The International Capital Markets Review

Ninth Edition

Editor
Jeffrey Golden

The LawReviews

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PREFACE

This book serves two purposes – one obvious, but the other possibly less so.

Quite obviously, and one reason for its continuing popularity, *The International Capital Markets Review* addresses the comparative law aspect of our readers' international capital markets (ICM) workload and equips them with a reference source. Globalisation and technological change mean that the transactional practice of a capital markets lawyer, wherever based, no longer enjoys the luxury – if ever it did – of focusing solely at home within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and technology more and more permits a practitioner to tackle international issues.

Moreover, clients certainly may have multi-jurisdictional ambitions or, even if unintended, their activities often may risk multi-jurisdictional impact. In such cases, it would be a brave but possibly foolish counsel who assumed: 'The only law, regulation and jurisdiction that matter are my own!'

Ironically, the second purpose this book aims to serve is to equip its readers to do a better job as practitioners at home. In other words, reading the summaries of foreign lawyers, who can describe relevant foreign laws and practices, is perfectly consistent with and helpful when interpreting and giving advice about one's own law and practice.

As well as giving guidance for navigating a particular local but, from the standpoint of the reader, foreign scene, the comparative perspectives presented by our authors present an agenda for thought, analysis and response about home jurisdiction laws and regulatory frameworks, thereby also giving lawyers, in-house compliance officers, regulators, law students and law teachers an opportunity to create a checklist of relevant considerations both in light of what is or may currently be required in their own jurisdiction but also as to where things there could, or should, best be headed (based on best practices of another jurisdiction) for the future.

Thus, an unfamiliar and still-changing legal jurisdiction abroad may raise awareness and stimulate discussion, which in turn may assist practitioners to revise concepts, practices and advice in both our domestic and international work. Why is this so important? The simple answer is that it cannot be avoided in today's ICM practice. Just as importantly, an ICM practitioner's clients would not wish us to have a more blinkered perspective.

Not long ago, I had the honour of sharing the platform with a United Kingdom Supreme Court Justice, a distinguished Queen's Counsel and three American academics. Our topic was 'Comparative Law as an Appropriate Topic for Courts'. The others concentrated their remarks, as might have been expected, on the context of matters of constitutional law, and that gave rise to a spirited debate. I attempted to take some of the more theoretical aspects of our discussion and ground them in the specific example of capital markets, and particularly the over-the-counter derivatives market.

Activity in that market, I said, could be characterised as truly global. More to the point, I posited, that, whereas you might get varied answers if you asked a country's citizens whether they considered it appropriate for a court to take account of the experiences of other jurisdictions when considering issues of constitutional law, in my view derivatives market participants would uniformly wish courts to at least be aware of and consider relevant financial market practice beyond their jurisdictional borders and comparative jurisprudence (especially from English and New York courts, which are most often called upon to adjudicate disputes about derivatives), even when traditional approaches to contract construction as between courts in different jurisdictions may have differed.

In such cases, with so much at stake given the volumes of financial market trading on standard terms, and given the complexity and technicality of many of the products and the way in which they are traded and valued, there appears to me to be a growing interest in comparative law analysis and an almost insatiable appetite among judges to know at least how experienced courts have answered similar questions.

There is no reason to think that ICM practitioners are any differently situated in this regard, or less in need of or less benefited by a comparative view when facing up to the often technical and complex problems confronting them, than are judges. After all, it is only human nature to wish not to be embarrassed or disadvantaged by what you do not know.

Of course, it must be recognised that there is no substitute for actual and direct exchanges of information between lawyers from different jurisdictions. Ours should be an interdependent professional world. A world of shared issues and challenges, such as those posed by market regulation. A world of instant communication. A world of legal practices less constrained by jurisdictional borders. In that sense and to that end, the directory of experts and their law firms in the appendices to this book may help to identify local counterparts in potentially relevant jurisdictions. And, in that case, I hope that reading the content of this book may facilitate discussions with a relevant author.

In conclusion, let me add that our authors are indeed the heroes of the stories told in the pages that follow. My admiration for our contributing experts, as I wrote in the preface to the last edition, continues. It remains, too, a distinct privilege to serve as their editor, and once again I shall be glad if their collective effort proves helpful to our readers when facing the challenges of their ICM practices amid the growing interdependence of our professional world.

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London
October 2019

Chapter 20

TURKEY

Ömer Çollak, Ökkeş Şahan and Nazlı Tönük Çapan[1]

I INTRODUCTION

i Overview of securities law

Although securities markets in Turkey have a long history, the recognition of securities as a separate area of law is relatively new. After the nasty experiences and substantial losses incurred by so many following the unregulated securities offerings in the 1980s, the Capital Markets Law No. 2499 (Former CML) was introduced in July 1981. The Capital Markets Board (CMB), the Turkish capital markets regulatory and supervisory authority, was incorporated and endowed with all necessary powers under the Former CML. Since its incorporation, the CMB has undertaken a leading role and, while conducting its regulatory and supervisory role, has also supported the improvement of the markets and the innovation and introduction of new capital market instruments.

At the end of 2012, the Former CML was replaced by the new Capital Markets Law No. 6362 (CML), which was enacted in the Official Gazette dated 30 December 2012. The main goal of the CML is to harmonise Turkish capital markets legislation with European Union (EU) norms and with the provisions of the new Turkish Commercial Code No. 6102. While transparency, accountability, proportionality and consistency have been regarded as key structuring principles, the general preamble of the law states that the CML is only a 'market regulating text'. Furthermore, although the provisions seem detailed, generally the CML is a framework law and, accordingly, secondary legislation has been prepared and published by the CMB with the aim of providing more detailed provisions pertaining to specific capital markets instruments, transactions and entities conducting capital markets activities.

According to Article 4 of the Former CML, all capital market instruments to be issued or offered to the public were required to be registered with the CMB. Now, instead of registration, an offering document approval system has been adopted. The practical outcome of this change is the shortening and simplifying of the application procedure to the CMB during offering activities. However, approval of the information included in the offering document provides no guarantee that it is true, and accurate or relevant instruments are recommended by the CMB. The CML has also introduced a validity period of 12 months for the prospectus, so unless there is an addition or amendment, it would be sufficient for issuers to conduct offerings based on the underlying prospectus without obtaining additional CMB approval, which will be advantageous for market participants in terms of time and costs. For issuances excluding a public offering, an issuance certificate will need to be prepared by issuers and approved by the CMB.

1 Ömer Çollak is a partner, Ökkeş Şahan is a counsel and Nazlı Tönük Çapan is an associate at Paksoy.

The CMB offering rules that are applicable depend on the types of securities offered. As a general rule, however, while it is mandatory to prepare offering circular-type disclosure documents for public offerings, it is not mandatory for private placements or offerings targeting qualified institutional investors. For the issuance of capital market instruments without a public offering process, the new law requires an issuance certificate, which must be approved by the CMB, to be prepared by the issuer.

Article 10 of the CML regulates the liability applicable for offering documents, preparation of which is mandatory and subject to CMB approval. Pursuant to Article 10 of the CML, issuers are responsible for a fair reflection of the facts in the information contained in the documents. However, as Article 10 clearly spells out, an intermediary institution, those conducting the public offering, guarantors (if any) or board members of the issuer not acting with due diligence can be held responsible for the part of the loss that cannot be indemnified by the issuers; thus, their liability is a secondary one and would be based on their negligence.

In an effort to enlarge the scope of services provided to investors in line with EU regulations, capital market instruments are redefined under the CML as securities, derivative instruments (which include leverage transactions), investment contracts and any other instrument to be determined as a capital market instrument by the CMB.

Provision of all capital market activities in Turkey is subject to CMB licensing requirements; however, foreign intermediary institutions can provide intermediary services to Turkish issuers for cross-border offerings and to Turkish investors on a reverse enquiry basis.

Corporate governance rules have been regulated by the CML, and the CMB is authorised to oblige public companies, depending on their qualifications, to comply partially or wholly with these rules, to determine principles and procedures thereto, to take decisions and to initiate lawsuits in cases of non-compliance.

Another innovation is the introduction of squeeze-out and appraisal right mechanisms into the CML. In a publicly held company, if the voting rights reach or surpass the ratio determined by the CMB as a result of a share purchase offer or any other cause, the majority shareholders will be entitled to squeeze out the minority shareholders. In such cases, the minority shareholders will also be entitled to sell their shares to the majority. In addition, shareholders opposing general assembly decisions regarding material transactions, such as a merger or material asset transfer, will have the right to sell their shares to the company and exit. The company will have to purchase the shares in an amount equal to the average amount of the weighted average price determined within the 30 days prior to the public announcement of such a material transaction.

Compared with the Former CML, the CML enlarges the scope of the supervision of the CMB. In addition to the capital market offences defined in the CML, which include insider trading, transaction and information-based market manipulation, unapproved offerings, unlicensed capital market activities, embezzlement and repurchase agreements without having underlying assets, there is the new concept of market abuse actions. Market abuse actions can be described as activities disrupting the trustworthy, transparent and stable functioning of the stock exchange and other organised markets that cannot be justified on any reasonable economic or financial grounds.

Pursuant to Article 115 of the CML, the implementation of a legal investigation because of a violation of the CML is conditional upon a written application submitted to the Public Prosecutor's Office by the CMB. In the event that a public prosecution has been filed with the trial court, a copy of the bill of indictment shall be notified to the CMB.

Apart from capital market offences, the CML regulates the administrative, pecuniary sanctions of the CMB. Accordingly, the CMB has the authority to impose administrative fines for violations of the regulations, standards and forms, or of the general and special decisions it issues. Administrative fines imposed by the CMB may be challenged in Turkey's administrative courts. The new law has significantly increased the upper limit of administrative fines for general violations to 478,846 Turkish lira for 2019 (subject to annual reevaluation by the CMB) as a deterrent to these kinds of offences. For transactions that disturb market conditions, however, the CMB can impose administrative fines of up to 958,581 Turkish lira (for 2019, subject to annual reevaluation by the CMB) depending on the case.

The CMB's primary activities take place before the criminal courts in relation to capital market offences. However, the CMB also has a role before the civil courts, mostly seeking, inter alia, interim injunctions in cases of unapproved offerings, the annulment of transactions realised by unlicensed entities or with the aim of embezzlement, and the annulment of board resolutions taken under the registered capital system.

Since the incorporation of special tribunals is forbidden by the Constitution of Turkey, all securities law-related proceedings are held before the courts of general jurisdiction, and the CML authorises the Supreme Council of Judges and Prosecutors to delegate capital markets crimes to criminal courts of first instance. There are practically only a few court precedents to consider, in either criminal or civil cases, as the culture of securities law is a relatively new area for the entire legal community and for Turkish society as a whole.

Intermediary activities in Turkey, including marketing activities, can only be conducted by intermediary institutions with licences granted by the CMB. Conduct against this rule constitutes a criminal offence as defined in the CML.

Foreign investment banks that are party to international sales of Turkish securities do not have legal standing before the CMB as authorised intermediary institutions. In deals where international and domestic offerings are realised concurrently, investment banks and international investors are treated as ordinary investors participating in a public offering realised in Turkey. In offerings made directly abroad, the CMB is not interested in to whom or by whom those securities are being offered.

The CMB has begun to request and review international offering circulars with the intention of protecting participants in domestic offerings. The CMB checks whether there is a contradiction between the international offering circular and the Turkish prospectus, and whether any material information is included in the international offering circular that is missing from the domestic prospectus. However, the CMB does not request or review international offering circulars in offerings of bonds issued by a Turkish issuer.

According to Decree Law No. 32, Turkish residents are free to conduct cross-border securities transactions (in the primary or secondary market) provided that these transactions are realised through a Turkish intermediary institution; however, these transactions should be realised on a reverse-enquiry basis, which means that foreign investment banks should abstain from conducting any intermediary activity in Turkey, including marketing.

On a separate note, the Central Bank of the Republic of Turkey, established in 1930, aims to achieve price stability and financial stability and to determine the exchange rate regime. The Central Bank also manages the gold and foreign exchange reserves.

II THE YEAR IN REVIEW

The CMB continues to profit from the flexibility and the greater role of the secondary legislation that was encompassed through the enactment of the CML at the end of 2012 to align the Turkish capital markets with international standards and to cope with the needs of the Turkish market.

To this end, the CMB has adopted various amendments to communiqués on subjects ranging from corporate governance to tender offers to establish robust, well-functioning capital markets. In 2016, all market participants familiarised themselves with the execution of the new legislation, and the market seems to be making significant progress since then given the changes made in certain legislation from time to time by the CMB to meet market participants' needs and to assert Turkish capital markets as a viable option for both local and international investors.

i Developments affecting debt and equity offerings

Equity offerings

In August 2008, an initiative was launched under the leadership of the CMB and the Istanbul Stock Exchange (now Borsa Istanbul) with a view to asserting Turkey as a viable option in the minds of international capital market investors, which was followed by studies on new capital market legislation.

Within the framework of this initiative, the CMB has also started revising its public offering regulations with the aim of deregulating public offerings as much as possible, stimulating innovation among market participants and decreasing the cost of unnecessary regulatory formalities. To this end, in 2017, the CMB published a major change regarding the sales periods and allocations percentages to attract Turkish companies to go public in Turkey rather than considering foreign exchanges. In parallel with the CMB's approach, Borsa Istanbul also introduced certain amendments to listing principles in the Borsa Istanbul Listing Directive with the aim of easing public offerings and boosting capital market activities in Turkey. Even though such changes have been made to the legislation by the regulators, the fate and success of Turkish initial public offerings (IPOs) remains inevitably tied to broader macroeconomic conditions, timing and investor sentiment.

In light of the new legislation studies, the CMB issued the Communiqué on Prospectuses and Issuance Certificates No. II-5.1, the Communiqué on Sale of Capital Market Instruments No. II-5.2 and the Share Communiqué No. VII-128.1 (New Regulations). The changes regulated under Share Communiqué No. VII-128.1, which reflect the CMB's decision dated 12 February 2013 issued regarding the transition period, can be summarised as follows.

Principles to be followed prior to an IPO of shares

The significant principles to be followed prior to an IPO are as follows:

a In the paid or issued capital of the company making an IPO, except for the funds allowed by the legislation, there should be no funds that have been created by way of equalising assets to market value within the past two years.

b If the fund to be collected upon capital increase is higher than the share capital of the company, and if this fund will be used in the payment of debts arising from non-cash asset transfers to related parties or companies, the capital increase will be considered as a material transaction. In this case, before the approved prospectus is submitted to the issuer, the shareholders must be granted an exit right.

c If the market value, which shall be calculated based on the public offering price of the shares to be offered to the public (except for the over-allotment option), is below 20 million Turkish lira, or between 20 million and 40 million Turkish lira, then either all the unsold shares, or all the unsold shares up to 20 million and half the unsold shares exceeding 20 million Turkish lira, are required to be underwritten by the intermediary institutions facilitating the public offering at their public offering price. Accordingly, the underwriting agreement is required to be sent to the CMB prior to the approval of the prospectus by the CMB. If the market value of the shares to be offered is over 40 million Turkish lira, there will be no such underwriting obligation. The intermediary institutions facilitating the public offering are not allowed to sell the shares that have been included in their portfolio through this method at a price lower than the public offering price within six months of the date the shares begin to be traded on the stock exchange.

d The earliest date to commence the public offering is the third day following the announcement date of the pricing report and the prospectus.

e The legally required percentage designated for allocation of the nominal value of shares in public offerings to domestic investors is 20 per cent (10 per cent to domestic institutional investors and 10 per cent to domestic individual investors), unlike the provisions in effect prior to the amendment dated 1 December 2017 to the Communiqué on Sale of Capital Market Instruments No. II-5.2 whereby issuers had to allocate at least 30 per cent of the nominal value of the shares to domestic investors (20 per cent to domestic institutional investors and 10 per cent to domestic individual investors). The CMB is also authorised to decrease the allocation percentages to zero or increase them to one time more by taking into consideration the market price of shares to be offered, the market conditions and an issuer's request on similar grounds.

f Revising an offering price downwards is possible through a public disclosure announcement without requiring any prospectus amendment. If the offering price is to be revised prior to initiation of the sales or book-building period, the public offering may not start until the second day following the date of the public disclosure, at the earliest. If the offering price is to be revised within the sales or book-building period, at least two business days shall be added to the relevant public offering period.

Listing requirements

The Borsa Istanbul Listing Directive previously required companies aiming to be listed on the BIST Star Market to have:

a a net profit according to the audited annual financial statements of the past two years; and

b an equity to capital ratio of 0.75 per cent for BIST Star Market Group 1, and of 1 per cent for BIST Star Market Group 2 in their most recent audited financial statements.

The amendments now in force enable companies that cannot satisfy the above two requirements to be listed on the BIST Star Market if the following less strict requirements are met:

a there should be an operating profit in the audited financial statements for the most recent annual or relevant interim period;

b the equity should be positive in the most recent audited annual financial statements (if negative, the application shall be made only to BIST Star Market Group 1);

c the equity to capital ratio should meet the threshold required for the BIST Star Market (the usual requirements for calculating the required ratio have been eased by allowing the proceeds to be obtained from the offering and the nominal value of the newly issued shares to be added to the equity amount in the most recent audited financial statement. Therefore, a company is able to include the new funds from the offering in its equity to capital calculations);

d the public offering must consist of primary shares with or without secondary shares (there must be an issuance of new shares); and

e other requirements to be listed on the BIST Star Market should be met.

If the above requirements are satisfied, Borsa Istanbul may decide for the shares to be listed on BIST Star Market, taking into account the projections that a company will present to Borsa Istanbul regarding its activities, existing financings and the use of offering proceeds.

Principles to be followed after an IPO of shares

The following are some of the key principles to be followed after an initial offering:

a As of the approval date of the prospectus for the shares offered to the public, shareholders holding 10 per cent and more of the shares in the current capital of the company or, regardless of the share percentage, all shareholders having control over the management of the company, shall not sell their shares on the stock exchange at a price lower than the public offering price for a period of one year from the date on which the shares began trading on the stock exchange. All those who will purchase shares through a private over-the-counter transaction from the shareholders shall also be subject to the aforementioned restrictions. However, the company's shares that have been purchased by the shareholders (investors) after the shares began trading on the stock exchange are not regarded within the scope of this restriction. For venture capital corporations that have purchased shares in a company that is making an IPO prior to the offering, the one-year term commences on the last date that the venture capital corporations purchased those shares.

b If the market value of the shares, which is calculated based on the public offering price (the floor price in cases of book building by way of a price range), is below 40 million Turkish lira, shares corresponding to 25 per cent of the nominal value of the shares offered to the public shall be made ready to be sold by way of restricting shareholders' rights to purchase new shares. In this case, the company must have adopted the registered capital system, and the necessary relevant information must be included in its prospectus.

c The intermediary institution facilitating the public offering, and having prepared a pricing report, is required to prepare at least two analysis reports within a year of the trading date of shares on the stock exchange. The reports must be announced on the Public Disclosure Platform and on the intermediary institution's website.

Capital increase through rights issues by companies whose shares are traded on the stock exchange

Share Communiqué No. VII-128.1 requires shareholders to be granted an exit right before the approved prospectus is submitted to the issuer if the fund to be collected upon capital increase is higher than the share capital of the company, and if this fund will be used in the payment of debts owed to related parties because of non-cash asset transfers. For cases of capital increases in cash, this Communiqué also obliges companies whose shares are traded on the stock exchange to prepare a report on the purposes for which the funds shall be used. Accordingly, this report should be adopted by the board of directors of the relevant company, must be sent thereafter to the CMB with the application for approval of the prospectus, and must be announced to the public in the same manner as the prospectus. In addition, following completion of the capital increase, a report must be prepared regarding whether the funds received are being used in accordance with the principles set forth in the report and prospectus. This report must also be disclosed and announced on the company's website and on the Public Disclosure Platform operated by Borsa Istanbul.

Capital increase of publicly held companies through bonus issues

According to Share Communiqué No. VII-128.1, without prejudice to the legal obligations relating to capital increases, applications made by companies whose shares are traded on the stock exchange for capital increases through internal sources, excluding the profit for the relevant financial year, which will result in the stock exchange price of the adjusted share being reduced to less than two Turkish lira (calculated on the average of the weighted average prices made on the stock exchange within the 30 days prior to the announcement of the capital increase to the public), shall not be put into operation by the CMB.

The share capital may not be increased from internal sources unless the lowest of the accumulated losses – according to the latest financial statements that have been prepared pursuant to the legal records of the publicly held company and the regulations of the CMB, and have been announced to the public accordingly – is not covered by setting off against internal sources, or a resolution by the board of directors in relation to the recovery of such losses has been given to the CMB. However, this will not be applicable to the gains (1) of real estate sales, (2) of participation sales that are awaited in the equity capital to be added to the capital, and (3) for the funds that are not allowed to be used in the set-off of the losses from previous years as per the legislation.

Debt offerings

As reported in earlier editions of *The International Capital Markets Law Review*, a substantial number of debt offerings in the form of Eurobonds and Turkish lira local bonds have been made by Turkish banks and corporates, particularly in the past three years, targeting international and Turkish investors, respectively. This can be attributed to the sound economic conditions in Turkey, and to certain actions undertaken by the regulatory authorities to stimulate and facilitate debt offerings.

Following the enactment of the CML, on 7 June 2013, the Communiqué on the Principles Regarding Board Registration and Sale of Debt Securities Series: II, No. 22 with the CMB was replaced by the Communiqué on Debt Instruments No. VII-128.8.

According to the Communiqué on Debt Instruments, the authority to set these limits is now held by the CMB. Currently, the issuance limit for listed companies has been decreased to the value of shareholders' equity multiplied by five, whereas the limit for non-listed companies has been decreased to shareholders' equity multiplied by three. The Communiqué on Debt Instruments introduced a detailed table of the financial statements that will be reviewed by the CMB on the application date.

Notwithstanding the foregoing, the limit for financial institutions with a long-term investment grade has been increased by 100 per cent and is set as the total equity multiplied by 10 for listed companies and the shareholders' equity multiplied by six for non-listed companies. The investment grading has to be granted by at least one rating agency qualifying as an '[institution] established in Turkey and certified by the CMB, or international rating agencies that are accepted by the CMB, to operate as [a] rating agency in Turkey'.

Pursuant to the Communiqué on Debt Instruments, debt instruments issued in Turkey are required to be registered with the Central Registry Agency (CRA). With the changes on 18 February 2017 to the Communiqué on Debt Instruments, debt instruments issued outside Turkey are no longer required to be registered with the CRA. However, the required information about the amount, issue date, International Securities Identification Number, interest commencement date, maturity date, interest rate, name of the custodian, currency of the bonds and the country of issuance must be submitted to the CRA within three business days of the issuance. Any changes to this information should be reported to the CRA within three business days of the date of change.

The new Communiqué indicates that debt instruments issued by all issuers, including banks and corporations, can be repurchased by the issuers in the secondary markets. In such cases, the issuer has three alternatives: it can retain, resell or cancel the bonds – all before the maturity date. Each of these are options, and do not constitute an obligation on the issuer (including cancelling the bonds). Note that retaining the bonds on the balance sheet would raise some questions under Turkish law as to the termination or cancellation of the debt as a result of the same issuer becoming the debtor and creditor (for the same debt), therefore issuers tend to prefer to opt to resell or cancel.

The new Communiqué also envisages early redemption at the request of the issuer or the investor. For bond issuances in Turkey, the rules and principles governing early redemption must be provided in the prospectus or in other relevant issuance documents. The relevant rules and principles may be freely determined between the issuer and the investors for issuances abroad, notwithstanding the legislation of the country where the issuance takes place.

Decisions of the Banking Regulation and Supervision Authority (BRSA) also affect the ability of banks to issue debt instruments. Historically, banks were not allowed to issue debt instruments because of the BRSA's negative approach, taking the needs of the Turkish Treasury into consideration; however, BRSA Decision No. 3665 dated 6 May 2010 allows banks to issue foreign currency debt instruments provided they sell to individual and institutional investors residing outside Turkey. These debt instruments are subject to general issuance limits determined by the Council of Ministers. BRSA Decision No. 3875 dated 30 September 2010 also allowed banks to issue Turkish lira-denominated debt instruments, subject to issuance limits that are different from the general issuance limits determined under the new Communiqué.

ii Developments affecting derivatives, securitisations and other structured products

Covered bonds

Turkish covered bonds are defined as capital markets instruments and referred to as covered securities or covered bonds in the legislation. Published on 21 January 2014 by the CMB, and amended on 5 September 2014, 20 October 2015 and 11 November 2018, the Communiqué on Covered Bonds No. III-59.1 replaced the two communiqués on mortgage-covered bonds and asset-covered bonds, creating a single framework for both debt securities.

Covered bonds may be issued by housing finance institutions or mortgage finance institutions. The nominal value of the covered bonds in circulation or trading at any given time and issued by non-mortgage finance institutions must not exceed 10 per cent of the total assets of the issuer. If the issuer is a mortgage finance institution, the nominal value of the covered bonds in circulation or trading at any given time should not exceed five times the equity of the issuer.

Issuers are required to apply to the CMB for approval to issue covered bonds, and if the covered bonds are to be offered to the public in Turkey, the CMB must also approve the related prospectus and provide the required issuance certificate. If the issuer is a bank, the consent of the banking authority must be obtained as well. Covered bonds are required to be listed if they are offered to the public. When giving approval, the CMB may ask for a third-party guarantee (e.g., by a bank) or insurance cover for the cover pool. It may also require that covered bonds are sold to qualified investors only, and require custody of the cover pool with a Turkish bank or mortgage finance institution.

Apart from the assets that the CMB may further determine, the following meet the eligibility criteria to form the pool of cover assets:

a receivables of banks and finance corporations arising from housing finance that have been secured by mortgage (or another type of eligible collateral that is approved by the CMB);

b receivables arising from financial lease agreements entered into for housing finance;

c mortgage-secured receivables (or commercial loans) of banks, financial leasing companies and finance corporations;

d receivables arising from the placement of house sale contracts by the Housing Development Administration of Turkey, TOKİ (but note that this cover asset qualifies only if the issuance is made by a mortgage finance institution);

e up to 15 per cent of the net current value of the cover pool may comprise certain approved substitute assets, which include cash, certificates of liquidity issued by the Turkish Central Bank, Turkish government bonds, Turkish Treasury lease certificates (i.e., *sukuk*), securities guaranteed by the Turkish Treasury within the framework of Law No. 4749 on Public Financing and Debt Management, securities issued by or with the guarantee of the central administrations and central banks of OECD countries, or other assets that the CMB may approve and disclose to the public; and

f listed derivatives or derivative contracts entered into with eligible swap counterparties to hedge currency or interest risk to meet the total liabilities or maturity mismatch between the covered bonds and cover pool.

Lease certificates

After conducting extensive studies and research to tailor a capital markets instrument in line with Islamic rules (*shariah* law), the CMB issued the Communiqué on the Principles regarding Lease Certificates and Asset Lease Companies in April 2010. The aim of this Communiqué was to fulfil the preferences of investors who have Islamic sensitivities to interest-bearing instruments; *sukuk* is the Arabic term used for financial certificates structured for their compliance with Islamic rules. Following the enactment of the Communiqué on the Principles regarding Lease Certificates and Asset Lease Companies, which focused only on the *ijara sukuk* structure, the CMB continued its study to diversify Islamic instruments in Turkey and accordingly introduced other types of sukuk with the Communiqué on Lease Certificates No. III-61.1 (Sukuk Communiqué) in June 2013.

According to the Sukuk Communiqué, lease certificates can be based upon a sale and leaseback structure (*ijara*), a management agreement (*wakala*), a sale and purchase (*murabaha* or *salam*), a partnership (*mudaraba* or *musharaka*) or a construction agreement (*istisna*), or on any combination thereof.

Lease certificates may be issued through an onshore special purpose vehicle, which is known as an asset lease company (ALC). An ALC can be incorporated in the form of a joint-stock company only by the entities listed in the Sukuk Communiqué, including Turkish banks and eligible intermediary institutions. Assets or rights subject to lease certificates can be movable or immovable property, intangible assets or rights over such assets. The ALC's only activity would be issuing lease certificates. Under the Sukuk Communiqué, the holders of lease certificates will be entitled to revenues generated by the underlying assets or rights, and the sale proceeds if such assets are sold in accordance with the Sukuk Communiqué, *pro rata* their share in the total number of certificates.

The Sukuk Communiqué requires lease certificates to be in electronically registered form, whereby the attached interests are recorded with the CRA in Turkey for both onshore and offshore issuances. The CMB has discretion to exempt certificates from this requirement if they are to be issued abroad.

Law No. 7159 providing certain exceptions to the issuance of lease certificates that are qualified as Additional Tier 1 and Tier 2 capital, under which participation banks are fund users, was published on 28 December 2018. As per the CML, non-recourse structures are impermissible, meaning that if the obligor of the underlying transactions does not fulfil its payment obligations towards the ALC, then the board of directors of the ALC is required to protect the interest of the certificate holders, including by selling the assets underlying the lease certificate and distributing the sale proceeds to the certificate holders. While this requirement aims to significantly protect the lease certificate holders, in the meantime it was restricting or eliminating the possibility of subordinated lease certificate issuances by ALCs, as such requirement was not in line with the requirements of banking legislation relating to Additional Tier 1 and Tier 2 issuances, and thus participation banks have tended to issue their Tier 2 certificates via offshore special purpose vehicles. However, with the recently introduced change on 28 December 2018 lease certificate issuances, which are qualified as Additional Tier 1 and Tier 2 capital, and where participation banks are funds users (i.e., obligors) in such issuances, they will be exempt from the obligation to use the underlying rights and assets to repay the lease certificate holders.

The same can be applied for most securities; lease certificates may be sold through a public offering, or without a public offering as a private placement or sale to qualified investors. The main difference between a public offering and a sale without public offering is the obligation to prepare an offering prospectus, which is not applicable to a sale without a public offering.

After the issuance of legislation on lease certificates, changes were made to Turkey's tax regulations to remove some of the barriers and to stimulate the issuance of lease certificates. These changes include exempting asset transfers from notary and land registry charges, prepared documents from stamp duty taxes and income derived from asset transfers from income taxes. Additionally, the Turkish Council of Ministers, with Decree 2011/1854 dated 29 June 2011, determined that withholding tax based on the maturities of lease certificate interest payments is the same as conventional notes.

iii Cases and dispute resolution

The courts of Turkey will not enforce a judgment obtained in a court in a country other than Turkey unless:

a there is in effect a treaty between Turkey and the other country providing for reciprocal enforcement of court judgments, or a multilateral treaty to which Turkey and the country where the judgment is rendered are party;

b there is a provision in the laws of the other country that provides for the enforcement of judgments of the Turkish courts; or

c there is *de facto* enforcement in the other country of judgments rendered by Turkish courts.

For instance, there is no treaty between the United States and Turkey or the United Kingdom and Turkey providing for reciprocal enforcement of judgments. There is also no provision in the laws of the United Kingdom or the United States permitting the enforcement of judgments rendered by Turkish courts. Further, there is no *de facto* reciprocity between Turkey and the individual states in the United States, except that courts of New York have rendered at least one judgment in the past confirming *de facto* reciprocity between Turkey and New York State. In 2005, the Supreme Court of the State of New York decided that a judgment of the First Commercial Court of the Republic of Turkey may be enforced in New York State. Turkish courts have also rendered at least one judgment in the past confirming *de facto* reciprocity between Turkey and the United Kingdom. However, since *de facto* reciprocity is decided by the relevant Turkish court for each individual case to determine the up-to-date situation with respect to the enforcement, there is uncertainty as to the enforceability of court judgments obtained in the United States or the United Kingdom by Turkish courts.

In addition, Turkish courts will not enforce any judgment obtained in a court established in another country if:

a the defendant was not duly summoned or represented or the defendant's fundamental procedural rights were not observed, and the defendant brings an objection before the Turkish court against the request for enforcement on either of these grounds;

b the judgment in question was rendered with respect to a matter within the exclusive jurisdiction of Turkish courts;

c the judgment is incompatible with a judgment of a court in Turkey between the same parties and relating to the same issues or, as the case may be, with an earlier foreign judgment on the same issue and enforceable in Turkey;

d the judgment is clearly against the public policy rules of Turkey;

e the judgment is not final and binding with no further recourse for appeal or similar revision process under the laws of the country where the judgment has been rendered; or

f the judgment was rendered by a foreign court that treated itself as competent even though it had no actual relationship with the parties or the subject matter at hand, and the defendant brings an objection before the Turkish court against the request for enforcement on this ground.

iv Relevant tax and insolvency law

Taxation

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

a the declaration regime: this is the primary regime whereby taxes are declared by taxpayers in their annual tax return; and *b* the provisional regime: this is a provisional regime that, although introduced as a temporary measure that was initially set to conclude at the end of 2015, has now 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 of withholding tax.

Debt instruments issued by Turkish-resident companies abroad, such as Eurobonds, are subject to the declaration regime. Non-resident investors are only exempt from the declaration regime until the end of 2020. Interest income is subject to withholding tax under the provisional regime at a rate that ranges from zero per cent to 10 per cent, depending on the debt instrument's maturity. Eurobonds with a maturity of three years or more are subject to withholding tax at a rate of zero per cent.

Debt instruments issued by companies resident in Turkey are subject to withholding tax under the provisional regime. The capital gains and the interest income derived from debt securities issued in Turkey by both resident and non-resident companies are subject to withholding tax at a rate of zero per cent.

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

a the shares are held for more than two years;
b the seller does not engage in securities trading;
c the proceeds are collected within two years of the sale year; and
d the exempted amount is kept in a special reserve account for five years and is not distributed to shareholders.

Finally, the transfer of shares is exempt from VAT and the documentation related to listing is exempt from stamp tax.

Insolvency

In the event that the bonds or notes are unsecured obligations of the issuer through a pledge, the bonds or notes rank and will rank *pari passu*, without any preference among themselves, with all other outstanding unprivileged and unsecured obligations of the relevant issuer through a pledge in the event of insolvency.

Regarding the restructuring of bonds, a new and limited set of rules has recently been introduced through the Borsa Istanbul Listing Directive to allow an increase in the trading volume of defaulted bonds under the Watch List Market of Borsa Istanbul. This has forced Borsa Istanbul to allow an amendment to the conditions of the bonds, and trading of both existing and new or restructured bonds on the Watch List Market. The new rules provide that an issuer restructures its defaulted bond on condition that it publicly discloses (prior to maturity) confirmation of its financial difficulty to repay the principal amount and discloses approval of the restructuring terms by bondholders holding a minimum of 50 per cent of the issuance. There is not any specific restructuring concept in the event of a default of a coupon payment, and we understand that the restructuring terms are very much limited in scope, mostly on extension of maturity.

In addition, Law No. 7186, which packages together several and diverse measures mainly in the banking, tax and capital markets laws, was published on 19 July 2019, and the long-awaited change related to the easing of the proof of debt instrument holders' right to claim was introduced by way of the addition of a new provision to Article 31 of the CML. With this change, the registry document provided by the CRA to bondholders is now treated as a document that could immediately and permanently remove any objection in debt collection proceedings that could be made by the issuer (debtor) as to the right to receivables or the existence of the debt under the bonds. The amendment clearly counts such document among the proof documents referred to in Article 68 of the Turkish Enforcement and Bankruptcy Law that serve the permanent removal of an issuer's objection and allows a bondholder (creditor) to immediately proceed with debt collection proceedings and seizure of the assets of the issuer, if needed. This amendment provides relief to bondholders by eliminating the need to initiate a full-fledged lawsuit to annul an issuer's objections, which would trigger a lengthy debt collection process risk in the case of default of issuers.

v Role of exchanges, central counterparties and rating agencies

Borsa Istanbul

The establishment of Borsa Istanbul was envisaged in the CML, as the successor to the Istanbul Stock Exchange and other securities exchanges in Turkey, for the purposes of creating a single platform. Borsa Istanbul is currently the only active stock exchange in Turkey and is located in Istanbul. It operates four main markets, namely the equity market, the debt instruments market, the precious metals and diamonds market, and the derivatives markets.

The equity market currently consists of the following market segments:

a the Star Market;
b the Collective Investment Products and Structured Products Market;
c the Main Market;
d the Emerging Companies Market;
e the Pre-Market Trading Platform;
f the Watch List Market; and
g the Equity Market for Qualified Investors.

In addition to these seven market segments, an official auction transaction may be conducted on the equity market when necessary, allowing the trading of stocks by courts, executive offices and other official entities in a separate market.

There is one other market, the Primary Market, on which shares in companies being publicly offered and listed for the first time on Borsa Istanbul and any additional shares offered following rights offerings of companies listed on Borsa Istanbul are traded.

In addition to these markets, there are two common transaction structures that are conducted on the equity market. Block trades of listed stocks are conducted as specifically regulated wholesale transactions, and preemption rights during rights issues (granting the right to subscribe for newly issued shares) are traded separately as preemption right transactions.

Borsa Istanbul has announced a new market structure for the Borsa Istanbul Equity Market and amendments to the trading principles on this market on 2 October 2019. The new market structure is expected to increase the motivation of both retail and institutional investors to trade on the secondary market, and encourage issuers to put more effort into expanding the depth and liquidity of the secondary market for their shares. Under the new rules, company shares traded on the Star Market and the Main Market of the Equity Market and having a similar size, liquidity and depth will now be traded in the same group, and grouping criteria have been set. Under the new market structure, two groups will be organised under the Star Market and Main Market, namely Group 1 and Group 2, and there will be different trading principles applicable to each group. The new structure and trading principles of the Equity Market, together with upcoming amendments to the Borsa Istanbul Equity Market Directive and the Listing Directive, will become effective on 4 November 2019, while the CMB regulation on ABCD share grouping will be repealed as of such date. In addition to grouping under the Star Market and Main Market, the Collective Investment Products and Structured Products Market will be renamed as the Structured Products and Fund Market, and shares trading on this market (real estate investment companies, venture capital investment companies and securities investment companies) will be taken off said market and traded in the relevant group on the relevant market.

Central counterparties

The CMB may require central clearing institutions to be a central counterparty (CCP) as of markets or capital market instruments whereby they undertake the duty to complete clearing by acting as seller against buyer and buyer against seller. Exchanges or other organised market places may also apply to the CMB to initiate the practice of the CCP for the traded capital market instruments.

The financial liability of clearing institutions with regard to clearing transactions, in which they undertake the duty to act as CCP, shall be determined within the limits to be established and in the framework of the guarantee to be taken from their members as well as other collateral.

Central clearing institutions that are to provide CCP services must have and must maintain an adequate level of capital in line with the financial risks they have undertaken in the related capital market instruments (and other risks), and must establish and maintain a data processing infrastructure as well as internal control, risk management and internal audit systems. The internal audit units of these institutions are obliged to control the reliability and adequacy of their risk management and data processing infrastructures at six-month intervals, as a minimum, and to notify the CMB of the results. The CMB may decide the related control be made more frequently and require an independent audit to be conducted with regard to the above-mentioned issues. Furthermore, the CMB is authorised to require the financial adequacy of the institution that is to provide CCP services to be assessed with methods it would specify, including stress tests, and to request a credit rating to be assigned in cases where it deems it necessary.

To maintain financial stability, the CMB may impose additional obligations, including capital requirements on institutions of systemic importance and their members.

In principle, guarantees taken by an institution that is to provide CCP services and the assets of account holders shall be monitored separately from the assets of the institution. The institution providing CCP services shall not use these guarantees or assets for purposes other than those they were deposited for, with the exception of transactions with regard to the execution of clearing. The institution that is to provide CCP services shall take all necessary measures to comply with these requirements.

Institutions that are to provide CCP services are not obliged to make separate contracts with the parties in each transaction.

As per a CMB resolution dated 19 June 2017, İstanbul Takas ve Saklama Bankası AŞ will act as the CCP for transactions effectuated in the Equity Market of Borsa Istanbul.

Rating agencies

As per the relevant legislation, rating services in capital markets consist of providing credit ratings for corporations and sovereign ratings, and providing ratings in relation to the compliance of corporations with corporate governance principles. The rating agencies incorporated in Turkey and duly authorised by the CMB and international rating companies that are authorised by the CMB can provide rating activities in Turkey. Sovereign rating services must also be provided in compliance with the relevant legislation of the CMB.

vi Other strategic considerations

Based on the latest trends in capital markets, there are signs that the outlook is due to improve, with numerous legislative changes, which will contribute to the growth of Turkish debt and equity markets. Depending on the macroeconomic conditions and Turkey's adoptive approach to such conditions, capital markets in Turkey are not likely to fall short of expectations in the coming year.

III OUTLOOK AND CONCLUSIONS

Turkish securities law has been evolving as a separate area of practice, in parallel to the inflow of funds into the Turkish economy through capital markets and the development of a corporate governance culture.

During the past few years, Turkey has solved most of its structural problems and achieved stable economic growth rates. This sound economic growth has pushed regulators to prepare new legislation, issue stimulating regulations and revoke regulatory impediments confronting entrepreneurs. Turkey's EU accession negotiations are another reason for the implementation of regulatory changes: to align the country's regulatory environment with the EU acquis. These circumstances have created a fast-changing environment bearing substantial risks that would be difficult to calculate and live with, and also provide the opportunity to set precedents and shape the implementation of the law.

The newly introduced CML, and secondary regulations aiming to remove bureaucratic impediments and unnecessary regulatory burdens or restrictions, are signs of progress realised in securities law. Although there has been a recent slowdown in Turkish offerings, capital markets experts expect that remarkable initiatives through legislative changes will encourage Turkish companies to tap into debt and equity offerings and support growth in the Turkish capital markets.

Appendix 1

ABOUT THE AUTHORS

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Paksoy

Ömer Çollak is the partner heading the capital markets practice of the firm. His practice focuses on representing corporate and bank issuers, underwriters and lead managers in cross-border public and private debt and equity offerings, regulatory capital as well as structured and Islamic finance transactions. Mr Çollak has been ranked as a leading and recognised lawyer for capital markets by *Chambers & Partners*, *The Legal 500*, *Who's Who Legal* and *Legal Experts*.

Mr Çollak also advises on various high-ticket cross-border mergers and acquisitions in a variety of sectors, including financial institutions and retail, acting for private equity firms and strategic investors.

Prior to joining to Paksoy, he worked as a foreign associate at a US firm in California, where he acted for biotech and high-tech multinational clients. He is a member of the International Bar Association and American Bar Association, and a board member of the Turkish Investor Relations Society. He is also an advisory board member of the alumni association of Marmara University School of Law, and a member of his alma mater, Darüşşafaka Society.

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Ökkeş Şahan specialises in securities, capital market transactions, corporate governance and company law.

Prior to joining Paksoy, Mr Şahan worked for almost 15 years at the Capital Markets Board of Turkey as legal counsel in the department of legal affairs, providing legal advice to other departments of the Capital Markets Board.

Mr Şahan practises in capital markets, acting for issuers and underwriters in equity, debt and equity-linked instruments in international public offerings, Eurobond offerings and private placements. He has also significant experience in listed company mergers and acquisitions in various sectors, including financial institutions and in retail and telecommunications, acting for private equity firms and strategic investors. He has unique experience and a deep understanding of the various types of disputes arising among various market participants such as investors, shareholders, listed companies, investment institutions, independent audit companies and other capital market participants.

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Nazlı Tönük Çapan specialises in capital markets, Islamic finance, banking and finance, mergers and acquisitions and corporate law.

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