

Turkish Energy and Infrastructure Newsletter

Summer/Fall 2020



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Recent Changes in Legislation

Amendments to the Electricity Market Licensing Regulation

Two amendments have been made in the Electricity Market Licensing Regulation (“**Regulation**”). The first amendment was published in the Official Gazette No. 31127 dated 14 May 2020 and entered into force on the same day (“**First Amending Regulation**”). The second amendment was published in the Official Gazette No. 31199 dated 28 July 2020 and also entered into force on the same day (“**Second Amending Regulation**”). The amendments introduced by the First Amending Regulation focus on the applicable license fees in shareholding changes and merger and division transactions while the amendments introduced by the Second Amending Regulation involve certain procedural matters in license amendments for hybrid power plants and hybrid renewable power plants which generate electricity by way of combining two or more different types of energy resources (“**Hybrid Plants**”).

The notable amendments introduced with the First Amending Regulation are as follows:

- During the evaluation of preliminary license applications, the Energy Market Regulatory Authority (the “**EMRA**”) will be able to request information and documents from the relevant institutions and organizations. Before the amendment, the necessary documents and information could only be demanded from applicants.
- In the case of a change in the shareholding structure made without obtaining EMRA’s approval (despite being subject to such approval under Article 57(2) of the Regulation), if the application for amendment of the license in relation with the respective change is made within the calendar year in which subject change has occurred, the license amendment fee will be multiplied by three and an additional fee in the amount of the license fee will continue to be applied for each calendar year following such change.
- In the case of a change in the shareholding structure made by obtaining EMRA’s approval or a change in the shareholding structure that is not subject to EMRA approval (as per Article 57(2) of the Regulation), if the application for amendment of the license in relation with the respective change is made within the calendar year in which the period specified in the relevant provision expires (*i.e.* 3 months as of the date of completion of the share transfer), the license amendment fee will be multiplied by three and an additional fee in the amount of the license fee will continue to be applied for each calendar year following such change.

- EMRA may require fulfillment of a certain obligation as a condition for its approval of a merger or division transaction within a certain period. The new license may only be obtained upon fulfillment of such condition and payment of the license fee within the period prescribed by EMRA. If the subject condition is not fulfilled within the prescribed period, except for force majeure, the approval will automatically become null and void at the end of the period.
- Article 51.1(c) of the Regulation which provided that real persons and legal entities controlling a licensee or a license applicant shall be deemed as the indirect holder of 100% of the shares in such legal entity is abolished.

The notable amendments introduced with the Second Amending Regulation are as follows:

- In license amendment applications for conversion of power plants to Hybrid Plants, the condition of having concluded a lease agreement with DSI for floating solar power plants or solar power units to be installed on the canal surfaces of hydroelectric resources or in the reservoir areas between the maximum water levels and the operating levels is abolished. Instead, the applicants will be required to submit a document evidencing that an application has been made for execution of such lease agreement.
- Auxiliary resource-based units may be established in additional areas integrated into the plant site boundaries to meet the internal needs of geothermal power plants within the scope of their conversion to Hybrid Plants.
- Similarly, except for coal-fired plants established within an industrial facility, auxiliary resource-based units may be established in additional areas integrated into the plant site boundaries or within the scope of mine operating licenses to be connected to the plant site through a corridor in order to meet the internal needs of the coal-fired power plants within the scope of their conversion to Hybrid Plants.
- In Hybrid Plants, no partial or full acceptance of auxiliary resource-based units will be made without the partial or full acceptance of the primary resource-based units prior to 1 January 2021.

Limitations to Dividend Distributions of Capital Companies

As part of the measures taken due to COVID-19, Provisional Article 13 (“**Provisional Article**”) has been added to the Turkish Commercial Code¹

¹ Published in the Official Gazette dated 14 February 2011 and numbered 27846.

("TCC"). With this Provisional Article, certain restrictions have been introduced to dividend distributions of capital companies (except for the state-owned companies) until 30 September 2020. In this respect, the Communiqué on the Procedures and Principles on the Implementation of the Provisional Article 13 of the Turkish Commercial Code ("**Communique**") was published in the Official Gazette dated May 17, 2020 and No. 31130 and has introduced certain exceptions to the profit distribution restrictions.

The Communiqué regulates as follows:

Principles on the distribution of dividend and dividend advance

- Until 30 September 2020, capital companies shall decide to distribute only up to 25% of the annual net profit of 2019. Previous year profits and free legal reserves shall not be subject to distribution. This limitation shall not be applied to the capital increases to be made from internal resources in accordance with Article 462 of the TCC.
- If it has been determined to distribute dividends in the general assembly meeting prior to the entry into force of the Provisional Article 13, but no payments or partial payment have been made to the shareholders, payments exceeding 25% shall be postponed until 30 September 2020. No interest shall be accrued for the postponed payments.

Exceptions to the dividend distribution restriction

Dividend distribution limitations shall not be applied to the companies that meet the conditions below:

- Companies that decide to distribute dividends equal to or less than TL 120,000, excluding
 - the companies employing those who (i) benefit from the short term work allowance and/or (ii) took unpaid leave due to Covid-19, and benefit from pecuniary wage support as well,
 - the companies that benefitted from the Treasury-backed loan surety under the Provisional Article 20 of the Law No. 4749 on the Regulation of Public Finance and Debt Management² and its related resolutions, and still have an outstanding debt balance,
- Companies that decide to distribute dividends, provided that more than half of the distributed dividends shall be used by the shareholder(s) in the fulfillment of their capital contribution

² Published in the Official Gazette dated 9 April 2002 and numbered 24721.

obligations towards another company in full and in cash within the framework of the provisions of the TCC,

- Companies that resolve to distribute dividends, provided that the distributed amount will be used, in cash, for the fulfillment of the obligations within the scope of the executed loan agreements or project financing agreements to be due until 30 September 2020. In these companies, the payments exceeding the liability amounts of the shareholders shall also be postponed until 30 September 2020.

Calculation of the dividends

In the calculation of the dividends, financial statements prepared in accordance with the Article 88 of the TCC shall be taken as basis by the companies that are subject to independent auditing requirement. For the remaining companies, financial statements prepared in accordance with the Tax Procedure Law³ shall be taken as basis.

In any case, the dividend amount to be distributed shall not exceed the total amount of the sources subject to profit distribution as per the records kept according to the Tax Procedure Law.

Affirmative opinion of the Ministry of Trade

In order to discuss the profit distribution at the general assembly meetings based on the above-mentioned exceptions, the relevant companies must obtain an affirmative opinion from the Ministry of Trade upon submitting the evidencing documents as listed in the Communiqué.

Amendments to the State Aids to Investments

The legislation on State aids to investments have seen several amendments during the summer term. First, the Amending Decision on Project Based State Aids to Investments⁴ entered into force on 28 June 2020. Then, the Amending Communiqué on the Implementation of the Decision on Project Based State Aids to Investments⁵ entered into force on 28 July 2020. Lastly, the Amending Decision on State Aids to Investments is published in the Official Gazette No. 31220 dated 20 August 2020 and the majority of its provisions entered into force with its publication.

³ Published in the Official Gazette dated 10 January 1961 and numbered 10703.

⁴ Published in the Official Gazette dated 28 June 2020 and numbered 31169.

⁵ Published in the Official Gazette dated 28 July 2020 and numbered 31199.

Main changes introduced by these amendments can be summarized as below.

Project-based aids:

- If the actual investment value is realized lower than the fixed investment amount indicated in the relevant investment incentive decision, the incentives granted for such investment will proportionally be reduced and the overpaid portion of the incentives, if any, will need to be reimbursed by the investor to the Ministry of Industry and Technology (the “**Ministry**”);
- Investors will be able to benefit from the energy support incentive as of the partial entry into operation of the relevant investment, rather than waiting until the completion of the whole investment. Similarly, the social security premium support will become applicable before the completion of the investment, if requested by the investor and approved by the Ministry.
- Investment incentive decisions will be repealed at the end of the third year as of the decision date, if the investment costs spent do not exceed TL 200,000 or 10% of the fixed investment amount. This three-years’ period can be extended for an additional three years by the President.

Other governmental incentives:

- Gold-based integrated mining investments are no longer considered among strategic investments, whereas the investments of public authorities can be deemed as strategic investments if they fulfil the conditions set out in the law. The list of prioritized investments (*öncelikli yatırımlar*) has also been revised.
- The maximum amount of interest or profit share incentive to be granted to R&D and environmental investments is increased to TL 1,800,000. The maximum ratios for social security premium support incentive have also been increased, as an alternative to tax support incentive.

Amendment of Law No. 4054 on the Protection of Competition

The Law Amending the Law on the Protection of Competition (“**Law No. 4054**”) has entered into force upon its publication in the Official Gazette dated 24 June 2020 and numbered 31165 (the “**Amendment**”). The novelties introduced by the Amendment, as briefly described below, are intended to introduce procedural efficiencies and facilitate the smooth enforcement of competition rules. The measures also create further harmony between the competition jurisprudence of the European Union (the “**EU**”) by introducing certain tests and exceptions already applied throughout the EU.

The main novelties of the Amendment are as follows:

- **The “significant impediment to effective competition” criterion in M&A procedures.** The insertion of the term “*effective*” to the first paragraph of article 7 of Law No. 4054 introduces the “significant impediment to effective competition” test already applied within the EU. Accordingly, the tests to be applied during M&A clearance reviews will consist of the examination as to the creation or strengthening of a dominant position and the significant reduction of effective competition.
- **Structural measures.** The amendment of the first paragraph of article 9 of Law No. 4054 introduces the Competition Board’s additional authority to issue structural measures (e.g. the transfer of an undertaking’s certain commercial activities, shares or assets) as part of its final decisions. Accordingly, the Competition Board is now entitled to order certain behavioral and such structural measures to ensure that competition infringements are terminated. The Amendment clarifies that such structural measures (i) must be proportionate to and necessary for the effective termination of the relevant infringement; and (ii) may only be ordered if the previously ordered behavioral measures proved to be ineffective. The Amendment further provides that undertakings will be granted 6 months to comply with the relevant structural measures once the Competition Board finally determines that the behavioral measures did not achieve the intended result.
- **On-site inspections.** The amendment of article 15 of Law No. 4054 clarifies the scope of documents that may be examined during on-site inspections ordered by the Competition Board. As such, the experts ordered to carry out such inspections will be entitled to examine and obtain copies and physical samples of corporate books, all kinds of documents and data kept in physical or electronic form and on information systems.
- **The EU’s “*de minimis*” exception.** The new paragraph added to article 41 of Law 4054 by way of the Amendment, provides for the so-called “*de minimis*” rule available in the EU competition law with the intention to prioritize certain breaches for the efficient use of public resources. Accordingly, the Competition Board may decide not to initiate an investigation against agreements, concerted practices and decisions distorting competition – except for explicit and grave infringements such as price settings, market or customer allocations and supply restrictions – that do not have a significant distortive effect on competition.

- **Commitments and settlement options.** The additional paragraphs introduced to article 43 of Law 4054 pursuant to the Amendment provide for the possibility of undertakings making certain commitments and settlement procedures.
- **Commitments of undertakings.** As per the newly introduced provisions, it is now possible for the relevant undertakings to make certain commitments addressed to eliminate competition concerns as a result of breaches of articles 4 (*Agreements, concerted practices and decisions distorting competition*) and 6 (*Abuse of Dominant Positions*) of Law No. 4054. Accordingly, undertakings may submit such corrective commitments during preliminary investigation and investigations stages. If such commitments are deemed adequate by the Competition Board to eliminate the relevant competitions concerns, the Competition Board may decide to terminate or refrain from initiating investigations by rendering such commitments binding on the relevant undertakings. However, such commitments will not be acceptable with respect to explicit and grave infringements such as price settings, market or customer allocations and supply restrictions. The Competition Board is further entitled to re-open or initiate investigations if (i) there is a substantial change in the factors forming the basis of its initial decision to accept the relevant commitment; (ii) the relevant undertakings act against their commitments; or (iii) the decision of the Competition Board has been issued on the basis of missing, false or misleading information.
- **Settlement procedures.** Following the commencement of investigations, the Competition Board will now be entitled to initiate settlement procedures upon the request of the parties or *ex officio*, taking into account the procedural benefits of an investigation's swift completion and differences in opinion as to the existence of an infringement. Accordingly, the Competition Board may reach a settlement with investigated undertakings accepting the existence and scope of the relevant infringement until the investigation report is served to such undertakings. Settlements will hence require an admission from the investigated undertakings. In settlement procedures, the investigated parties will be given a fixed period of time to submit a letter of settlement in which they accept the existence and scope of the violation. Any statements submitted after such deadline will be disregarded. The Amendment finally provides that the administrative fines to be imposed may be reduced by up to 25 % in

case the settlement procedure is applied and that the parties will be prohibited from initiating any legal proceedings against the fine imposed and the issues set out in the settlement letter.

Conclusion

The novelties introduced with the Amendment expand the Competition Board's options with respect to its reviews and inspections and constitute efforts to ensure procedural efficiency while creating additional harmony between the competition rules of the EU. Details as to the implementation of the "*de minimis*" rule and settlement procedures are yet to be clarified in secondary legislation. Another issue to be seen in practice is the way data privacy concerns are handled in connection with the authority of experts during on-site inspections.

Omnibus Law No. 7251 Amending the Code of Civil Procedure and Certain Laws

Omnibus Law No.7251 Amending the Code of Civil Procedure and Certain Laws ("**Amending Law**") was published in the Official Gazette No. 31199, dated 28 July 2020. The Amending Law introduced certain amendments mainly to the Code of Civil Procedure, Code of Enforcement and Bankruptcy, Code of Administrative Procedure, Law on Establishment, Duties and the Jurisdiction of Courts of First Instance and Regional Judicial Courts, Insurance Law, Turkish Commercial Code and Consumer Protection Law. The highlights of the amendments under the Amending Law are as follows:

1. Amendments to the Code of Civil Procedure

- Amending Law makes several arrangements on procedural issues likewise recusal, transactions to be made by the parties and the courts upon the lack of jurisdiction decisions, peremptory terms rendered by the courts, etc.
- Certain amendments have been introduced regarding the conditions for commercial books to be accepted as evidence in favor of their owner during the litigation. In order to consider commercial books as evidence in favor of its owner, the books must be kept completely and duly in accordance with the law, opening and closing approvals must be complete and the records in the books must verify each other pursuant to the existing law. With the Amending Law, "*counter party's non-submission of its commercial books*" has been added to the article as another reason to accept the commercial book as evidence in favor of the party that submits the book. Furthermore, in case the commercial books submitted by the counter party of the lawsuit in accordance with the aforementioned terms, do not include any record regarding the matter in

dispute, the commercial books shall not be accepted as evidence in favor of their owners with respect to the Amending Law.

- The Amending Law regulates that in case preparing an objection to the expert report within legal period is difficult or impossible or it requires a special or technical study, the court may grant additional time for objection to the applicant commencing from the end of the legal period which cannot exceed two weeks and for one time only if the party requests it within the legal objection period.
- Amending Law stipulates that the rejection of the preliminary injunction decisions of the courts shall be rendered with reasoning.
- The *ex officio* notification of declaratory minutes and expert report, if exists, drafted as a result of determination of evidence by the court, to the counter party shall be mandatory under the Amending Law.
- Arbitral award may be notified to the parties by the relevant arbitral institution as well in addition to the arbitrator or head of arbitration committee.

2. Amendments to the Enforcement and Bankruptcy Law

- For the purpose of conducting an expeditious procedure in execution proceedings, several arrangements have been made in Enforcement and Bankruptcy Law. Thereafter, the creditor may be able to request attachment and ask for information about debtor's assets via National Judiciary Informatics System (UYAP).
- In parallel to the amendment made in the Code of Civil Procedure, it has been regulated the decision for rejection of preliminary attachment requests shall be rendered with a reasoning.

3. Other Amendments

- Amending Law introduces the mandatory mediation process for consumer disputes. Pursuant to the amendments, mandatory mediation shall be a cause of action before filing of the consumer lawsuits. The disputes fall within the scope of the consumer arbitration committee's duty, the objections against the decisions of this committee, the disputes regarding the rights arising from real estate and consumer transactions such as suspension of production or sale and recall of goods have been excluded from the scope of mandatory mediation. By virtue of the Provisional Article 2, the provisions regarding mandatory mediation shall not be applied to the pending lawsuits before first instance

courts, regional judicial courts and High Court of Appeals as of the date of the provisions have entered into force which is 28 July 2020.

- Pursuant to the amendments in the Law on Establishment, Duties and the Jurisdiction of Courts of First Instance and Regional Judicial Courts, the monetary threshold for the lawsuits heard by a sole judge in the commercial courts has been increased to TL 500,000 from TL 300,000 and the monetary threshold for the commercial lawsuits to be subject to simplified procedures has been determined as TL 500,000 instead of TL 100,000. Similar amendment has been made under Turkish Commercial Code in accordance with it.

Draft Legislation

A New Project Finance Tool: Project Backed Securities (Project Bonds)

On 20 February 2020, a new provision was included in the Capital Markets Law, which introduced an alternative tool for the financing of major public service projects in Turkey: the project finance fund ("PFF").

Accordingly, on 24 July 2020, the Capital Markets Board ("CMB") announced the Draft Communiqué on Project Backed Securities ("Draft Communiqué") regulating the establishment and operation of PFFs in detail. The Draft Communiqué was open for public review and feedback until 14 August 2020; however, as of the date hereof there have been no further developments in terms of publication of the final version. A high-level summary of certain key elements of the Draft Communiqué are as follows:

1. PFFs and PBS

A PFF may be established in Turkey with the approval of the CMB, either for a specific or indefinite duration. Its assets may consist of (i) the rights and revenues of a single project transferred by an *originator*, or (ii) the receivables under a portfolio of secured project finance loans relating to different projects (and secured loans for the refinancing of the same) transferred by a *founder*.

- **Originator (Kaynak Kuruluş):** The original owner (i.e. a legal entity, institution or establishment (or a joint venture established by such persons)) of the rights and receivables relating to a project.
- **Founder (Kurucu):** A bank or a general intermediary institution (*geniş yetkili aracı kurum*) that is authorized by the CMB to perform investment services and activities.

A PFF holds assets transferred to it in custody on the basis of fiduciary ownership (*inançlı mülkiyet*) and the assets are managed by the management

board (please see *Operation and Management* below). It has legal personality only for the registration of its assets to official registries (trade registry, title deed registry, etc.).

With the approval of the CMB, a PFF may issue project backed securities (*projeye dayalı menkul kıymet*) (“**PBS**”) by public offering or private placement in Turkey. Alternatively, PBS may also be offered abroad.

2. Issuance Limits

For PBS backed by an originator’s rights and revenues pertaining to a single project, the issuance limit (*ihraç tavanı*) cannot be more than 70% of the project cost, and the remaining project costs must be covered by way of equity from the originator. If the originator is a special purpose vehicle, or a company that has commenced operation within the previous two years, such equity requirement must be covered by the capital of the parent(s) of such originator.

For PBS backed by a founder’s receivables under a portfolio of secured project finance loans relating to a portfolio of projects, the issuance limit cannot be more than the total value of such loans.

Notwithstanding the foregoing, for PBS where the originator is a public authority or private company appointed pursuant to a build-operate-transfer or privatization tender, and for PBS based on project revenues guaranteed by the Ministry of Treasury and Finance, the issuance limit is 100% of the project cost.

3. Ring-Fencing and Additional Guarantees

Payment obligations to PBS holders are fulfilled from the cash flow generated by the PFFs assets. The assets of the PFF are ring-fenced from the assets of the originator, service provider and/or founder. Until any PBS issued by the PFF have been redeemed in full, the PFF’s assets remain immune to encumbrance and seizure (including in the event that the management or control of the originator or founder is transferred to a governmental authority) other than for the purposes of security for the performance of the PBS.

The CMB may also require that the payment obligations under PBS be guaranteed by a local bank or a third party.

4. Operation and Management

The PFF is governed by a management board that oversees the fund’s assets pursuant to internal by-laws (*iç tüzük*).

A service provider (*hizmet sağlayıcı*), which can be the founder, originator, or another bank/general intermediary authorized by the CMB, is tasked with the PFF’s day-to-day administration pursuant to a written servicing agreement (setting

out the duties and responsibilities of the service provider) executed between the management board and the service provider.

Other News

New Solar Power Project Tenders in Renewable Energy Resource Areas (YEKA GES III)

On 3 July 2020, the Ministry of Energy and Natural Resources (“**MENR**”) announced⁶ tenders (“**YEKA GES III**” or the **Tenders**”) for 74 solar power projects in 36 regions, each with installed capacities of 10 MWe, 15 MWe or 20 MWe, amounting to a total installed capacity of 1.000 MWe (“the **Projects**”) based on renewable energy resource areas (“**RERA**”) model. The Projects are called “Mini-YEKA Tenders” as they come after one successful tender for a 1,000 MWe project in 2017 (YEKA GES I) and one cancelled tender for four projects of 250 MWe each in 2019 (YEKA GES II). The Tenders aim to encourage small and medium sized investors to participate and diversify the investor base.

The key aspects of the Projects are as follows:

- **Locations, Capacities and Application Deadlines:** The Projects will be constructed in 36 regions in Turkey and each will have their own connection capacity of 10 MWe, 15 MWe or 20 MWe. As a result of the large number of tenders, the application deadlines are determined separately between 19 and 23 October 2020.
- **Purchase Guarantee:** The winning bidders will benefit from a 15-year purchase guarantee on the basis of the winning (electricity purchase price) bids. The purchase guarantee will be available for 15 years starting from the signing date of the agreement within the scope of YEKDEM.
- **Ceiling Price:** The Tenders are Turkey’s first RERA projects on Turkish Lira basis and the ceiling price for the Projects is set as TL 0.30/kWh. The price will be escalated with producers price index, subject to a cap to be calculated with the then-current market clearing price.
- **Possible Bidder Structures:** Only legal entities which are established as a Joint Stock Company or a Limited Liability Company in accordance with Turkish Commercial Code are allowed to participate in the Tenders.

⁶ The announcement was published in the Official Gazette No. 31174 and dated 3 July 2020.

- **Eligibility Criteria:** No technical or financial eligibility criteria is required to participate the Tenders.
- **Provisional Bonds:** The bidders will submit a one-year and convertible provisional bond during application as follows:

| Connection Capacity (MWe) | Amount (TL) |
|---------------------------|-------------|
| 10 | 3.500.000 |
| 15 | 5.500.000 |
| 20 | 7.000.000 |

- **Performance Bonds:** The winning bidders will then submit a ten-year and convertible performance bond as follows:

| Connection Capacity (MWe) | Amount (TL) |
|---------------------------|-------------|
| 10 | 7.000.000 |
| 15 | 11.000.000 |
| 20 | 14.000.000 |

- **Domestic Component Requirements:** The bidders will not be obliged to establish a factory for the production of the components for the Projects. However, both Domestic Product Certificate and domestic production ratio requirements must be satisfied under the Specifications.

The solar modules will be used in the power plants must satisfy a minimum of 70% domestic production ratio and these modules must be supplied from the factories established in Turkey or manufacturers outside of free trade zones.

- **License Period:** In case the capacity allocated as a result of the Tenders is 10 MWe, the preliminary license period will be 18 months maximum and construction period will be 18 months maximum. If the capacity is 15 MWe or 20 MWe, then these periods will be 22 months each. The generation licenses will be granted for 30 years.

Extension of Commissioning Deadlines for Feed-In Benefits in Renewable Projects

Commissioning deadline to benefit from the feed-in tariff and additional domestic production incentive for renewable energy power plants have been extended for 6 months.

As per the Renewable Energy Law, renewable energy companies can benefit from the Renewable Energy Resources Support

Mechanism (“YEKDEM”), which is a purchase guarantee applicable for the first 10 years of operation. Such purchase guarantee was envisaged to apply only to power plants to be commissioned on or before December 31, 2020. With the Presidential Decree published in the Official Gazette on September 18, 2020 (“Presidential Decree”), the commissioning deadline has been extended for 6 months to June 30, 2021.

In addition to the feed-in tariff, renewable energy based power plants whose mechanical and/or electromechanical parts have been produced in Turkey can also benefit from domestic production incentive. The Presidential Decree has also extended the commissioning deadline to benefit from the additional domestic production incentive for 6 months to June 30, 2021.

Active Ratio: Recent Easing Measures

In April, as part of its measures to control the economic effects of the Covid-19 pandemic, the Turkish Banking Regulatory and Supervision Agency (“BRSA”) introduced a requirement for banks to calculate an active ratio, where their level of lending would be measured against their deposits. Perceived as (among other measures) a push by the regulator on private banks to increase their lending, thereby sharing responsibility with public banks during a potential liquidity crunch, active ratio requirements were gradually eased with the onset of the “normalization” process. The latest decrease in the required active ratio levels was introduced by the BRSA on 28 September.

The current formula for the calculation of the active ratio of a bank is the following: $[Loans^7 + (Securities \times 0.75) + (Turkish\ Central\ Bank\ Swap \times 0.5)] / [Turkish\ Lira\ Deposits + (Foreign\ Currency\ Deposits \times 1.75^8)]$

When it was first introduced in April, the minimum active ratio required of a bank by the BRSA was determined as 100% for deposit banks and 80% for participation banks. In August, these figures were revised as 95% and 75%, respectively. Finally, pursuant to the BRSA announcement dated 28 September, a bank’s active ratio must be at least **90%** for deposit banks and **70%** for participation banks, applicable as of 1 October. The active ratio requirement is not applicable to development and investment banks and banks under the management of the Saving Deposit Insurance Fund.

⁷ A coefficient of “1.1” is applied to (i) loans granted to small and medium sized enterprises, (ii) project financing facilities and (iii) export credits.

⁸ This coefficient is applied as “1.00” for (i) foreign currency deposits up to an amount equal to foreign currency loans and (ii) deposits belonging to foreign residents.

In the above formula;

- “Loans” means the total amount of loans granted to commercial and individual customers, except for non-performing loans, non-cash loans, facilities granted to other banks, factoring and financing companies, residents abroad and facilities with a term shorter than three months.
- “Securities” means the total value of private sector bonds and debentures as well as Turkish Treasury debt instruments, lease certificates and Eurobonds. Securities and share certificates issued by residents abroad are not included in this calculation, whereas funds provided to real estate investment funds and venture capital investment funds are included.
- “Turkish Central Bank Swap” means the total amount in Turkish Lira (“TL”) of the foreign currency provided by banks to the Turkish Central Bank (“CB”) in a swap transaction.
- “Turkish Lira Deposits” means the total amount of the TL denominated deposits / participation funds, except for local/foreign banks’ deposits (*bankalar mevduatı*).
- “Foreign Currency Deposits” means the total amount of foreign currency deposits / participation funds, including gold and precious metals.

When calculating the active ratio, the foreign currency figures must be converted to TL at the average CB buying rate for the previous month, as notified to banks by the BRSA. The required reserves maintained by the CB for deposits and the cash balance maintained by banks to meet their clients’ cash needs are not included in the active ratio formula.

The active ratio must be calculated by banks on a weekly basis, but verification by the BRSA is made on a monthly basis. Accordingly, the monthly average of the weekly calculated ratio shall not be lower than the active ratios determined by the BRSA.

Easing of Limitations on Foreign Currency Derivative Transactions

In April, in an attempt to offset the volatility and risk in the global markets triggered by the COVID-19 pandemic, the Turkish Banking Regulatory and Supervision Agency (“BRSA”) and the Capital Markets Board of Turkey (“CMB”) had tightened their limits on foreign currency swap, forward, option and other derivatives transactions (where the parties swap Turkish Lira and foreign

currency) (“FX Derivatives Transactions”)⁹. As a step towards normalization, on 25 September 2020, the BRSA relaxed the tightened measures it introduced on local banks (“Banks”) in April. As of writing, the CMB has not yet made an announcement on the matter and it is unclear whether similar easing measures will be made available to Capital Markets Institutions (defined below).

For context, the BRSA has maintained a tight policy towards FX Derivatives Transactions following heavy fluctuation in the value of the Turkish Lira in 2018 and has consequently introduced a number of measures restricting Banks engaging in such activity¹⁰ (cumulatively, “BRSA Imposed FX Derivatives Limitations”). With its announcement in April, the CMB began imposing similar restrictions on institutions which are regulated by the CMB¹¹ (“Capital Markets Institutions”) that take part in FX Derivatives Transactions (“CMB Imposed FX Derivatives Limitations” and together with BRSA Imposed FX Derivatives Limitations, “FX Derivatives Limitations”).

The most recent changes to the BRSA Imposed FX Derivatives Limitations specify that, for FX Derivatives Transactions between Banks and non-resident counterparties:

- (a) if at settlement a Bank receives Turkish Lira, the previously imposed volumetric threshold of 1% of the Bank’s regulatory capital, has now been revised as 10%;
- (b) if at settlement a Bank provides Turkish Lira; new volumetric thresholds shall be 2% for transactions with seven days remaining until settlement, 5% for transactions with thirty

⁹ Please refer to our Alert dated 14 April 2020 available at http://www.cakmak.av.tr/articles/Banking_Finance/41250_012.pdf for further details.

¹⁰ BRSA Press Release dated 13 August 2018
BRSA Press Release dated 15 August 2018
BRSA Press Release dated 17 August 2018
BRSA Press Release dated 8 September 2018
BRSA Press Release dated 17 September 2018
BRSA Letter to the Banks Association of Turkey dated 19 September 2018
BRSA Press Release dated 18 December 2019
BRSA Press Release dated 9 February 2020
BRSA Press Release dated 12 April 2020

¹¹ The Capital Markets Law No. 6362 specifies capital markets institutions as: (i) investment firms, (ii) collective investment schemes, (iii) independent audit firms, appraisal firms and credit rating agencies that are active in the capital markets, (iv) portfolio management companies, (v) mortgage finance institutions, (vi) housing finance and asset finance funds, (vii) asset leasing companies, (viii) central clearing institutions, (ix) central depository institutions, (x) trade repositories and (xi) other capital market institutions falling under the regulation of the CMB.

days remaining until settlement and 20% for transactions with one year remaining until settlement, whereas such thresholds had been previously determined as 1%, 2% and 10%, respectively; and

- (c) all other previously announced BRSA Imposed FX Derivatives Limitations shall remain unchanged.

Following these developments, the FX Derivatives Limitations can be summarized as follows:

Pursuant to the BRSA Imposed Derivatives Limitations, FX Derivatives Transactions between Banks and non-resident counterparties shall be subject to the following restrictions:

- (1) Where at settlement a Bank receives Turkish Lira; the total notional amount of FX Derivatives Transactions may not exceed **10%** of the Bank's most recently calculated regulatory capital (delta values may be taken into consideration for options transactions), and if any excess exists, further such FX Derivatives Transactions may not be executed and any such FX Derivatives transactions may not be renewed;
- (2) Where at settlement a Bank provides Turkish Lira; depending on the settlement date of the FX Derivatives Transactions, their total notional amount may not exceed certain ratios based on the Bank's most recently calculated regulatory capital (delta values must be taken into consideration for options transactions) as follows: (i) **2%** for transactions with seven days remaining until settlement, (ii) **5%** for transactions with thirty days remaining until settlement and (iii) **20%** for transactions with one year remaining until settlement. Furthermore, for purposes of the calculation above, the effective date shall be taken into consideration for FX Derivatives Transactions where the effective date is after the transaction date. If any excess exists, further such FX Derivatives Transactions may not be executed within the maturity ranges with limit breaches;
- (3) Banks' transactions with their consolidated non-resident credit and financial institution affiliates are exempt from the FX Derivatives Limitations;
- (4) The above ratios must be calculated daily, on a solo and consolidated basis; and
- (5) Any early settlement or extension of the original maturity date (for whatever reason) of any transaction falling within the scope of the BRSA Imposed FX Derivatives Limitations shall be subject to the prior written consent of the BRSA.

As of writing, the CMB Imposed FX Derivatives Limitations remain unchanged and accordingly, FX Derivatives Transactions between Capital Markets Institutions and non-resident counterparties are subject to the following restrictions:

- (6) Where at settlement a Capital Markets Institution receives Turkish Lira; the total notional amount of FX Derivatives Transactions may not exceed 10% of the Capital Markets Institution's capital calculated at the end of the preceding month pursuant to applicable capital adequacy calculation laws, and if any excess exists, further such FX Derivatives Transactions may not be executed and any such FX Derivatives transactions may not be renewed;
- (7) Where at settlement a Capital Markets Institution provides Turkish Lira; depending on the settlement date of the FX Derivatives Transactions, their total notional amount may not exceed (on any day) certain ratios based on the Capital Markets Institution's capital (as calculated in (6) above): (i) 2% for transactions with seven days remaining until settlement, (ii) 5% for transactions with thirty days remaining until settlement and (iii) 20% for transactions with one year remaining until settlement;
- (8) The above ratios must be calculated on a daily basis; and
- (9) Any early settlement or extension of the original maturity date (for whatever reason) of any transaction falling within the scope of the CMB Imposed FX Derivatives Limitations shall be subject to the prior written consent of the CMB.