

Critical New Exceptions and Clarifications to Fx Borrowing Restrictions – Decree 32

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With the amendments to Decree No. 32¹ effective as of 2 May 2018, a new generation of restrictions have been introduced on foreign currency borrowing by Turkish persons. Quickly becoming the top priority of financial market players in Turkey, these restrictions raised wide spectrum concerns and uncertainties.

A new Capital Movements Circular was issued by the Turkish Central Bank, effective of as 2 May 2018 addressing some of the issues and concerns raised. In this Client Alert, we will highlight some of the important new exceptions and clarifications introduced by the Circular.

New Exceptions to the Decree 32 Requirements relating to Fx Income

The principle requirement of the amended Decree 32 for Fx denominated borrowings by Turkish persons is to have an Fx income. Certain limitations and exceptions in respect of this requirement are regulated under the amendments to Decree 32.

Under the recently issued Circular the Prime Ministry exercised its discretion² to introduce additional exceptions to the Fx income requirements of Decree 32.

Some of the exceptions introduced by the Circular are as follows:

- Provisional Article 1 of the Circular seems to be introduced for the purpose of allowing holding companies, with a consolidated Fx outstanding cash loan balance in excess of USD 15 million, to continue their operations “as is” in obtaining additional financing **through any of their group entities**, until further regulation.

Prior to the introduction of this provisional article the exception granted to Turkish persons with an Fx outstanding cash loan balance in excess of USD 15 million was regulated and treated on a “solo

¹ Decree 32 Regarding the Protection of the Value of Turkish Currency (“**Decree 32**”) was amended by Council of Ministers’ Decree No. 2018/11185 published in the Official Gazette dated 25 January 2018.

² Pursuant to sub-paragraph (f) of Paragraph (3) of Article 17 of Decree No. 32 (as amended by Decree No. 2018/11185)

basis". Consequently, for the time being, holding group companies seem to be safe-harboured from the new restrictions of the amended Decree 32.

- Investments for renewable energy resources within the Renewable Energy Support Mechanism (YEKDEM) that benefit from a purchase guarantee are eligible for Fx financings. In this respect,
 - The renewable energy resource certificate (YEK Belgesi) or a licence issued within this context are required to be submitted to the intermediary bank.
 - The maximum amount of Fx loans may not exceed the product of the annual generation amount provided under such certificate/licence multiplied by the Renewable Energy Support Mechanism price (including any applicable local content premium) for eight years.
- Turkish entities that are awarded privatization tenders³ and the public tenders with a contract price denominated in Fx are eligible to utilize Fx denominated loans.
- Turkish SPVs incorporated with the sole purpose of acquiring shares of a target company in Turkey are eligible for obtaining acquisition financings denominated in Fx currency.
 - The maximum amount of such loans may not exceed the acquisition price as set out in the relevant share purchase agreement to be submitted to the intermediary bank.

Clarifications in respect of Fx Income, Export Transactions and Decree 32 Exceptions⁴

- It is clarified under the Circular that:
 - Fx income will include, commercial receivables (including those denominated in Turkish Liras) evidenced to be collected from persons resident outside of Turkey.
 - Fx income will not include any Fx denominated payments if received from Turkish persons in Turkey (other than those payments that qualify as "deemed exports and Fx generating activities" under the applicable legislation).
 - Fx income of export intermediary companies may be treated as Fx income of the manufacturing entities subject to certain requirements.

It is common practice in Turkey for manufacturers to use export companies (often a group entity) in exporting their products. With the amendments to Decree 32 it was not clear as to whether the manufacturers will be entitled to benefit from the Fx income collected through such export companies.

The Circular, clarifying this issue, provides that Fx income obtained by (i) entities performing export transactions through intermediary exporters, agencies or off-shore representatives or (ii) entities transacting with an export condition, will qualify as Fx income provided that the invoices supporting the related export transactions and the written consent and waiver of the intermediary exporters are submitted to the related financial institution.⁵

- The exception regulated under Decree 32 in respect of Fx loans obtained pursuant to investment incentive certificates shall be up to:
 - (i) the Fx loan amount stated in the investment incentive certificate; or
 - (ii) the Fx loan amount (converted at the selling rate of the Turkish Central Bank on the date of disbursement) where the financing in the investment incentive certificate is denominated in Turkish Liras.⁶
- The Fx loans to be obtained on the basis of the prospective Fx income exception regulated under Decree 32 will be subject to, among others, the following requirements:

³ Tenders within the scope of the Law on Privatization No. 4046 (*Özelleştirme Uygulamaları Hakkında Kanun*).

⁴ Existing exceptions are set out under Paragraph (3) of Article 17 and Paragraph (3) of Article 17 of Decree No. 32 (as amended by Decree No. 2018/11185).

⁵ Paragraph (4) of Article 15.

⁶ Paragraph (3) of Article 21.

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- (i) Fx loans obtained may not have a maturity in excess of 24 months.
 - (ii) once an Fx loan is obtained on the basis of the exception for prospective Fx income, the borrower may not be entitled to borrow, on the basis of the same exception, within the following three years.⁷
- o The prohibition on refinancing of Fx loans - outstanding balance of which is less than USD 15 million as of the date of entry into force of Decree 32 amendments – is not applicable to the restructurings made in accordance with the Regulation on Classification of Loans and Procedures and Principles on Provisioning in respect of such Loans⁸, since these restructurings only provide certain rights granted to distressed debtors and therefore, should not be considered as refinancings under Decree 32.

Conclusion

The Circular has shed some light to core issues that have been the focus of discussion following the amendment of Decree 32. There remain various issues to be addressed on the face of the extended regulations. We expect further secondary regulation to be introduced in the coming months.

We will be covering the Decree 32 amendments in an extended note that will be posted soon.

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⁷ Paragraphs (8) to (14) (included) of Article 21.

⁸ Published in the Official Gazette dated 22 June 2016 and numbered 29750.