

# Turkish IPOs in Istanbul, London and the United States – Key Issues for Market Participants

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The Turkish IPO market has experienced a significant uptick in activity since the second half of 2020, indicating that the IPO outlook for Turkish businesses is significantly improving. Following a period of notable volatility, the Turkish capital markets laws were amended and modernized in 2020, laying the groundwork for a record-breaking period for Turkish IPOs. In fact, eight companies successfully launched IPOs in Turkey and raised approximately TRY462.5 million in 2020. Turkish IPOs targeting local investors also faced an unexpected rise in 2021, fueled by a significant reduction of interest rates during the pandemic, which encouraged investors to seek Borsa Istanbul as a viable listing venue. Among many noteworthy transactions,<sup>2</sup> another highlight of 2021 was the \$783 million IPO registered with the U.S. Securities and Exchange Commission (“SEC”) of Hepsiburada, the first-ever Turkish company to be listed on the Nasdaq, on which Cleary Gottlieb and Paksoy acted as counsels for the underwriters.

This memorandum outlines certain of the key international and Turkish legal considerations arising in such transactions. It considers each step in the transaction timeline, focusing specifically on IPOs involving a *Borsa Istanbul* listing in the context of a global equity offering<sup>3</sup>. It also compares these to the equivalent requirements for an IPO and listing of a Turkish business on the London Stock Exchange and in the United States (by way of an SEC-registered offering listed on the New York Stock Exchange or Nasdaq).<sup>4</sup>

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<sup>1</sup> This alert memorandum provides updates to our prior publications dated May 25, 2016 and March 7, 2018 for recent market developments.

<sup>2</sup> Including the *Borsa Istanbul* listings of ready-mixed concrete and aggregate producer Boğaziçi Beton Sanayi ve Ticaret A.Ş., clean energy and renewable company Kartal Yenilenebilir Enerji, and brokerage firm OYAK Yatırım.

<sup>3</sup> Typically, an equity offering to qualified institutional buyers in the United States under SEC Rule 144A and outside the United States under Regulation S. Offerings involving (i) a domestic public offering to retail investors and (ii) an offering to institutional investors both domestically and internationally will be referred to as “dual-tranche offerings”.

<sup>4</sup> This memorandum considers the key U.S. federal securities laws applicable in the context of an IPO by a non-U.S. issuer – principally the U.S. Securities Act of 1933, as amended (the “1933 Act”), and the rules and regulations promulgated thereunder.



## A. OFFERING STRUCTURE

### I. Prospectuses

#### *Istanbul*

In the case of a *Borsa Istanbul* listing<sup>5</sup>, an English language international offering circular (“IOC”), prepared to an international standard in terms of disclosure, is typically produced, along with the Turkish prospectus (*izahname*) used for the domestic offering. The *izahname* contains separate financial statements prepared in accordance with Turkish Financial Reporting Standards; these are virtually identical to IFRS. In terms of disclosure, the *izahname* must include all material information contained in the IOC and be substantively consistent with it; the layout must follow a specific format prescribed by the Capital Markets Board of Turkey (“CMB”).

#### *London*

For a London listing, a prospectus compliant with the UK Prospectus Regulation<sup>6</sup> (the “UK PR”) and other UK rules is prepared and filed for approval with the Financial Conduct Authority (“FCA”). By contrast to the position in Turkey, a single prospectus can be used to conduct a public offering to retail investors in the United Kingdom as well as a global institutional offering and to obtain the London listing. However, the timetable needs to be structured carefully in such circumstances: for use in a retail offering, the prospectus (including a price range) needs to be approved by the FCA before the start of book-building.

#### *United States*

Shares of foreign corporations are most commonly listed and traded in the United States in the form of

American Depositary Receipts (“ADRs”), required to be sponsored through a depositary agreement with a U.S. depositary bank against the deposit of the issuer’s underlying shares.<sup>7</sup> For a foreign private issuer, a 1933 Act registration statement containing a prospectus must be filed with the SEC on Form F-1, which requires extensive information concerning both the issuer and the securities to be offered. The depositary and the issuer must also file an additional short-form registration statement on Form F-6, which is used to register the ADRs that are issued by the depositary and evidence the issuer’s underlying shares.

### II. Offering Tranches

Under Turkish law, no offering by Turkish companies inside Turkey is permitted without a public offering to Turkish retail investors, which would trigger the requirement for a *Borsa Istanbul* listing.<sup>8</sup> In recent years, the Turkish regulator has relaxed the requirements for listing on *Borsa Istanbul*, with a view to encouraging more companies to come to market. In particular, companies that have not made a net profit in the past two years or do not meet the shareholders’ equity to capital ratio as required under the Listing Directive of *Borsa Istanbul*, or both, can now be listed in the Stars Market, following an amendment to the Listing Directive, provided certain conditions are met. Before this amendment, many companies with operating profits could not go public because of certain cost and expense items which prevented them from satisfying the requirements of the Listing Directive relating to net profits. Moreover, a company is able to include the offering proceeds in its shareholders’ equity to capital calculations. However, this is only possible where the shareholders’ equity to capital ratio of the relevant company is positive as per its latest

<sup>5</sup> *Borsa Istanbul* is composed of several markets, the two largest and most important for equity securities being the Stars and Main Markets. Both markets require specific minimum profitability, offer value and offer size requirements.

<sup>6</sup> Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017, as it forms part of domestic law by virtue of the European Union (Withdrawal) Act 2018.

<sup>7</sup> While equity listings may also take place (i) as a direct listing of ordinary shares, or (ii) as shares issued by the foreign corporation specifically for the U.S. market in a form adapted to the needs of

U.S. investors, this is rare, largely due to the associated difficulties in transfers of shares between U.S. and non-U.S. clearing systems and in the payment of dividends denominated in currencies other than the U.S. dollar. The remainder of this article thus assumes a listing of ADRs for purposes of the discussion of a U.S. public offering.

<sup>8</sup> As of January 13, 2016, the dual listing of shares of Turkish or foreign issuers is permitted on *Borsa Istanbul* if such shares are already listed on an exchange in certain foreign jurisdictions.

audited financials, and an operating profit shows in the company's most recent full year financial statements and in any subsequent interim period.<sup>9</sup>

Effective as of December 1, 2017, the CMB significantly relaxed previously strict rules on the size of minimum allocations to domestic investors in IPOs of Turkish companies with a *Borsa Istanbul* listing (the "Minimum Domestic Allocation"), which had placed notable pressure on the book-building and allocation process. These rules formerly required a Minimum Domestic Allocation of 30%, with 10% being allocated to Turkish retail investors and 20% to Turkish institutional investors.

Under the updated rules, however, the Minimum Domestic Allocation has been modified to only 20% (with a minimum of 10% to be allocated to Turkish institutional investors and 10% to Turkish retail investors).

Moreover, under such rules it is possible for the issuer<sup>10</sup> to apply to the CMB for a reduction of the Minimum Domestic Allocation (potentially to zero) in advance of the start of book-building.<sup>11</sup> When doing so, factors the issuer could cite to the CMB as justifications for such a reduction would include the limited size of the domestic investor base, the number of IPOs coming to market at a similar time and the pressure on book-building created by such required minimum thresholds (which are not common in other jurisdictions).

Under both the updated and former rules, if the offering is upsized at the end of the book-building period,<sup>12</sup> the amount of the upsize can be allocated entirely to international investors. Also, once book-building commences, should there be under-subscription in the domestic market, an amount up to and including the size of the Minimum Domestic Allocation can be re-allocated and sold to international investors. We note that the practical effect of this would be to permit a full reduction of the Minimum Domestic Allocation through action taken only during the book-building process (without any pre-launch application or approval thereof by the CMB). However, such re-allocation, which would occur during the domestic book-building process (the last two to three business days in a typical two week international book-building period) has the potential to unsettle investors and ultimately disrupt demand. As such, applying for such reduction before the start of the book-building process would be preferable, as a practical matter.<sup>13</sup>

Turkish rules on Minimum Domestic Allocation are idiosyncratic, the closest equivalent being the rule under the UK PR (applicable in London listings) that, subject to relaxation by the national regulator, 10% of the class of listed equity securities be held in public hands ("free float").<sup>14</sup> As such, Turkish companies could avoid the complications arising from the rules on Minimum Domestic Allocation by listing only outside of Turkey.<sup>15</sup> However, this has been a rare occurrence to date, in part due to the difficulties associated with

<sup>9</sup> These eligibility criteria are only applicable where there is an issuance of new shares, other requirements of listing in *Borsa Istanbul*'s Stars Market are met and the board of *Borsa Istanbul* approves the listing application of the relevant company.

<sup>10</sup> The CMB expects such application to be made by the issuer, whether or not the offering is primary or secondary in nature.

<sup>11</sup> This was theoretically possible under the old rules, although this can only be done after the start of book-building.

<sup>12</sup> Known in the Turkish market as "over-allotment" shares, although these are not associated with a conventional "greenshoe" option. See Section D below.

<sup>13</sup> As noted above, recent market practice has developed to reflect this.

<sup>14</sup> The FCA reduced this free float requirement from 25% to 10% on December 3, 2021. Holders excluded from this calculation include directors and their connected persons, and those holders owning more than 5% of the shares. In the U.S., the rules of the exchange may also impose additional criteria on the minimum number of U.S. stockholders, depending on whether a liquid market already exists for a foreign issuer's equity securities in its home jurisdiction.

<sup>15</sup> That said, we note in any event that if the number of shareholders of the issuer crosses 500 (worldwide), the issuer will be obliged to file with the CMB and become a public company under Turkish law (with requirements to list or become private again within two years).

establishing effective settlement arrangements in Turkish shares to be listed overseas.<sup>16</sup> By contrast, an alternative is to establish a non-Turkish holding company and complete an international listing (two prominent examples being the London Stock Exchange listings of Global Ports Holding plc<sup>17</sup> and DP Eurasia N.V.). If this structure is pursued, the consequences of a corporate reorganization to put in place an international holding company should be carefully assessed, especially for any tax consequences arising from transferring the shares of the Turkish entity abroad, as well as any change of control provisions that could be triggered by the reorganization.

Separately, in 2016, the European Securities and Markets Authority (“ESMA”) published an opinion (the “ESMA Opinion”)<sup>18</sup> on Turkish prospectuses, stating that an *izahname* drawn up in line with Turkish laws and regulations can constitute a valid prospectus for European purposes (without the addition of any wrapper), provided that it contains financial statements in accordance with IFRS. However, the ESMA Opinion acknowledged the continued (and unlimited) discretion of national competent authorities to require further information, either in the prospectus itself or by way of a “wrapper” to the prospectus. Although this was presumably designed to increase the number of issuers seeking to obtain dual listings on *Borsa Istanbul* and in Europe, enabling them to conduct public offerings in both jurisdictions, no such dual listing has yet taken place since the issuance of the ESMA Opinion. Depending on the size and profile of the transaction, issuers undertaking European IPOs are likely to want to market to qualified institutional buyers in the United States under Rule 144A. For offerings where most of the sales will be to investors outside of Turkey, we would expect the English language IOC, as opposed to an English translation of

the *izahname*, to drive the disclosure process, with necessary amendments being made to satisfy the relevant European requirements (as interpreted by the national competent authority in question).

### III. Underwriting Syndicates

#### *Istanbul*

For a number of reasons, including Turkish financial intermediary licensing requirements and market practice, in a typical dual-tranche offering in Turkey there are two separate syndicates of banks: international and domestic. Domestic syndicates in Turkey consist primarily of one or several lead managers who coordinate the activities of a broader consortium of domestic intermediary banks. In larger IPOs, the market practice for domestic banks is to provide intermediary services on a best efforts basis (*en iyi gayret aracılığı*), without any actual underwriting commitment, under an “intermediation agreement” signed just before the CMB’s approval of the *izahname*. The international syndicate may make a similar undertaking or, in the most common alternative, underwrite the international tranche on a firm commitment basis under a separate underwriting agreement signed at pricing.

This offering structure closely resembles one that used to be common in global equity offerings, in which a separate underwriting agreement would typically govern each of the tranches to be offered in the several countries in question. As used to be the case in transactions structured in this way, underwriters should consider entering into an intersyndicate agreement to coordinate the offering of the domestic and international tranches, including selling restrictions, settlement procedures, the allocation of commissions, stabilization of the shares offered in each tranche, the re-allocation of shares from one offering to the other

<sup>16</sup> See Section E below regarding technical settlement considerations which may necessitate a corporate reorganization before such share listing.

<sup>17</sup> Cleary Gottlieb advised the underwriters in the IPO and London listing of Global Ports Holding plc.

<sup>18</sup> “ESMA assessment of Turkish laws and regulations on prospectuses,” dated February 8, 2016: [https://www.esma.europa.eu/sites/default/files/library/2016268\\_opinion\\_on\\_equivalence\\_of\\_the\\_turkish\\_prospectus\\_regime.pdf](https://www.esma.europa.eu/sites/default/files/library/2016268_opinion_on_equivalence_of_the_turkish_prospectus_regime.pdf).

and, most importantly, the inter-conditionality of both offerings.<sup>19</sup>

### *London*

The syndicate structure differs in the case of a dual-tranche offering in the London listing context. As would be usual in an offering solely to institutional investors, a syndicate of international banks markets (and underwrites, as of pricing) the deal to institutional investors.

In the London listing context, the retail component can be marketed through certain financial intermediaries.<sup>20</sup> The prospectus and contractual arrangements between the issuer and financial intermediaries can be designed to ensure a single document can be used to market the institutional offer and the retail offer. To the extent that retail investors would also benefit from shorter form documents in addition to the prospectus, these can be prepared in parallel. Such intermediaries, appointed by the issuer directly under a separate contractual arrangement (the “Intermediaries’ Terms and Conditions”), then market the offering to retail investors. Care should be taken to ensure that the Intermediaries’ Terms and Conditions contain suitable restrictions on the conduct of the intermediaries, in line with those placed on the international banks, in relation to matters such as publicity, research distribution and use of specified materials to market the offering.<sup>21</sup>

### *United States*

Public offerings of securities in the United States are generally made through a single syndicate of underwriters led by one or more managing underwriters. The underwriting agreement is usually entered into at pricing and a preliminary form is filed with the registration statement. ADRs are sometimes offered as a single “tranche” of a “global” offering of

the issuer’s shares in several countries (effectively, a variation on the “dual-tranche offering” structure referenced elsewhere in this memorandum). Generally in such cases, it is customary for underwriters to organize global offerings in two tranches: a “local” tranche, consisting of shares offered in an issuer’s home country, and an “international” tranche, consisting of ADRs (and sometimes shares) offered in the United States and elsewhere outside the issuer’s home country. In such circumstances, an intersyndicate agreement (covering the subject matter set forth above) may also be helpful.

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In all cases, it is common for there to be commercially negotiated lock-ups of the issuer and selling shareholder, subject to certain customary exceptions (contractually agreed with, and subject to waiver by, the underwriters). Notably in the Istanbul context, a typical 180-day lock-up of the issuer and selling shareholders is supplemented by a “regulatory lock-up” imposed on shareholders by Turkish securities laws. This prevents any holders of 10% or more of the issuer’s ordinary shares (as well as any person which otherwise holds a controlling interest in the issuer)<sup>22</sup> from selling further shares below the IPO price for the period ending one year after the start of trading.

## **B. PRE-LAUNCH**

### **I. Filing with the CMB**

In case of a *Borsa Istanbul* listing, the regulatory steps required to be taken by the issuer are numerous and must occur in a prescribed order, particularly if the issuer operates in a regulated industry (*e.g.*, banking or energy) where the relevant industry regulator’s consent is required for the offering or change of shareholding structure.

<sup>19</sup> Under Turkish law, if the domestic offering is not successful for reasons other than lack of demand (*e.g.*, a termination right in the domestic underwriting agreement is triggered or the *izahname* is not approved by the CMB), then the international offering must be discontinued.

<sup>20</sup> This approach was followed in the Global Ports Holding IPO.

<sup>21</sup> In this regard, such arrangement can serve a similar function to the intersyndicate agreement referenced above in the Turkish listing context.

<sup>22</sup> For example, a shareholder holding “privileged” shares granting the right to appoint the majority of the board.

First, the issuer must apply to the CMB to amend its articles of association to permit the IPO. Following the CMB approval, the issuer must amend its articles of association in due course. This is followed shortly afterwards by the first filing of the *izahname*, which triggers the start of the CMB's review and is public. This should typically take place at least eight weeks before the anticipated final approval date<sup>23</sup> (close to launch) to provide sufficient time for review.

The CMB review process may take notably longer than in other jurisdictions (such as the UK). This factor, when combined with the timing/availability of financial statements and practical deadlines for launching and closing an international offering, can put significant pressure on the transaction timetable.<sup>24</sup> By way of example of such constraints, an offering using an issuer's audited financials for the year ended December 31, 2021 would need to close on or around May 13, 2022. Based on a typical (two-week) book-building period and T+2 settlement schedule, this would require filing of the *izahname* in early March 2022, within days of the audited financials for the most recent year having become available.<sup>25</sup> This leaves little (if any) time for drafting the sections of the disclosure related to the financial statements, principally the Operating and Financial Review in the IOC and the corresponding section of the *izahname*.

While the first draft of the *izahname* needs to include a set of prescribed information, Turkish securities laws permit certain information to be omitted (typically recent financial disclosure not available in stable form at the time of the first filing). To ensure that the CMB has sufficient time to review the *izahname* in advance of the desired date of final approval, the possibility of

filing a partially complete version should be raised with the regulator. Such version would contain a full discussion of the earliest two (of three) years' financials, with a subsequent filing containing the analysis of the most recent period.<sup>26</sup> Any such interim or subsequent filings are not made public until the *izahname* is finally approved.

## II. Filing with the FCA

By contrast to a first filing with *Borsa Istanbul*, a first filing with the FCA in advance of London listing remains confidential; as such, the forthcoming offering can be kept out of the public domain until the announcement of the intention to float (the "ITF"). The FCA requires 10 clear working days to provide comments on the first submission of a prospectus for an IPO, and 5 clear working days for any subsequent submission. The timetable needs to be structured to ensure sufficient time is allowed for FCA review. As is the case with the CMB filing, the deal team should discuss with the FCA the possibility of filing a draft prospectus for the first submission that does not include a discussion of the results of the latest financial year (this being included in a subsequent submission instead).

Although a London listing offers greater flexibility in preserving confidentiality at the earlier end of an IPO timetable compared to a *Borsa Istanbul* listing, equity offerings in London with an analyst presentation have, since July 2018, been required to follow revised Conduct of Business Sourcebook ("COBS") provisions issued by the FCA in October 2017, which essentially require issuers to publish an approved registration document or a prospectus before the

<sup>23</sup> Under Turkish law, the review process of the CMB should not exceed a maximum of 20 business days from the time the filing is complete (in practice, this is achieved in stages, with the first filing starting the process but being inevitably incomplete due to, *inter alia*, the reasons discussed in this section).

<sup>24</sup> This timing problem arises regardless of whether the latest financial statements are as of year-end (and so audited) or for an interim period (and so only reviewed), though it may be more pronounced in the former context due to additional time required for auditors to complete their work. By way of background, Statement on Auditing Standards No. 72 provides that auditors

may not give negative assurance to underwriters as to changes in specified financial statement line items as of a date 135 days (or more) subsequent to the date of the most recently audited or reviewed financials.

<sup>25</sup> It is important to involve the auditors early on in the process of preparing for the IPO to agree on all comfort-related issues.

<sup>26</sup> General market practice suggests that the CMB is unlikely to agree to such an approach, although each transaction is reviewed on a case-by-case basis.

publication of research reports by connected and unconnected analysts.<sup>27</sup>

### III. Filing with the SEC

Draft registration statements related to initial public offerings may be confidentially submitted to the SEC for non-public review. However, if the issuer proceeds with the IPO, such draft submissions are not permitted to remain confidential: at least 15 days prior to any road show (or, in the absence of a road show, at least 15 days prior to the requested effective date of the registration statement), the issuer must publicly file with the SEC all previously submitted non-public draft registration statements.<sup>28</sup> In practice, this is usually done concomitantly with the public filing of the registration statement with the SEC, thus requiring the issuer and the underwriters to wait 15 days between the public filing and the commencement of the book-building process.

The timing and the scope of the SEC's review of confidential submissions are generally the same as those for publicly-filed registration statements. The SEC's review can involve extensive discussions between the issuer and the SEC staff, and issuers can expect to wait approximately 30 days to receive the SEC's initial comments on the registration statement. Overall, an aggressive but reasonable timeline might take about 26 weeks: eight weeks to prepare materials for submission to the SEC, eight to twelve weeks to complete the SEC's review and then make a public filing, two weeks for investor education meetings, three weeks for marketing and a week to price and close the IPO.

Publicity considerations under the U.S. federal securities can be complex and merit careful consideration in any offering to U.S. investors

(whether registered or unregistered). In the context of a registered offering, the 1933 Act provides that an "offer" of securities may not be made until the related registration statement has been filed with the SEC (and the appropriate filing fees paid), unless the offering is made pursuant to an exemption from the registration requirements of the 1933 Act. The definition of "offer" is broad and actions taken in advance of a public offering that have the effect of arousing public interest in the issuer or its securities, including posting information on the issuer's website, may constitute an offer of securities in violation of the 1933 Act. Pre-filing publicity that constitutes an offer, even if inadvertent, is known as "gun-jumping" and may result in delays to the offering to allow for a "cooling-off period" to reduce the risk that investors may rely on information not included in the prospectus.

There are, however, certain safe harbors that allow communications that would otherwise constitute impermissible "offers" under the 1933 Act, set forth in rules promulgated under the 1933 Act, which can be of use in the course of an IPO.

## C. LAUNCH

### I. Borsa Istanbul Listing

#### *Timing*

It is important to distinguish between international and domestic offerings in this context—the former being a placement to institutional investors only (for the purposes of this memorandum) and the latter including a public offer to Turkish retail and institutional investors.

Marketing for the domestic offering/book-building takes place using the "final" *izahname*, which is

<sup>27</sup> For further details on the changes to the timeline for London IPOs, please see the Cleary Gottlieb memorandum dated November 21, 2017, available at the following link: <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/alert-memos/updated-fca-reforms-uk-ipo-process--significant-implications-for-dea.pdf>.

<sup>28</sup> The confidential submission process described above is separate from, but consistent in most respects with, the confidential registration statement review procedures available to emerging

growth companies ("EGCs"), including foreign private issuers that qualify and elect to be treated as EGCs, under the Jumpstart Our Business Startups Act (the "JOBS Act"), enacted in 2012. An issuer qualifies as an EGC if: (i) it had annual gross revenues of less than \$1.07 billion during its most recent fiscal year; (ii) it has not issued more than \$1 billion in non-convertible debt during the previous three-year period; and (iii) its initial registered public offering of stock occurred on or after December 9, 2011.

printed and circulated (with a price range) only after approval by the CMB.<sup>29</sup> Domestic book-building typically coincides with the end of the international offering book-building period, and must be conducted over two to three business days under Turkish law. While Turkish institutional investors may, in line with international practice, place bids across the full spectrum of the price range, Turkish retail investors are, for practical reasons, required to place orders at a price equivalent to the top of the range (the excess amount being reimbursed if the deal prices at a lower level).

The marketing/book-building for the international offering may start before the final CMB approval if the preliminary IOC includes appropriate disclaimers that indicate, among other things, that the Turkish *izahname* has not yet been approved by the CMB and no formal orders are taken.

#### *Local Valuation Report and Price Range*

One of the domestic lead managers is required to prepare a valuation report, the purpose of which is to provide a fair market value estimate of the shares (in the form of a price range).<sup>30</sup> The valuation methodology of the report—but not the valuation itself—is reviewed by the CMB, which may require several versions to be submitted.<sup>31</sup> The final report is disclosed to the public on the Turkish Public Disclosure Platform.

The price range needs to be included in the preliminary IOC for consistency of treatment between international and domestic investors (as noted above, the final price range is disclosed to the latter in the *izahname*). The timetable should thus be structured to ensure that approval of the final valuation report

containing the price range (coinciding with the approval of the *izahname*, which also includes such range) is received before the launch of the international offering, though that is not always possible, such that this final price range can be included in the preliminary IOC for use in the international roadshow.<sup>32</sup> As a matter of Turkish law, there is a limit to any widening of the price range: the top of the price range cannot be more than 20% higher than the bottom.

## **II. London Listing**

In a dual-tranche offering involving a retail element in the London listing context, a prospectus containing a price range is approved by the FCA ahead of launch, and used for marketing purposes to both institutional and retail investors. Under the UK PR, in the case of a public offering to retail investors the approved prospectus must be available to the public for six working days before the end of the offer (thereby providing a minimum length of offering period for the retail tranche). However, this is not a significant limiting factor in practice, since institutional book-building typically lasts for ten working days.

The existence of the retail tranche also triggers certain requirements under the UK regime for regulating financial promotions (commonly construed as communications of an invitation or inducement to engage in investment activity). While communications to professional investors are generally exempt from such regulations, those to retail investors are not. As such, the ITF announcement, launch press release and other similar communications by the issuer need to be approved by an FCA-authorized person (typically, one of the underwriting banks) under FCA Conduct of

<sup>29</sup> For purposes of this memorandum, it has been assumed that domestic book-building takes place using a price range set at launch, which is the method used in the overwhelming majority of Turkish IPOs.

<sup>30</sup> Other domestic managers or any other Turkish investment banks may also review the valuation report and provide their own analyses, which is, like the valuation report, made public.

<sup>31</sup> The first draft of the report contains a valuation range that is in most cases wider than the final IPO price range. The

CMB-approved version of the valuation report contains the narrower price range included in the preliminary IOC and *izahname* and used during international and domestic book-building.

<sup>32</sup> This is earlier than the timing prescribed by the Turkish securities laws, which requires publication of the local valuation report at least three days prior to the start of book-building to domestic investors.



Business Rules for retail promotions. Communications must be fair, clear and not misleading, as applied to an unsophisticated retail audience; in practice, this limits use of financial and industry jargon in such communications.

In a typical Regulation S/Rule 144A offering without a retail tranche, the underwriting agreement is signed at pricing of the transaction, after the completion of book-building. By contrast, it is typical in London listings with a retail tranche for the underwriting agreement to be signed at the start of book-building, although the underwriting commitment of the banks is contingent on the execution of a subsequent agreement at pricing. In this way, the underwriters obtain the benefit of the issuer's and selling shareholders' representations and warranties (specifically those regarding the truth and accuracy of the prospectus), but their underwriting obligations remain contingent on the book of investor demand having been successfully built. In spite of this divergence, in both such cases the underwriting banks take only "settlement risk", since underwriting commitments are only made at pricing, by which point investor demand is known.

### III. United States Public Offering

Under the U.S. federal securities laws, an offering of securities may commence upon the filing of the registration statement,<sup>33</sup> but sales may be made only after the declaration of effectiveness by the SEC. During the period between the filing of the registration statement and its effective date, copies of the preliminary prospectus may be circulated to prospective purchasers and to sales personnel of securities dealers involved in the offering. The

<sup>33</sup> Provided, however, that if draft registration statements were confidentially submitted to the SEC for a non-public review, such draft submissions must be publicly filed with the SEC 15 days prior to commencement of the road show and book-building process, as discussed above.

<sup>34</sup> Item 501(b)(3) of Regulation S-K. According to SEC staff guidance, the estimated price range generally cannot be wider than \$2.00 (if the maximum price is \$10 or less) or 20% of the maximum price (if the maximum price is greater than \$10). With respect to foreign registrants which are listed in their home country

preliminary prospectus typically omits information as to pricing and final underwriting arrangements but is otherwise essentially complete. However, if the issuer is not an SEC reporting company, the first preliminary prospectus "circulated," or distributed to the market to solicit customer orders, must include a bona fide estimate of the price range and maximum size of the offering.<sup>34</sup> The final prospectus containing all information required by the 1933 Act must, however, be filed with the SEC prior to delivery of the securities purchased.

As in the Regulation S/Rule 144A offering without a retail tranche, the underwriting agreement is signed at pricing of the transaction.

## D. PRICING

### I. Timing and Upsizing the Deal: Turkish vs. International Practice

The CMB has amended the requirement relating to the announcement of the price range initially disclosed in the *izahname*, the revision of which was not permitted under prior rules unless included in a new *izahname* filing with the CMB.<sup>35</sup> The price range disclosed in the *izahname* can be decreased through simple and brief public disclosure and need not require a formal amendment to the *izahname* itself.<sup>36</sup> It is advisable to explicitly disclose this new regulatory flexibility and the possibility of a future decrease of the price range in the preliminary IOC and the *izahname*. Such decrease may occur either before or after commencement of the domestic book-building period. This gives market participants greater flexibility in initially setting the price range for the book-building period and in

prior to filing, the SEC staff has often permitted such registrants to provide share price information for the home market as of a recent date in lieu of the price range information referred to above.

<sup>35</sup> This would cause the CMB approval process to either restart completely or to restart with a supplement, approval of which would take additional time.

<sup>36</sup> Any revised price range remains subject to the limitation that the top of the range be no more than 20% above the bottom.

decreasing such price range, should market conditions demand it.

If the price range is decreased before the opening of the domestic book-building period, the start of such period is required to be delayed until, at the earliest, the second calendar day following the announcement. If the price range is decreased during the domestic book-building period, the book-building period must remain open for a minimum of two business days after any such decrease. As international books close at the same time as the domestic book in a typical dual-tranche IPO in Turkey, any such change to the price range has the effect of extending the international book-building period as well.

In the international context, pricing typically occurs on the day books of demand are closed. At such time, the price is set, the pricing term sheet is circulated to investors (and “time of sale” occurs for U.S. securities law purposes) and the underwriting agreement among the issuer, selling shareholder and underwriters is signed.

In the Turkish context, an additional layer of complexity is added by Turkish practice regarding “upsizing” the deal, this referring to any selling shareholder’s option to increase the size of the offering by up to 20% of the originally intended size (including primary and secondary components).<sup>37</sup> All descriptions relating to the offering (for example, in public announcements made in respect of launch) should reflect the possibility of this occurring. In terms of timing, any decision to upsize typically takes place following the night of pricing, at the end of the international and domestic book-building periods. Book-building is typically scheduled to finish (and the final offering price to be determined) on a Friday. The allocation list is circulated to the issuer (and selling shareholder(s)) on the morning of the following Monday, and the “sale contract” with domestic

investors is formed on that day under Turkish law, following the approval of such list by the issuer and selling shareholder(s). Only at such later time is the pricing term sheet circulated to international investors and the underwriting agreement signed in such offerings. The intervening weekend is used to consider any “upsize” and finalize allocations.

This practice is sometimes referred to in the Turkish market as an “over-allotment,” whereas in international practice (including, for this purpose, the London listing context), this term refers to the creation of a short position, typically settled using a share borrowing, intended to support stabilization activities, with the short position being closed out through market repurchases or the exercise of the “greenshoe” option. While a conventional over-allotment option structure is legally and theoretically possible in Turkey, it is very uncommon in practice.<sup>38</sup> Instead, in the Turkish construct, a portion of the proceeds from the offering is used to effect stabilizing purchases in the aftermarket.

In our opinion, the Turkish structure is better understood as being substantially equivalent to a “brownshoe” (or “reverse greenshoe”), which is common in certain Central and Eastern European jurisdictions. In such structures, a portion of the proceeds from the offering is withheld at closing and used to effect market stabilization (together with any unused proceeds being transferred back to the issuer/selling shareholder at the end of the stabilization period). The same approach is taken in Turkey, the only difference being that it is primarily the proceeds of the optional upsize that are used to fund the stabilization activities.

Irrespective of any “upsize,” stabilization activity may still be carried out under Turkish law within 30 days of closing. Pursuant to a separate stabilization agreement, one of the domestic lead managers, as a stabilization

<sup>37</sup> Such upsize is not possible in offerings with no secondary component.

<sup>38</sup> There is a general perception in Turkey that, save for fees/commissions, underwriters should not profit from the sale of

the shares, a result that is, of course, possible in a conventional over-allotment structure. That said, there is a clear disconnect between this and the stabilization practice discussed in the next paragraph.

manager, has exclusive discretionary authority to undertake stabilization activities during the stabilization period. The number of shares that are repurchased in stabilization activities should not, at any one time, constitute more than 20% of the total offer size.

Under CMB regulations, if there are primary and secondary tranches in the offering, initially the proceeds from the secondary offering must be used to finance the stabilization activities, which is what typically occurs. In circumstances where the stabilization activities are funded out of the primary offering proceeds, the amount used may not exceed 20% of the primary proceeds before any upsize. In such circumstances, consideration would have to be given to the implications of the effectively reduced offering size on use of proceeds and capital resources, particularly as a matter of disclosure.

In U.S. public offerings of common stock, the over-allotment option granted by the issuer to the underwriters generally allows the underwriters, for a period beginning with the execution of the underwriting agreement and ending 30 days after the closing date, to purchase from the issuer and/or the selling security holders, at the public offering price less the commissions provided for in the underwriting agreement, up to 15% of the shares (or ADRs) being offered but solely for the purpose of covering any over-allotments.<sup>39</sup> By contrast to practice in London listings, share borrowings are not used for the settlement of over-allotment options in U.S. public offerings. “Brownshoe” structures remain very uncommon.

## **E. CLOSING**

Payment for the shares is made in Turkish lira in same day funds. In practice, the syndicates of banks open

custody accounts with a recognized Turkish depository for the investors in order to make payments of Turkish lira and take receipt of the shares. Upon settlement, a first time issuer gains public status and becomes a public company under Turkish law.

In case of a London listing, care should be taken that listed shares should be eligible for settlement on the CREST system, which is limited to securities of English companies. While international companies incorporated in certain foreign jurisdictions can have their shares effectively made eligible for CREST settlement through the issuance of CREST Depositary Interests, Turkish law prevents a Turkish company from accessing this route. This has, in recent times, led Turkish companies to pursue a corporate reorganization ahead of listing their shares on the London Stock Exchange.

For primary offerings, it is important to note that new shares of Turkish companies may only be issued after the issuer receives full payment of the share issuance price. For U.S. public offerings of ADRs, this requirement must be carefully considered in preparation for settlement: to allow for the ADRs to be timely issued at closing, the underlying shares must be deposited with the depository bank before closing (in other words, before the issuer receives the offering proceeds). To address this timing misalignment, parties may consider structuring the settlement with either a pre-funding of the shares by the underwriters or with a share borrowing, whereby one or more of the current shareholders lends existing shares to the underwriters for deposit in the ADR program before closing, such share borrowing to be settled with the new shares of the issuer, issued after obtaining the registration and authorization from the Istanbul Trade Registry (approximately 3 business days after the closing date).

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<sup>39</sup> Rule 5110(f)(2)(J) of the Financial Industry Regulatory Authority (“FINRA”) Securities Offering and Trading Standards and Practices prohibits the receipt by FINRA members in a firm commitment underwriting of an over-allotment option relating to more than 15% of the securities being offered, without taking into account the securities offered pursuant to the over-allotment option. The FINRA staff has indicated that it interprets this rule as

prohibiting FINRA members participating in a firm commitment global offering from being allocated over-allotment option securities in excess of 15% of the aggregate amount of securities registered with the SEC in the global offering, regardless of the number of securities actually sold by such members.

In a U.S. public offering, trading in the ADRs typically commences the morning after pricing. Closing usually occurs two business days after pricing of the IPO, and so may need to be synchronized carefully with any concurrent non-U.S. public offering.

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