Banking & Finance

Amendment to the Regulation on the Operations of Banks subject to Permissions

The Regulation on the Operations of Banks subject to Permissions and Indirect Shareholdings was amended on 4 February 2011. As per the amendment, the establishment of domestic partnerships and the participation in established partnerships by banks are subject to the permission of the Banking Regulation and Supervision Board (the "BRSB"). Banks are further obliged to comply with corporate governance principles and preventive provisions stipulated in the Banking Law (published in the Official Gazette dated November 1, 2005 and numbered 25983(bis)) (Law No. 5411) (the "Banking Law"). Applications for permissions are to be made to the Banking Regulation and Supervision Agency (the "BRSA") together with a report explaining in detail the reasons for the establishment of the partnership or participating in an established partnership. It is worth noting that the foregoing requirements will not apply to participating in trading stock investments, share acquisitions made for the purpose of the collection of receivables and participating in capital increases of partnerships.

Law No. 6111

The Law No. 6111 on the Restructuring and Rescheduling of certain Outstanding Public Debts and on Amendments and Revisions to the Law on Social Security and Public Health Insurance and to some other Laws and Governmental Decrees in Force of Law (the "Law No. 6111" or the "Omnibus Law") (published in the Official Gazette on 25 February 25, 2011 and numbered 27857(bis)) contains clauses affecting the law of economy as part of the amendments and revisions in various laws.

Further to another amendment by the Law No. 6111 the legal barrier prohibiting general managers or deputy general managers of banks from working in any other commercial enterprise has been removed.

It is also understood that through the additions made to Article 35 by the Omnibus Law the BRSA is authorized (i) to determine and fix the subjects on which banks are allowed to procure support services, and (ii) to limit the subjects of support services, or to prohibit all or any such support services, or to require liability insurance coverage in connection therewith, or to make it obligatory to receive and obtain prior permission in connection thereof.

The amended wording of Article 36 imposes liability insurance as a legal obligation on independent audit firms only, and states that the other three types of firms are held liable to take out and maintain liability insurance (i) only if and when demanded so by the banks to whom they serve, or (ii) if and when deemed "necessary" by the BRSA.

Article 73 has been amended in order to remove doubt in the practice of law as to whether confidential information may be given or disclosed to persons or entities authorized by other laws and regulations. Furthermore, the law provision holding banking circles liable and obliged to keep information regarded as banking secrets in strict confidence and not to give or disclose the same to any persons or entities other than the authorities clearly authorized by the applicable laws has also been amended.

Finally, as per the amendments to Article 73/4 of the Banking Law, it is deemed that the obligation of confidentiality does not arise provided that the disclosure of confidential information as to the secrets of banks or their clients both in the course of the exchange of all kinds of information and documents under certain conditions, the underlying rationale for the amendments to the confidentiality obligations of banks and the BRSA is to harmonise Turkish law in light of EC Directives and EU legislation for the sake of the top level protection of secrets and confidential information.

As per an additional article to the Banking Law, a Risk Centre shall be established and founded within the organization of the Banks Association of Turkey in order to "gather and collect risk information and data" relating to clients of crediting institutions and other financial institutions and to ensure the "sharing of such information" both with these entities and institutions and other natural persons or legal entities and with private law

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legal entities subject to their prior consent. Additionally, operation principles and procedures with respect to the Risk Centre will be determined within one year of the publication of the Omnibus Law and regulated by the Banks Association of Turkey and published in the Official Gazette. The Risk Centre will be subject to the audit and supervision of the BRSA.

Amendment to Statutory Reserve Ratios

The Communiqué No. 2005/1 regarding Statutory Reserves (the "Communiqué") was amended on 23 March 2011 and 21 April 2011 to be effective as of 1 April 2011 and 13 May 2011, respectively. The amendments to Article 5 of the Communiqué increased Turkish lira and foreign exchange statutory reserve ratios dependent on the type of account held with the Central Bank of the Republic of Turkey (the "Central Bank").

Capital Markets

Amendments to the Capital Market Law

The Omnibus Law (or the "Law No. 6111") introduces several amendments to the Capital Market Law (Law No. 2499) (the "Capital Market Law"). The amendments involve primarily dematerialised securities, revenue sources for the Capital Market Board (the "CMB"), authority of the CMB and relocation of the CMB headquarters.

According to Article 157 of the Omnibus Law amending the Temporary Article 6 of the Capital Market Law, financial rights arising from undelivered physical capital market instruments representing dematerialised instruments will no longer be followed by the Central Registry Agency and physical instruments that were delivered will automatically become void and will be destroyed.

According to Article 155 of the Omnibus Law, intermediation in trades involving the leveraged sale of foreign exchange, commodities, precious metals or other assets that may be determined by the CMB will now be listed among capital market activities in the Capital Market Law. The said provision will enter into force by the end of August 2011.

According to another amendment brought by the Omnibus Law, the CMB headquarters will be located in Istanbul instead of Ankara; furthermore the CMB will be able to open representative offices in foreign countries, subject to the approval of the Council of Ministers. The relocation to Istanbul must be completed within two years.

New Practice on Disclosures of Unlisted Companies

A new method has been introduced for the public disclosure of publicly held companies which are not listed on the Istanbul Stock Exchange. Accordingly all material event disclosures made by unlisted publicly held companies will be published on the CMB website instead of in the CMB weekly bulletins. Previous notifications made by unlisted companies, which were published in the CMB weekly bulletins have also been uploaded to the website.

Amendment to the Debt Instruments Communiqué

The Communiqué on Principles Regarding Registration and Sale of Debt Instruments (Serial: II No: 22) was amended on 8 March 2011. Further to the amendment, the procedure with respect to identifying the maturity date of the debt instruments has been changed. The date on which the debt instrument is transferred to the investor's account has been set as the start of the maturity period. According to the new provision it is mandatory for the issuers to take the necessary precautions in order to prevent any harm coming to investors who requested to make cash requests to buy the debt instrument, between the date when they made an offer to buy the instrument and the maturity date, and to disclose such in the prospectus.

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Amendments to Exemption Conditions for Issuers

In accordance with the CMB policy to encourage fundraising from capital markets, provisions of the Communiqué of Principles on Conditions of Exemption and Delisting of Issuers (Serial: IV No. 39) regarding exemption conditions was amended on 16 March 2011. The amendment seeks to decrease the costs of issuers and make capital markets a viable alternative for fundraising especially for small and medium enterprises ("SMEs"). The amendment includes an exemption from the obligation to distribute first dividends for companies that will be traded on the ISE Emerging Companies Market for a maximum of three accounting periods after their registration by the CMB. Furthermore, SMEs that issue securities will not be required to publish a prospectus for issuances under a certain limit. As an another amendment, issuers exempt from the requirement to publish a prospectus due to bond issuances to qualified investors have also been exempted from the obligation to submit annual and interim financial statements to the CMB and the exchange, as well as from the statutory audit obligation for mentioned financial reports.

Tax

Provisions of the Omnibus Law

In general, the Omnibus Law (Law No. 6111) regulates the restriction of unpaid taxes until 31 December 2010, restructures public receivables and introduces amendments primarily regarding tax and social premium receivables. Accordingly, the Omnibus Law regulates taxes and tax penalties, interest on default and default fines concerning such tax liabilities related to the period prior to -and including- 31 December 2010 and to declarations that should have been submitted (for declaration based taxes) before –and including- 31 December 2010, tax liabilities for the year 2010 and accrued prior to –and including- 31 December 2010 and penalties, default interest and default fines related to such tax liabilities, tax penalties related to the main tax liabilities and other certain public receivables regarding the determinations made prior to the date of 31 December 2010.

The Omnibus Law also envisages that those who have previously made respective declarations, but have not brought their assets to Turkey timely will by no means be subjected to any tax examination or tax assessment with regard to the terms prior to the date of 1 January 2008, on the condition that such persons either bring their assets in cash, foreign currency, gold, security and other capital market instruments into Turkey, or transfer the said to a respectively opened bank account in Turkey no later than two months after the effective date of this Omnibus Law. Taxpayers who wish to benefit from the provisions of the said Law should submit an application to the relevant tax administration by the actual ending of the second month following the date of its promulgation. (Since the second month following promulgation is April, taxpayers would normally have until the last day of April for such applications. However, since the last day of April and the first day of May are not business days, the due date for the submission of such application is 2 May 2011.) A taxpayer who applies for the Omnibus Law but fails to pay the related instalments (i.e. reduced amounts of tax or a tax penalty under Law No. 6111) loses his right for any reductions or write-offs under the amnesty brought by the Amnesty Law and will have to pay all taxes, tax penalties and interest as before and, in some cases, with additional penalties.

Dispute Resolution

Equalization Claim (Portfolio Compensation) by the New Turkish Commercial Code

The understanding of a Portfolio Compensation under the laws of Turkey is "the expression of gratitude for the efforts of the agent to establish a market for the principal", as indicated in legal doctrine and Court of Appeals' judgments.

More precisely, if through its activity, an agent has substantially increased the principal's clientele and if, even after termination of the agency relationship, the principal benefits substantially from the business relations with this acquired clientele, the agent has a right to request an adequate compensation called "portfolio compensation".

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Despite the clear provisions stated in the German and Swiss Commercial Codes, there is no objective criteria stated in the Turkish Commercial Code in force (Law No. 6762) (published in the Official Gazette on July 9, 1956 and numbered 9353) (as amended from time to time) (the "TCC"), with respect to the facts to be considered in the calculation, such as the period for which the agent or distributor provided a service to the principal or the maximum limit of portfolio compensation. Although some calculation methods have been set forth within some Court of Appeals' judgments, such methods were not codified.

On the other hand, the New Turkish Commercial Code (Law No. 6102) (published in the Official Gazette on February 14, 2011 and numbered 27846) (which shall enter into effect on July 01, 2012) (the "NTCC") regulates the right to request "portfolio compensation", under the provision titled "equalization claim".

In this respect, pursuant to Article 122 of the NTCC, following the termination of the contractual relationship (i) in the event the principal benefits substantially from the new clientele acquired by the agent, even following the termination of the contractual relationship, (ii) in the event the agent, as a result of the termination of the contractual relationship, loses its right to request payment that it shall be entitled to if the contractual relationship had continued due to the clientele provided to the enterprise by it or through the transactions which would have been done in a short period of time and (iii) if such payment is deemed just, by taking into consideration the specificity and conditions of the existing situation; then, the agent is entitled to request adequate payment from the principal.

Concerning the amount of such compensation, Article 122 stipulates that the compensation amount cannot exceed the average of the annual commission or other payments that the agent obtained as a result of its transactions in the last five years. However, if the contractual relationship has continued for a shorter period of time, then the average during the course of the transaction shall be taken into consideration for the calculation.

On the other hand, the said Article also brings a limitation as to the equalization claim by underlying that, if the agent has terminated the agreement without just cause or if the agreement has been terminated by the principal with just cause due to the fault of the agent, the agent cannot claim equalization.

In addition, it is expressly stipulated within the mentioned Article that the claim of equalization cannot be subject to a waiver in advance.

The time limit set forth for the equalization claim is one year following the termination of the contractual relationship. In other words, pursuant to Article 122, any claim for equalization must be filed within one year following the termination of the contractual relationship.

Last but not least, Article 122 also regulates the legal application framework of the notion. In that regard, the mentioned Article states that this provision shall be applied to the termination of the exclusive distributorship agreements and other similar continued contractual relationships providing monopoly rights, unless deemed unjust.

In light of the explanations above, it is clearly seen that the NTCC, through codification of the "portfolio compensation" and by bringing a uniform understanding of the notion, fills the gap which existed during the period of the former TCC.

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