such Corporate Borrower must not exceed the consideration set out in the underlying project agreement;
- in the case of FX Loan extensions within the framework of public private partnership projects, (i) a copy of the Turkish Trade Registry Gazette extract indicating the incorporation of the Corporate Borrower, as well as the original copies of the relevant pages of the underlying implementation agreement including the provisions with respect to parties, subject, consideration, date and signatures, and the written approval to be obtained by the relevant public institution (where the consideration of the underlying agreement is indicated) must be submitted to the Turkish Intermediary; and, (ii) the

maximum amount to be utilised by such Corporate Borrower must not exceed the consideration set out in the underlying agreement;

- with respect to utilisations in the context of international tenders, defence industry projects or public private partnership projects, as applicable, in order to prevent Corporate Borrowers from utilising more than one FX Loan based on the same underlying agreement, the Turkish Intermediary must insert annotation to each original page of the underlying agreement and the written approval of the relevant public institution provided by the Corporate Borrowers;
- in the case of FX Loan extension to a Corporate Borrower with probable FX Revenue, such Corporate Borrower must (i) notify the Turkish Intermediary that it had no FX Revenue in the last three financial years; and (ii) not utilise any further FX Loans in the context of probable FX Revenue within the next three financial years from the disbursement date. Please note that, in determining the probable FX Revenue of a Corporate Borrower, agreements, customs declarations (with non-cash payment method) or pro forma invoices are taken into consideration. Further, FX Loans extended within the framework of probable FX Revenue cannot have a maturity of more than 24 months;

Separately, according to the Circular, the Ministry has determined that the FX Revenue requirement will not be sought for the FX Loans:

- to be extended to a Corporate Borrower for financing its investments in relation to renewable energy resources within the scope of the Turkish Government's purchase guarantee, as per the Law No. 5346 on the Use of Renewable Energy Resources for Generating Electricity, in which case (i) such Corporate Borrower is required to submit renewable energy resource certificate or generation license to the Turkish Intermediary; and, (ii) the FX Loan amount must not exceed the sum (calculated for eight years) reached by multiplication of (x) the annual generation capacity specified in the generation license and (y) the price (including the feed-in tariffs) under the renewable energy resources support scheme;
- to be utilised by Corporate Borrowers awarded with the tenders in the context of the Privatization Law No. 4046 or public tenders where the tender price is denominated in foreign currency, in which case (i) the original copies of the relevant pages of the underlying tender agreement including the provisions with respect to parties, subject, consideration, date and signatures, and the written approval to be obtained by the Directorate of Privatization Administration (*Özelleştirme İdaresi Başkanlığı*) or the relevant public institution must be submitted to the Turkish Intermediary; and, (ii) the maximum amount to be utilised by such Corporate Borrower must not exceed the tender price; or
- to be utilised by a Corporate Borrower incorporated for the sole purpose of acquiring the shares of a new company – please note that this exemption, on its face, allows FX Loans to special purpose

vehicles in the context of acquisition finance. In this case, (i) the original copies of the relevant pages of the agreements (in relation to acquisition of shares) including the provisions with respect to parties, subject, consideration, date and signatures; and, (ii) the maximum amount to be utilised by such Corporate Borrower must not exceed the total consideration to be paid for the shares.

Borrowings by the Corporate Borrowers with FX Revenue:

As regards the Corporate Borrowers who have FX Revenue, the Amendments introduce the following conditions:

- if the Credit Balance of the Corporate Borrower is below USD 15 million, the aggregate of (i) the FX Loan to be utilised and (ii) the existing Credit Balance must not exceed the sum of the last three financial years' FX Revenues;
- following the utilisation, if it is determined that the Credit Balance exceeds the sum of the last three financial years' FX Revenues, then the exceeding portion of the loan is either called or converted to Turkish Lira-denominated loan.

II. Foreign Borrowings

The Amendments bring parallel provisions to domestic borrowings in respect of foreign borrowings. Therefore, for the avoidance of repetition, we would suffice to state that the explanations above in relation to the domestic borrowings are also applicable to the foreign borrowings, except that the duty to monitor the position of the Credit Balance against the FX Revenue is vested upon Turkish Intermediaries.

Apart from the foregoing restrictions and subject to certain notification and solicitation requirements, the Corporate Borrowers will continue to be permitted to obtain FX Loans from a foreign lender, provided that the relevant loan proceeds, principal repayments, interest and other payments are transferred through a Turkish Intermediary.

(c) Other Notable Points

(i) Declaration of FX Revenue

As per the FX Legislation, the FX Revenue pertaining to the last three financial years is to be substantiated by submission of the FX Revenue Declaration Form set out under the Circular, accompanied by a report prepared and approved either by an independent accountant or certified public accountant on the basis of the unconsolidated financial statements of the last three financial years.

Please note that FX Revenue declarations by Corporate Borrowers are required to be made on standalone basis, including the group companies.

According to the Circular, when calculating the FX Revenue, the revenue of the preceding year is included in the calculation on the last business day falling four months after the end of each financial year.

(ii) Notification to the Risk Centre

As a result of the Amendments, the need to monitor the Credit Balance of each Corporate Borrower has arisen. Accordingly, the Circular requires (x) in the case of domestic borrowings, the banks or financial institutions extending FX Loan; and (y) in the case of foreign borrowings, the Turkish Intermediary, to notify any FX Loan utilised or FX Revenue declaration made by Corporate Borrowers to the Banks Association of Turkey Risk Centre (*Türkiye Bankalar Birliği Risk Merkezi*) (**Risk Centre**). Likewise, repayment of FX Loans would also be required to notified to the Risk Cente.

Where FX Loan is utilised by a Corporate Borrower with no FX Revenue as per the exemptions, FX Revenue declaration would not be required. That being said, such FX Loans are, in any case, notified to the Risk Centre for the purposes of Credit Balance calculation.

(iii) Revolving Loans

With the Amendments, the prohibition on revolving loans utilised from outside of Turkey is continuing. Accordingly, Turkish Borrowers would not be able to obtain revolving FX Loans from abroad, which is defined as "*overdraft facilities with, typically, floating interest rates, and not having a specific maturity which may be withdrawn and repaid by the borrower at different times within the loan limit set out under the loan agreement entered into between the borrower and the lender*" under the Circular.

As opposed to the revolving loans, the Circular allows Corporate Borrowers to utilise tranche loans which are disbursed in multiple disbursements up to the loan limit set out under the loan agreement from foreign lenders. Please note that, however, it is explicitly forbidden to re-borrow the amounts repaid by the borrower under such tranche loans.

Please note that foregoing prohibition on revolving FX Loans is not applicable to those obtained from Turkey. Accordingly, a Corporate Borrower would be able to utilise revolving FX Loan from Turkey, provided that such Corporate Borrower has a Credit Balance of, at least, USD 15 million as at the date of utilisation. In addition, each repayment and re-borrowing in the context of domestic revolving loans would need to be notified to the Risk Centre.

(iv) Turkish Lira Denominated Loans from Abroad

With the Amendments, Turkish Borrowers continue to be able to obtain Turkish Lira denominated loans from outside of Turkey, provided that such loans are intermediated by the Turkish Intermediary.

Please note that with the Amendments such Turkish Lira denominated Loans cannot be qualified as FX Indexed Loans. Separately, as opposed to the case before the Amendments (where the repayment in foreign currency was possible), Turkish Lira denominated loans would, now, only be repaid in Turkish Lira.

(v) Restructuring

Pursuant to the Circular, restructuring to be effected in the context of the Classification of Loans and Provisions Regulation (**Provisioning Regulation**), which entered into force as of 1 January 2018, would not be considered as renewal of the loan for the purposes of implementation of Decree No. 32 in that the restructuring of a loan is defined under the Provisioning Regulation as privileges granted to a debtor who faces or would probably face

financial difficulties in relation to the repayment of the loan, which privileges would not be granted to other debtors not facing such repayment difficulties.

That being said, the restructuring of FX Indexed Loans would not be effected as FX Indexed Loans.

(vi) Loans between Corporate Borrowers

According to the Circular, a Corporate Borrower is not allowed to extend FX Loan to another Corporate Borrower. In case where a Corporate Borrower obtains FX Loan and then extends such FX Loan to another Corporate Borrower, banks or financial institutions extending the original loan must notify the Undersecretariat of Treasury of the breach upon becoming aware thereof.

That being said, a Corporate Borrower is allowed to extend FX Loans or Turkish Lira denominated loans to (x) the legal entities where it holds shares; (y) its parent company; or, (z) group companies, in each case outside of Turkey, and provided that such loans are transferred through the Turkish Intermediary. In addition, a Corporate Borrower qualifying as wholly owned subsidiary of a foreign capital parent company residing abroad is permitted to obtain FX Loan from such parent company.

➤ **Conclusion**

In light of the above, as of 2 May 2018, the Turkish foreign exchange regime has undergone a radical change and both the Turkish Borrowers and the lenders (be it domestic or foreign) need to align themselves with the new system envisaged by the Amendments.

Further, according to government officials, the Amendments – whose target is primarily the Individual Borrowers and the SMEs – will be followed by a second wave of amendments, which, when introduced, will impose specific requirements such as hedging on large-scale companies in order for protection thereof against foreign exchange risks.

Gedik Eraksoy Avukatlık Ortaklığı

Büyükdere Caddesi, River Plaza
Bahar Sokak, No: 13 Kat: 17
TR-34394 Levent, Istanbul
Turkey

Tel +90 212 371 2950
Fax +90 212 371 2955

www.gedikeraksoy.com



Hakkı Gedik
Partner, Gedik & Eraksoy

Contact

Tel +90 212 371 2953
hakkı.gedik@gedikeraksoy.com

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