PEKİN & PEKİN

Legal Newsletter Q3/2014

Read below the latest legal developments in Turkey. This latest roundup provides insight on the latest amended and repealed laws and regulations affecting different sectors.

To discuss how these developments affect your business interests please contact Fethi Pekin, Managing Partner. Email: fpekin@pekin-pekin.com

BANKING & FINANCE

Introduction of IRB and Advanced Measurement Approaches

In order to ensure that the national legislation is consistent with the Basel II guidelines, on September 6, 2014, the Banking Regulation and Supervision Agency (the "**BRSA**") has issued an amendment to the Regulation on the Capital Adequacy of Banks (the "**Regulation**") (published in the Official Gazette dated June 28, 2012 and numbered 28337) which has introduced and allowed the use of the Internal Ratings-Based (IRB) Approach and the Advanced Measurement Approach (AMA) in national legislation. The IRB Approach allows banks to use their own estimated risk parameters in the calculation of their capital adequacy as the banks are allowed to use their own internal rating systems for their counterparties and exposures to credit risk. Only the Banks which have received the consent of BRSA can use the IRB approach method. The Advanced Measurement Approach (AMA) of operational risk allows banks to develop their own models of quantifying required capital for operational risk. The use of AMA is also subject to the approval of the BRSA. Under AMA the banks are allowed to develop their own empirical model to quantify required capital for operational risk. Banks can use this approach only subject to approval from their local regulators. Once a bank has been approved to adopt AMA, it cannot revert to a simpler approach without supervisory approval.

The introduction of the IRB Approach in the Regulation has been followed by certain amendments to the legislation related to the capital adequacy. Accordingly, the Communiqué on the Calculation of the Essential Amount of the Credit Risk with IRB Approach has been published in the Official Gazette dated September 6, 2014 and numbered 29111. The Communiqué regulates the procedure of consent to use IRB Approach, which sets forth certain criteria for the banks which may be consented to be subject to the IRB Approach model. Briefly, these criteria include capital adequacy, risk management, documentation and corporate management standards and disclosure requirements. In addition, the BRSA has also issued a Communiqué on Risk Reduction Techniques which sets forth certain techniques for the calculation of the risk weight in

standard approach method and the risk weight and expected loss in IRB approach method. Furthermore, in order to harmonize the legislation with the recent IRB approach method, the Regulation Regarding the Equity Capital of Banks has been amended on September 6, 2014 to include provisions regarding the calculations of supplementary capital, core capital and consolidated equity capital with certain amounts calculated by the use of standard approach and IRB approach models. The BRSA also issued the Communiqué Regarding the Calculation of the Essential Amount of the Operational Risk on September 6, 2014 in order to set forth the criteria to be eligible for the approval of the BRSA for using AMA and the principles to utilize this model.

Securitization Risk Weight Calculation Revised

An amendment has been issued on August 19, 2014 to the Communiqué on the Calculation of the Risk Weight Regarding Securitization (published in the Official Gazette dated June 28, 2012 and numbered 28337) which have stipulated that the bank realizing the securitization may hold the securitized values exempt from the calculation of risk weight if (i) it is approved by the BRSA that a significant proportion of the credit risk has been transferred to third persons or (ii) the bank realizing the securitization applies a risk weight of 1250 % to all of the securitization positions related to the relevant securitization. The Communiqué also defines the conditions in which the bank is deemed to have transferred a significant amount of the credit risk to third persons. The Communiqué has also stipulated similar arrangements for synthetic securitizations; including the condition to apply a risk weight of 1250 % to the securitized items in order to hold them exempt from the calculation of risk weight.

The amount of the Required Reserves which may be held as USD has been amended

Pursuant to the amendment made on the Communiqué on Required Reserves (published in the Official Gazette dated December 25, 2013 and numbered 28862) on June 25, 2014, the coefficients used in the calculation of the amount of the required reserves which may be held as USD will be applied as follows starting from the date of August 1, 2014: (i) for 0-30% of the required reserve, 1,4; (ii) 30-35% of the required reserve, 1,5; (iii) 35-40% of the required reserve, 1,8; (iv) 40-45% of the required reserve, 2,6 (v) 45-50% of the required reserve, 2,9; (vi) 50-55% of the required reserve, 3,1 and (vii) 55-60% of the required reserve, 3,2. The amount which is allowed to be held as USD is calculated by multiplying the amount with the corresponding coefficient next to the percentage between which the amount is placed.

Principle of Proportionality and Handbooks Regarding Good Practice

The Regulation of the Procedures and Principles of Auditing by the Banking Regulation and Supervision Agency has been amended in July and two amendments have been made. (*published in the Official Gazette dated July 11, 2014 and numbered 29057*)

The first one is that an additional sub clause has been incorporated under Clause 4.1

(*Definitions*). The new sub clause defines "the principle of proportionality"; which was not defined before as, The principles shall be enforced considering the nature and complexity of its scope; risk profile; operation; scale of its deals and transactions and, written statements by the banks for inapplicable principles whether fully or partially shall be preserved.

The second amendment is that a new clause, Clause 7/A, has been incorporated after Clause 7. The new clause states that (1) a good practice handbook may be published by the Agency to show the expectant practices of good practice and the assessment criteria that will be used during the Auditing by the Agency, (2) the principles that are in the handbook will be used as criteria for evaluating the effectiveness and competence of the banks practices and will be the basis for the assessment made by the Agency and the decisions taken afterwards, (3) the principles in the good practice handbook shall be used in line with the principle of proportionality.

In connection with these amendments, the Banking Regulation and Supervision Agency has promulgated five handbooks on risk management on the Agency's website.

Regulation Regarding the Assessment Phase of the Internal Systems and Internal Capital Adequacy of Banks

Banking Regulatory and Supervisory Agency have issued a Regulation regarding the assessment phase of the internal systems and internal capital adequacy of banks. (*published in the Official Gazette dated July 11, 2014 and numbered 29057*)

The purpose and scope of the abovementioned regulation is regulating the procedures and principles of; internal control, internal auditing, risk management and internal capital adequacy assessment phase and their functioning.

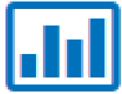
The regulation is divided into six sections. The first section incorporates preliminary provisions as well as the way internal systems shall be created and the liabilities of senior management. Section two, stipulates provisions regarding internal control systems, their purpose and scope, controls within there are and information about the internal control unit and its personnel. Section three regulates how the internal audit system works, provides its purpose, scope, organisation, professional care and internal auditing operations. Fifth section defines İSEDES and provides information on its usage, results and report. The regulation defines İSEDES as, a process of collection of processes that provide the ability to assess risks correctly and to establish strong risk management systems.

Final section regulates the matters of obligation to report and defines which applications should be executed in Turkish.

FCIB introduced Communiqué No. 13 regarding the Procedures and Principles on the Suspicious Activity Reports

FCIB has issued a new Communiqué No. 13 (the "**Communiqué No. 13**") (published in the Official Gazzette dated August 25, 2014 and numbered 29099) regulating the procedures and principles of suspicious activity reports (the "**SAR**"). Pursuant to Article 27 (2) of the Regulation on the Measures for the Prevention of Money Laundering and the Financing of Terrorism (published in the Official Gazzette dated January 9, 2008 and numbered 26751), any suspicious activity shall be reported to the Financial Crimes Investigation Board (the "**FCIB**") regardless of the value of the transaction. The Communiqué No. 13 has abolished the previous Communiqué No. 6 that covered the same issue. The Communiqué No. 13 has introduced significant amendments. As per Article 4 of the Communiqué No. 13, in the event a transaction raises serious suspicion, such transaction shall be suspended until the FCIB is notified. In cases where it is impossible to suspend the transaction or the suspension of the transaction will hamper the identification of the ultimate beneficiary, the transaction can be carried out and the FCIB can be notified afterwards. It has also been clarified that in the event the evaluation of multiple activities raises suspicion, a single SAR can be prepared. Article 5 of the Communiqué No. 13 stipulates that the digital notification of a suspicious activity will be considered to be delivered when the notification is received by the FCIB. Article 6 of the Communiqué No. 13 stipulates that certain guides are to be published by the FCIB which clarifies the procedures of preparing and delivering the SARs and guides the firms regarding various types of suspicious activities. FCIB has issued in three guides for (i) the banks and the Post Office Departments, (ii) intermediary firms functioning in the capital markets and (iii) other obligors its internet site. You can have access to the guides by clicking on the following link <<http://www.masak.gov.tr/tr/content/sektorel-sib-rehberleri/2359>>. Article 7 of the Communiqué No. 13 stipulates that one of the categories, which are set forth under the guides to be prepared by the FCIB, must be chosen with regards to the SARs. Pursuant to Article 8, the FCIB shall determine various types of suspicious activities and declare them in the abovementioned guides; however, it should be noted that the suspicious activities listed in the guides are not conclusive and it is under the obligors' responsibility to detect any other types of suspicious activities. The Communiqué No. 13 also clarifies the persons who are authorized and responsible from delivering the SARs to the FCIB. Accordingly, for the obligors which are not obliged to appoint a compliance officer, the real person himself (for real person obligors), the legal representative of the legal entities and the directors or the persons authorized by the directors (for the entities which do not have a legal personality) are authorized and responsible from delivering the SARs to the FCIB. It should be noted that only the relevant branch, agency or unit is obliged to make the notification. In addition, the Communiqué No. 13 lists the delivery methods of the SARs; which are (i) registered mail or (ii) fax. Faxed reports shall physically be delivered to the FCIB via registered mail or by hand. Article 9 of Communiqué lists, with reference to the "Regulation on Program of Compliance with Obligations of Anti-Money Laundering and Combating the Financing of Terrorism" (published in the Official Gazette dated September 16, 2008 and numbered 26999) the obligors as two groups which have the obligation to form a Compliance Unit (Article 4 of the Regulation) and those who just have to have an Compliance Officer (Article 29 of the Regulation). Also, intermediary institutions for derivatives are asked to designate a Compliance Officer. Finally, the Regulation requires the institutions to provide all necessary information and documents that the Compliance Officer requires. Article 13 of the Communiqué explains the use of MASAK.ONLİNE for electronic notification of

suspicious activity.



CAPITAL MARKETS

Establishment of the Modern Mortgage System

With the Communique No. III-60.1 on the Principles regarding Mortgage Finance Institutions (*published in the Official Gazette dated July 17, 2014, No. 29063*) ("**Communiqué**"), mortgage finance institutions have been regulated for the first time in Turkey, in order for the establishment of modern mortgage system. According to the Communiqué, in parallel with the global practice, the mortgage finance institutions are expected to engage in the activities in two main fields of operation: liquidity facility and securitization.

Certain provisions set forth by the Communiqué are stated below:

- Mortgage finance institutions are mainly designated as secondary market institutions which will issue capital market instruments in exchange of loans and debts owed which is taken over or taken as collateral.
- Mortgage finance institutions may be established by the institutions such as the housing finance institutions, brokerage firms with broad authorities, asset lease companies and Housing Development Administration of Turkey (TOKİ).
- Minimum initial capital of the mortgage finance institutions shall not be less than 10,000,000 Turkish Liras.

Duties and Authorities of the Central Registry Agency

Capital Markets Board (the "**CMB**") has issued the Regulation on the Principles regarding the Foundation, Activity, Operation and Supervision of the Central Registry Agency (*published in the Official Gazette dated August 7, 2014, No. 29081*) ("Regulation") within scope of the duties and authorities of the Central Registry Agency (MKK) determined by the new Capital Markets Law. The Regulation mainly covers the foundation, membership, and supervision principles as well as the income and principles of premium distribution of MKK.

Dematerialized Capital Market Instruments

As the new Capital Markets Law grants the CMB the authority to regulate procedures and principles of dematerialized capital market instruments, the CMB has issued the Communiqué No. II-13.1 on the Principles and Procedures regarding Keeping Records in relation to Dematerialized Capital Market Instruments (*published in the Official Gazette dated August 7, 2014, No. 29081*) ("**Communiqué**"). The Communiqué sets out the accounts to be kept with the Central Registry Agency (MKK), dematerialization, delivery

and destruction of the capital market instruments, transactions to be carried out on the capital market instruments other than government debt securities and principles regarding the transactions on government debt securities.

CMB Redetermines the Licensing Requirements

CMB has published the Communiqué No. VII-128.7 on the Principles regarding Licensing and Keeping Records of the Registry for the Persons Operating in the Capital Markets (*published in the Official Gazette dated August 14, 2014, No. 29088*) ("**Communiqué**"). The Communiqué mainly updates the license types and clarifies the conditions of obtaining licenses for the employees of capital market institutions and publicly-held companies.

Update on the Guide regarding Investment Services and Activities and Investment Institutions

Capital Markets Board (the "**CMB**") has updated the Guide regarding Investment Services and Activities and Investment Institutions (the "**Guide**") with the decision dated September 23, 2014, which has been prepared for the implementation of the Communiqué No. III-37.1 on Principles regarding Investment Services and Activities and Ancillary Services and Communiqué No. III-39.1 on Principles of Establishment and Activities of Investment Institutions. Some of the material issues added into the Guide are listed below:

- Principles in relation to operation of portfolio intermediation and risk management units have been determined.
- Obligation to employ internal control personnel has been imposed for the companies which will engage in portfolio intermediation activities on derivative instruments.
- Principles to be sought in data processing infrastructure of the investment institutions which will engage in portfolio intermediation activities and/or render general custody service have been determined.
- Principles regarding monitoring of risks on client basis, in relation to the transactions during transaction intermediation and portfolio intermediation have been determined.
- In scope of activities regarding intermediation of purchase and sale, it has been accepted that, meeting activity conditions only for the related activity which is foreseen to be carried out (intermediation of conveyance of orders, transaction intermediation or portfolio intermediation) is sufficient.

DISPUTE RESOLUTION

Various Amendments to the Labour Code

The Law Amending the Labour Code and Certain Laws and Decree Laws and Restructuring Certain Receivables was published in the Official Gazette dated September 11, 2014 and numbered 29116 bis (*Law No. 6552*) (the "**Law No. 6552**"). The Law No. 6552 has introduced several amendments to the Labour Code (*Law No. 4857*) (*published in the Official Gazette dated June 10, 2003 and numbered 25134*) (the "**Labour Code**") concerning underground employees and sub-contracting practices.

Article 2 of the Law No. 6552 has amended the first paragraph of Article 18 of the Labour Code entitled "Justification of Termination By a Valid Reason" which provides that the employer who terminates the contract of an employee who is employed for an indefinite period in a workplace with minimum thirty workers and who has a minimum seniority of six months shall depend on a valid reason related to the capacity or conduct of the employee or to the operational requirements of the workplace or the work. According to the new sentence inserted to the said paragraph by Article 2 of the Law No. 6552, the minimum seniority of six months condition shall not be required for the underground employees. Consequently, the employers shall justify the termination of the employment agreement of any employee who is engaged in underground works for an indefinite period in a workplace with thirty or more employees without the minimum seniority of six months being required for such employees.

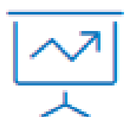
Article 4 of the Law No. 6552 has introduced two new paragraphs to Article 41 of the Labour Code entitled "*Overtime Wage*" to come after the eighth paragraph. Pursuant to the said amendments, the employers cannot perform overtime work for the mineworkers except under the conditions defined in Article 42 and Article 43 of the Labour Code. In addition to this, the overtime wages to be paid to the mineworkers for each hour of overtime exceeding thirty six hours per week shall not be inferior to the twofold of the normal hourly rate, which is calculated as one and a half times the normal hourly rate for other employees.

Article 5 of the Law No. 6552 has inserted a new sentence to the fourth paragraph of Article 53 of the Labour Code entitled "*Right to Annual Paid Leave and Leave Periods*" which provides that the lengths of the annual paid leaves to be granted to the employees engaged in underground works shall be calculated by increasing the normal annual paid leave lengths by four days.

Pursuant to Article 7 of the Law No. 6552 inserting a new sentence to the first paragraph of Article 63 of the Labour Code entitled "*Working Time*", the working time of the mineworkers shall not exceed thirty six hours per week and six hours per day.

Article 3 of the Law No. 6552 amends the fifth paragraph of Article 36 of the Labour Code entitled "*The Obligation of Public Agencies and Employers to Deduct the Wages from Entitlements*". As per the said amendment, the employer who engages a sub-contractor is obliged to ensure, upon request of the employees or ex officio in every month, that the salaries of the employees of the sub-contractor have been paid and to perform the payment of any unpaid salary to the relevant employees' bank accounts by deducting such amount from the entitlement of the sub-contractor.

Another amendment concerning the sub-contracting has been introduced by Article 6 of the Law No. 6552 which inserts a new paragraph to Article 56 of the Labour Code entitled "*Implementing of the Annual Paid Leave*". As per the new paragraph, the length of annual paid leave of the employees of the sub-contractor who work in the same workplace although their sub-contractor has changed shall be calculated by considering the sum of their employment periods performed in the same workplace. Additionally, the employer is obliged to ensure that the employees of the sub-contractor have been granted their annual paid leaves and to grant them within the relevant year while the sub-contractor is obliged to give to the employer a copy of the leave record which he is obliged to keep as per the sixth paragraph of the same Article.



CORPORATE

Environment

Completion of the File Allowed at Applications for Environmental Permit and Licenses

A new Environmental Permit and License Regulation (*published in the Official Gazette dated September 10, 2014 and numbered 29115*) has been published by the Ministry of Environment and Urban Planning in order to be effective as of November 1, 2014 and repealed the former regulation. Pursuant to the Article 8/2 of the new Regulation, applications made for temporary operating certificate shall not be rejected directly anymore by the Ministry in case of a missing report/document in the application documentation. With the new Regulation, the applicant shall have the right to complete such missing report/document in 60 days upon the notification of the Ministry. Furthermore, new areas such as military zones, nuclear plants, waste recycling facilities, etc. have been included within the scope of the new Regulation.

Corporate

Revocation Not Allowed in Certain Privatization Cases

A provisional clause (Provisional Article 26) has been inserted in the Privatization Law (*published in the Official Gazette dated November 27, 1994 and numbered 22124*) by the Omnibus Law on the Amendment of the Labour Code as well as Certain Laws and Decrees Law and Configuration of Certain Receivables (published in the Official Gazette dated September 11, 20114 and numbered 29116) (the "Omnibus Law"). Accordingly, no procedure can be started regarding the revocation of establishments which its privatization and transfer has been completed 5 years before the publication date of this Provisional Article other than situations stated under their privatization agreements.

Internal Directive Necessary for Commercial Agents and Representatives

The same Omnibus Law has made some amendments in the Turkish Commercial Code (*published in the Official Gazette dated February 14, 2011 and numbered 27846*) (the "**TCC**").

A new clause has been included in the Article 371 and Article 629 of the TCC. Accordingly, the Board of Directors in Joint Stock Companies and Managers in Limited Liability Companies shall have the right to appoint non-representing Board members (or directors in limited liability companies) or employees of the company as the commercial representatives or other commercial agents. Duties and authorities of such people shall be determined by an internal directive which shall be registered before the relevant trade registry and announced in the trade registry gazette. The Board of Directors/Managers is jointly and severally liable for the damages caused by these people to any third party or the company.

Lastly, pursuant to the Provisional Article 123 of the Omnibus Law, dissolution procedures shall not be applied to companies if they have increased their share capitals to minimum amounts stipulated under the TCC three months within the publication date of this Omnibus Law. Furthermore, the same period has been granted to companies which its records have been deleted from the trade registry due to the failure of increasing their share capital to minimum amounts stipulated under the TCC.

Consumer Goods & Retail

No Attorney Fee for the Consumer Arbitration Committee

Pursuant to the Amendment to the Article 70 of the Consumer Protection Law (*published in the Official Gazette dated November 28, 2013 and numbered 28835*) by the Omnibus Bill, no payment of attorney fee shall be determined by the arbitration committee for consumer problems.

Others – All Sectors

- Amendment on the Regulation Regarding the Procedures and Principles to be followed in Audits, Preliminary Investigations and Investigations in the Petroleum Market has been published in the Official Gazette dated August 30, 2014 and numbered 29104 by Energy Market Regulatory Authority.
- Amendment on the Regulation Regarding the Procedures and Principles to be followed in Audits, Preliminary Investigations and Investigations in the Liquid Petroleum Gases Market has been published in the Official Gazette dated August 30, 2014 and numbered 29104 by Energy Market Regulatory Authority.
- Amendment on the Regulation Regarding the Procedures and Principles to be followed in Audits, Preliminary Investigations and Investigations in the Electricity Market has been published in the Official Gazette dated August 30, 2014 and numbered 29104 by Energy Market Regulatory Authority.
- Amendment on Regulation Regarding the Procedures and Principles to be followed in Audits, Preliminary Investigations and Investigations in the Natural Gas Market

has been published in the Official Gazette dated August 30, 2014 and numbered 29104 by Energy Market Regulatory Authority.

- A new Regulation on Medical Device Clinical Investigation has been published by the Official Gazette dated September 6, 2014 and numbered 29111 by Turkish Pharmaceutical and Medical Device Institution.

EMPLOYMENT

Notification of Foreigners after the Receipt of Work Permit

The Regulation on Social Insurance Transactions (*published in the Official Gazette dated May 12, 2010 and numbered 27579*) was amended on May 3, 2014. The amendment regulates notification requirements for foreign employees. According to the amendments at Article 11, the information in regard to the foreigners shall be delivered to the Social Security Institution by employers within 45 days following the start date or the receipt of the work permit, as the case may be. In other words such notifications shall be deemed as if it is made within the required period.

Three year Period for the Inclusion of Registration Number in Periodical Control Reports

The Regulation on Health and Security Conditions in Utilization of Work Equipments (*published in the Official Gazette dated April 25, 2013 and numbered 28628*) was amended on May 2, 2014. The amendment notes that registration numbers in periodical control reports shall not be required for three years as of the date of issue of said regulation. Accordingly, the period of one year has been extended to three years for these requirements.

Statutory Minimum Wage

The Regulation on Minimum Wage (*published in the Official Gazette dated August 1, 2004 and numbered 25540*) was amended on April 19, 2014. The subject of the amendment is with respect to redefining business line, and adding new conditions to the principle of equality on salary. As per the Regulation, the Statutory Minimum Wage shall be determined at least once every two years. Moreover, no discrimination is allowed during the determination of the Statutory Minimum Wage according to the Regulation.

Other Regulations

- The Communiqué on Danger Classes regarding Occupational Health and Safety (published in the Official Gazette dated December 26, 2012 and numbered 28509) was amended on April 18, 2014.

This legal newsletter has been prepared for informational purposes only; it has not been prepared for advertising purposes or with the intention of creating an attorney-client relationship. It does not seek to provide information on all legal developments in Turkey with the quarter specified. None of the information contained in this legal newsletter shall constitute legal advice or anything akin thereto. To unsubscribe email the Editor: newsletter@pekin.pekin.com

PEKIN & PEKIN 10 Lamartine Caddesi Taksim 34437 Istanbul Turkey | Tel: +90 212 313 3500 | www.pekin-pekin.com