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# Restructuring across borders

Turkey

Corporate restructuring and  
insolvency procedures | January 2022

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# Introduction

Turkey's restructuring and insolvency laws were substantially amended and modernised following the currency crisis in 2018.

While those amendments are widely regarded as a step in the right direction, and are being widely used domestically, significant limitations remain. It is expected, particularly in cases involving international creditors, that borrowers and creditors will continue to explore the use of international restructuring tools and techniques to supplement the tools available domestically in Turkey.

A distressed borrower wishing to restructure its indebtedness will typically elect to do so under one of the two primary 'rescue' procedures available under Turkish law; a **Financial Restructuring** or **Konkordato**. The

key difference between the two is that a Financial Restructuring is an out-of-court restructuring process led by the borrower and a consortium of its creditors, whereas Konkordato is a court-supervised process which involves significant court involvement and oversight.

The choice between the two procedures will depend upon the specific facts and circumstances. Generally speaking, unless one of the specific features of Konkordato (such as the 'universal' moratorium or the ability to bind non-financial creditors) is required, stakeholders tend to favour the greater flexibility and speed afforded by the out-of-court nature of Financial Restructurings.

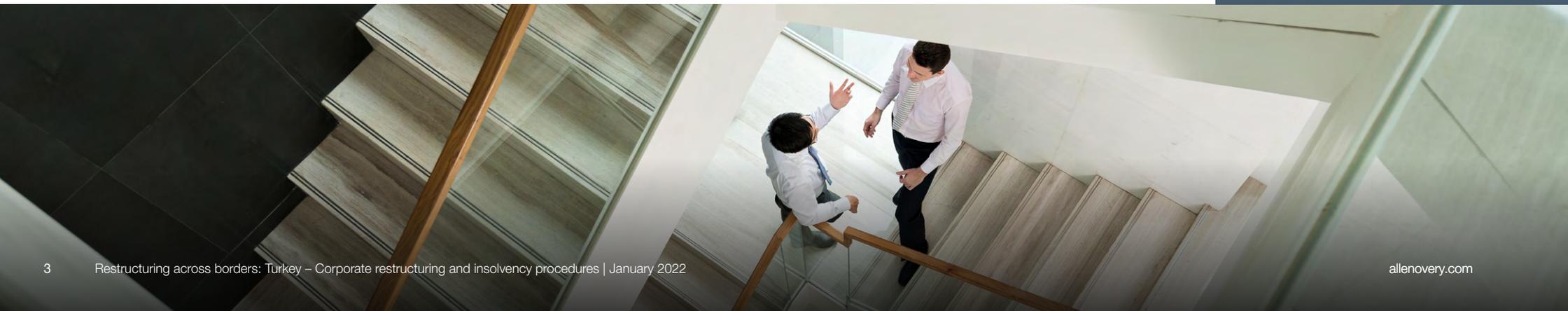
The implementing legislation for Financial Restructurings is provisional only; it initially applied for a two year period ending 19 July 2021 and was recently extended by Presidential Decree for a further two years.

A third 'rescue' procedure, a **Restructuring Settlement**, is also available but carries with it a significant degree of risk of liquidation and is therefore rarely used in practice.

If there is no business to be rescued, it may be more appropriate to put the company into **bankruptcy** (*iflas*), the formal winding-up procedure for Turkish companies.

The principal restructuring and insolvency processes now available for companies under Turkish law are:

- financial restructuring under the framework agreement (**Financial Restructuring**), a new process that was introduced in 2018 and further developed in 2019;
- composition (*konkordato*) (**Konkordato**);
- restructuring through settlement (*uzlaşma yoluyla yeniden yapılandırma*) (**Restructuring Settlement**); and
- bankruptcy (*iflas*) (also known as winding-up).



# Financial Restructuring under the Framework Agreement

Where a borrower is essentially profitable but its debt burden is too great, it may be able to persuade its creditors to reschedule its payment obligations by extending the maturity/payment dates, allowing it to continue funding the borrower. This is a simple example of a restructuring which might be effected through a Financial Restructuring, the most recent addition to the Turkish restructuring toolkit.

The primary objective of a Financial Restructuring is to develop a financial restructuring agreement (a **Financial Restructuring Agreement**) which places the borrower on a more sustainable financial footing and is capable of being approved by the requisite majority of creditors (further details below). Since their introduction, Financial Restructurings have quickly emerged as the preferred procedure for Turkish borrowers to restructure debts owed to Turkish financial institutions.

A Financial Restructuring is initiated by the borrower making an application to any one of its three largest creditors. It is the only out-of-court restructuring procedure available under Turkish law (aside from a fully consensual restructuring); this is seen as one of its key benefits. It was initially introduced by the Regulation on Restructuring of Debts in the Financial Sector (**Regulation**) on 15 August 2018, with the implementing legislation (Provisional Article 32 which amends the Banking Law (**Provisional Article 32**)) following in 2019. Provisional Article 32 and the Regulation contemplate, and provide a statutory basis for, a 'framework agreement' to be agreed by creditors for the purpose of regulating the implementation of all Financial Restructurings. Provisional Article 32 is provisional legislation only. Although it was initially set to expire on 19 July 2021, it was recently extended by the President of the Republic of Turkey for a further two years.

37 Turkish banks (including all of the major Turkish banks), factoring companies, financial leasing companies and financing companies have since signed up to, and agreed to be bound by, the updated framework agreement for large-scale companies published by the Banks Association of Turkey (the **Framework Agreement**).<sup>1</sup>

As an 'agreement', the Framework Agreement binds its signatories only; creditors who are not signatories (including international creditors<sup>2</sup> and trade creditors who have not signed the Framework Agreement) are not bound and not subject to the 'cram-down' or other provisions in the Framework Agreement. Accordingly, depending on the composition of the creditor group, the Framework Agreement may not provide a universal or collective restructuring solution.

Non-signatories may nevertheless agree (contractually) to be bound by the proposed terms of the Financial Restructuring or to different restructuring terms. In certain circumstances, it may also be possible to compel adherence by non-signatories through international restructuring processes (such as an **English law scheme of arrangement**) which may be run in parallel, and made inter-conditional, with the Financial Restructuring.

Secured creditors' claims may be compromised only to the extent they exceed the value of their security or otherwise with their consent.

<sup>1</sup> A different framework agreement applies for 'small-scale companies' with aggregate indebtedness of less than TRY100 million.

<sup>2</sup> International financial institutions are able, at their discretion, to become a signatory to the Framework Agreement (such that they become subject to the Framework Agreement in the same way as a signatory Turkish financial institution) or to 'opt in' to the Framework Agreement on a 'per transaction' basis (in which case they become subject to the Framework Agreement in respect of the specific transaction only).

## The key features of the Framework Agreement include:

- **Moratorium** – A 90-day (extendable to 180-day) moratorium or ‘standstill’ on creditor enforcement action comes into effect upon the borrower making an application to its creditors for a Financial Restructuring. The purpose of the moratorium is to give the borrower and its creditors ‘breathing space’ and a stable platform for formulating and negotiating a Financial Restructuring Agreement. This moratorium applies to all signatories to the Framework Agreement (including secured creditors) but does not apply to creditors who are not signatories to the Framework Agreement; contractual standstill arrangements (which sit alongside the moratorium) may be considered for those creditors.
- **Information** – Unless the creditors agree otherwise, the borrower’s application for a Financial Restructuring is required to be accompanied by detailed information with respect to the borrower and its associates. The requirement for this detailed information (including regarding shareholders) to be delivered together with the application is sometimes viewed by borrowers as a deterrent and can have the effect of delaying an application, which can be prejudicial in circumstances where the benefit of the moratorium is urgently needed.
- **Creditor consortium** – Following the borrower’s application, a creditor consortium is formed for the purpose of facilitating the restructuring discussions between the borrower and the creditors. The creditor consortium is led by a lead bank, which is usually the creditor with the largest exposure.
- **Cram-down** – All creditors who are signatories to the Framework Agreement will be bound by a Financial Restructuring Agreement if it is approved by two thirds (by value) of those creditors, save that:
  - secured creditors cannot be bound without their consent in relation to the secured portion of their debt, unless they otherwise undertake or agree under the Financial Restructuring Agreement;
  - the consent of all affected creditors is required in order to effect a ‘write-off’ of any debt;
  - the consent of all affected creditors and the requisite majority of shareholders is required in order to convert debt into equity;
- if new security is to be granted in favour of some (but not all) creditors, the consent of the creditors who will not benefit from the new security is required except in cases where that new security secures new money; and
- if the proposed Financial Restructuring Agreement contemplates an interest rate which is less than 75% of the Turkish Lira Overnight Reference Rate (TLREF) as at the date of the borrower’s financial restructuring application, it must be approved by at least two members of the creditor consortium holding not less than 90 per cent. (by value) of the aggregate debts owed to members of the creditor consortium.
- **Treatment of smaller creditors** – The most recent amendments to the Framework Agreement introduce a mechanism pursuant to which certain minority creditors may be offered a different payment plan to the other creditors.
- **New money priority** – New-money financing will be afforded priority, vis-à-vis the indebtedness of the signatories to the Framework Agreement that is restructured, if:
  - it is provided by all of the banks who are members of the creditor consortium (the **Consortium Banks**) pro rata and it is approved by at least two Consortium Banks holding not less than 90 per cent. (by value) of the aggregate debts owed to the Consortium Banks; or
  - it is provided by (i) one or more (but not all) Consortium Banks; (ii) members of the creditor consortium who are not ‘banks’; or (iii) creditors who are not members of the creditor consortium, and it is approved by at least two members of the creditor consortium holding not less than two thirds (by value) of the aggregate debts owed to members of the creditor consortium.
- **Dispute resolution** – Any dispute arising under the Framework Agreement is resolved by an Arbitral Tribunal selected by the Banks Association of Turkey.

# Konkordato

Konkordato is an alternative to a Financial Restructuring. Unlike a Financial Restructuring (which is an out-of-court process regulated by the Framework Agreement and which applies only to the signatories thereto), Konkordato is a court-supervised restructuring process of universal application under the Execution and Bankruptcy Law No. 2004 (the **Bankruptcy Law**). It involves a borrower and its creditors seeking to restructure debts pursuant to a court-approved restructuring project (a **Composition Project**).

In view of the heavy court involvement, and the risk of liquidation associated with Konkordato (further details below), as well as the publicity and stigma associated with processes under the Bankruptcy Law, Konkordato is generally regarded as a 'fall-back' option for use when a Financial Restructuring is not suitable (for example because it is necessary to bind non-financial creditors or to benefit from a 'universal' moratorium).

Konkordato is initiated by the borrower or one of its creditors making an application to the court. The borrower may make an application if it has failed, or its board of directors considers that it is expected to fail, to pay its debts. Additionally, any creditor who is entitled to apply for bankruptcy of the borrower (further details below), may also apply for Konkordato. Upon receipt of the application, the court may grant an initial grace period (*geçici mühlet*) of up to three months (which may be extended for an additional two months). If the court is satisfied as to the likely success of the Composition Project, it may subsequently grant a definitive grace period of up to one year (which may be extended for an additional six months).

Secured creditors' claims may be compromised only to the extent they exceed the value of their security or otherwise with their consent.



## The key features of Konkordato include:

- **Moratorium** – Once the court makes an order for the commencement of the initial grace period (*geçici mühlet*): (i) enforcement proceedings against the borrower are suspended; (ii) provisional remedies such as attachments (*ihtiyati haciz*) and injunctions (*ihtiyati tedbir*) cannot be imposed against the borrower; and (iii) any receivables generated after the commencement of the initial grace period will fall outside the scope of any pre-existing security which purports to assign receivables. Save in respect of certain receivables, creditors whose claims are secured by a pledge may initiate or continue enforcement proceedings. However such creditors cannot benefit from any protective measures (*muhafaza tedbirleri*) or request the sale of the pledged assets.  
  
Notwithstanding the foregoing, creditors may request the sale of pledged assets, if: (i) the Composition Project does not contemplate the use of the relevant pledged assets; (ii) there is a risk that the value of the relevant pledged assets will decrease unless a sale is made; or (iii) there would be significant cost involved in maintaining such pledged assets.
- This moratorium applies for the duration of the grace period (described above) and is wider than the moratorium that applies in respect of a Financial Restructuring (the latter applying to signatories of the Framework Agreement only).
- **Ipsa facto clauses** – Contractual provisions in material contracts which purport to allow the counterparty to terminate the contract in the event of Konkordato or which treat Konkordato as a breach of contract or an event of default (including under a loan agreement), cannot be enforced during the moratorium.
- **Interest for unsecured debts** – interest ceases to accrue on unsecured debts from the commencement of the initial grace period (*geçici mühlet*).
- **Commissar** – The court will typically appoint a ‘commissar’ to supervise the management and operation of the borrower. Accordingly, management’s flexibility and ability to make certain decisions (such as granting security and disposing of assets) may be curtailed and/or delayed.
- **Cram-down** – The Bankruptcy Law requires that the Composition Project be approved by *either*: (i) 50% by value and number; or (ii) two thirds by value and one quarter by number, of all creditors. Secured creditors’ claims are included for voting purposes only to the extent that they exceed the value of their security.
- **Court approval** – Once the Composition Project has been approved by the requisite majority of creditors, the commissar submits it to the court. The court evaluates, among other things, whether the creditors are likely to achieve a better outcome under the Composition Project than they would likely receive under a bankruptcy (*iflas*). If the Composition Project is approved by the court, all creditors will, as a matter of Turkish law, be bound by it. The usual considerations apply in relation to compromising foreign law governed debts (including debts governed by English law) and as a result it may be necessary to deploy parallel consensual or international restructuring processes to deal with any non-Turkish law debts.
- **Court rejection** – If the court rejects the Composition Project, it must declare the borrower bankrupt.
- **New money priority** – Priority for new money is not specifically contemplated.

# Restructuring through Settlement

## (Uzlaşma Yoluyla Yeniden Yapılandırma)

Restructuring through settlement is a rarely used 'rescue' procedure under the Bankruptcy Law. It is only available for corporations (notably for joint stock companies (*anonim şirket*) and limited companies (*limited şirket*), both of which are companies limited by shares). Settlement may be used for a pre-pack type transaction or as part of a wider corporate reorganisation. Non-corporation business vehicles such as partnerships or sole proprietorships are not able to benefit from this procedure.

A Restructuring Settlement allows a borrower to apply to the court to restructure its debts with the consent of two thirds (by value) of its creditors. Unlike Konkordato, it allows different creditors to be treated differently (in which case creditors vote in classes according to their treatment).

One of the perceived shortcomings of Restructuring Settlements is the risk that the process may ultimately result in bankruptcy (*iflas*) of the borrower.

The Bankruptcy Law contains strict time limits (the court has a maximum of 60 days to issue its ruling in on the borrower's application) and, if the Restructuring Settlement is not approved by creditors, and/or the court determines that it will not approve the Restructuring Settlement, it must declare the borrower bankrupt.



# Bankruptcy (İflas)

Bankruptcy (or winding-up) is the dissolution procedure for companies under Turkish law. In that sense, it might be thought to be akin to ‘liquidation’ in England & Wales or ‘Chapter 7’ in the United States. It is a procedure of last resort.

Bankruptcy can be initiated by the company or one of its creditors. A company may voluntarily file for bankruptcy if it becomes unable to pay its debts to its creditors.

In terms of mandatory filing for bankruptcy, both the Bankruptcy Law and the Turkish Commercial Code No. 6102 (the **TCC**) set out mandatory filing obligations.

Under the Bankruptcy Law, a company must apply for bankruptcy if: (i) an enforcement through attachment against the company results in the loss of more than 50% of its assets and its remaining assets are insufficient to satisfy its obligations which are or will become due within the next one-year period; or (ii) if, according to the interim balance sheet prepared based on the liquidation value (*muhtemel satış fiyatı*) of its assets, the

company is considered insolvent (ie, balance sheet insolvency – *borca batıklık*) by: (A) the board of directors; (B) the liquidators (of the company, if in liquidation process); (C) the creditors; or (D) the court, and if there is no bankruptcy protection measure in place.

Under the TCC and its secondary legislation, a company must apply for bankruptcy if it has become insolvent<sup>3</sup> and failed to implement remedies applicable under the TCC and its secondary legislation. For insolvency, the TCC and its secondary legislation provide for three different insolvency tests, and the board of directors is obliged to take certain steps in each situation to remedy the insolvency (and failure to do so may result in a requirement for mandatory filing for bankruptcy). Accordingly, if: (i) the company has lost two thirds of its paid capital and statutory legal reserves due to losses; or (ii) its assets are not sufficient to cover its liabilities pursuant to an interim balance sheet prepared based on both the liquidation value (*muhtemel satış fiyatı*)

and the going concern value (*işletmenin devamlılığı esası*), the company must implement the applicable remedies (such as increase and/or decrease of share capital, remedy of the capital deficit, the creditors’ approval in writing that their claims will rank subsequent to all other creditors and confirmation of the same by the court appointed expert), with failure to do so resulting in a mandatory filing requirement for bankruptcy.

A creditor may apply for bankruptcy if its statutory demand has not been resolved to its satisfaction within seven days, or otherwise if the execution process issued on a court judgment is returned unsatisfied. In addition, in certain cases prescribed under the Bankruptcy Law, a creditor may directly apply for bankruptcy without being necessarily required to seek payment of a statutory demand or initiate the execution process on a court judgment first (e.g. where a Composition Project is not sanctioned by the court).

Creditors of the bankrupt borrower will convene at the creditors’ meeting and appoint a bankruptcy administrator (*iflas idaresi*). The bankruptcy administrator will be responsible for performing the necessary procedures for liquidation of the assets and distribution of the liquidation proceeds.

The Bankruptcy Law requires that the process after the declaration of bankruptcy by the commercial court be completed within six months, subject to a possible extension. In practice, it is common for bankruptcy processes to last longer than six months.

Once the process has been completed, the company is dissolved.

<sup>3</sup> Under Turkish law, a company will be deemed insolvent if (i) it becomes unable to pay its debts to its creditors; (ii) it enters into a composition (*konkordato*); (iii) it has lost two thirds of its paid capital due to losses; (iv) its assets are not sufficient to cover its liabilities; (v) it enters into a restructuring through settlement; or, (vi) it has been declared bankrupt.

# Cross border issues

Legal entities whose principal place of business is located in Turkey are subject to the Turkish insolvency regime. Turkey has not adopted the UNCITRAL Model Law on Cross Border Insolvency and there are no specific provisions in Turkish law for recognition of insolvency proceedings commenced in other jurisdictions or for cooperation with the courts of other jurisdictions. Turkish courts may recognise a foreign judgment of insolvency on a reciprocal basis. However, such recognition is subject to a number of conditions, including being compliant with public policy rules in Turkey, both parties having obtained adequate representation, and the judgment being obtained from a jurisdiction which enforces Turkish judicial rulings.



# At a glance – Framework Agreement and Konkordato

	Financial Restructuring under the Framework Agreement	Konkordato
<b>Nature of process</b>	Out-of-court restructuring process led by the borrower and a consortium of its creditors.	Court-supervised restructuring process with significant court involvement and oversight.
<b>Who can initiate the process?</b>	Borrower.	Borrower or any creditor.
<b>When is it available?</b>	At any time but only if no enforcement proceedings have been initiated by a Turkish financial institution.	Borrower application – A Borrower may apply if it has failed, or is expected to fail, to pay its debts.  Creditor application – A creditor who is entitled to make an application for bankruptcy of the debtor may, by submitting a petition, initiate the Konkordato process.
<b>Moratorium/standstill</b>	90 (extendable to 180) day moratorium / standstill on creditor enforcement action. Applies only to creditors (including secured creditors) who are signatories to the Framework Agreement or have ‘opted-in’ to the Framework Agreement ( <b>Participating Creditors</b> ).	90 day (extendable up to 18 months) moratorium/standstill on creditor enforcement action. Save in respect of certain receivables and other limited exceptions, creditors whose claims are secured by a pledge may initiate or continue enforcement proceedings (however, they cannot benefit from any protective measures ( <i>muhafaza tedbirleri</i> ) or request the sale of the pledged assets).
<b>Management control</b>	Borrower’s management remains in control of the business.	The borrower’s management remains in place under the supervision of a court-appointed ‘commissar’.
<b>Cram-down</b>	Yes with the consent of two thirds (by value) of Participating Creditors (cannot be used to write-off debts, for debt-to-equity conversions or to grant new security securing existing debt in favour of some (but not all) creditors).	Yes with the consent of either (i) 50% by value and number or (ii) two thirds by value and one quarter by number of creditors.

## At a glance – Framework Agreement and Konkordato (cont.)

	Financial Restructuring under the Framework Agreement	Konkordato
<b>Which creditors are bound?</b>	Binds only Participating Creditors and secured claims can be bound only to the extent that the relevant secured creditors agree. Therefore may not provide a ‘universal’ solution for borrowers, particularly where there are both Turkish and international creditors (international non-Participating Creditors may be dealt with through a parallel English law scheme of arrangement or similar process).	As a matter of Turkish law, binds all creditors other than secured creditors. The usual considerations apply in relation to compromising foreign law governed debts (including debts governed by English law) and as a result it may be necessary to deploy parallel consensual or international restructuring processes to deal with any non-Turkish law debts.
<b>Treatment of secured creditors</b>	Secured creditors’ claims may be compromised only to the extent that they exceed the value of their security or otherwise with their consent.	Secured creditors’ claims may be compromised only to the extent that they exceed the value of their security or otherwise with their consent.
<b>Suitable for multi-debtor or group-wide restructurings?</b>	Yes.	Less so (given that this is a statutory process and the law envisages a standalone process for individual debtors and does not explicitly contemplate joinder of proceedings or consolidated proceedings).
<b>Priority for new money</b>	Yes, subject to conditions.	No.
<b>Duration</b>	The Framework Agreement provides for a fixed 90-day (extendable to 180-day) timeline.	The Bankruptcy Law provides for an initial grace period ( <i>geçici mühlet</i> ) of three months (extendable for an additional two months) followed by a definitive grace period ( <i>keisn mühlet</i> ) of up to one year (extendable for an additional six months).

# Key contacts

We are the only law firm in Turkey with a Partner-led team of English lawyers permanently 'on the ground' in Istanbul. Unlike most other international firms which operate in Turkey through a part-time 'fly-in fly-out' model, our team of English lawyers are embedded in the Turkish market, ensuring that our clients remain at the forefront of market developments. Our unrivalled on the ground English law capability, combined with our local law expertise (through Gedik & Eraksoy), sets us apart in the Turkish market. If you require advice on any of the matters raised in this document, please call any of the contacts below or your usual contact at Allen & Overy.

## **Hakkı Gedik**

Partner

Tel +90 212 371 2953  
hakk.gedik@gedikeraksoy.com

## **Umut Gürgey**

Partner

Tel +90 212 371 2966  
umut.gurgey@gedikeraksoy.com

## **Joe Clinton**

Partner

Tel +971 4 426 7177  
joe.clinton@allenoverly.com

## **Adam Fadian**

Partner

Tel +90 212 371 2918  
adam.fadian@allenoverly.com

## **Jennifer Marshall**

Partner

Tel +44 20 3088 4743  
jennifer.marshall@allenoverly.com

## **Katrina Buckley**

Partner

Tel +44 20 3088 2704  
katrina.buckley@allenoverly.com

## **Sigrid Jansen**

Partner

Tel +31 20 674 1168  
sigrid.jansen@allenoverly.com

## **Lucy Aconley**

Counsel

Tel +44 20 3088 4442  
lucy.aconley@allenoverly.com

## **Jon Webb**

Senior PSL

Tel +44 20 3088 2532  
jon.webb@allenoverly.com

## **Harini Viswanathan**

Associate

Tel +44 20 3088 3992  
harini.viswanathan@allenoverly.com

## **Mark Pugh**

Associate

Tel +44 20 3088 7179  
mark.pugh@allenoverly.com

# Further information

Developed by Allen & Overy's market-leading Restructuring group, "Restructuring Across Borders" is an easy to use website that provides information and guidance on all key practical aspects of restructuring and insolvency proceedings in Europe, Asia, Africa, the Middle East and the U.S.

To access this resource, please [click here](#).



For more information, please contact:

## **Turkey**

Allen & Overy LLP  
River Plaza, Floor 17  
Büyükdere Caddesi, Bahar  
Sokak No. 13,TR-34394 Levent  
Istanbul, Turkey  
  
Tel + 90 212 371 2900

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