

Initial Public Offerings

Contributing editors

Joshua Ford Bonnie and Kevin P Kennedy



2019

GETTING THE
DEAL THROUGH

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Joshua Ford Bonnie and Kevin P Kennedy
Simpson Thacher & Bartlett LLP

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Preface

Initial Public Offerings 2019

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Initial Public Offerings*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on South Africa, Spain and Sweden.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Joshua Ford Bonnie and Kevin P Kennedy of Simpson Thacher & Bartlett LLP, for their continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
July 2018

Turkey

Ömer Çollak, Ökkeş Şahan and Nazlı Tönük Çapan

Paksoy

Market overview

1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

In 2017, three companies successfully launched initial public offerings in Turkey and collected approximately 1.254 million Turkish lira.

2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

Generally, domestic companies tend to list their shares at home. Overseas companies do not tend to list in the Turkish market.

3 What are the primary exchanges for IPOs? How do they differ?

Borsa Istanbul is the sole exchange entity in Turkey, combining the former Istanbul Stock Exchange, Istanbul Gold Exchange and the Derivatives Exchange of Turkey. Borsa Istanbul mainly consists of four markets, namely, the Equity Market, the Debt Securities Market, the Derivatives Market and the Precious Metals and Diamond Market. The publicly held companies from various sectors are traded in the Equity Market of Borsa Istanbul and trading in the Equity Market is carried out in the submarkets. These are the Star Market, the Main Market, the Emerging Companies Market, the Collective Investment Products and Structured Products Market, the Watch List Companies Market, the Equity Market for Qualified Investor and the Pre-Market Trading Platform.

Regulation

4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Capital Markets Board (CMB), Borsa Istanbul, the Istanbul Clearing, Settlement and Custody Bank and the Central Registry Agency are the main rulemaking and enforcing authorities on IPOs in Turkey.

5 Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

The issuer must prepare a prospectus used for domestic offering and submit it to the CMB for approval. The issuer shall apply to Borsa Istanbul to get the offered shares listed. The major requirements for launching an IPO and getting the offered shares listed are as follows:

- the company's articles of association must be amended to comply with the CMB rules and regulations;
- there must be nothing that restricts the transfer or trading of the equity securities to be traded on Borsa Istanbul or prevents shareholders from exercising their rights;
- the issuer's share capital must:
 - be fully paid in;
 - except for the funds specifically permitted by law, have been free from any revaluation funds or similar funds in the two years preceding the application for the public offering; and
- the total amount of non-trade related party receivables cannot exceed 20 per cent of the issuer's total receivables and cannot exceed 10 per cent of its total assets.

The issuer must pay to the CMB a fee that is equal to the sum of 0.1 per cent of the difference between the nominal value of the offering shares and their offering price, and 0.2 per cent of the nominal value of any shares that are not being publicly offered.

Listing requirements

Borsa Istanbul Listing Directive (Listing Directive) regulates the listing and trading of securities through a public offering, through a private placement without a public offering, and to qualified investors. Under the CMB, only joint-stock companies can become public companies and list their shares on Borsa Istanbul. To list and trade securities on Borsa Istanbul, a company must have been incorporated for at least two calendar years in accordance with the relevant CMB regulations.

Minimum size requirements

The company must meet all the conditions of the group of the market to which it belongs. The groups are generally determined by the value of the shares offered to the public.

Star Market Group 1

The following rules apply:

- the market value of shares offered to the public must be at least 250 million Turkish lira;
- total market value of the company must be at least 1 billion Turkish lira;
- profit must have been earned in the past two years;
- the minimum ratio of publicly offered shares to paid-in capital must be 5 per cent; and
- the minimum ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 0.75.

Star Market Group 2

The following rules apply:

- the market value of shares offered to the public must be at least 100 million Turkish lira;
- the total market value of the company must be at least 400 million Turkish lira;
- profit must have been earned in the past two years;
- the minimum ratio of publicly offered shares to paid-in capital must be 10 per cent; and
- the minimum ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 1.

As per the amendment made in the Listing Directive on 8 January 2018, companies that have not earned a profit in the past two years and/or that do not meet the shareholders' equity to the capital ratio, can still be listed in the Star Market of Borsa Istanbul. In order to satisfy the foregoing, companies that record operating profits in the preceding financial year and relevant interim period, with positive shareholders' equity (if negative, the application shall be made only to Group 1) and that have shareholders' equity to capital ratio – which is calculated by addition of nominal value of capital increase with premiums of shares to be acquired upon public offering to the amounts classified under shareholders' equity, meeting the ratios required for the Star Market

of Borsa Istanbul – will be eligible for listing in Borsa Istanbul's Star Market. Such eligibility criteria are applicable only where there is issuance of new shares, other requirements of listing in Star Market of Borsa Istanbul are also met and the board of Borsa Istanbul approves the listing application of the relevant company.

Main Market Group 1

The following rules apply:

- the market value of shares offered to the public must be at least 50 million Turkish lira;
- there is no total market value requirement;
- profit must have been earned in the past two years;
- the minimum ratio of publicly offered shares to paid-in capital must be 15 per cent; and
- the ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 1.

Main Market Group 2

The following rules apply:

- the market value of shares offered to the public must be at least 25 million Turkish lira;
- there is no total market value requirement;
- profit must have been earned in the past two years;
- the minimum ratio of publicly offered shares to paid-in capital must be 25 per cent; and
- the ratio of shareholders' equity to the capital according to the most recent independently audited financial statements must be more than 1.25.

Other requirements

Under the Listing Directive, the following requirements also apply:

- two calendar years must have elapsed since the company's establishment (this, however, is not applied for holding companies that have been established in less than two calendar years but owns a minimum of 51 per cent in shares of a company that has been established for more than two calendar years);
- the exchange management must have had the corporation's financial structure examined and accepted its ability to continue as an ongoing concern;
- the company must have obtained confirmation from Borsa Istanbul that its financial structure is sufficient for its operations;
- the shares must not contain any clauses prohibiting the shareholders to use their rights;
- the articles of association of the company must not contain any clauses restraining the transfer or the circulation of the shares;
- the company's articles of association must include nothing to restrict the transfer or trading of the securities to be traded on Borsa Istanbul or prevent shareholders from exercising their rights;
- there must be no major legal disputes that may affect the production and the operation of the company;
- there must be an independent legal report confirming that the establishment and the operation are in compliance with the relevant laws;
- there must be no material legal disputes that might adversely affect the production or other commercial activities;
- the company must not have done any of the following:
 - suspended its operations for more than three months during the past two years, except for the causes accepted by the exchange management;
 - applied for liquidation or concordat (a concordat is a formal project regarding the liquidation of debts, prepared and presented by the debtor to the court for its approval, under which the debtor is released from his debts once the partial payments are completely made); and
 - taken part in any other similar activity specified by the Borsa Istanbul board without the board's permission;
- the company's securities must comply with Borsa Istanbul's criteria on current and potential trading volumes; and
- the company's legal status in terms of its establishment and activities and its shares must comply with the applicable law.

If an application is to be filed for an initial listing of shares, such listing application shall be made for the whole amount of capital of the relevant company.

6 What information must be made available to prospective investors and how must it be presented?

The prospectus is the main document for an IPO. It will contain separate financial statements prepared in accordance with Turkish Financial Reporting Standards, which are virtually identical to the International Financial Reporting Standards. In terms of disclosure, the prospectus must include all material information. The layout will follow a specific format prescribed by the CMB.

7 What restrictions on publicity and marketing apply during the IPO process?

IPOs are marketed through the following:

- company research reports produced by connected brokers;
- early-stage pilot-fishing pre-marketing discussions with potential investors identified by the investment banks;
- roadshows and presentations following the publication of the intention to float announcement; and
- for retail offerings, more general advertising in order to generate additional interest in the IPO.

The issuer, the selling shareholders and the underwriters may decide to conduct a marketing campaign for Turkish investors, as is customary in Turkey. The publicity to be used in any such campaign must be in Turkish, distributed exclusively to investors in Turkey and limited to information contained in the Turkish prospectus.

After the application to the CMB and prior to the publication of the Turkish prospectus, publicity must be limited to information relating to the industry sector in which the issuer operates, its position in the sector, its fields of business, and goods or services provided by it. In addition, equal access to information among all investors must be ensured. Any publicity related to the securities must also include cautionary disclosures indicating:

- if published prior to the approval of the Turkish prospectus by the CMB, that the Turkish prospectus has not yet been approved;
- following the approval by the CMB and publication of the Turkish prospectus, where copies of the Turkish prospectus may be obtained as well as websites (including the Public Disclosure Platform (PDP)) where the Turkish prospectus has been made available;
- if the publicity contains a statement with respect to the public offering price for the securities, that neither the CMB nor Borsa Istanbul has any right of discretion or approval in determining such public offering price; and
- that any investment decision with respect to the securities should be made based on such investor's review of the Turkish prospectus.

The public offering in Turkey (Turkish offering) is not permitted to take place in Turkey prior to the approval of the Turkish prospectus by the CMB. Any information required to be disclosed in connection with the public offering in accordance with the CMB regulations must be included in the Turkish prospectus. In addition, any publicity, advertising or announcements directed to the public in connection with the Turkish offering must be consistent with the information contained in or expected to be contained in the Turkish prospectus, and must not include inaccurate, exaggerated, incomplete, unfounded or misleading information and must not misguide the investors to create false impressions about the issuer, the selling shareholders or the securities. The CMB may request the suspension and removal of the publicity that it considers inaccurate, exaggerated, incomplete, unfounded or misleading. Furthermore, any such publicity must not imply that the approval of the Turkish offering and the Turkish prospectus by the CMB would constitute any guarantee by the CMB or another administrative authority.

It is important to note that the content of any advertisements in relation to the issuer or the offering may trigger liability of the issuer and certain other persons with respect to the information disclosed (or not disclosed) in the Turkish prospectus. The persons involved are responsible for the fair reflection in any such advertisements of the facts and information contained in the Turkish prospectus. Any change in the information disclosed to the public in the Turkish prospectus and any new information that may affect investors' investment decisions must

be notified by the Issuer to the CMB immediately through the most convenient means of communication, preferably in writing. The content of any publicity following the publication of the Turkish prospectus must be consistent with the information included in the Turkish prospectus.

8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

The issuers, brokers or dealers, underwriters and guarantors may be held liable for various breaches of the IPO rules. The CMB and Borsa Istanbul are authorised to impose various administrative and criminal sanctions on them (see also question 19).

Timetable and costs

9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

Each deal is different, but an indicative timetable for an IPO is set out below (where "T" is the first day of trading on Borsa Istanbul).

T minus six months to T minus three months	Preparation for the IPO, for example: <ul style="list-style-type: none"> articles of association of the company must be amended to comply with the CMB; requirements for public companies must be considered; advisers must be appointed; eligibility for an IPO and listing is discussed; and due diligence is started. After the preparation period, prospectus drafting commences.
T minus three months	First submission of the prospectus to the CMB.
T minus two months to T minus one month	First draft reports circulated and announcement of intention to float made.
T minus five weeks	Connected brokers' research is published and the research blackout period starts.
T minus four weeks	Borsa Istanbul approval of listing is received and the price range is set. The Turkish underwriting agreement is signed and the final valuation report is submitted to the CMB. Updated prospectus with price range (subject to approval by the CMB) is made available on the issuer's and domestic underwriter's websites. There is a management briefing to syndicate sales. The preliminary immediate or cancel (IOC) order with price range (subject to approval by the CMB) is distributed. The management roadshow starts.
T minus three weeks	Submission of final documents to the CMB. End of the period for informing investors of the IPO.
T minus two weeks	Prospectus approved by the CMB. International bookbuilding starts and announcement of sales.
T minus nine days	Domestic book-building starts.
T minus six days	The pricing decision is made. Domestic and international book-building ends.
T minus four days	If requested, the distribution list is sent to the CMB. Offer price and allocations announced. New shares are created and shares can be sold or transferred.
T minus one day	Settlement and publication of final IOC.
T	First day of trading and start of price stabilisation (if any).

10 What are the usual costs and fees for conducting an IPO?

Below are the usual costs and fees for conducting an IPO and their percentage of the total amount of such costs and fees:

- brokerage and IPO consultancy fees (71 per cent);
- independent audit fees (5 per cent);
- legal consultancy fees (9 per cent);
- CMB fees (4 per cent);
- Central Securities Depository (Merkezi Kayıt Kuruluşu A.Ş.) fees (1 per cent);
- Borsa Istanbul listing fees (2 per cent); and
- other fees (advertisement, promotion, other consultancy services, etc) (8 per cent).

Based on the Borsa Istanbul reports, the aggregate amount of the fees and costs generally corresponds to the 4 per cent of the total offering proceeds of the issuer for the issuances launched in the main equity market.

Corporate governance

11 What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

Below are the basic corporate governance principles that are applicable to the issuers conducting an IPO:

- various information and documents must be announced in the corporate website and at PDP at least three weeks before the general assembly meeting;
- informing the shareholders in the general assembly in relation to the related party transactions of the company in which a director or manager of the company or their certain relatives are party;
- the number of the directors shall be determined in order to ensure that the board members conduct productive and constructive activities, make rapid and rational decisions and efficiently organise the formation and activities of the committees provided that the number cannot be less than five in any case;
- a majority of the members of the board of directors shall consist of members who do not have an executive duty;
- a non-executive member of the board of directors is the person who does not have any administrative duty or any other executive unit of the company other than having a board member status and is not involved in the daily work flow or ordinary activities of the corporation;
- there must be independent members from among the non-executive board members who have the ability to fulfil their duties impartially and independently;
- the number of independent board members cannot be less than two;
- the term of office of the independent members is up to three years – it is possible to re-nominate and re-elect them as independent directors;
- the nomination committee shall evaluate the candidate proposals for independent membership, including those of the management and the investors, by considering whether the candidate meets the independence criteria and shall report its evaluations and submit its report for the approval of the board of directors; and
- the board of directors shall form an audit committee (except for banks), early detection of risk committee (except for banks), corporate governance committee, nomination committee, remuneration committee (except for banks) in order to fulfil its duties and responsibilities duly and adequately (however, in case a separate nomination committee and remuneration committee cannot be established as a result of the structure of the board of directors, the corporate governance committee shall fulfil the duties of such committees).

12 Are there special allowances for certain types of new issuers?

The Emerging Companies Market is the market in which the shares of smaller or growth companies may be listed. There are special allowances and discounts in relation to CMB fees, CSD (MKK) fees and Borsa Istanbul listing fees for such smaller and growth companies.

13 What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

There are no regulated specific forms of anti-takeover defence under Turkish law. The management of a target would have fiduciary duties against the shareholders and should at all times act in the best interest of the company; therefore, if the management tries to jeopardise the offer based on personal gains, it may be liable for damages to the shareholders.

Anti-takeover defences are not precedential. In case of voluntary tender offers, the target's board is required to prepare and announce a report on the features of the offer and prospects of the acquisition on the target, which could be used to convince the shareholders in

declining the offer; or the management can try to buy additional time from the CMB to call the shareholders for a meeting, and try to indulge competing offers. Anti-trust concerns may also be used as a defence.

Foreign issuers

14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

Requirements for the listing of securities of foreign-based institutions that are operating abroad are the same as for Turkish institutions. There is no requirement for ministerial approval for the initial listing of foreign capital market instruments. In addition, there is no requirement for the foreign company to be listed in its home country. However, the board may ask for additional requirements or waive some of the conditions.

Foreign issuers must apply to the Borsa Istanbul with the information and documents indicated in the Listing Directive for the listing of securities. There are special discounts relating to Borsa Istanbul Listing Fees applicable to foreign issuers.

15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?

There is no explicit exemption in the legislation. However, we think that investors located in Turkey can participate in an IPO of the foreign issuer conducted abroad as long as the following conditions are met:

- the offer does not take place in Turkey (ie, all of the offering, marketing and settlement take place outside of Turkey);
- no transaction is conducted that can be defined as a public offering in Turkey;
- the information provided to investors located in Turkey does not contain any statements that give the impression of a public offering; and
- the foreign issuer and the intermediary financial institutions do not engage in any sort of marketing, advertising or publicity activities towards Turkish resident investors relating to the offering.

Tax

16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

There are two regimes for the taxation of securities in Turkey:

- the declaration regime: the primary regime where taxes are declared by taxpayers in their annual tax return; and
- the provisional regime: a provisional regime that, although currently temporary and was initially set to conclude at the end of 2015, has been extended until the end of 2020.

Income tax is covered by the declaration regime. Capital gains and interest income derived mainly from listed securities are covered by the provisional regime.

Under the provisional regime, taxation is carried out through withholding, mainly by brokerage houses, banks and custody banks. The capital gains derived for a listing of equities on the stock exchange falls under the provisional system and will be subject to a zero per cent rate withholding tax.

In addition to the withholding tax above, any capital gains derived from listing will be subject to corporate tax at a rate of 20 per cent (22 per cent for 2018, 2019 and 2020). Certain exemptions can apply to the corporate tax due. For example, there is a 75 per cent capital gains exemption applicable provided that:

- the shares are held for more than two years;
- the seller does not engage in securities trading;
- the proceeds are collected within two years following the sale year;
- the exempted amount is kept under a special reserve account for five years and is not distributed to shareholders; and
- the transfer of shares is exempt from VAT and the documentation related to listing is exempt from stamp tax.

Investor claims

17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

Judicial authorities (ie, the courts) are authorised to resolve the disputes arising between the investors and the issuers' underwriters. The CMB may be involved in such disputes only for regulatory purposes (ie, whether there are any incompliances of the relevant CMB rules and regulations for sanctioning purposes).

18 Are class actions possible in IPO-related claims?

Class actions have been recently introduced by the new Turkish Civil Procedural Code. Only associations and other legal entities are entitled to file class actions in order to protect the interest of their members or persons they represent. Real persons are not entitled to file class actions.

19 What are the causes of action? Whom can investors sue? And what remedies may investors seek?

The company drafts the prospectus (generally through its lawyers). All the IPO and special payment order advisers must contribute to its preparation, review and sign-off. A formal verification exercise is undertaken to test the accuracy of key statements in the prospectus.

The issuer is primarily liable for a prospectus relating to equity securities. In addition to the issuer, in the case of a public offering, the underwriters and guarantors, if any, are also liable for the accuracy and completeness of the information provided to the investors, in proportion to their fault.

Issuers are responsible for making sure that the information contained in the documents is a fair reflection of the facts. However, intermediary institutions, those conducting the public offering, guarantors (if any) and any board members of the issuer who have acted without due diligence can be held responsible for the part of the loss that cannot

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be indemnified by the issuers. Their liability is a secondary one and is based on their negligence.

In relation to offering documents that are not mandatory and are not subject to CMB approval, the parties must comply with the relevant Turkish law provisions. Criminal liability will be based only on fraud.

An issuer can be liable to investors in contract or tort. Underwriters and guarantors involved in an equity offering can also, in certain circumstances, be liable. Under statute, any person who has acquired securities to which the prospectus relates and has suffered loss as a result of the prospectus can claim compensation from those responsible for the prospectus if the prospectus: contained any untrue or misleading information, or failed to disclose any material information.

There are a number of statutory defences. For example, a person who proves that he or she was not informed about the inaccurate, misleading or incomplete information included in the public disclosure documents, and that the fact they were not informed was not a result of their gross negligence or wilful intention, will not be responsible for the deficiency.

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