The International Capital Markets Review

Tenth Edition

Editor
Jeffrey Golden

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THE INTERNATIONAL CAPITAL MARKETS REVIEW

TENTH EDITION

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PREFACE

Well, we did not see that one coming!

When the ninth edition of this volume appeared a year ago, we did not see the coming pandemic, lockdowns and working from home (WFH).

We knew even then that there would be new challenges ahead for the capital markets. We knew, for example, that key interbank offered rates (IBORs), benchmarks on which so much financial market activity relies, would be undergoing a period of change and that market participants would have to face up to the adoption of alternative rates and consider adjustments to legacy transactions based on LIBOR or other previously used pricing sources. No one said LIBOR migration would be easy. And that challenge has not gone away. The message from many key regulators is that, pandemic and other operational complications notwithstanding, the shift remains on track. LIBOR, supporting as it does hundreds of trillions of dollars of market activity, is slated for replacement by the end of 2021!

But we did not see and anticipate other challenges brought about by covid-19, basic as some of these may have been, and hidden as they may also have been, in notice provisions and other boilerplate buried in the back recesses of our transaction documents. How do you give effective notice to offices closed (often with the force of law) and with the decentralisation of WFH? If none of the methods contemplated by the parties' agreement can be used, may a different method be used instead?

Challenges though there may be, the capital markets have nonetheless shown their resilience. As I write this preface, Jack Ma's Ant Group has just filed for an initial public offering in Hong Kong and Shanghai that is expected to raise about US$30 billion, in what could be the world's largest offering ever.

And so international capital markets lawyers are still in business, still relevant. But our modus operandi may have changed a bit. In this world of WFH, we keep company with the books on our bookshelves more than we do with the other lawyers in the building. In circumstances such as these, there are ever more compelling reasons to keep this particular volume on our shelf. We can expect to turn more often to published answers when we cannot consult the practitioner in the office next door as easily.

As I have written before, 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 market (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 (even WFH), no longer enjoys the luxury – if ever it did – of focusing solely

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on a home market within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and increasingly technology permits practitioners to tackle international issues.

Moreover, clients certainly may have multi-jurisdictional ambitions or, even if unintended, their activities may often risk multi-jurisdictional impact, in which case, 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 offered 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 and also as to where things in that jurisdiction could, or should, best be headed (based on the best practice 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 us as 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), notwithstanding that traditional approaches to contract construction may have differed between courts in different jurisdictions.

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 at least to know how experienced courts have answered similar questions.

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There is no reason to think that ICM practitioners would be situated any differently, from judges in this regard or would be less in need of or benefit less from a comparative view when facing the often technical and complex problems confronting them. 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 (with new jurisdictions having been added this year – Austria and Taiwan). 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. As I wrote in the preface to the last edition, my admiration for our contributing experts 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 both the growing interdependence of our professional world and, now, the coronavirus pandemic and its impact on the global economy.

Best wishes for this difficult period. Stay safe, stay well and stay alert.

Jeffrey Golden
Joint Head of Chambers
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October 2020

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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 (the 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 of 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 procedure of application to the CMB during offering activities. 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.

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

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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 of the CML was the introduction of squeeze-out and appraisal right mechanisms. 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 these cases, the minority shareholders will also be entitled to sell their shares to the majority. In addition, shareholders opposing general assembly decisions regarding significant transactions such as certain mergers or demergers as defined under the relevant communiqué, asset transfers or changes in the company type will have the right to sell their shares to the company and exit. The public company may pass a board of directors' resolution and decide to initially offer the shares of the shareholders exiting the company, to other remaining shareholders or third-party investors before these are purchased by the public company itself. A shareholder holding shares on the public disclosure date of the significant transaction is eligible to exercise its right to exit. When a shareholder exercises its right of exit, the public company, whose shares are listed in the exchange, is obliged to purchase the shares of the exiting shareholder with the purchase conducted on the basis of fair-price criteria.

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 lacking underlying assets, there is also the concept of market abuse actions. Market abuse actions can be described as activities that cannot be justified on any reasonable economic or financial grounds and that disrupt the trustworthy, transparent and stable functioning of the stock exchange and other organised markets.

As well as governing 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

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and special decisions it issues. Administrative fines imposed by the CMB may be challenged in Turkey's administrative courts. The CML significantly increased the upper limit of administrative fines for general violations as a deterrent to these kinds of offences; the limit, which is subject to annual re-evaluation by the CMB, is set at 586,969 Turkish lira for 2020. For transactions that disturb market conditions, however, and depending on the case, the CMB can impose administrative fines of up to 1,175,029 lira (for 2020, subject to annual re-evaluation by the CMB).

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.

II THE YEAR IN REVIEW

The CMB has adopted various amendments to communiqués in recent years on subjects ranging from corporate governance to tender offers to establish robust, well-functioning capital markets. At present, market participants are generally familiar with the relevant legislation and the markets continue to develop in response to the legislative changes that the CMB makes from time to time 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 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 sales periods

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and allocation 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.

In the light of legislative 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 Share Communiqué No. VII-128.1. The changes introduced in Share Communiqué No. VII-128.1 can be summarised as follows.

Principles to be followed prior to an initial public offering of shares

The significant principles to be followed prior to an initial public offering (IPO) are as follows:

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

b If the market value calculated on the public offering price of the shares to be offered to the public (except for the over-allotment option) is below 20 million lira, or between 20 million and 40 million lira, then either all the unsold shares, or all the unsold shares up to 20 million and half the unsold shares exceeding 20 million lira, must be underwritten by the intermediary institutions facilitating the public offering at their public offering price. Accordingly, the underwriting agreement must 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 lira, there will be no underwriting obligation of this kind. The intermediary institutions facilitating the public offering are not allowed to sell shares 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.

c The earliest date on which the public offering can commence is the third day following the announcement date of the pricing report and the prospectus.

d 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). (Previously, prior to the amendment to the Communiqué on Sale of Capital Market Instruments No. II-5.2 of 1 December 2017, 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 by taking into consideration the market price of shares to be offered, the market conditions and an issuer's request on similar grounds.

e 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 must be added to the relevant public offering period.

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Listing requirements

Following an amendment to the Borsa Istanbul Listing Directive on 8 January 2018, companies that have not earned profit in the past two years or do not meet the shareholders' equity to capital ratio requirement (or both of these) can still be listed on the Borsa Istanbul Stars market provided certain conditions are met. The usual requirements to be met to be listed have been relaxed, allowing the addition of the proceeds to be obtained from the offers, as well as the nominal value of the newly issued shares, to the shareholders' equity amount under the most recent audited financial accounts in calculating the required ratio. From now on, a company is able to include the new funds from the offering in its shareholders' equity-to-capital calculations. However, this is only possible where the ratio of the shareholder's equity to capital in the company concerned is positive according to the company's latest audited financial accounts, and there is an operating profit according to its latest audited annual financial accounts and relevant interim accounts. In addition, these eligibility criteria are only applicable where there is an issue of new shares, the other listing criteria of the Stars Market are also met and the board of Borsa Istanbul approves the listing application of the company concerned.

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, cannot 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 purchase shares from the shareholders through a private over-the-counter transaction are also subject to the aforementioned restrictions. However, company shares purchased by the shareholders (investors) after the shares began trading on the stock exchange are not subject to this restriction.

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 lira, shares corresponding to 25 per cent of the nominal value of the shares offered to the public must 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 must have prepared a pricing report and is required to prepare at least two analysis reports within a year of the date of trading of the 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. In the case 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

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and must then be sent to the CMB with the application for approval of the prospectus; it 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 for the purposes set out 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) that will result in the stock exchange price of the adjusted shares being reduced to less than two lira (calculated on the average of the weighted average prices made on the stock exchange in the 30 days prior to the announcement of the capital increase to the public) will not be put into operation by the CMB.

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 in accordance with 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) from real estate sales, (2) from participation sales that are awaited in the equity capital to be added to the capital, or (3) from funds that are not allowed to be used to set off losses from previous years pursuant to the applicable 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 lira local bonds have been made by Turkish banks and corporate entities, particularly in recent years, targeting both international and Turkish investors. 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. Further, Turkish banks have global medium-term notes programmes and make issuances under these programmes regularly, depending on the market conditions.

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. The Law on Amendments to the Banking Law and Other Laws (The Amendment Law), published in the Official Gazette on 25 February 2020, introduced various amendments to the CML with the aim of increasing the depth and competitiveness of the capital markets while developing an investor-centred approach to reflect practical experience and to meet the real needs of the sector. The Amendment Law's key changes to the CML cover new and diverse topics under Turkish securities law such as bondholders' meetings, security trustees and project-backed securities. Notably, while the Amendment Law has introduced concepts and provided the general framework, the CMB retains the authority to issue implementing regulations in the form of new communiqués or amendments to existing communiqués.

With the changes of 18 February 2017 to the Communiqué on Debt Instruments, the issuance limit for listed companies was decreased to the value of shareholders' equity

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multiplied by five, whereas the limit for non-listed companies was decreased to shareholders' equity multiplied by three. Notwithstanding the foregoing, the limit for financial institutions with a long-term investment grade was increased by 100 per cent. Following the amendment of 13 June 2020 to the Communiqué on Debt Instruments, these issue limits will not be applicable to debt securities issued by mortgage finance institutions.

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 of 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.

Pursuant to the Communiqué on Debt Instruments, debt instruments issued by all issuers, including banks and corporations, can be repurchased by the issuers in the secondary markets, in which case 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 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.

The concept of the bondholders' meeting has been introduced through the Amendment Law, along with measures for the active representation of investors and protection of their rights. The Amendment Law provides that the holders of all outstanding bonds constitute a bondholders' meeting under Turkish law. Investors holding a tranche of bonds can also convene a separate bondholders' meeting. The Amendment Law states that the bondholders can act collectively to change the terms and conditions of the bond during the life of the bond, allowing bondholders and issuers to do so without obstacles and allowing them to agree on bond restructuring before or after a payment default. The Amendment Law further envisages the appointment of a joint representative, which may be similar to a trustee, to represent all bondholders. Unlike a fiscal agent, the representative should, to some extent, be able to enforce the terms of the bonds or negotiate with the issuer regarding any necessary amendments to the terms of the bonds, especially in times of financial distress.

The CMB recently issued a new Communiqué on Bondholders' Meetings No: II-31.A/1, published in Official Gazette No. 31241 of 11 September 2020. In line with the Amendment Law, this Communiqué introduces rules and procedures regarding the structure of bondholders' meetings (i.e., general bondholders' meetings and tranche bondholders' meetings), the representative of the bondholders, the bondholders' meeting procedure and the measures that can be taken in the event of the issuer's default; however, this Communiqué is not applicable for debt instruments issued outside Turkey. The market is

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expected to evolve and become increasingly more sophisticated in the course of time as new issuances of debt instruments in Turkey come on to the market and market practice becomes more broadly established.

Project-backed securities have been introduced through the Amendment Law, which provides a general legal framework and takes an initiative by introducing project finance funds for the financing of major long-term projects such as infrastructure, energy, industrial and technology projects, using a non-recourse financing structure.

Additionally, the Amendment Law recognises the concepts of security trustee and security trust deed as a matter of Turkish law, in line with their meaning under common law. The Amendment Law provides that debt securities determined by the CMB can be secured through collaterals, also determined by the CMB, to collateralise obligations secured under the debt securities. On this basis, as a matter of Turkish law, the title of assets can now be transferred as security to a security trustee, or rights *in rem* can be established on the assets in favour of the security trustee, and both in respect of the secured obligations owed by the issuers to the investors. The security trustee will have to be authorised by the issuer through a security trust deed and approved by the CMB before the issuance to protect the rights of the investors; the trustee will also have to fulfil, at any registry office, all applicable procedures and transactions in relation to registration or removal of all mortgage or other rights *in rem* in its own name but to the benefit of the investors.

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 this was opposed by the BRSA out of deference to the needs of the Turkish Treasury; however, BRSA Decision No. 3665 of 6 May 2010 allowed 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 of 30 September 2010 also allowed banks to issue lira-denominated debt instruments, subject to issuance limits that are different from the general issuance limits determined under the Communiqué on Debt Instruments.

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. Following the change made in the Communiqué on Covered Bonds No. III-59.1 of 14 May 2020, this limit has been removed for mortgage finance institutions.

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,

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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., from a bank) or insurance cover for the cover pool. It may also require covered bonds to be sold to qualified investors only and require custody of the cover pool with a Turkish bank or mortgage finance institution.

Apart from 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 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 (the 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 of these.

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

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lease certificates will be entitled to revenues generated by the underlying assets or rights, and the sale proceeds if the assets are sold in accordance with the Sukuk Communiqué, pro rata with their share in the total number of certificates.

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, exempting prepared documents from stamp tax and exempting asset transfer-related income, if any, from income taxation.

Additionally, Presidential Decree No. 842 of 20 March 2019 stipulated that withholding tax on interest (the applicable level of which is based on the maturity of lease certificates) 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 a treaty in effect 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 provision in the laws of the other country 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 could 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 in each individual case to determine the current situation with respect to 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;

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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 these grounds.

iv Relevant tax and insolvency law

Taxation

There are two regimes for income taxation of securities in Turkey:
a the declaration regime, which is the primary regime whereby taxes are declared by taxpayers in their annual tax declaration; and
b the provisional regime, which is a provisional regime that has been extended for five years, starting from 1 January 2016.

Income taxation is generally covered by the declaration regime, while 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. Capital gains derived from a listing of equities on the stock exchange fall under the provisional system and are subject to a zero per cent rate of withholding tax.

Debt instruments issued abroad by Turkey-resident companies, 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 on Eurobonds, however, is subject to withholding tax (under the provisional regime) at a rate that ranges from zero to 7 per cent, depending on the maturity of the debt instrument. Interest on Eurobonds with a maturity of three years or more are subject to withholding tax at a rate of zero per cent.

In contrast to debt instruments issued abroad, 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 by resident and non-resident corporations from debt securities issued in Turkey are subject to withholding tax at a rate of zero per cent.

In addition to the aforementioned income taxation through withholding, any capital gains derived from listings are, in principle, subject to corporate tax at a rate of 20 per cent (22 per cent for 2020) and the general exemptions available under tax law are maintained.

Finally, the transfer of shares is exempt from value added tax and the documentation related to listing is exempt from stamp duty in Turkey.

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

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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 diverse measures mainly in banking, tax and capital market 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. Following this change, the registry document provided by the CRA to bondholders is now treated as a document that can 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 this 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 allow a bondholder (creditor) to immediately proceed with debt collection proceedings and seizure of the assets of the issuer, if necessary. This amendment provides relief to bondholders by eliminating the need to initiate a fully fledged lawsuit to annul an issuer's objections, which would trigger a lengthy debt collection process risk in the case of default of issuers. The Amendment Law envisages that, as is typical in restructurings, in the event of a bond restructuring through amendment to the terms and conditions of the bonds after a payment default, all proceedings initiated because of default of the bonds will be suspended as of the date on which the bond terms and conditions are considered to be amended; also preliminary injunctions and precautionary attachments cannot be enforced. Accordingly, any statute of limitations that may be stopped on account of execution proceedings will be suspended.

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 with a view to 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 Structured Products and Fund Market;
c the Main Market;
d the SubMarket;
e the Pre-Market Trading Platform;
f the Watch List Companies Market; and
g the Equity Market for Qualified Investors.

In addition to certain changes made to its market structure in October 2019, on 17 September 2020, Borsa Istanbul announced a new structure for the Equity Market and amendments to the trading principles on this market. This new structure is expected

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to motivate 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.

Central counterparties

The CMB may require central clearing institutions to be a central counterparty (CCP) for 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 marketplaces may also apply to the CMB to initiate the CCP function for traded capital market instruments.

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

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 for which they were deposited, with the exception of transactions regarding the execution of clearing. The institution that is to provide CCP services must take all necessary measures to comply with these requirements.

According to a CMB resolution of 19 June 2017, İstanbul Takas ve Saklama Bankası AŞ will act as the CCP for transactions carried out in the Equity Market of Borsa Istanbul.

Rating agencies

Pursuant to 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 authorised by the CMB can provide rating activities in Turkey.

vi Other strategic considerations

Turkish capital markets faced a slowdown in 2019 compared with previous years. Although 2020 saw a rapid start in terms of capital market activity in Turkey, the emergence of the covid-19 pandemic has had an impact on the country's markets similar to that seen in economies globally, resulting in a significantly marked downturn. While the markets have been volatile during the first half of the year, once they rebound, the Turkish IPOs and issuances of debt instruments that have been postponed are expected to return to the market at the first opportunity.

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.

The introduction of the CML and secondary regulations aimed at removing bureaucratic impediments and unnecessary regulatory burdens or restrictions are signs of progress realised in securities law. In addition, the changes made to the CML through the Amendment Law

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together with upcoming changes in the secondary legislation are expected to meet the needs of the Turkish capital markets while increasing their competitiveness. Although there has been a recent slowdown in Turkish offerings, capital market experts believe that the significant initiatives being implemented through legislative changes will encourage Turkish companies to tap into debt and equity offerings and support growth in the country's capital markets.

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Appendix 1

ABOUT THE AUTHORS

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Paksoy

Ömer Çollak is the partner heading the capital markets practice at Paksoy. 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 and Partners*, *The Legal 500*, *Who's Who Legal* and the Legal Media Group *Expert Guides*.

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.

ÖKKEŞ ŞAHAN

Paksoy

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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He holds the following licences: capital market activities (advanced level), derivative instruments, real estate appraiser, credit rating specialist, corporate governance rating specialist and independent auditing in capital markets.

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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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Ms Tönük Çapan is also experienced in financial sector private mergers and acquisitions, particularly in the IT and energy sectors, takeovers, loan and credit facilities and other general corporate law-related matters.

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