The Legal 500 Country Comparative Guides

Turkey: Securitisation

This country-specific Q&A provides an overview to securitisation laws and regulations that may occur in Turkey.

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1. **How active is the securitisation market in your jurisdiction? What types of securitisations are typical?**

   The securitisation market began developing in the second half of the 1990s in Turkey. Until the last few years, compared to many developed countries, securitisation was mostly undertaken by the banking sector, and the asset classes were limited to credit card receivables, cheque receivables, diversified payment right receivables and leasing receivables. Due to changes in the tax regulations, transactions in the banking sector had decelerated, but this is expected to change following the Capital Markets Board's commitments to deepen capital markets via diversification of financial instruments for raising more funds through alternative and less costly methods. Therefore, Turkey offers much potential for the securitisation market.

   In this direction, in November 2018, certain amendments made to the respective securitisation legislation and in December 2018, an asset finance fund was established by Turkish Development and Investment Bank (TDYB) and it used mortgage-based securities of four Turkish banks as underlying asset for its securitisation transaction which collected a demand 2.43 times higher than the originally planned with an amount of TRY 3.15 billion (approx. USD 596.26 million). Because of the success of the first transaction in December 2018, TDYB issued its second securitized assets in March 2019 where it invested in the mortgage-based securities of Turkish banks and used such securities as underlying assets for its own securitisation. Also notable, the first securitization transaction is made by a Turkish non-bank institution, Volkswagen Doguş Finansman A.Ş. (51% owned by Volkswagen Financial Services AG and 49% by Turkish conglomerate Doguş Group) which established an issuance program for TRY 5 billion (USD 858 million) asset-backed securities backed by the company's auto loans receivables.

   During the last couple of years, most Turkish retail banks have securitised their diversified payment rights through offshore SPVs such as Akbank through ARTS Ltd, a company established under the laws of Jersey, which issued five tranches with five different international banks in an amount of US$795 million as part of its diversified payment rights securitization program in April 2018. Such deal structure is used extensively by major Turkish banks to access more hard currency funding and these deals have increasingly relied on demand from institutions such as the European Bank for Reconstruction and Development, the International Finance Corporation and the European Investment Bank.

   The development of the Turkish sukuk market, especially ijara and wakala structures, for example, provided an excellent basis for securitising a pool of such financings originated by Turkish Islamic banks. Although securitization through sukuk structures is also available under Turkish legislation, our answers below relate to the conventional securitization mechanism namely asset-backed and mortgage-backed securities.

2. **What assets can be securitised (and are there assets which are prohibited from**

being securitised)?

The asset-backed securities can only be issued by an asset finance or a housing finance fund.

For ordinary asset-backed securities, the portfolio of an asset finance fund can consist only of the following:

- receivables of banks and financing corporations arising from consumer loans and commercial loans;
- receivables arising from financial leasing agreements entered into pursuant to the Law on Financial Leasing, Factoring and Financing Companies;
- receivables arising from the sale of real estate property by the Housing Development Administration of Turkey, based on instalments and contracts;
- commercial receivables attached to deeds or collateral, arising from invoiced sales by joint-stock companies engaged;
- short-term deposits with maturity of less than three months, participation accounts, reverse repo transactions, money market funds, funds for short-term debt securities and Central Clearing Institution (Takasbank) Bank Money Market transactions, which are conducted in order to utilise the cash generated from the assets available in the fund portfolio; and
- assets in the reserve accounts;
- other assets which will be approved by the Capital Markets Board of Turkey.

The portfolio of a mortgage finance institution can consist only of the following:

- receivables of banks and financing corporations, arising from housing finance as defined under the respective legislation, which have been secured by a mortgage;
- receivables arising from financial leasing agreements entered into within the framework of the Law numbered 6361, provided that such receivables arise from housing finance as defined under the respective legislation;
- commercial loans and receivables of banks, financial leasing and financing companies, which have been secured by a mortgage;
- receivables arising from the house sales of the Housing Development Administration of Turkey, based on instalments and contracts;
- short-term deposits with maturity of less than three months, participation accounts, reverse repo transactions, money market funds, funds for short-term debt securities and Central Clearing Institution (Takasbank) Bank Money Market transactions, which are conducted in order to utilise the cash generated from the assets available in the fund portfolio; and
- assets in the reserve accounts;
- other assets which will be approved by the Capital Markets Board of Turkey.

The financial assets listed above, should meet certain criteria set forth under the Capital Markets Board of Turkey legislation which are as follows:

- Bank loans should fall within the scope of the group one loans of a Standard Nature loans;
- With respect of the loans extended by financing corporations and financial leasing receivables, there must be no special provisions set aside pursuant to the provisions of the Communiqué regarding Accounting Practices and Financial Statements of Financial Leasing, Factoring and Financing Companies;
- In relation to the immovables property which constitute a collateral for loans and receivables which have been collateralized with a mortgage:

1) The immovable property has to be located in Turkey,

2) The mandatory insurance liabilities in relation to the immovable property should be satisfied,

3) The market price of the immovable property should have been determined by the licensed appraisal companies, at the stage of utilisation of the loan or accrual of the receivable.

- With respect of commercial loans related to sea, air and land vehicles, Hull and Machine Insurance has to be established for the sea vehicles; Air Vehicles Hull Insurance has to be established for the land vehicles; and
- The covered securities issued in Turkey should be registered with Central Registry Agency and they should be transferred to the fund's account.

3. **What legislation governs securitisation in your jurisdiction? What transactions fall within the scope of this legislation?**

The main laws governing securitisations are the:

- Capital Markets Law No. 6362 published in the Official Gazette dated 30 December 2012 (Capital Markets Law),
- Communiqué on Asset-Backed and Mortgage-Backed Securities, Serial: III, No. 58.1, published in the Official Gazette dated 9 January 2014 (**Communiqué**),
- Communiqué on Principles of Mortgage Finance Institutions, Serial: III, No. 60.1, published in the Official Gazette dated 17 July 2014,
- Communiqué on Lease Certificates, Serial: III, No. 61.1, published in the Official Gazette dated 7 June 2013.

Ordinary asset-backed securities and sukuk issuances fall within the scope of these legislations.

4. **Give a brief overview of the typical legal structures used in your jurisdiction for securitisations and key parties involved.**

1. A founder such as banks incorporates an asset finance fund and asset-backed or mortgage-backed securities (**AMBS**) are issued and sold to the investors;
2. Issuance proceeds are transferred from the investors to the asset finance fund;
3. Purchase price of the underlying assets is paid to the originator with the issuance proceeds and the assets are transferred to the asset finance fund by the respective originator,
4. Proceeds of the underlying asset portfolio are collected by the asset finance fund through a service provider and as per the Communiqué, founders, originators and entities, which are entitled to be a founder can act as a service provider, and
5. Investors are repaid from the proceeds of the asset portfolio paid to the servicer and on-paid to the asset finance fund.

5. **Which body is responsible for regulating securitisation in your jurisdiction?**

Capital Markets Board of Turkey (CMB) is the regulatory and supervisory authority in charge of the capital markets in Turkey (www.cmb.gov.tr). The CMB aims to ensure the safe, fair and orderly functioning of the capital markets and to protect the rights and benefits of investors.

6. **Are there regulatory or other limitations on the nature of entities that may participate in a securitisation (either on the sell side or the buy side)?**

Although there is not any limitation on the nature of buy side, there are strict rules regulating the issuers and their founders.

Issuer

A securitisation governed by the Capital Markets Law and implementing communiqués on asset-backed securities requires incorporation of an asset/housing finance fund, which acts as issuer of the asset-backed securities.

Asset-financed funds are defined as a separate asset pool formed by the proceeds of the asset-backed securities sold. They do not have a legal personality and must be managed according to fiduciary ownership principles.

Founder of Issuer

Issuer funds can only be established in the specific forms defined by the CMB communiqués, by certain entities listed in the regulations (for example, banks, financial leasing and finance companies and brokerage houses).

7. **Does your jurisdiction have a concept of "simple, transparent and comparable" securitisations, following the BCBS recommendations?**

Although the respective legislation does not explicitly refer to such concept, it includes the most of the similar criteria for “simple, transparent and comparable” securitisations. Some of those criteria adopted under Turkish securitization legislation is as follows:

- There are risk retention requirements for the originator or founder.
- Homogeneous eligible underlying exposures are required since loans in default when the securitisation transaction begins or when new exposures are transferred cannot be used as underlying asset.
- The asset transfer is enforceable against any third party and the underlying exposures be beyond the reach of the seller (originator, sponsor or original lender) and its creditors, including in the event of the seller’s insolvency.

8. **Does your jurisdiction distinguish between private and public securitisations?**

Asset-backed securities can be sold through a public offering or a private placement and such issuance must also be approved by the CMB.

9. **Are there registration, authorisation or other filing requirements in relation to securitisations in your jurisdiction (either in relation to participants or transactions themselves)?**

In addition to the CMB approval stated under question 8 above, there are certain registration and notification formalities which are as follows:

- Transfer of assets

The originator, as the owner of the receivables, creates a pool of the receivables, which is then transferred to the fund through a written assignment agreement so that it constitutes a true sale.

A written assignment agreement is not required for covered bonds to be included in the fund but such assets are required to be in electronic form and to be transferred to fund’s account.

- Collaterals

To perfect the transfer of mortgages, commercial enterprise pledges and pledges on motor vehicles, the transfers must be registered at the land, commercial enterprise and motor vehicle registries.

10. **What are the disclosure requirements for public securitisations?**

It is mandatory to prepare an offering circular for public offerings.

11. **Does your jurisdiction require securitising entities to retain risk? How is this done?**

The originator or founder must purchase asset-backed securities/mortgage-backed securities corresponding to 5% of the nominal value of the asset-backed securities/mortgage-backed securities issued, and retain this value until maturity. If the asset-backed securities/mortgage-backed securities are issued in classes, this requirement applies either:

- When the asset-backed securities/mortgage-backed securities classes do not have a credit rating or have the same credit rating, on a pari passu or pro rata basis for each class.
- To the class or classes having the lowest credit rating, if there are different asset-backed securities/mortgage-backed securities classes with different credit ratings.

The CMB is authorised to vary the above ratio depending on the type of assets or on the originators or founders, but the ratio cannot exceed 10%.

In case there are more originators, the risk retention requirement is applicable for the tranche issuances related to the assets transferred by each originator.

12. **Do investors have regulatory obligations to conduct due diligence before investing?**

No, there is not such obligation for the investors under the respective legislation.

13. **What penalties are securitisation participants subject to for breaching regulatory obligations?**

Pursuant to Article 91 of the Capital Markets Law, the CMB is authorised to take all necessary measures, including request for interim injunctions or cautionary attachments, (save for all civil and penal liabilities) in case of an issuance or attempt to issue capital markets instruments in violation of the Capital Markets Law and the CMB legislation.

The CMB is further authorised to notify the respective issuer in order to eliminate the consequences caused by the illegal issuance and refund cash and other assets to the right holders, and if the consequences cannot be fully eliminated within a year after such written notice, CMB is authorised to file a lawsuit for the refund or for the liquidation of the partnership.

Pursuant to Article 96 of the Capital Markets Law, in case capital markets institutions' activities (such as issuers of a securitization transactions, i.e. asset/mortgage finance funds, and credit rating agencies), are not in line with the respective legislation, the standards of the CMB, their articles of associations or the fund rules, the CMB is authorised to restrict or cease their operations.

Pursuant to Article 99 of the Capital Markets Law, in case of unauthorised capital market activities, the CMB is entitled to take all necessary measures and to file lawsuits for the cancellation of consequences of such unauthorized activity or for the return of the cash or capital markets instruments to investors.

Pursuant to Article 103 of the Capital Markets Law, in addition to measures above, in case of a breach of capital markets laws, regulations and the CMB decisions, an administrative fine (TRY 46,958 – TRY 586,969 for 2020) might be imposed on the respective parties. However, if there is a benefit resulting from such action, the amount of the fine cannot be less than twice of such benefit.

Pursuant to Article 109 of the Capital Markets Law, selling capital market instruments without approved disclosure documents and engaging in unauthorised capital markets activities are deemed as a capital markets crime and those who conduct such acts shall be sentenced to imprisonment from two years up to five years and be subject to a judicial fine from five thousand days up to ten thousand days.

14. **Are there regulatory or practical restrictions on the nature of securitisation SPVs?**

A CMB-governed issue requires incorporation of an onshore fund, which is subject to strict restrictions. Pursuant to the Communiqué, an asset/housing finance fund can act as issuer of the asset-backed securities. For tax reasons, most recent securitisations have been done through offshore SPVs incorporated in the Cayman Islands or similar jurisdictions, and are not subject to Turkish legislation.

15. **How are securitisation SPVs made bankruptcy remote?**

Legal ownership of assets passes to the issuer fund, thus, those assets cannot be subject to insolvency proceedings of the originator.

Furthermore, a guarantee can be used as a tool to ensure payment of obligations that cannot be paid by the fund itself. However, if the originator cannot fulfil its obligation for the guaranteed part of the payments, the investors can attend the liquidation process of the originator for this part pari passu along with the other creditors.

16. **What are the key forms of credit support in your jurisdiction?**

Requirement for purchase of 5% of the asset-backed securities/mortgage-backed securities by the respective founders or originators is the only credit support form. Please see question (11) above.

17. **How may the transfer of assets be effected, in particular to achieve a ‘true sale’?**

Must the obligors be notified?

Although notification to the debtors is not required to perfect the assignment, it is recommended that the agreement include a provision obliging the originator to notify its debtor(s) of the assignment and to request an acknowledgment of no prior ranking assignments or counterclaims from the debtor(s). The debtor cannot then raise a good faith claim for the payments directly to the originator after they have received the assignment notice. In other words, the debtor, following receipt of such notice, is legally barred from discharging its payment obligations to the originator. Serving a notification and requesting an acknowledgment of no prior ranking assignments or counterclaims from the debtor of the relevant receivable should also assure the SPV that the receivables were not previously assigned or subject to counterclaims.

18. **In what circumstances might the transfer of assets be challenged by a court in your jurisdiction?**

Transactions cannot be unwound at a later date. The Execution and Bankruptcy Law No. 2004 has specific provisions regulating the procedure for unwinding transactions.

The following transactions are voidable if made within one year before the declaration of the bankruptcy of an insolvent party:

- The creation by the insolvent party of an encumbrance over its assets to secure an existing debt where that person had not previously promised (or is under contractual obligation) to execute such an encumbrance.
- Any payments made by the insolvent party other than with money or ordinary payment methods.
- Prepayment of debts that are not yet due.
- Registrations made to the title deed registry to strengthen contractual rights.

The court will not declare such arrangements void if third parties that benefit from the security arrangements prove that they were not aware of the financial condition of the insolvent party.

Additionally, transactions that can be invalidated include those made for no consideration (including donations) or for a consideration that is significantly less than the actual value of the transaction. The clawback period for such action is two years (prior to the insolvency).

Disposals made intentionally to impair the interest of creditors can be challenged by the creditors within five years after the date of such disposals.

19. **Are there data protection or confidentiality measures protecting obligors in a securitisation?**

The Data Protection Law No. 6698 (Data Protection Law) governs the processing of all types of personal data, i.e., data that relates to an identified or identifiable individual. If personal of the obligor will be processed and transferred in a securitization, the relevant provisions (set out below) of the Data Protection Law shall be applicable.

Under the Data Protection Law, the transfer of personal data requires, in principle, the prior approval of the data subject (that is, the owner of the personal data/obligor), unless a legal exemption applies. The transfer of the obligors' personal data that is strictly required to establish or claim a debt will not be subject to the prior consent of the debtor. Therefore, there is no need to obtain prior approval of the debtors in the assignment/transfer in a securitisation transaction if the transfer is limited to personal data that is strictly necessary to effectuate the transfer of loans and exercise recourses against the obligors.

If the obligors' personal data will be transferred outside of Turkey within the scope of a securitisation transaction, the principles applicable international data transfers under the Data Protection Law should be complied with. As the transfer of the obligors' personal data falls under the scope of an exemption from the requirement to obtain explicit consent, the applicability of any further conditions to the transfer depends on whether there is an adequate level of protection of personal data in the country to which the personal data will be transferred. The Turkish Data Protection Board has not issued the list of countries that are recognised as providing an adequate level of protection as of the date of this Q&A. If the destination country has not been recognised as providing an adequate level of protection, the data exporter in Turkey and the data importer in the destination country or countries must undertake in writing to provide an adequate level of protection, and the transfer is subject to the prior approval of the Turkish Data Protection Board.

20. **Is the conduct of credit rating agencies regulated?**

The conduct of credit rating agencies is regulated under the Communiqué No. VIII-51 on Principles of Rating Operations and Rating Institutions.

21. **Are there taxation considerations in your jurisdiction for originators, securitisation SPVs and investors?**

For tax purposes, offshore securitisation structures are treated as lending arrangements and SPVs are defined as financing institutions. Therefore, the following tax treatment applies:

- Given the regulation for a special tax regime, withholding tax is, in principle, applicable at the level of the Turkish resident Seller that will act in a tax agent capacity. However, effective from 21 March 2019, the reduced rate of applicable withholding tax to be taken into consideration relating to interest to be paid by the Issuer to the investors is 0% (zero per cent.) Therefore, no income tax will be payable through withholding in this particular respect.
- VAT and stamp duty exemptions apply (that is, VAT and stamp duty never apply on a

securitisation). According to a Ministry of Finance advance opinion published recently on its website, stamp duty should apply to offshore securitisation documentation. The advance opinion letters are not binding on taxpayers but they are on the tax authorities. This means that taxpayers are not obliged to comply and settle or litigate the matter in the case of a dispute, whereas the tax authorities would issue the same opinion for similar transactions unless there is a change in the legislation.

- The application of the resource utilisations support fund Levy depends on the denomination currency and on the average maturity. The rate is 3%. The base amount is interest on Turkish lira loans and principal amount for foreign currency loans. Turkish intermediary banks act as tax agents and the levy is usually a borrower's liability.

Onshore securitisations are generally made through funds which are technically considered taxable fiscal units (that is, taxable entities) in Turkey. However, this income item of the concerned funds is exempt from corporate income taxation in Turkey.

Onshore securitisations are generally subject to tax (that is, corporate tax on any gains, VAT and stamp duty). However, exemptions apply for some types of securitisations such as sukuk issuances under sale and leaseback models and mortgage-backed securities.

22. **To what extent does the legal and regulatory framework for securitisations in your jurisdiction allow for global or cross-border transactions?**

There is no restriction on the cross-border transactions and such offshore issuance is not subject to legislative requirements of CMB.

23. **To what extent has the securitisation market in your jurisdiction transitioned from IBORs to near risk-free interest rates?**

Since the number of the onshore securitization transactions are limited and they are sold through private placement, the arrangement between parties cannot be confirmed.

24. **How could the legal and regulatory framework for securitisations be improved in your jurisdiction?**

Although current CMB legislation is in line with international standards, we believe that certain amendments to current bankruptcy and enforcement legislation such as concordat and intermediation regimes in order to prevent delays during the enforcement process and to encourage an efficient mechanism will constitute an important tool to attract especially foreign investors.

When it comes to tax side, in the last few years, due to the changes in the regulations, transactions in the Turkish market have decelerated. Therefore, in terms of the current environment, Turkey is in a position that offers much potential for the securitisation market.