Çakmak Avukatlık Bürosu

Client Alert

Draft Law on Improvement of the Investment Environment in Turkey

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The Draft Law on Improvement of the Investment Environment (the "**Draft Law**") was submitted to the Parliament on 23 June 2016. As an omnibus bill, the Draft Law includes amendments to various laws with an objective to create a more favorable investment climate. The main novelties relate to (i) the deferral of bankruptcy (*iflasın ertelenmesi*) and the composition of debts (*konkordato*), (ii) simplified company formation and expedited liquidation process, and (iii) amendments to tax legislation.

Amendments to the Enforcement and Bankruptcy Law

One of the most important novelties that the Draft Law envisages introducing is the prevention of easy recourse to the "deferral of bankruptcy" proceedings by the companies. Pursuant to the current provision of the Enforcement and Bankruptcy Law[1], if a company is under financial distress and its representative or one of the creditors (in case the company is in liquidation) submits a recovery project to the court, which establishes a specific approach for the company to overcome its adverse financial position, the company could benefit from the deferral of bankruptcy. The Draft Law envisages amending deferral of bankruptcy provisions in order to prevent the abuse of this process by the companies, taking into consideration the rights of the creditors. Some of the major amendments are as follows:

- In order to apply for deferral of bankruptcy, a company must submit, along with a recovery project, additional documents proving that the recovery project is feasible and credible and must provide lists that indicate the identities and the rights of their creditors, as well as providing practical solutions on how to meet their working capital throughout this phase. Failure to submit these documents will result in rejection of the deferral of bankruptcy request.

[1] Enforcement and Bankruptcy Law No. 2004, published in the Official Gazette No. 2128 dated 19 June 1932.

- A company which has already benefited from the deferral of bankruptcy cannot reapply for one year starting from the expiry of the deferral period.

- Following the deferral of bankruptcy request, creditors are granted the right to oppose to the request after it has been published in the Trade Registry Gazette. However, such rejection needs to be raised within a period of two weeks and only in cases where the creditors allege that the conditions of deferral of bankruptcy are not met.

- In order to protect the assets of the company, the court is entitled to stop all ongoing enforcement proceedings which were initiated prior to the deferral request by an interim relief and prevent new enforcement proceedings, including proceedings which were initiated for the collection of public receivables. This interim decision can first be objected and then challenged before the intermediate court of appeal *(istinaf mahkemesi)*.

- Deferral of bankruptcy may be extended only for another year, as opposed to the current provision, which stipulates that the period could be extended to a total of four years after taking the legal administrator's reports into consideration.

- Deferral of the bankruptcy decision given by the commercial court can be first contested before the intermediate court of appeal within 10 days following the notification of the decision, or following the announcement for third parties. The decisions of the intermediate court of appeal can also be challenged before the High Court of Appeals in line with the same principles and time limitations.

- The Draft Law further envisages reforming the "composition" proceedings with creditors by amending the relevant provision in the Enforcement and Bankruptcy Law. One of the main reasons why requesting a composition with creditors has been unpopular among debtors was the short period of protection granted by courts, *i.e.* three months plus a maximum of two months of extension. This leaves debtors vulnerable to enforcement proceedings in cases where the validation proceedings *(tasdik yargılaması)* exceed this deadline. The Draft Law attempts to solve this issue and grants courts with the authority to stop ongoing enforcement proceedings and block new proceedings, so that the debtor is protected during the composition validation process.

Amendments to the Turkish Commercial Code

- Under the Draft Law, it becomes possible to sign a signature declaration or articles of association before the trade registry rather than a notary public. The Draft Law further annuls the provision which introduced the document of "founders' declaration", a declaration given by the company's founders during the formation process. The amendments aim to reduce the company formation costs as it will no longer be necessary to visit a notary public for signature certification.

- The Draft Law moreover expedites the liquidation process of companies. Following the payment of its outstanding debt and the return of its share prices, a company in liquidation may distribute its remaining assets among the shareholders. The current form of Article 543(2) of the Turkish Commercial Code[2] stipulates that the remaining assets may only be distributed provided that one year has passed as of the third call to the

[2] Turkish Commercial Code No. 6102, published in the Official Gazette No. 27846 dated 14 February 2011.

creditors. The intended amendment foresees an alteration to such period of one year and shortens the prescribed waiting period to six months.

- The Draft Law further introduces a provisional article to the Turkish Commercial Code which provides for the *ex officio* deletion of the trade registry record of a company whose liquidation has been ordered by the Ministry of Customs and Trade prior to effective date of the provisional article, but whose liquidation procedure has not yet been completed. Accordingly, after the entry into force of the amendment, such companies will be identified by the trade registry and published in the commercial registry gazette in order to allow creditors to apply within two months as of the date of such publication to continue the liquidation procedure. The company's trade registry record will be *ex officio* removed within one month following the expiry of the application period for creditors.

- In relation to checks, the Draft Law introduces a barcode system, which provides check holders with various information regarding the check issuers and requires that banks will not provide to the check account owners check pages without a barcode after 31 December 2016. The Draft Law also makes certain amendments in the Check Law[3] regarding the obligation of the beneficiary to register the check and the bank's liability for payment.

Amendments to Tax Legislation

The Draft Law also includes various amendments to the tax legislation on a wide range of issues, including exemptions from stamp taxes and fees and tax amnesty regarding transfer of off-shore assets. Main novelties include:

- certain stamp tax exceptions and favorable applications to reduce the stamp tax costs on some transactions and investments;
- exemption from real estate tax for the lands assigned to the investors or acquired by the investors during the investment incentive certificate period;
- VAT exemption of interest payments over the bonds; and
- tax amnesty provisions for the overseas assets under certain conditions.

Please see in the **Annex** hereto a Client Alert prepared by Hakan Eraslan, tax counsel, for details of such amendments to the tax legislation.

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[3] Law of Checks No. 5941, published in the Official Gazette No. 27438 dated 20 December 2009.

Client Alert | Tax

Turkish Tax Bill Regarding Improvement of the Investment Environment

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The Council of Ministers passed a new omnibus bill for consideration by Parliament on June 23, 2016. The aim of the bill is to increase the efficiency and feasibility of the 10th State Development Plan. In order to achieve this aim, changes are made in tax laws and in other laws. The bill mainly targets improvement of the investment environment and reduction of transactional costs, application of unique R&D incentives, removal of different tax applications among financial institutions, promotion of Islamic finance instruments, incentivization of international investments, directing savings to more productive areas through tax legislation, increased predictability of taxation and reduction of compliance costs. The bill also covers tax amnesty provisions regarding off record overseas assets.

The omnibus bill makes changes in many tax laws and in many other areas. While several changes have been made to the tax legislation, only a selection of major changes is presented below.

Stamp Tax Exemptions and Favourable Applications

Stamp taxes are considered a major transactional cost for the investment environment and it is often argued that stamp taxes are a barrier to freedom of written contracts. The bill anticipates some stamp tax exceptions and favourable applications to reduce stamp tax costs on certain transactions and investments. The main changes are:

Currently stamp tax is applied on each original copy of documents executed separately. However the bill anticipates application of stamp tax on only one original copy and therefore removes the tax burden on multiple original copies.

Monetary amounts in the penalty clauses included in the agreements will not be subject to stamp tax unless executed as a stand-alone agreement.

A future increase in the agreement value of a contract, of which stamp tax had been paid at the ceiling amount, will not be subject to stamp tax.

Stamp tax exemptions on documents executed in relation to exportation, the transit trade inward processing regime and other foreign currency gain related transactions including in the national defense industry, BOT projects and PPP projects have been re-regulated favorably.

Documents relating to mid and advance level technology productions will be exempt from stamp tax.

Stamp tax exception has been introduced for the transfer of capital corporation shares including joint stock companies *(Anonim Şirket)* and limited liability companies *(Limited Şirket).*

The stamp tax exemption available for derivative agreements made between banks or to which a bank is a party or which are made through a bank will also be available for the financial intermediary institutions.

Exemptions regarding loan transfers by banks have been clarified.

Stamp tax exception has been introduced for leasing, transfer and management of underlying assets of leasing certificates.

Fees Exemptions and Favourable Applications

Some exceptions and similar favourable regulations have also been introduced with respect to statutory fees *(harçlar).* The major changes anticipated for fees are mentioned below:

Proportional fees will be applied on only one original copy of documents.

Renewal of notarized notes, agreements and other documents will be subject to notary fees on the increased amount.

Transfer of immovable assets to the leaseholder at the end of the leasing period, within the context of the Financial Leasing, Factoring and Financing Company Law, will be exempt from the land registry fee.

Transfer of capital corporation shares including joint stock companies *(Anonim Şirket)* and limited liability companies *(Limited Şirket)* will be exempt from fees.

Transactions within the context of investment incentive certificates will be exempt from fees.

Transactions relating to mid and advance level technology productions will be exempt from fees.

Fee exceptions are regulated for leasing, transfer and management of underlying assets of leasing certificates.

Fee exceptions regarding export, transit trade and other foreign currency gains transactions including in the national defense industry, BOT projects and transportation have been regulated favorably.

Fees will no longer be applied to arbitration cases.

Mortgage fees will be applied as 50% for mortgages between merchants.

Investors Will Be Exempted from Real Estate Tax

Land assigned to investors or acquired by investors will be exempt from real estate tax during the investment incentive certificate period and buildings constructed under an investment incentive certificate will be temporarily exempt from real estate tax for 5 years following the year end of the year in which the building is completed.

Buildings which will be under an investment incentive certificate will be exempt from building fees collected by municipalities.

Interest Payments on Bonds Issued by the Private Sector Exempted from VAT

VAT treatment of interest payments to institutions which are not banks or financial institutions has long been subject to debate. The bill introduces a VAT exemption for interest payments on bonds and clarifies the application of VAT.

Transfer Pricing

A 10% shareholding, voting right or dividend right threshold is defined in the transfer pricing regulation in order for a shareholder to be classified as a direct or indirect related party.

Deduction of VAT incurred on related party transactions which falls into transfer pricing adjustments is permitted in the bill.

Retroactive application of advance transfer pricing agreements with the tax authority has been enabled.

Regional Management Centres

Corporate tax exemption is provided for regional management centres of companies which do not have headquarters or centres of business in Turkey. The wage income of employees of regional management centres is also exempt from income taxation, provided that their wage payments are made in foreign currency.

Invitation Request for Explanation

An invitation request for explanation *(İzaha Davet)* procedures is introduced in the Tax Procedural Law to increase the voluntary adaptation of taxpayers to tax compliance. Accordingly, a tax authority may invite taxpayers to submit an explanation regarding issues for which the tax authority has some preliminary findings about tax loss cases. Tax payers will have the right to make an explanation and file a correction tax return within fifteen days following the explanation. The 100% tax loss penalty will be reduced to 20% provided that the taxes declared are paid within the same deadline.

Taxation of Capital Gains Obtained in the Stock Exchange

Currently, income and earnings obtained from capital markets transactions are subject to 0% withholding tax, which is final for individuals and non-residents. The bill anticipates granting an authority to the Council of Ministers for withholding tax rates up to 15%, depending on the holding period of assets.

Tax Amnesty Regarding Transfer of Overseas Off Record Assets

The omnibus bill has a tax amnesty provision in Temporary Article 2 for overseas assets provided that such assets are declared to banks and financial institutions or tax offices by the end of 2016 and are transferred to Turkey within one year following the declaration. Provided that the other conditions stated in the legislation are fulfilled, taxpayers will not be charged any taxes or penalties for such assets. Furthermore, taxpayers or their legal representatives will not be investigated within the context of currency legislation, customs legislation, anti-smuggling legislation and some provisions of the Capital Markets Law and Turkish Criminal Code.

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