

THE SCOPE OF THE BAN ON FOREIGN CURRENCY CONTRACTS IS CLEAR NOW

Following the recent Decree of the Presidency of the Republic of Turkey dated 13 September 2018, (Decree No: 85) that bans to use foreign currencies in contracts between Turkish residents, the Ministry of Treasury and Finance issued the Communiqué numbered 2018-32/51 on October 6, 2018, (the “Communiqué”) that clarifies implementation of the Decree and clarification of certain exemptions.

Background

The Presidency of the Republic of Turkey issued a new Presidential Decree (Decree No:85) in the Official Gazette dated 13 September 2018 and numbered 30534, which bans to use foreign currencies in contracts between Turkish residents.

Pursuant to the Decree No:85, Turkish residents acting as party to following type of contracts with other Turkish residents are prohibited to use foreign currency (including Turkish Lira indexed to foreign currency) in determining the contractual value and payment liabilities:

- a) Contracts for sale and purchase of movables;
- b) Contracts for sale and purchase of immovables (i.e. real estates);
- c) Contracts for rental of movables and immovables (including rental of vehicles and financial leasing contracts);
- d) Leasing contracts;
- e) Employment contracts,
- f) Service contracts,
- g) Contracts of work.

Decree No. 85 states that the Ministry of Treasury and Finance is authorized to determine the exemptions for applicability of the referred prohibition.

Pursuant to the authorization as referred to in the Decree No:85, the Communiqué was issued by the Ministry of Treasury and Finance to determine the exemptions for applicability of the prohibition and to clarify the implementation of the Decree.

Scope of the Ban on Foreign Currency Contracts

1. *What is the subject of ban?*

Pursuant to the Decree No:85 and the recent Communiqué, certain types of contracts, as defined under the Communiqué, to be executed between Turkish residents shall not be executed in or indexed to “foreign currencies”.

In order for the ban to be applicable, all parties to the contracts shall be Turkish residents.

2. *Who are “Turkish Residents”?*

Either real persons with legal residency in Turkey or Turkish companies or corporations established in Turkey under applicable laws and regulations shall be treated as Turkish residents. Real persons with legal residency in Turkey who are employed, self-employed or owners of independent business abroad shall also be considered as Turkish residents.

Furthermore, pursuant to the Communiqué, branches, representative offices, offices and liaison offices incorporated by Turkish residents in foreign jurisdictions; investment funds held or managed by Turkish residents in foreign markets and corporations with shareholding of Turkish residents by 50% or more and corporations directly or indirectly held by Turkish residents in foreign jurisdictions shall also be treated as Turkish residents for the purpose of the Decree.

3. *Scope of “Foreign Currency (f/x) Contracts”*

All contracts consisting of payment liabilities, either as primary obligation or secondary obligation, defined either in a foreign currency or although defined in Turkish Lira, indexed to a foreign currency shall be treated as “foreign currency contracts” under the Decree No:85 and the Communiqué.

Furthermore, contracts with liabilities indexed to precious metals and/or commodities traded in international markets in foreign currencies shall also be treated as foreign currency contracts.

4. *Which contracts are subject to the ban?*

Pursuant to the Communiqué, following contracts cannot be executed in or indexed to any foreign currencies:

- (a) Contracts for Sale of Real Estates (i.e. residence or offices) located in Turkey (including Turkish Free Trade Zones) executed between Turkish residents.

- (b) Contracts for Rental of Real Estates (i.e. residence or offices) located in Turkey (including Turkish Free Trade Zones) executed between Turkish residents.
- (c) Contracts for Sale of Vehicles (including construction machinery) executed between Turkish residents;
- (d) Contracts for Rental of Vehicles (including construction machinery) executed between Turkish resident;
- (e) Employment Contracts executed between Turkish residents;
- (f) Service Contracts, including consultancy, intermediation and transportation services, executed between Turkish residents;
- (g) Contracts of Work (i.e. production) executed between Turkish residents;
- (h) Leasing contracts executed between Turkish residents.

It should be noted that any negotiable instruments to be executed under the referred contracts shall also be subject to the ban.

5. What are the exemptions?

Pursuant to the Communiqué, following exemptions shall be applicable in determination of the contracts being subject to the ban:

- (a) Employment contracts between Turkish residents shall be exempt from foreign currency ban if they meet any of the following conditions:
 - The subject work under the employment contract is to be performed abroad.
 - Any of the parties to the employment contract is a non-Turkish citizen (even though he/she is a Turkish resident).
 - Any of the parties to the employment contract is a branch, representative office, office and liaison office incorporated in Turkey by non-residents of the Republic of Turkey.
 - Any of the parties to the employment contract is a Turkish company of which shares are directly or indirectly held by non-resident shareholders at 50% or more.
 - Any of the parties to the employment contract is a company located at Turkish free trade zones.
- (b) Service contracts between Turkish residents shall be exempt from foreign currency ban if they meet any of the following conditions:
 - The service contract is relevant with activities to be performed abroad.
 - Any of the parties to the service contract is a non-Turkish citizen.

- Any of the parties to the service contract is a branch, representative office, office and liaison office incorporated in Turkey by non-residents of the Republic of Turkey.
 - Any of the parties to the service contract is a Turkish company of which the shares are directly or indirectly held by non-resident shareholders at 50% or more.
 - Any of the parties to the service contract is a company located at Turkish free trade zones.
 - The service contract is relevant with export, transit trade, sale and deliveries in the form of export, and services and activities resulting foreign currency earnings.
 - The service contract is relevant with electronic communication services where the services commence in Turkey and end abroad or commence abroad and end in Turkey.
 - The service contract is relevant with licenses or services for hardware and software which are produced abroad under information technologies.
- (c) Contracts of work between Turkish residents relevant with construction, repair and maintenance of ships as defined under Law no. 4490 and 491 shall be exempt from foreign currency ban.
- (d) Leasing contracts relevant with ships as defined under Law no. 4490 and 491 shall be exempt from foreign currency ban.
- (e) Leasing contracts executed under Articles 17 and 17/A of Decree No:32 shall be exempt from foreign currency ban.
- (f) All contracts between Turkish residents for sale of movables, excluding sale of vehicles and construction equipment, shall be exempt from foreign currency ban.
- (g) All contracts between Turkish residents for rental of movables, excluding rental of vehicles and construction equipment, shall be exempt from foreign currency ban.
- (h) All contracts between Turkish residents relevant with sale of software which are produced abroad under information technologies shall be exempt from foreign currency ban.
- (i) All contracts where public entities and institutions act as a party thereof, excluding sale and rental of real estates, shall be exempt from foreign currency ban.
- (j) All contracts to be executed by contractors relevant with payment obligations to third parties under f/x based or f/x indexed tenders, agreements and international treaties where public entities and institutions act as a party thereof, excluding employment contracts and contracts for sale and rental of real estates, shall be exempt from foreign currency ban.

- (k) All contracts executed by banks relevant with transactions under Law on Public Finance and Management of Debts (Law No:4749) shall be exempt from foreign currency ban.
- (l) All foreign capital market instruments (including foreign securities, depository receipts and shares of foreign investment funds) under Capital Markets Law (Law No:6362) may be structured, issued, traded and the liabilities thereunder may be valued in any foreign currencies.
- (m) All contracts executed by commercial airline companies, companies performing support, maintenance and ground services to the same, and companies incorporated by the same or companies they hold at least 50% or more shareholding, excluding employment contracts and sale or rental of real estates, shall be exempt from foreign currency ban.

6. Status of Existing Contracts

Pursuant to the Communique, foreign currency liabilities in existing and continuing contracts within the scope of the ban shall be converted into Turkish Lira as required by the Decree (by October 13, 2018, at latest).

In conversion of the f/x values of respective contracts into Turkish Lira, the parties to the contracts may mutually agree on applicable exchange rate for such conversion. However, in case the parties cannot agree on the applicable rate, the banknote selling rate of Turkish Central Bank as of 2nd January 2018, shall be used to determine the values as of 2nd Jan 2018 and such values shall be increased by CPI (Consumer Price Index) to be announced by Statistics Institution of Turkey until the date of conversion.

Conclusion

After the issuance of Decree No:85, under recent economic views, the purpose of this approach was clear, but the Decree has not provided details to define the scope of the ban. By issuance of the Communique, although there are still some vague areas required to be discussed from our legal point of view, the scope of the ban is clear now for Turkish market.

It is understood that the ban is limited to liabilities of Turkish residents to be performed in Turkey. On this basis, contracts involving foreign persons or foreign entities or contracts of local entities with control by foreign persons are principally exempt from the ban, excluding sale and rental of real estates located in Turkey.

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