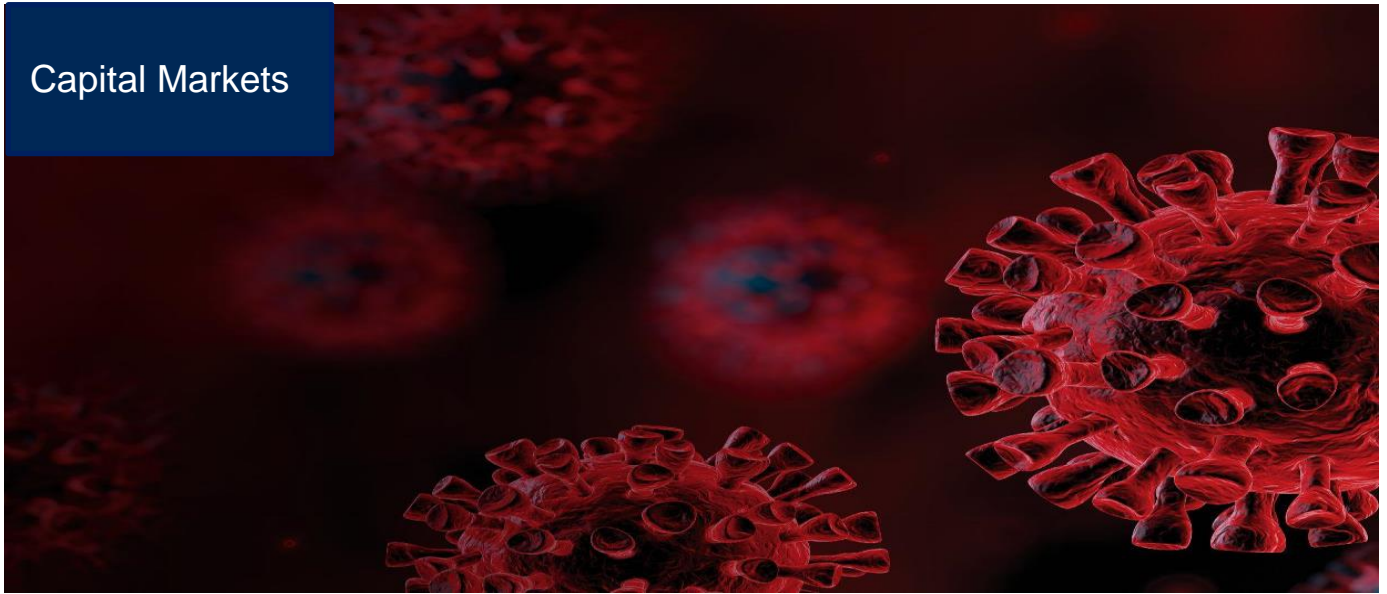


Capital Markets



COVID-19: Key Considerations for Capital Markets Players

COVID-19 was first detected in Wuhan, China on December 31, 2019. In a matter of months, COVID-19 spread to several countries, and the World Health Organization declared COVID-19 a pandemic on March 11, 2020. COVID-19's impact on Turkey, like elsewhere in the world, has become the most important issue on the business community's agenda.

For companies looking to raise capital at this time, COVID-19 demands extra contractual considerations as issuers and underwriters became increasingly focused on force majeure and material adverse change provisions. Transactional parties also need to navigate the disclosure requirements required by law and regulation and explore alternate means of completing diligence and book building in light of travel restrictions and medical recommendations to avoid face-to-face meetings. Companies that are already listed or have listed securities will have to consider their continuing disclosure obligations, in particular in relation to emerging inside information, as COVID-19 continues to impact their businesses and necessitate that regulators introduce new practices and requirements.

In addition, companies must grapple with the challenges of virus-related disclosures in their year-end accounts, and in some cases the challenges of simply fulfilling their financial reporting obligations, given travel restrictions and lockdowns. Day-to-day corporate governance may also become more problematic: for example, holding annual general meetings would become impossible since some governments are suspending major public gatherings.

This alert is intended to help investors, underwriters and issuers consider the potential impact of the COVID-19 outbreak on their capital markets-related transactions.

Key Issues

Termination for force majeure: There has been a significant amount of industry and legal commentary around the relevance of force majeure provisions with regard to a company's obligations, but these discussions have largely been in the context of commercial contracts within manufacturing and supply chains. In equity offerings, the underwriters and issuer enter into an underwriting agreement for the sale of securities and a force majeure clause is often included under the termination provisions. The provision generally provides a list of events, typically including epidemics, pandemics and outbreaks of diseases, which give the underwriters (but not the issuer) a potential termination right. However, since the full impact of COVID-19 still uncertain, underwriters may want to consider the inclusion of a more explicit force majeure clause. For example, since the outbreak of the severe acute respiratory syndrome (SARS) in 2002, SARS has been expressly included as one of the diseases in standard force majeure provisions in at least some of the affected jurisdictions, along with swine or avian flu,

H5N1, H1N1, H7N9 and their related/mutated forms. Going forward, we expect that termination provisions will also include COVID-19 as a named disease in more jurisdictions.

If an underwriter were to claim that a force majeure event has occurred, the potential termination right would generally still be subject to a requirement that the event makes it impracticable or inadvisable to market the securities; to enforce contracts for the sale of the securities; or to prejudice the success of the offering. Since the determination of whether the conditions are met is usually down to the sole opinion of the underwriters, it is not unusual for some issuers to have concerns about the extent and operation of the termination provisions. However, these provisions are market standard in an underwriting agreement, and although a deal may be pulled or delayed for a variety of reasons prior to the deal pricing, such as poor market conditions or an unforeseen event, the termination provisions take effect only upon signing the agreement after pricing. Consequently, the period between signing and closing during which the underwriters can terminate the agreement is a relatively short amount of time. Once the deal is priced, the underwriters are highly incentivized to close the deal and, historically, have proceeded to do so even in the face of major unforeseen events, such as the 9/11 terrorist attacks. It is therefore likely that while deals may be postponed due to COVID-19, any deal that reaches the stage of signing the underwriting agreement is unlikely to be terminated due to the force majeure provision.

A related contractual provision permits the agreement termination upon occurrence of a material adverse change ("**MAC**") in the financial condition and prospects of the issuer (or the similar concept of material adverse event). It may be difficult to argue that the virus constitutes a MAC, but since any of COVID-19's adverse effects that exist at the time of the execution of the underwriting agreement would likely be disclosed in the offering document and, therefore subsumed in a representation regarding the absence of any MAC subsequent to the date of the issuer's most recent balance sheet "except as disclosed" in the offering document. Only new information pointing to an unforeseen impact on the issuer's business and operations, or the substantial worsening of an already disclosed impact, would trigger the MAC clause in that limited period between the signing and closing.

Existing debt securities: For issuers who have issued debt securities, COVID-19 could impact the company's performance to the extent that they have trouble meeting their contractual obligations to pay interest and/or principal under the terms and conditions of the bonds/notes. This situation could cause an event of default and potentially trigger an acceleration of the bonds/notes and cross-defaults into other debt securities or credit agreements. There may be a short grace period for the non-payment of interest, though this is primarily intended to cover the issuer for purely technical problems in case there is a delay in the transmission of payment. Parties may wish to consider extending this grace period. If the issuer's business is impacted by the virus outbreak to the extent that its ability to meet its payment obligations is compromised, it should consider conducting a liability management exercise to help restructure its debt, such as exchanging old bonds for new bonds or conducting a consent solicitation to amend the conditions of the existing bonds. As a result, we expect to see an uptick in liability management exercises being undertaken if the ability of issuers to meet their payment obligations is compromised. Liability management measures to help restructure debt, such as exchanging old bonds for new bonds or conducting a consent solicitation to amend the conditions of the existing bonds, should be considered.

Disclosure: One of the more challenging aspects of the COVID-19 outbreak for capital markets participants concern the disclosure of business risk and impact. Disclosure can be categorized into two elements: first, the disclosure requirements of the stock exchange and/or regulator when securities are first offered to the public; and second, the ongoing reporting and disclosure obligations once securities have been listed.

Since the emergence of the SARS outbreak in 2002, offering documents in the Asia Pacific region have regularly included fairly generic risk factors to disclose that the outbreak of an infectious disease could affect the business, financial condition, results of operation and prospects of a company's group. As new diseases have emerged, such as Middle Eastern respiratory syndrome (MERS), Ebola, avian flu, H1N1 and Zika virus, they have been included into the risk factors. We are now seeing offering documents including express references to the Wuhan coronavirus. The degree of disclosure will depend on many issuer-specific factors, such as the level of information and data available; the significance of the affected jurisdictions on the business; the effect on customers and supply chains; business continuity planning measures; and the geographic proximity to the virus. Given that COVID-19 is a relatively new virus, it is difficult to make any reliable judgments about how long the outbreak will last or its medium to long-term effects on business. For a company listing securities, full and fair disclosure is critical from a risk management perspective.

In addition to risk factors, issuers should consider covering the impact of the virus and the measures they are taking to mitigate its effects in the management discussion and analysis and/or a recent developments section so as to explain to investors the specific steps that are being taken, including any business continuity plans.

Securities offerings require due diligence. In particular, underwriters and counsel must carefully assess their ability to conduct appropriate due diligence if site visits and in-person meetings become difficult or impossible to arrange due to government or business travel restrictions or personnel unavailability. We may also begin witnessing COVID-19 specific due diligence questions being asked in management meetings, on bring downs and closing calls. Although a physical signing meeting is now a rarity, the logistical issue that it presents may also need to be considered.

The second disclosure consideration affects companies that already have listed securities. Companies will have to carefully consider the impact of COVID-19 on their business, operations and revenues to assess whether this information constitutes "inside information". In general, a company whose financial instruments are listed and admitted to trading on a stock exchange will be subject to general disclosure requirements designed to prevent the creation of a false market in the company's securities. What constitutes a significant effect on the price of financial instruments will vary from issuer to issuer and fact pattern to fact pattern.

In addition to companies with significant operations in China, companies with supply chains, distributors and customers in the region are also issuing disclosures. Issuers planning to tap the market in the following months are also adding COVID-19 to their laundry lists of factors that could affect the outcome of the forward-looking statements in their disclosure documents.

Financial reporting: Companies will also need to factor in guidance related to the preparation of their year-end accounts. While some companies are grappling with the challenges of virus-related disclosures in their year-end accounts, for others there is the practical difficulty of fulfilling their financial reporting obligations due to travel restrictions and shutdowns. A company experiencing these reporting issues will need to assess whether this could be considered inside information requiring a separate announcement as soon as reasonably practicable.

In this regard, the Capital Markets Board has taken a number of actions to provide flexibility to Turkish public companies in terms of their financial reporting obligations. Public companies whose securities are traded on an exchange or an organized market will have a 30-day extension to disclose their financial statements. Public companies subject to special financial reporting periods will also benefit from the 30-day extension. Public companies whose securities are not traded on an exchange or an organized market have until the end of the month following the expiry of the disclosure date for their 2019 financial statements to disclose their statements.

Annual general meetings: A practical impact on day-to-day corporate governance, which could become an issue for an increasing number of companies as the virus spreads, is the ability to hold annual general meetings ("**AGM**"). In addition to travel restriction that may limit meeting attendance, some governments have started to suspend or place limits on major public gatherings. In a number of jurisdictions, some companies are already holding "virtual" annual meetings. While some contend that this is intended to decrease participation by corporate "gadflies" and others who attend these meetings for the specific purpose of posing difficult questions to management, the spread of COVID-19 and related travel restrictions could accelerate this development in the jurisdictions where virtual meetings are permitted.

Although Turkish capital markets laws allow the shareholders of public companies to electronically participate in general assembly meetings, all planned general assemblies should be postponed to prevent the spread of COVID-19. As discussed in our previous [alert](#), the Minister of Trade stated on March 20, 2020, that they are taking certain measures on how to proceed with these meetings and that companies will be allowed to hold general assembly meetings electronically, despite no specific provision for electronic meetings under companies' articles of association. In addition, there is a draft bill proposing to increase the time limit to convene annual general meetings from three months to five months starting from the end of the company's fiscal year.

New financing models: Virus outbreaks like as SARS and MERS indicates that it was only a matter of when, not if, a new threat would emerge. In anticipation of this, the World Bank issued USD 320 million of so-called "pandemic bonds" in 2017. In addition to requiring a certain number of deaths to have occurred, they also prescribe a required waiting period from the initial outbreak. The bonds have faced some criticism for paying out

too slowly so that they cannot be used to fund the critical early preventative stage.

While the clock ticks on the pandemic bonds, the Chinese government is actively encouraging companies to issue "coronavirus bonds" to raise money to support their businesses. The key requirement of the bonds is that at least 10% of the proceeds must be earmarked for measures to tackle the pandemic. The bonds' approval process has been significantly shortened to a matter of days. The bonds currently offer low coupon rates, which may have deterred some private investors, but state banks have been encouraged to fill this demand gap to support the initiative. Outside of China, the Agricultural Development Bank of China recently issued dim sum bonds in Hong Kong to raise funds to tackle the coronavirus outbreak. Depending on the development of the coronavirus situation, we may see more of these fundraising exercises in different jurisdictions.

Lasting impact: COVID-19 has forced businesses to adopt new ways of operating. One aspect of the capital raising process that has been around for many years is the investor roadshow to help the book building process, whereby the underwriters and issuer engage in marketing or "roadshow" meetings with investors around the world in order to gauge their interest at different price levels before signing the underwriting agreement. Although "online roadshows" have been part of the landscape for some time, given the travel restrictions put in place by governments and the reluctance of many people to travel, issuers and underwriters may move towards conducting more online roadshows, perhaps even hosting roadshows exclusively online. With the obvious cost saving advantage and efficiencies, not to mention the avoidance of long-haul travel and jet-lag, it remains to be seen whether one of the lasting effects of the virus could be the widespread adoption of alternative roadshow practices.

Conclusion

Unfortunately, capital market actors shoulder more risk and responsibility in these difficult times. It is key for these actors to review their transactions and actions in light of the above to diagnose and resolve possible issues, since continued market volatility is likely to increase pricing pressure and uncertainty.

The COVID-19 outbreak has a continuously growing global impact, including an increasing death toll and disruption of daily life. Amid this rapidly changing situation, issuers and financial institutions need to be aware of the potential financial, regulatory and legal consequences for their businesses. Currently, the response from issuers approaching the capital markets has been mixed: in the Asia Pacific region we have noticed a gradual increase in IPOs being launched in February and March compared to January, while numerous deals have been delayed elsewhere. Risk mitigation will be key for informed IPO decisions. For issuers who decided to press ahead with their IPOs or capital raising, they will need to include appropriate risk factors and disclosures relating to any impact or potential impact of the virus situation on their business, internal controls and risk management in the offering document. A critical factor in a successful transaction will be to ensure that the issuer provides investors with sufficient and up-to-date information to make an informed investment decision.

Please stay up to date with further developments through [the Esin Attorney Partnership Coronavirus Helpdesk](#).