# THE LENDING AND SECURED FINANCE REVIEW

FOURTH EDITION

**Editor**
Azadeh Nassiri

THE LAWREVIEWS

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# PREFACE

This fourth edition of *The Lending and Secured Finance Review* contains contributions from leading practitioners in 25 different countries, and I would like to thank each of the contributors for taking the time to share their expertise on the developments in the corporate lending and secured finance markets in their respective jurisdictions and on the challenges and opportunities facing market participants. I would also like to thank our publishers without whom this review would not have been possible.

I hope that the commentary that follows will serve as a useful source for practitioners and other readers.

**Azadeh Nassiri**
Slaughter and May
London
July 2018

**Chapter 24**

# TURKEY

*Sera Somay*[1]

## I OVERVIEW

Turkey is the 18th largest economy in the world, with a gross domestic product of US$720 billion. In less than a decade, per capita income in the country has nearly tripled and is now almost US$10,000. According to the Organisation for Economic Co-operation and Development (OECD), Turkey is expected to be one of the fastest growing economies of the OECD members during 2014–2016, with an annual average growth rate of 3.6 per cent. However, despite strong growth of loans and deposits since 2006, the Turkish banking sector remains significantly underpenetrated compared with banking penetration in the eurozone.

The banking system traditionally has a majority share in the Turkish financial sector; however, there has been an increase in the number and size of non-bank financial institutions, such as leasing and insurance companies. As of March 2016, of 53 banks operating in Turkey, 31 are deposit-taking banks and 13 are development banks. Four of these 13 are state-controlled banks and nine are private banks, including four with foreign capital. Furthermore, there are three private and two state-owned participation banks operating, three of which are under the supervision of the Savings Deposits and Insurance Fund.

Turkish Banking Law No. 5411 permits deposit-taking banks to engage in all fields of financial activities, including deposit collection, corporate and consumer lending, foreign exchange transactions, capital market activities and securities trading. The main objectives of development and investment banks are to provide medium and long-term funding for investment in different sectors.

Turkish deposit-taking banks (including participation banks) have been the main finance providers to Turkish corporates, where lending has been in the form of revolving lines of credit, acquisition financing, bridge loans, club deals, secured or unsecured term financing, limited recourse project finance, structured and off-balance-sheet financing. On selective deals, Turkish banks started to use the terms of the Loan Market Association in financing transactions after adapting relative provisions to mandatory requirements of Turkish law.

Turkey's banking sector grew by 18 per cent in 2015; however, the sector's total assets decreased by 6 per cent in dollar terms. Loan demand, which significantly outpaced deposit growth, necessitated policies promoting a higher saving ratio in the economy.

1 Sera Somay is a partner at Paksoy.

## II LEGAL AND REGULATORY DEVELOPMENTS

Implementation of Basel III within a period starting from 2013 until 2019 was decided by member countries of the Basel Committee on Banking Supervision, including Turkey. As Basel III regulations entered into effect, Turkey started its studies regarding the implementation of reform proposals. Several banking regulations have been adopted by the Banking Regulation and Supervision Agency (BRSA) during the transition period.

In 2013, the BRSA announced its intention to adopt the Basel III requirements. The main focus was the capital adequacy of the banks. Turkish banks' capital adequacy requirements will continue to be further affected by Basel III, which includes requirements regarding regulatory capital, liquidity, leverage ratio and counterparty credit risk measurements, which are expected to be implemented by 2019. The Regulation on Equities of Banks (the Equity Regulation) was published in the Official Gazette in September 2013 and entered into effect on 1 January 2014. The Equity Regulation introduced core Tier I capital and additional Tier I capital as components of Tier I capital. Additionally, the Regulation on the Measurement and Evaluation of the Capital Adequacy of Banks (the Capital Adequacy Regulation) entered into force on 31 March 2016, superseding the previous capital adequacy regulation, which dated back to 2012. The Capital Adequacy Regulation introduced a minimum core capital adequacy standard ratio (4.5 per cent) and a minimum Tier I capital adequacy standard ratio (6 per cent) to be calculated on a consolidated and non-consolidated basis (these ratios are in addition to the previously existing requirement for a minimum total capital adequacy ratio of 8 per cent). Furthermore, as a prudential requirement, the BRSA requires a target capital adequacy ratio that is 4 per cent higher than the legal capital adequacy ratio of 8 per cent.

Tier II rules were subject to major changes in terms of the Basel III implementations. Certain loss absorbency rules regarding Tier II instruments were provided, and write-down and conversion-to-equity mechanisms were specified. Upon entry into force of new regulations, existing subordinated debt instruments issued before 1 January 2014 and that do not meet the specified criteria of the new Tier II rules were phased out of recognition as Tier II capital as of 1 January 2014. In addition to the Equity Regulation, the BRSA has published other regulations including the Regulation regarding the Protection of Capital and Cyclical Capital Buffers regulating the procedures and principles regarding the calculation of additional core capital amount, and the Regulation on the Measurement and Evaluation of Leverage Levels of Banks constraining leverage in the banking system and ensuring maintenance of adequate equity on a consolidated and non-consolidated basis against leverage risks. Both regulations were published in the Official Gazette in November 2013 and entered into force on 1 January 2014. Finally, in February 2016, the BRSA published a regulation regarding systemically important banks (D-SIB), which introduced additional capital requirements for D-SIB in line with the requirements of Basel III. The BRSA defines D-SIB according to their size, complexity and impact on the financial system and economic activity.

Turkey was already compliant with Basel II requirements in terms of capital adequacy in 2012, and Basel III will enable Turkey to strengthen the banking system in the near future.

## III TAX CONSIDERATIONS

Loan transactions are subject to various taxes and regulations depending on whether:

*a* the parties are related parties;
*b* the lender is a bank or similar financial institution; or
*c* the lender is resident in Turkey or not.

### i Corporate tax considerations

From a corporate tax perspective, interest payments are deductible as long as they are related to the borrowers' business.

There is an interest deduction limitation, but it is not applicable *de facto* because of the absence of secondary legislation.

### ii Related-party loans

When the borrower and the lender are related parties, the loan transaction is subject to transfer pricing and thin capitalisation rules.

An arm's-length interest should be determined according to Turkish transfer pricing regulations. It is very similar to OECD legislation, adopting the same principles, definitions and methods.

According to Turkish thin capitalisation rules, a 3:1 debt-to-equity ratio is applicable for related party loans. The ratio is 6:1 if the lender is a bank or similar institution.

### iii Loans from non-bank non-resident companies

#### *Stamp tax*

Loan agreements and related signed documentation are subject to 0.948 per cent stamp tax. An annually determined ceiling amount is applicable for the maximum stamp tax payable.

#### *Interest withholding tax*

A 10 per cent interest withholding tax is applicable.

#### *VAT*

Interest payments are subject to a reverse charge of 18 per cent value added tax.

#### *Resource Utilisation Support Fund*

The Resource Utilisation Support Fund (RUSF) is a form of tax imposed on credit-based imports and loans. RUSF will depend on the type of currency and the average maturity of the loan:

*a* For Turkish lira denominated loans, 3 per cent is applicable over the interest amount.

*b* For foreign currency denominated loans, the below rates are applicable depending on the average maturity over the principal amount:

- up to one year: 3 per cent;
- from one to two years: 1 per cent;
- from two to three years: 0.5 per cent; and
- from three years and upwards: zero per cent.

### iv Loans from banks

The taxation of loans from banks varies according to whether the lender bank operates in Turkey or not. In this section, the term 'banks operating in Turkey' refers to both Turkey-resident banks and Turkish branches of non-resident banks, and the term 'banks operating outside Turkey' refers to both non-resident banks and foreign branches of Turkish resident banks.

***Banks operating in Turkey***

*a* Stamp tax: the loan agreements and related documentation signed by banks are exempt from stamp tax.
*b* Interest withholding tax: no interest withholding tax applicable.
*c* RUSF: as long as the loan is not a consumer loan, zero per cent RUSF should be applicable.
*d* VAT: interest payments should be exempt from VAT.
*e* Banking and insurance transaction tax (BITT): the interest income derived is subject to 5 per cent BITT.

***Banks operating outside Turkey***

*a* Stamp tax: loan agreements and related documentation signed by banks are exempt from stamp tax.
*b* Interest withholding tax: zero per cent interest withholding tax is applicable.
*c* VAT: interest payments should be exempt from VAT.
*d* BITT: no BITT should be applicable.
*e* RUSF: RUSF will depend on the type of the currency and the average maturity of the loan.
*f* For Turkish lira denominated loans, 3 per cent is applicable over the interest amount.
*g* For foreign currency denominated loans, the below rates are applicable depending on the average maturity over the principal amount:
- up to one year: 3 per cent;
- from one to two years: 1 per cent;
- from two to three years: 0.5 per cent; and
- from three years and upwards: zero per cent.

## IV CREDIT SUPPORT AND SUBORDINATION

### i Security

In general, the following types of security interests would be available for project financing:
*a* pledge:
- pledge over the movables
- pledge over the shares; and
- pledge over the bank accounts;

*b* mortgage;
*c* transfer or assignment of receivables; and
*d* guarantee and suretyship (which are summarised later on in this section).

***Pledge***

In principle, the conditions below should be met for the establishment of a pledge under Turkish law:
*a* secured receivable: to establish a pledge, there must be an existing underlying right, loan or debt prior to or at the time of the establishment of the pledge;
*b* pledge over the movables: the pledge should be registered within the registry of the pledge over the movables; and
*c* written agreement: a written pledge agreement must be executed between the parties.

*Movable pledge*

A new law aiming to facilitate the use of a movable asset pledge with regards to commercial operations entered into force as of 1 January 2017 (the Movable Asset Pledge Law) along with three regulations regarding procedures under the Movable Asset Pledge Law.

The Movable Asset Pledge Law and the Regulations (1) broadens the scope of the assets that can be the subject of a movable pledge, (2) introduces a central registration system as opposed to the previous system, which was based on physical delivery of the assets, and (3) intriduces alternative enforcement methods.

### ii Scope of the pledge over the movables

Commercial enterprise pledge: the scope of the commercial enterprise pledge is now extended and includes real property allocated the operations of an enterprise as well as all the movables (including tangible and intangible assets).

Pledge on assets on individual basis or as a group: the previous pledge system required the physical delivery of the pledged assets to the pledgee and this was one of the reasons why the commercial enterprise pledge (which didn't require physical delivery of the pledge assets) was commonly used in Turkey. The Movable Asset Pledge Law does not require the physical delivery of the pledged asset to the pledgee. The following assets are subject to the new law:

*a* existing and future receivables, income of the enterprise;
*b* inventory, raw material;
*c* rental proceeds, rental rights;
*d* IP rights, trade name;
*e* licences that are not qualified as administrative approvals;
*f* all movable assets of an enterprise such as machinery, equipment, IT hardware, etc;
*g* agricultural products, livestock;
*h* commercial projects;
*i* vehicles, licence plates, commercial;
*j* routes, train wagons; and
*k* revenues of the pledged assets.

The pledge of the following assets is not subject the Movable Asset Pledge Law and should be regulated by the Civil Code or by its special laws: bank accounts, shares, derivative agreements, aircrafts, ship or vessel and mines. It is also still possible to pledge vehicles under their specific traffic law.

*Pledge over the shares of a company*

The shares of a company can be pledged under Turkish law. The scope of the share pledge can be commercially agreed between the parties.

A pledge over the shares of a company can only be established by entering into a written share pledge agreement by and between the pledgor and the pledgee. In addition, the pledgor should make a pledge endorsement (or blank endorsement depending on the agreement between the parties) on registered shares, and physical possession of the pledged shares must be delivered to the pledgee.

Although it is not legally required for a valid perfection of share pledge, it is advisable (to protect the pledge from third-party claims) that:

*a* the company whose shares are pledged passes a corporate resolution acknowledging the pledge and resolving to register the same in the share ledger of the company; and
*b* the pledge is registered in the share ledger of the company in which the shares are pledged.

*Pledge over bank accounts*

Pledge over accounts held with a bank is another form of security arrangement that is generally provided under Turkish law.

A written pledge agreement is required for the establishment of bank account pledge under Turkish law.

There is no requirement for a pledgor to obtain consent from the account holding bank for the pledge in favour of the creditor. However, an acknowledgment notice from the bank is highly recommended, particularly if the account bank is not a lender or a security agent and any obligations (e.g., restricting withdrawals on paying funds direct to the creditor) are to be assumed by the bank. In addition, the same acknowledgement would serve to confirm that no prior ranking pledge, assignment or counterclaims exist.

***Mortgage***

*In general*

A mortgage can be established over immovable property or certain rights connected to the immovable property, such as ground lease or usufruct right, to secure the payment of existing or future debts. In general, a mortgage established over immovable property covers the accessories of that property.

*Conditions for the establishment*

A mortgage is created validly by means of an official mortgage deed, which shall be executed before the title deed registry having jurisdiction on the relevant real estate. The mortgage is recorded within a special mortgage column on the relevant page of the title deed registry where the records of real property subject to mortgage are kept.

In principle, the amount of the mortgage must be registered and if the amount of the receivable is not determinable, the maximum amount secured by the mortgage agreed by the parties can be registered in Turkish lira. However, an exception for foreign loans provided by Turkish or foreign banks or credit institutions is stipulated under Turkish law as a 'foreign currency mortgage', which should be in the same currency as the loan, and can be granted for establishing a security in favour of these banks or credit institutions.

*Ranking*

The degree system adopted under Turkish law provides a priority ranking to mortgagees holding a mortgage with a preceding degree over other mortgagees in the subsequent rankings. Each degree of mortgage on the immovable property separately secures the obligations for which they are established up to the mortgage amount in those degrees. The degrees set the order of distribution of the foreclosure proceeds.

***Transfer or assignment of receivables***

Transfer or assignment of receivables is commonly utilised as a security mechanism, which includes the transfer of the receivables of the creditor (transferor) to a third person (the transferee) by execution of a written agreement.

In the case of a transfer of receivables by way of security, we see the following mechanisms: (1) lenders collect the assigned receivables for repayment purposes; (2) assigned receivables are collected into an reserve account for repayment or security purposes, and (3) the assignment is silent until an event of default, hence it is not perfected and the lender has the right to collected such receivables upon an event of default.

Present and future determinable receivables can be transferred through a written agreement executed between the transferor and transferee.

Although notification or approval of the debtor is not required for the perfection of the transfer, we recommend that the transfer of receivables agreement includes a provision obliging the transferor to notify its debtors of the transfer and to request an acknowledgment of no prior ranking assignments, transfers or counterclaims from such debtors.

***Guarantee and suretyship***

The guarantee and suretyship that are summarised below (Section IV.ii) are also commonly used in financing transactions in Turkey.

### iii Guarantees and other forms of credit support

***Guarantee and surety***

*Guarantee*

Since there is no specific legislation with regards to guarantee agreements, these agreements are subject to the general provisions of the Turkish Code of Obligations No. 6098, dated 11 January 2011 (TCO) regarding the concept of 'undertaking of performance of a third party' whereby the obligation of the guarantor is characterised by its independent nature.

Since the obligation of a guarantor is independent from the primary obligation, the invalidity or unenforceability of the primary obligation does not have any effect on the validity or the enforceability of the guarantee obligation. Therefore, unless otherwise agreed, a guarantee is effective until the risk ceases to exist.

There is no condition for the establishment of a guarantee (other than a personal guarantee) such as a written agreement or requirement to determine a limit or cap for the guarantee. However, according to the TCO, in the case of a guarantee provided by a real person (personal guarantee), the conditions for the suretyship will be applicable for the establishment of the personal guarantee.

*Suretyship*

Although the suretyship appears to be similar to a guarantee agreement, the security obligation of the surety depends on the validity of the debtor's debt. This is to say that when a debtor's debt becomes invalid for any reason whatsoever, the surety is – contrary to guarantee agreement – entirely released of all its obligations. Accordingly, a surety's liability is always ancillary in nature.

According to the TCO, a written agreement is required between the parties and a statement of the amount of maximum liability agreed in handwritten form by the surety should be provided under the agreement.

In addition, the suretyship period for real persons and the type of suretyship, for example, ordinary or several, should be specified under the agreement. Also, if a married individual is the surety, the TCO requires the spouse of the surety to provide consent on or before the date of the surety agreement except for in certain cases. The consent of the spouse is not required for securities that are given for a business or company by the owner of a commercial enterprise registered with the trade registry or the shareholder or manager of a commercial company, on securities given by craftsmen and artisans registered with the craftsmans' associations related to occupational activity, on securities given for the credits used under Law No. 5570 dated 27 December 2006 and on securities for credits given by credit and security cooperatives, and credits extended by state institutions and organisations to cooperative partners.

Finally, the TCO provides that if the surety is a real person, the suretyship automatically expires at the end of a 10-year period beginning from the execution of the surety agreement. However, the parties may extend the suretyship for an additional period of 10 years upon the consent of the surety, which may be obtained at the earliest of one year before the expiration of the surety agreement.

### *Quasi-securities*

*Step-in*

In recent years, common quasi-securities in the foreign lending markets have been introduced to the Turkish markets, especially for energy and infrastructure project financing transactions. One of the most important features in this regard is the step-in provision that gives the lenders or banks the right to step into the project company's rights and obligations under the project documents.

In principle, the Turkish energy markets (electricity, petroleum, gas and liquefied petroleum gas) are strictly regulated and restrict the transfer of licences. However, starting with the first amendment to the electricity markets licence regulation in 2008, banks or financial institutions that provide limited or irrevocable project financing to the relevant licence holder within the scope of their loan agreements are also entitled to apply to the Energy Market Regulatory Authority to grant a new licence to another third party, provided that the third party agrees to take on all of the obligations arising under the relevant licence. The legal entity proposed by the institutions shall be granted the related licence on the condition that it complies with the obligations under the relevant licensing regulations. There is no time restriction with respect to the transfer of licences under these regulations, such as prohibition of transfer during or after the construction or operation phase.

On the other hand, direct agreements – the objective of which is basically to enable the banks to 'step into the shoes of the project company' if it defaults in its loan obligations – are also common on the Turkish markets but only provide a contractual obligation, which may not be enforced before the regulatory or governmental authorities unless it is drafted in compliance with the above-mentioned energy regulations.

*Protection under the constitutional documents*

The lenders or banks (through a security agent) may also acquire one single privileged share of a project company (and parent company if necessary) to control the powers and entitlements at the corporate level and prevent certain resolutions to be taken by the company that may jeopardise the lenders' rights in the finance documents. For example, a provision that states that no security may be granted over any of the company assets and no disposal of shares in the project company or no subordinated debt lent to the company can be made without the vote of the single privileged share in the company.

*Completion guarantee*

Completion guarantees provided by the parent companies of the project companies are also used as a quasi-security at the Turkish lending markets. In most of the project finance transactions, lenders or banks require a completion guarantee in which the parent company undertakes relevant equity contribution to the project company, the cost overrun in the project and other financial covenants in the facility agreement such as the debt service coverage ratio.

*Negative pledge clauses*

Unlike certain continental law jurisdictions where negative pledge provisions are registered with the registrar of companies, negative pledge covenants only constitute contractual undertakings under Turkish law binding upon the parties, and specific performance cannot be imposed on the pledgor breaching such a covenant. Still, these provisions are commonly used in the Turkish lending markets. In the case of a breach of such a covenant, the claimant may request damages or, in certain exceptional circumstances, file for the cancellation of the transaction.

### iv Priorities and subordination

***Subordination***

While the subordination is valid as a contractual undertaking and the parties have contractual claims against each other if the provisions of the subordination agreement are not honoured, Turkish law does not recognise subordination of debts in the event of the bankruptcy or insolvency of a Turkish company. Accordingly, in the event of the insolvency or bankruptcy of a Turkish company, subordination will not be upheld by the liquidators and, as a result, the claims of the subordinated creditors will rank *pari passu* with the claims of all unsecured creditors.

In practice, to give effect to subordination arrangements, the lenders request the subordinated creditors to assign or transfer all their subordinated loans – including the receivables to arise in relation to loans to be granted in the future (most commonly shareholder loans) – to them through an assignment or transfer of future receivables.

***Pledged and non-pledged claims and priorities in the ranking system***

According to Execution and Bankruptcy Law No. 2004 dated 9 June 1932, receivables of secured creditors have priority over the sale proceeds of secured assets after deduction of the relevant taxes *in rem* (i.e., taxes arising from the use or mere existence of the secured assets such as real estate taxes, motor vehicle taxes, custom duties, etc.) and expenses arising from

the administration or preservation of the secured assets or from sale auctions in case of the bankruptcy of the debtor. In other words, if the debtor goes bankrupt; the pledged assets will be sold and the sale proceeds will be paid to the creditor whose receivables are secured through the pledged asset.

## V LEGAL RESERVATIONS AND OPINIONS PRACTICE

A legal opinion in lending transactions can be requested from both parties' (i.e., lender's or borrower's) legal counsel and it is generally referred to the lenders, including the potential assignees or transferees of the loan in the future.

### i Reservations

Other than the common reservations that are used in most legal opinions of foreign lending transactions, some of the specific reservations that a Turkish lawyer should cover in a legal opinion are briefly explained below.

#### *Enforceability*

The term 'enforceable' is generally explained in the reservation section of the legal opinion, providing that enforceability may be limited to certain obligations of the parties, namely:

*a* bankruptcy, insolvency, liquidation, debt restructuring, reorganisation and other laws of general application relating to or affecting the rights of creditors;

*b* general principles of law including, without limitation, concepts of good faith, fair dealing and reasonableness; and

*c* remedies available before Turkish courts.

In addition, where obligations are to be performed in a jurisdiction outside Turkey, they may not be enforceable in Turkey to the extent that their performance would be illegal under the laws of that jurisdiction.

#### *Interest*

To the extent that the application of the provisions of opinion documents relating to interest and default interest results in accrual of interest on default interest, this would not be enforceable under Turkish law on public policy grounds, but the remaining provisions of the opinion documents would continue to be effective.

#### *Security agent concept*

Although some court precedents exist that recognise the concept of an owner in trust in respect of immovable property, and in certain financing deals that we are aware of a security agent was named and registered as the security right holder; the concept of a security trustee or security agent cannot yet be regarded as officially recognised under Turkish law because of the lack of court precedents. To our knowledge, there has been no test of the concept of a 'security agent' before Turkish courts. However, the concept has been commonly used in major financing deals in Turkey, and in our view there would be no reason under Turkish law not to give effect to the concept of security agent.

***Subordination***

Although it is unregulated, contractual subordination (by way of transfer of receivables) is widely used and commonly agreed in financings. However, subordination agreements or subordination clauses under opinion documents do not affect the rights of third parties, and cannot be enforceable against or recognised by the bankruptcy authorities in the case of the debtor's bankruptcy under Turkish law since the order in which creditors are paid in bankruptcy is regulated by law. Accordingly, in the event of the insolvency or bankruptcy of a Turkish company, subordination under the opinion documents will not be upheld by the liquidators, and as a result the claims of the subordinated creditors will rank *pari passu* with the claims of all unsecured creditors.

***Notices under the Turkish Commercial Code***

Pursuant to Article 18(3) of the Turkish Commercial Code (TCC), for evidentiary purposes, notices relating to default, termination or rescission should be served through a Turkish notary public, by telegram or by registered mail (return receipt requested) or electronic mail using a secure electronic signature.

Also, under the Law on Compulsory Use of Turkish language No. 805, any notice to be sent to a Turkish borrower must be in Turkish. Although the said Law is outdated, it is still in force and, accordingly, it would be advisable to send the Turkish translation along with any foreign-language notices.

### ii Choice of foreign law

Under Turkish law, the parties to a contract can freely determine the law applicable to their contractual relationship if the contract includes a foreignness element.

### iii Enforcement of judgments

Judgments obtained in a foreign jurisdiction are enforceable in the courts of Turkey, and the Turkish courts shall not make any re-examination on the merits of the case provided that the following conditions are met:

*a* the judgment has become final and binding with no recourse for appeal or similar revision process under the jurisdiction where the judgment is obtained;

*b* there is *de facto* or *de jure* reciprocity of the enforcement of judgments between the courts of Turkey and the jurisdiction where the judgment is obtained. Such reciprocity is to be evidenced by:

- a treaty between Turkey and the jurisdiction where the judgment is obtained, providing for reciprocal enforcement of court judgments;
- a provision in the laws of the jurisdiction where the judgment is obtained permitting the enforcement in that country of judgments rendered by Turkish courts; or
- *de facto* enforcement of judgments rendered by Turkish courts in the jurisdiction where the judgment is obtained;

*c* the subject matter of the judgment does not fall under the exclusive jurisdiction of the Turkish courts;

*d* the judgment is not rendered by a court that does not have an actual connection to the parties or the subject matter of the judgment (provided that this is asserted by the defendant);

*e* the judgment is not explicitly against Turkish public policy (a Turkish court would determine at its discretion, and on a case-by-case basis, whether a public policy concern exists); and

*f* due process is observed under the jurisdiction where the judgment is obtained.

### iv Financial assistance

Prior to the entry into force of the TCC (1 July 2012), there was no specific rule or restriction relating to the use of a target company's assets for securing the financing of an acquisition (financial assistance) of the target company in Turkey. It was generally accepted that if the articles of the target company enable the issuance of collateral (e.g., pledges, guarantee, sureties) in favour of third parties, then the target company may grant security to secure the debts and liabilities of third parties, including its parents or subsidiaries (purchasers).

Following the entry into force of the TCC, financial assistance was introduced with certain limitations (i.e., granting of security in favour of a third party to acquire its own shares).

These restrictions are mainly based on the prohibition of advancing funds, making loans and providing security and guarantees by a target company for the acquisition of its own shares. However, there are two exceptions to this prohibition:

*a* transactions performed by banks or financial institutions, provided that these transactions are performed pursuant to their normal course of business; and

*b* advances, loans and security provided to the company's employees or parent or sister company's employees to acquire the shares of the company.

The financial assistance rules in the TCC also apply to group companies (i.e., companies formed into groups consisting of a holding company, or parent company, which owns a number of subsidiaries).

## VI LOAN TRADING

Transfer of loans by lenders is permitted via transfer of agreement; transfer or assignment of rights; or by way of novation.

For the transfer or assignment of rights that need to be in writing (see Section IV.i), there may be a requirement in the loan agreement for the existing lender to consult with the borrower or to notify the borrower prior to transferring the loan. Accordingly, the borrower's consent is not legally required under Turkish law. However, if the borrower is not notified, the borrower's payments that have been made to the transferor (assignor) in good faith shall be an effective payment.

Transfer of an agreement (loan agreement) is another option for the transferor (exiting lender), remaining party (remaining lenders) and transferee (new lender) whereby a tripartite agreement, which shall be made in the same form as the original (transferred) agreement, is entered into between the transferor, transferee and the remaining party of the agreement, and the transferor cedes its title of party to the agreement together with all its rights and obligations to the transferee.

Neither transfer of loan agreement nor the transfer or assignment of a loan would result in termination of the original debt. Therefore, from a Turkish law perspective, the security rights attached to the original debt would not be extinguished following these assignments or transfers.

However, transfer of loan by way of a novation (i.e., the discharge of the original debt) will have the effect of extinguishing the Turkish law-governed security. In such cases, there is a requirement to re-establish the security for the new lender. Parallel debt structure may be a way of preventing the fall of the accessory security as a result of novation. For further explanations of parallel debt, see Section VII.

Transfer of debts (in a loan agreement) is also possible and made by an agreement between the transferor (assignor), the transferee (assignee) and the debtor (borrower). The agreement does not have to be in writing. However, security providers for such debts should provide their consent in written form as well.

There are no registration requirements with the Turkish authorities for a transfer or assignment to be effective.

## VII OTHER ISSUES

### i Security agent concept

Under Turkish law, there is no specific legislation in relation to the concept of a security agent or security trustee. However, it is widely accepted that security agent provisions are enforceable under Turkish law under the general provisions of law. To date, there have been numerous English law-governed transactions accompanied by Turkish law security documents where the security is held by a security agent or trustee. However, none of those transactions have been tested before the courts in Turkey in respect of the security agent provisions. Therefore, there is no relevant court precedent on the subject.

Nevertheless, we believe that:

*a* security interest to be taken in relation to a debt may be validly granted to an indirect agent (i.e., the security agent, acting in its own name, on behalf of and for the benefit of the secured parties or lenders); and

*b* if the security agent arrangement is recognised by English courts, then it is likely that a Turkish court would uphold it as being valid as well.

There are some Turkish court precedents that recognise the concept of an owner in trust (i.e., fiduciary transactions) in respect of movable or immovable property and there are also certain financing deals on Turkish markets where a security agent or trustee is named and registered as the security right holder acting in the name of and on behalf of the secured parties. However, as mentioned above, the concept of a security trustee or security agent has never been tested before the Turkish courts.

#### *Parallel debt*

In other continental law jurisdictions where this issue is also a matter of concern, the concept of parallel debt has been introduced to ensure that accessory security would not fall away as a result of a transfer by novation, and thus enable a changing class of beneficiaries to take benefit of security without the need to have separate transfer arrangement. Under the parallel debt structure, the security agent has an independent right to demand payment of the parallel debt. The lenders are not, however, entitled to recover the debt twice. Any payment of the outstanding debt by the borrower to a lender will reduce the amount owed to the security agent *pro rata* (and vice versa with regard to any payment made to the security agent). The security documents will secure the debt owed to the lenders and the parallel debt owed to the security agent. As a result, even if a loan (any portion thereof) is transferred to a new lender

by way of novation, the security would remain in place as it would continue to secure the parallel debt. We believe that this parallel debt structure, which is abstract in nature, would be recognised under Turkish law. On the other hand, some scholars argue that there might be enforceability problems when the security agent is not one of the lenders.

### ii Private sale

Principles or procedures for enforcing a share pledge through private sale are not regulated under Turkish law. This is a concept accepted in the doctrine. Private sale is considered within the context of an upfront contractual agreement between the pledgor and the pledgee whereby the pledgee is given the right in the relevant security agreement to enforce the security and cause the pledged collateral to be sold privately.

In a private sale arrangement, the pledgee's right to enforce the security will be carried out privately and outside the jurisdiction of the execution offices, avoiding the relatively lengthy and costly process of a public sale.

## VIII OUTLOOK AND CONCLUSIONS

Although private sector loans are still increasing, the ratio is still relatively lower than that in developed countries, suggesting that there is much room for financial deepening. However, there are structural obstacles to such financial deepening, such as domestic savings, which are still low, and therefore Turkey's economic growth and corporate lending rely on capital inflows, particularly external financing, to finance investments and growth.

A weak outlook for current global activity and more severe international funding strains have the potential to spill over to Turkey, which may affect the financing required by corporates. Also, as investors have become wary and many emerging markets that rely heavily on foreign investors have seen financial capital being drawn away from their economies, it is still an open question as ti how Turkey, with its current account deficit, will be affected by normalisation of monetary policy in advanced economies.

Apart from this global view, there are more Islamic transactions based on commodity *murabahah* and *mudarabah* transactions on the markets. Refinancing and syndicated loans are also becoming more popular in Turkey.

**Appendix 1**

# ABOUT THE AUTHORS

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