**Best Restructuring Examples In Foreign Legal Systems and Enforcement Laws And Analysis Of The Relevant Legislation In Turkey**

**August 9, 2019**

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****Scope of The Study****

This study was conducted by GKC Partners and White & Case for the TBB, with the purpose of

1. explaining the international best practices in the enforcement and bankruptcy law, and the developments and the new methods developed in the comparative law, regarding enforcement and bankruptcy, particularly on the enforcement and bankruptcy law practices, the methods used for collecting debts owed to banks, accelerating the legal process for collecting receivables, debt restructuring to the extent related to the enforcement and bankruptcy law, and the legal provisions applicable to bankruptcy, deferral of bankruptcy, and composition with creditors.
2. giving the particulars of, and comparing, the “best practices” of major restructuring processes under the UK (particularly England), US and Italian legal systems;
3. analyzing the proposed regulations that may be issued to ensure the consistency between the restructuring legislation and the regulations issued under the EBL; and
4. considering these “best practices” and the Turkish legal system, developing the main structure of the proposed restructuring regulation that would be applied under the EBDL in accordance with the demands of the business life in general, fairly protecting the legal interests of creditors.

(The points listed in (i) to (iv) above will hereinafter be referred to as the “**Scope of this Study**”.)

This Report sets forth the results of the legal analysis carried out by GKC Partners and White & Case in relation to the Scope of this Study, introduces the restructuring and debt collection scenarios and mechanisms applied regarding financial creditors in the comparative law, and informing the TBB on possible amendments that may be made in the EBL so that similar mechanisms may be adopted by the Turkish law, considering the characteristics, demands and interests of creditors in the financial sector, particularly banks and other financial institutions.

In fact, the information on the countries and their legal systems, other than the UK, US and Italian legal systems, that we refer to in this Study (such as the EU legislation, the Principles of the World Bank, and the Indian law) have been provided to us as summarized information by various resources, and we hereby provide such information for informatory purposes only, without making a general analysis under such legal systems. Our comments on such countries and legal systems are included to this Report only for informatory purposes, and we recommend you to get legal opinion from qualified lawyers in such jurisdictions to analyze, comment on, and confirm such information together with the relevant laws and regulations, and further provide updates, if any.

This study is neither a legal opinion nor a due diligence report, nor does it contain conclusive legal advice on the issues that it refers to. This study was prepared only for the benefit of TBB; and no other person can rely on the information contained in this study. GKC Partners and White & Case do not accept or acknowledge any liability, liability or duty of care towards any third party. Without the written permission of GKC Partners and White & Case, this work may not be distributed, circulated, referenced, used as a basis, shared with or quoted from any person or organization.

We have not been provided with any document regarding this study, and our legal analysis is based solely on public records and the provisions of the relevant legislation.

Please contact us if TBB requires us to analyze any issue that not covered in this report, or wishes to ask us any question, obtain more detailed information, or ask for clarification of any section in this study.

****Definitions****

| **Term** | **Definition** |
| --- | --- |
| **EU Directive on Restructuring** | refers to the “DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)” dated May 15, 2019, as amended from time to time. |
| **Scope of this Study** | has the meaning assigned to it in Section I (Scope of the Study) herein. |
| **Framework Agreement** | refers to the Financial Restructuring Framework Agreement dated January 29, 2019. |
| **World Bank Principles** | refers to the Principles For Effective Insolvency And Creditor/Debtor Regimes, the World Bank, revised 2015. |
| **Regulation on Restructuring Debts Owed to the Financial Sector** | refers to the Regulation for Restructuring Debts Owed to the Financial Sector, promulgated in the Official Gazette No. 30510 on August 15, 2018, as amended from time to time. |
| **Directive on Financial Collateral Arrangements** | refers to the Directive 2002/47/EC, which entered into force on June 27, 2007, as amended from time to time. |
| **FR** | refers to Financial Restructuring |
| **GKC Partners** | refers to Devrim Güniz Gökçe Attorney Partnership. |
| **EBL** | refers to the Enforcement and Bankruptcy Law No. 2004. |
| **Report** | refers to this Report |
| **TBB** | refers to the Banks Union of Turkey (*TürkiyeBankalarBirliği*). |
| **TCC** | refers to the Turkish Commercial Code No. 6102. |
| **White & Case** | White & Case LLP |

Summary of The Analysis

This Report examines, in consideration of the international “best practices” and the Turkish legislation, (i) the legal mechanisms for debt restructuring, and (ii) the remedies that creditors in the financial sector may resort to, particularly debt collection and foreclosure proceedings. In this respect, we analyzed what type of systems can be established in connection with the statutory restructuring and debt collection/foreclosure mechanisms under the Turkish legal system, which terms/concepts may be adopted and/or which already existing mechanisms and terms in the Turkish legal system can be amended with the purpose of rehabilitating financial distress and increasing the efficiency of foreclosures, considering the demands of the current economy and business.

1. **Restructuring Mechanisms**

* We believe that a restructuring arrangement to be designed in accordance with international practices should be based on certain mechanisms targeting the continuation of debtors’ activities and allowing restructuring of debts owed to certain creditors, within the limits of certain statutory measures and supports, rather than a mechanism intervening in debtors’ activities, such as statutory administration, forced liquidation or bankruptcy, and aiming at satisfying creditors by liquidating debtors.
  + The material basic characteristics of the restructuring mechanism that we recommend, and whose details are actually given in Section V (1) (*Restructuring Processes*), are as follows:
    - ***Legal Basis of the Relevant Regulations –***Developing a system that will be clearly set forth in the applicable laws, detailed in the secondary legislation, and incorporated to the legal culture and practice of the sector by the governmental authorities’ directives and recommendations.
    - ***Early Warning and Prevention Systems –*** In order to detect insolvency potentials of debtors and take action without delay, it is necessary to have access to clear and transparent early warning tools; and certain restrictions should be introduced to the banking regulations in order to prevent the increase of the loan burden of debtors that are not financially stable to a risky level.
    - ***Aiming at preventing insolvency -*** The restructuring system should be open to debtors that have financial difficulties and face the risk of losing their solvency, before becoming insolvent; and it should be focused on ensuring mutual compromises, and contributing to the sustainability of debtors as well as the general economy, rather than focusing on collection through liquidation.
    - ***Debtor’s initiative in the process –***The process should not be arranged as a forced sanction, but rather in a manner so that it is, in principle, initiated by debtor, however allowing creditors to take action to persuade debtor to launch the restructuring process
    - ***Eligibility of debtors–***Restructuring should be open to any and all debtors other than those specific debtors operating in regulated markets; however debtor should be allowed to proceed to restructuring only after documenting that their application for restructuring is in line with the purpose of this mechanism.
    - ***Creditors that may be included in a restructuring, and their categories -***The restructuring should be designed flexibly so that it may be directed to all or only some of a debtors’ creditors, in accordance with the plan presented, and debtors would have the opportunity to group their creditors regarding whom they need their debts to be restructured as required by their business (rather than as a system where all creditors are automatically included in a package, without any distinction). Accordingly a debtor’s creditors should be categorized in different groups, and it should be possible to discuss different restructuring conditions with each of these groups.
    - ***Continued management and control by debtor–***Debtor should continue to have control over their business throughout the restructuring negotiations, but require the approval of the court and/or the restructuring specialist to be appointed by the court from among those holding certain qualifications (as to be set forth in the applicable legislation) for certain transactions that may jeopardize creditors’ interest, such as further borrowings, sale of assets, or related party transactions.
    - ***Qualified and specialized judicial authorities and specialists–***Each court or judicature that would be competent regarding the restructuring mechanism should be established specifically for this purpose, and the restructuring specialists to be appointed should be selected from the professionals with special training on this subject, and experience in the relevant business sector.
    - ***Freedom of choice from different restructuring tools -***The restructuring tool should not be listed exhaustively, and the parties to a restructuring agreement should, to the extent permitted by the principles of equity, be free to choose from various arrangements, such as acquiring a debtor through special purpose vehicles/funds and turning it into a subsidiary, in addition to typical restructuring tools, such as extending payment terms or granting new loans.
    - ***Temporary prevention of debt collection proceedings–***To the extent required for the restructuring negotiations, the court may, upon the request of the debtor, temporarily suspend any process aiming at preserving the current status, or any debt collection proceeding, for certain creditors, receivables and transactions as to be determined by the court for a certain period (no longer than the cap to be set forth in the applicable legislation).
    - ***Professional analysis considering the business -*** It should be possible to include professionals in the process in order to obtain appraisal and other consultancy services, so that the appraisal may be performed by a company that the parties may find mutually acceptable considering their business relationship.
    - ***Restructuring requirement, and equal treatment principle -*** Provided that equal treatment principle is applied at all times, each group of creditors should be allowed to vote among themselves any restructuring proposal that may be presented to such group, and approve such proposal with a certain majority of the creditors in such group; and any group of creditors accepting a proposal presented to it should have the means to force the other groups of creditors, who have not yet accepted the offers submitted to them, subject to the compliance with certain principles of equity, and the approval of the relevant court.
    - ***Voting the restructuring–***In principle, all creditors affected by a restructuring plan should have a voting right and be entitled to exercise this right at their sole discretion; however any creditor that is not to receive any amount under such plan should be deemed to have rejected the plan, and any creditor that is to receive the full amount of its receivables under the plan should be deemed to have accepted the plan, and in any event, a final period should be set for voting the restructuring plan.[[1]](#footnote-1)
    - ***Court’s final approval –***In principle, the court should respect the creditors’ approval, however any plan approved by the relevant creditors should be subject to the final approval of the relevant court, so that the court may verify whether certain principles and procedures under the applicable legislation have been duly complied with, and protect the rights of the creditors who have voted against the plan and whose rights are negatively affected by the plan to a certain extent.
    - ***Consequences of the Rejection of a Restructuring Plan–*** The rejection of a restructuring plan should not directly lead to bankruptcy.
  + The restructuring mechanism that we propose contains the following fundamental sub-processes:

*Approval of the restructuring plan by different groups of creditors*

*Application for restructuring*

*Negotiation of the restructuring plan with different groups of creditors*

*Court approval of the restructuring plan*

***Court decision to preserve the thenexisting conditions for a period and to the extentestablished by the court***

***(prevention of debt collection proceedings)***

* The proposed restructuring mechanism based on the fundamental principles given below and further detailed in the later sections of this Report, would have significant structural similarities with “arrangement with creditors” (*konkordato*) (hereinafter referred to as “concordat”). Accordingly it is necessary to separately consider whether the concordat concept should still be kept in the Turkish legal system, after the introduction of such a restructuring mechanism, and if it is to be kept in the legal system, then how these two concepts would interact with each other.
  + The restructuring mechanism proposed in this Report is designed based on the regulations and practices in the compared legal systems, and considering the elements of the currently existing concordat concept. It is structurally similar to concordat in terms of application for, and continuance and conclusion of the process; however it is aimed at designing it as a structure that may be flexed by specialized judicial authorities and specialists considering circumstances and existing commercial agreements, so that debtors may be “saved” and bankruptcies may be “prevented”.
    - We believe that, to this end, it is necessary to establish a judicial system consisting of certain courts specialized on restructuring, be able to involve specialists with experience in similar restructuring transactions in the process (not only for managing the process, but also for special services, such as appraisal), allow a certain extent of flexibility in the categorization of creditors (such as secured and unsecured creditors); treat group companies/shareholders as secondary creditors ranking after the others, including, but not limited to, financial creditors, and reflect this treatment to the relevant regulations; allow courts to freely decide whether or not to suspend legal proceedings against debtor; and prevent automatic bankruptcy if restructuring fails (provided that the bankruptcy conditions under the applicable legislation are not met, and without prejudice to such conditions). These details are similar to the fundamental steps in concordat; however the proposed restructuring mechanism is more in line with the requirements of business, focused on ensuring the furtherance of business activities and more suitable as a preventive measure.
  + Another important target of the proposed restructuring mechanism is to create a new opportunity to restructure debts, given that arrangement creditors is commonly known as “*a measure similar to bankruptcy*” or “*a step before bankruptcy*”; so that debtors/creditors may be less hesitant to resort to this remedy (considering not only its consequences for debtors, but also their reputation).
  + The proposed restructuring mechanism should cover the elements of concordat, however it should apply to a wider range of creditors and financial scenarios. After finally deciding on which elements of this restructuring mechanism is to be approved, all parties should consider whether to introduce the rearrangement mechanism as an option in addition to concordat, or make certain modifications in the concordat mechanism to convert it into a restructuring mechanism (which may then be used together with the elements of concordat, as to be decided by the court considering the severity of the circumstances).
    - The restructuring mechanism may be introduced as a positive and preventive opportunity to “restructure debts”, rather than “concordat”, which is publicly perceived as something negative. However if newly introducing the restructuring mechanism is chosen over modifying the existing concordat mechanism, it would be also necessary to decide whether or not to restrict or prevent (for a certain period) debtors from applying to the concordat mechanism if they fail in the restructuring mechanism so that debtors would be prevented from abusing the relevant legislation to delay their payments for a very long time by separately applying to each of these mechanisms.

1. **Debt Collection Regulations**

* Analyzing the regulations on debt collection and foreclosure reveal, we believe that it is necessary to introduce certain other mechanism to the Turkish law, such as the sale of collaterals with the mutual agreement of the parties, without the intervention of a court and/or an enforcement office, in order to maximize the return of the sale of such collateral. Accordingly we recommend you to consider the following possible mechanisms:
  + ***Sale by Receiver -***In this mechanism, provided that the parties agree on such sale in the relevant collateral agreement, creditor would be entitled to appoint a receiver that is to act as the representative of debtor, sell the assets given as collateral, and make payment to creditor out of the proceeds of such sale.
  + ***Private (direct) sale -***Creditor may be allowed to directly sell the collateral, provided that such option is incorporated to the agreement between the parties, or certain conditions laid down by the applicable regulations are met.
  + ***Direct acquisition –***The *lex commissoria* principle should be flexed and creditor should be allowed to directly acquire the title to a collateral in the event of debtor’s default, provided that this is incorporated as an option to the agreement between the parties.
  + ***Security agent concept -*** It should be confirmed that “security agent” concept where an agent is appointed so that all collaterals regarding a transaction may be provided to such agent in the name and on the account of all creditors involved is effective under the Turkish law.
  + ***Financial creditors’ right to intervene-*** Financial creditors of a debtor should be authorized to intervene in the management of such creditor, after the approval of the competent authority, during the interim period before the foreclosure of a pledged asset or the conclusion of the restructuring, if and when certain circumstances requiring immediate intervention arises.

“Best practices” in Comparative Law

IV – (1) Restructuring Processes

There are different mechanisms in different legal systems to restructure the debts owed by debtors that have difficulties in paying their debts to financial creditors and other groups of creditors, such as commercial creditors, where public authorities intervene to certain extent. Such restructuring procedures are based on fundamentally similar approaches and principles, however there are significant differences in terms of the restructuring’s effect on different groups of creditors, the restrictions imposed on debtors and the results that may be achieved in the end.

In order to better explain the fundamental principles and operation mechanisms of such restructuring tools, we will outline certain restructuring principles under the Anglo-Saxon Law and the Continental European Law.

* 1. **United Kingdom** 
     1. ***“Scheme of Arrangement”***
        1. **In general**

“*Scheme of arrangement*” (“**SoA**”) is a restructuring option provided in the Anglo-Saxon law to allow any debtor that has difficulties in paying out their debts to acquire the ability to repay the same under new conditions.

The SoA procedure is similar to the “arrangement with creditors” approach that serves as the basis of the concordat mechanism in Turkish Law. In this procedure, a debtor company proposes to its creditors a restructuring agreement that requires such creditors to make certain compromises. This procedure is not a typical “bankruptcy” procedure.

* + - 1. **Restructuring Option offered by the SoA**

What can be included in the restructuring project that can be offered to creditors under a SoA is not exhaustively listed in the relevant legislation. Accordingly, each debtor is allowed to offer commercial conditions ideal for its financial performance and its targeted cash flow, considering the composition of the creditors to whom it has difficulty in making payment and the debts owed to such creditors.

Debtors are also allowed to include only some of their creditors (that are finally determined in accordance with a procedure under the applicable legislation) to a SoA and preserve the legal status quos of the remaining creditors as of the relevant date. Accordingly, a debtor may, for example, enter into a SoA where only its debts to financial creditors may be restructured.

This flexibility of the SoA mechanism presents debtors the following alternatives:

1. To discharge debts allowing creditors to collect their receivables in kind (by acquiring asserts, including the shares in the debtor company);
2. To transfer debtor’s business enterprise and activities to its creditors.

A debtor’s business enterprise may be transferred only when the SoA mechanism is upon an application for the appointment of an administrator to the debtor company or as a part of the proceedings launched by its debtors for foreclosing any existing pledge (if any).

* + - 1. **Process**
* The first step in the SoA process is a court session for meeting/authorization to be held upon the application filed with the court by a debtor.
  + During this session, the relevant restructuring proposal and other explanatory documentation are presented to the court.
  + Mainly whether or not the applicant company has a sufficient degree of connection with the UK is discussed during this session. Whether the UK courts are competent to conduct the SoA Procedure is established considering certain criteria, such as whether the company is incorporated in the UK, whether the financing documents related to the debts concerned are governed by the UK Law, or whether the “center of the company’s interests” is located in the UK.
  + During this session, the court also establishes the groups of creditors to be included in the SoA. Each group of creditors need to consist of creditors that have rights so similar that they can act in consultation with each other for their mutual interests. When categorizing creditors into these groups, the court may take into consideration the extent of the similarity between the legal rights of the relevant creditors, and the possible unifying (or distinctive) effect the rejection of the SoA application on the creditors proposed to be included in a group of creditors. There is no clear provision in the applicable legislation on the categorization of creditors into groups (such as creditors secured by pledge – creditors not secured by pledge).
    - Such groups of creditors are proposed by the applying debtor, but creditors are entitled to object to the groups they are assigned to. The categorization of creditors into groups may be discussed before the court not only in the first court session on the court’s jurisdiction at the beginning of the process, but also the last session, where the SoA is to be approved (when the court considers fairness of the approved structure).
  + The SoA process may be initiated only by a debtor, and no creditor is entitled to directly apply for a SoA.
* In practice, a debtor wishing to initiate a SoA process, holds thorough restructuring meetings with its creditors holding the majority to approve the SoA, and launches the SoA process based on the restructuring proposal agreed with such creditors.
  + Given that the SoA process involves significant expenses, this process is launched only after reaching a consensus with significant creditors, in order to avoid a possible rejection.
* The court decides to hold a meeting with the creditors so that they may vote on the proposed SoA, if the court establishes its competence and is satisfied with the proposed groups of creditors in the initial meeting / court session on the court’s competence. When the proposed SoA is voted at the creditors’ meeting, the approval requires the affirmative votes of the majority of the creditors in the relevant group of creditors representing 75% of the amount of debt. During this voting, the creditors are required to act in good faith, vote considering the interests of the group of creditors in which they are included, and refrain from solely pursuing their own interests.
* The SoA process does not prevent creditors from launching debt collection proceedings.
  + On the other hand, SoA is a structure that is used generally by significant debtors for restructuring their secured financial debts. As explained above, debtors prefer reaching an agreement with their creditors on the conditions of the proposed restructuring, before launching the SoA process. In accordance with such agreement, a debtor may enter into an agreement to “preserve the status quo” or a “restructuring agreement” with its creditors before applying to the court for launching the SoA process. In such contractual arrangements, the relevant creditors agree to vote in favor of the SoA or refrain from taking any action that may jeopardize the restructuring in the SoA process. The creditors may also waive their rights regarding any default under an existing financing agreement for a limited period of time, in order to allow the continuance of the relevant restructuring negotiations.
* Similar to the concordat process under Turkish law, the proposed SoA approved by the requirement majority of the creditors must also be approved by the court. To that end, the court makes a separate analysis and declares its opinion on the merits of the proposed SoA. When doing so, the court considers whether or not the proposed SoA is fair as well as the objections of the creditors voting against the SoA, if any.
  + In practice, courts generally approve proposed SoAs, respecting the wishes of creditors approving them, provided that there is no objection or irregularity.
  + Again in practice, courts generally refrain from intervening in the restructuring conditions under SoAs, if they are approved by the relevant creditors. If a court finds an issue in the restructuring conditions proposed, then it refers to such issue during the initial court session on its competence, so that the SoA concerned may be amended before being submitted to the approval of the relevant creditors.
* There is no prescribed time limit for the negotiations on a proposed SoA, given that the launch of a SoA process does not prevent any creditor from launching a debt collection proceeding or any other proceeding to preserve the status quo.
  + - 1. **Consequences**

When a SoA is duly approved, it applies to all creditors being affected by the proposed SoA, including those voting against such proposal. However it is only binding for the group of creditors subject to the proposed SoA. A SoA process is not binding for any group of creditors other than that such process is launched for, unless and until a separate SoA is proposed for such other creditors, which is then approved by the relevant creditors and the court.

However, in practice, if a group of creditors rejects a SoA, such group of creditors may be forced to accept a SoA or they may be prevented from foreclosing the debtors’ assets and collecting the debts owed to them outside the restructuring, provided that certain other conditions are met or certain other procedures are followed, although the SoA principles does not directly authorize the majority of a debtor’s creditors to force the other groups of creditors to accept the restructuring based on a proposed SoA.

* If the group of creditors that have the majority and approve the SoA also apply for an administration order as explained below) and sell the company’s assets to a company controlled by such group of creditors approving the proposed SoA, the remaining creditors’ claims against the company will continue to be effective but there will be no company asset left even if they launch a debt collection proceeding.
* Another alternative is that the creditors approving the proposed SoA may foreclose their pledge over the company shares, if any. Typically in English law practice, inter-creditor agreements entered into between preferred and subordinated creditors allow security agent to delete the debts owed to subordinated creditors and release any security created in their favor, if any, in the event that preferred creditors apply for foreclosure under certain conditions. In a financial structure where there is such an inter-creditor agreement containing the aforementioned clause, if the preferred lenders approve a SoA and then apply for the foreclosure of the pledge over the borrower’s shares, then the security agent may exclude the claims made by subordinated creditors that have not approved the SoA, and release any and all security rights created in their favor, based on the aforementioned right.
  + Incorporating such a provision that may be enforced against subordinated creditors in an inter-creditor agreement generally requires a legal opinion from an investment bank stating that the exercise of the rights under such provision would be fair. This aims at ensuring that the subordinated creditors would be deprived of their claims and collaterals only if the debtors’ assets are actually sufficient to partially or fully discharge the liabilities towards the preferred group of creditors (and in the example given below, the group of creditors that enters into an agreement with the debtor and approve the SoA) and in any event no asset will remain to pay out the debts owed to the subordinated creditors.

A SoA proposal approved in the UK does not automatically become effective in under the laws of any other country. Certain specific regulations in the US legislation (*Chapter 15 recognition*) allow the recognition and enforcement of a SoA finalized by the relevant local UK court under the UK Law in the US.

Contract negotiations before the process

**14**

**15**

**36**

**39**

**40**

**60**

**0**

Court Confirmation of the SoAproposal

Court Session on

Authorization/Meeting

Initiation of SoA process by circulating final conditions to creditors

Agreement entered into between creditors and

debtor for preserving the situation

Creditors’ Meetting

Introduction of theconfirmedproposal in the US or other countries

Providing creditors with informatory documentation presented to court, and inviting creditors to a meeting

Drafting official documents to be presented to court

**39**

**40**

**60**

* + 1. ***“Company Voluntary Arrangement”***

Company voluntary arrangement (“**CVA**”) is similar to the SoA process, but there are less procedural requirements as compared to SoA.

* As a part of the CVA mechanism, debtor makes a restructuring proposal to its creditors. The process is administered by specialized professionals, rather than a court. Given that the process is not subject to a court review, it is less expensive.
* A CVA becomes final once it is approved by the majority of the creditors representing 75% or more of the total amount of the company’s debt. Once finalized, the proposal becomes binding for all unsecured creditors, but the secured creditors are not affected from the CVA unless they give their approval.
* It is possible to apply to court to object to a finalized proposal within 28 days, claiming that the process was unfair or there has been a major procedural breach.
* The CVA procedure does not prevent the launch of any legal proceeding; therefore, this mechanism is used together with an administrative order to prevent the creditors from taking action against the debtor in a manner that may prejudice the restructuring.
  + 1. ***“Administration”***

This is another legal process under the bankruptcy legislation of the UK, where a debtor and its assets are restructured though the appointment of an administrator to the company, and it is prohibited to launch legal proceedings against the company. This mechanism aims at satisfying the creditors to an ideal extent through the liquidation of the debtor, rather than sustainably restructuring the debtor.

* In fact, the objective of this process is to save a company during this process, but when it is not possible to achieve this objective, it is aimed at getting better results in favor of the creditors as compared to the company’s liquidation, and ensuring that the secured/preferred creditors receive the full value of the company’s assets. In any event, this process aims at preventing any damage to the creditors in general, when foreclosing the debtor’s assets.
* Administrator is appointed by the virtue of a court upon the application of (i) major creditors, (ii) the debtor, or (iii) the company’s executives, in each case meeting certain conditions set forth in the relevant legislation.
* Once an administrator is appointed to the company, the company’s management is entrusted to the administrator(s), and the then existing executives of the company will be released of their duties during this process. The scope of the administrator(s)’s duties may be different for each company or application.
* Administrators are appointed from among professionals that are licensed for this purpose, generally working in the field of accounting. Administrators are treated as officers of the court under the applicable legislation, and the court may take action against any administrator that does not duly perform the duties assigned to them (although this is rarely the case). There is also a disciplinary board considering the complaints made against administrators.
* The prohibition of legal proceedings during such process aims at providing a stable platform to solve the company’s problems.
* In general, separate administrators are appointed to different companies, even if they are in the same group of companies.

As a specific type of this process, the owners of a company and the prospective buyer may negotiate the sale of such company before the launch of this process (and informing the administrator to be appointed), and upon the appointment of the administrator, the company may be sold in accordance with previously agreed conditions, under the supervision of the administrator (*pre-pack administration*).

* 1. **USA** 
     1. ***Chapter 11***

As a mechanism provided by the US enforcement and bankruptcy legislation, Chapter 11 is more formal procedure that interferes more with parties’ rights as compared to the SoA mechanism in the UK (“**Chapter 11**”).

* A Chapter 11 process is launched generally when a debtor files an application with a court and presents its restructuring project and other informatory documents. Such informatory documents must be approved by the court, before the submittal of the restructuring project to the approval of the creditors.
* The conditions that are required to be met so that a US court would accept its competence to hear a Chapter 11 case is less strict as compared to the conditions that the UK courts require to be met in connection with SoA procedures. In general, such conditions are deemed to be met when the relevant debtor company has a bank account in the US.
* Unlike the SoA procedure, a Chapter 11 filing results in the prohibition of legal proceedings that is binding for all creditors. This prohibition prevents creditors from resorting to legal remedies, and in some cases, certain agreements signed by the debtor are terminated. However, courts may bend this prohibition by allowing secured creditors to exercise certain remedies related to such securities. Debtor is required to file its final restructuring scheme within 120 days following its preliminary application (that may be extended up to 18 months in total). The restructuring scheme is discussed exclusively for the 60 days’ period following the filing of this restructuring scheme. If the plan is not approved by the end of this 60 days’ period, the other relevant parties may file a different plan.
  + This prohibition of legal proceedings automatically apply upon the filing of the relevant application with the court, without any further procedural requirement. This does not require the debtor to be insolvent, and the court is not required to take any decision for either introducing or maintaining this prohibition.
  + On the other hand, any debtor filing for Chapter 11 is required to be “acting in good faith”. If any interested party objects to the Chapter 11 filing by the debtor, and the court finds the debtor’s filing to be in bad faith, the Court may reject the Chapter 11 filing or convert it to a liquidation process. When considering such matters, the courts generally focus on whether or not the debtor wishes to preserve its assets and maximize its assets for the benefit of its creditors. If the court believes that the debtor’s Chapter 11 filing aims at suspending legal proceedings and the debtor does not actually intend to restructure its business, they find the debtor to be in bad faith, acting in a manner to abuse the filing process. Similarly such filing by a solvent debtor with the sole purpose of suspending legal proceedings may also be regarded as an abuse.
  + Courts are authorized to exempt certain secured creditors from this prohibition, in order to avoid its potential abuse only when (i) there is no equity value remaining after the payment of the secured debt, and such security is not necessary for the effective restructuring of the debtor, or (ii) the debtor cannot afford sufficient protection in connection with such security’s use in the restructuring process (such as periodical cash payments or replacement security).
* It is also possible for a borrower subject to Chapter 11 below to borrow additional loans, subject to court approval. The priority of such borrowings in terms of repayment and collateral as compared to the other liabilities is guaranteed under the applicable legislation. In practice, it is observed that secured creditors in a Chapter 11 process are more willing to provide to lend such additional amounts to strengthen their secured positions by getting an additional priority in repayment and collaterals.
* A borrower subject to a Chapter 11 proceeding may maintain or terminate their existing contracts, subject to the approval of the court concerned. Until and unless the borrower revokes an agreement, the counterparty of that agreement continues to be bound with their contractual obligations thereunder, and is not entitled to unilaterally terminate the agreement, even if a Chapter 11 filing has been agreed to serve as a ground for terminating the contract.
  + In practice under the applicable law, the launch of a Chapter 11 proceeding regarding a debtor does not entitle any counterparty to terminate a loan agreement previously entered into with such debtor. Accordingly such proceeding is regarded as an event of default, under customary contractual provisions treating insolvency of the debtor or launch of insolvency proceedings against the debtor (such as a Chapter 11 proceeding) as an event of default; and the loan may be accelerated under such contractual provisions.
* A debtor subject to an ongoing Chapter 11 proceeding may sell their assets in the ordinary course of business, only after a court approval. Such approval is given if there is sufficient commercial basis for such sale, and the sale should be made to the proposed buyer making the highest and best offer.
  + Creditors’ approval is not required for such transactions, and assets may be sold free and clear of any encumbrance thereon. However the creditors holding such encumbrances lifted will receive the proceeds of such sale in the same order of priority.
  + Within this context, secured creditors are furnished with special, rights, such as the right to apply for “adequate protection” regarding such collaterals (as explained above), or the right to offer to purchase any asset and offset the value against its receivables.
* A restructuring scheme under Chapter 11 needs to be approved by the majority of each group of creditors being affected by the scheme and representing 2/3 of the total amount of their receivables. This 2/3 majority requirement applies to each group of creditors, and therefore any debt owed to a creditor that votes against such scheme and rejects the scheme must be restructured in accordance with the plan approved by the remaining creditors.
  + Any group of creditors whose rights are not prejudiced under the restructuring scheme is deemed to have accepted the plan, and the creditors in such group are not entitled to vote.
  + If a restructuring scheme makes it impossible for a group of creditors to make any collection, then such group of creditors is deemed to have rejected the scheme, and the creditors in this group are not entitled to vote.
  + Unlike the SoA structure, it is possible for a group of creditors approving a restructuring scheme presented under Chapter 11 to force other groups of creditors to approve the scheme, subject to certain conditions. This is possible when
    - At least one group of creditors whose rights are diminished under the restructuring scheme has approved the scheme, and
    - The restructuring scheme does not unfairly discriminate any of such groups, and it is fair for every group whose rights are diminished, and who have not approved the scheme.
  + A restructuring scheme is deemed to be fair for a group of secured creditors if the creditors in the group
    - receive a cash payment not less than the then current value of their claims while maintaining their securities; or
    - are entitled to make an offer in order to acquire any secured asset required to be sold under the scheme, and set off its value against any debt owed to them; or
    - receive a value undoubtedly equal to their claims.

However, in practice, there is not any case where a group of unsecured creditors forces a group of secured creditors to approve a restructuring scheme.

* + In order for the shareholders of a debtor to receive any payment under the scheme, the liabilities to any and all unsecured creditors should have been fully discharged.
* The Chapter 11 proceedings are administered by the US courts and exercise “global jurisdiction” to ensure compliance with the stay of enforcement proceedings under Chapter 11. In practice, the relevant parties outside the US generally comply with this prohibition imposed by the US courts.
* Given that court are significantly involved in Chapter 11 proceedings and professionals’ support is required for managing the process, this is a more expensive restructuring alternative to SoA.
* Restructuring schemes under Chapter 11 vary depending on the circumstances at the beginning of the proceedings. In practice, common Chapter 11 case types are as follows:
  + Prepackaged filings: Chapter 11 filings where a restructuring scheme is discussed with, and approved by, the relevant creditors before the launch of the proceedings so that the proceedings may be accelerated.
  + Prearranged filings: Chapter 11 filings where a debtor company develops a corporate restructuring strategy before the filing, and contact certain major creditors for he purpose of getting their support by preliminary negotiations (but without fully reaching an agreement).
  + Traditional filings: Chapter 11 filings where a debtor makes the filing without making any preliminary plan or without getting support from any creditor (freefall) or where a debtor simply designs a restructuring scheme without discussing it with any creditor (soft-landing).
  + Creditor let filings: Chapter 11 filings by creditors. This type of filings is very exceptional in the USA, given the risk of indemnification liabilities in the event that the filing is dismissed.

**Filing**

Presenting informatory documents and the restructuring scheme

Objections to informatory documentation and court sessions

Approval of the scheme by creditors

Objections to creditors’ approval, and court session for the court’s approval

Approval of the scheme

120 days for the approval of the scheme *(probably extended to 20 months)*

180 days for the approval of the scheme *(probably extended to 20 months*)

* + 1. ***Assignment for the benefit of creditors***
* As a mechanism under states’ legal systems, it is possible for a debtor to assign its assets to an “assignee” which is to foreclose such assets for the benefit of the creditors. Such assignment for the benefit of the creditors is for the purpose of discharging existing liabilities by liquidating the debtor’s assets, rather than restructuring its debts for ensuring the continuance of its business.
* A debtor that transfers its assets for the benefit of its creditors no longer has the control of its business, and no corporate restructuring takes place.
* Notwithstanding the foregoing, any assignment for the benefit of the creditors do not result in the full discharge of the debtor’s liabilities. After the foreclosure, there may still be certain due but unpaid claims against the debtor.
* This assignment mechanism covers all or substantially all of the debtor’s assets, and therefore a debtor may apply for this mechanism only if it is approved by its management and its shareholders.
* Assignment for the benefit of creditors is regarded as an event of default under standard finance documents.
* The assignee is generally selected by the debtor. However the assignee has a duty of care towards all creditors, and are generally selected from accountants or other professionals experienced on liquidation of assets.
* The assignee that is to foreclose the debtor’s assets is generally required to post a security and regularly report to the court supervising the process.
* The assignee is authorized to sell the debtor’s assets one by one at appropriate times, in order to maintain the value of the debtor’s assets at the highest level possible.
* The assignee’s claim is generally paid out of the proceeds of the sale of the debtors’ unencumbered assets.
* Such assignment is generally agreed under a formal agreement, however certain states also require the debtor to notify the relevant court or registry. In some states, the debtor is not required to notify the court, but its creditors.

Any and all encumbrances on the assets assigned are maintained. Therefore secured creditors have priority in receiving payment out of the proceeds of the sale of encumbered assets.

* 1. Italy

There have been certain developments in the Italian legislation aiming at “saving” debtor companies, rather than liquidating them, during the past 5-6 years. For this purpose,

* The applicable laws and regulations have been amended so that they may focus on the continuance and survival of debtors experiencing problems;
* Certain options have been developed for restructuring before bankruptcy;
* The options for making an arrangement with creditors before bankruptcy have been improved;
* The responsibilities of executives and creditors have been balanced; and
* Accessing financing that may be required in problematic periods has been simplified.

Today, Italian law provides certain out of court and judicial financial restructuring options (including more than one option).

1. ***Out of Court Restructuring***

The Italian Bankruptcy Law gives the opportunity to debtors to restructure their debts under a restructuring plan, following a process out of the court.

* This mechanism may be used when the debtor is unable to pay out its debts, or more broadly experiences other financial difficulties.
* This mechanism does not require the publicizing of the proceedings, and can be kept fully confidential. However the debtor is authorized to request the announcement of the relevant restructuring plan at the companies’ registry.
* The restructuring proceedings does not require any change in the debtor’s then existing management.
* No action or transaction under the restructuring plan can be subject to the action for annulment of disposition.
* Any and all actions or transactions under the restructuring plan are exempted from the criminal liabilities under the bankruptcy law.
* The restructuring may take place under this mechanism if the debtor
  + prepares a restructuring plan acceptable to its major creditors; and
  + receives an independent expert report verifying the data serving as the basis of, and the feasibility of, the restructuring plan.

1. ***Restructuring involving the court***
   1. **Judicial Restructuring**

* It is possible to resort to this mechanism not only when the debtor is unable to pay off its debts, but also when it experiences other financial difficulties in general.
* The restructuring agreement is discussed between private parties, but subject to the inspection and approval of the court. It is then announced at the companies’ register.
* The restructuring proceedings do not require any change in the then existing management of the debtor.
* No action or transaction under the restructuring agreement can be subject to action for annulment of disposition.
* Any and all actions and transactions under the restructuring agreement (or even before the restructuring process in certain cases) are exempted from the criminal liability under the bankruptcy law.
* Legal proceedings can be prohibited during the pre-contract negotiations, if the debtor files an application for that purpose and an independent expert confirms in their report that once the scheme is approved, amounts owed to the creditors not included in the scheme would also be paid out.
* Under certain conditions, the debtor may be allowed to borrow additional funds, which would have priority in repayment, without being required to present an independent expert report during this interim period (including the court’s approval). The debtor would be allowed to borrow additional funds if there is an urgent need for such additional funds, the lack of which would result in imminent and irreparable damages.
* The capital adequacy rules under the Italian Law are suspended.
* The debtor may apply to the court to pay out its existing liabilities arising from goods and services purchased, provided that an independent expert finds it useful for the essence of the debtor’s business and to meet the demands of creditors. If the funds provided to the debtor for such payments will not be repaid or will be subordinated to the claims of the creditors, approval is not required for such payments.
* The conditions precedent to restructuring under this mechanism are as follow:
  + Agreement with the creditors representing at least 60% of the debtor’s liabilities;
  + An independent expert’s report verifying the data serving as the basis of the restructuring agreement and its feasibility (particularly including the payment of the liabilities towards the creditors that are not party to the agreement); and
  + The court’s approval.
* Once approved, the restructuring agreement only applies to the parties approving the agreement.
* Within 60 days following the approval of the restructuring agreement and its announcement in the registry, the creditors whose claims arose before such date will no longer be authorized to launch any proceeding or apply for any preliminary measure against the debtor.
* Any interested party may raise an objection within 30 days after announcement of the approved structuring agreement in the companies’ register.
* If the debtor applies to the court regarding a restructuring arrangement, but receives an extension to submit the relevant documents at a later date, the debtor may submit the documentation for a pre-bankruptcy arrangement instead of the restructuring agreement within such extension. The stay of enforcement proceedings against the debtor continues to apply during this process.
* Under this mechanism, the borrower may also apply for a tax restructuring in order to partially and regularly pay out its tax liabilities.
* The recent developments in the applicable legislation allow the debtor to enter into a restructuring agreement only with its financial creditors.
  + This is possible only when the debtor’s financial liabilities correspond to at least 50% of the total amount of its outstanding liabilities.
  + If such a restructuring agreement is signed by the creditors representing 75% or more of the total amount of outstanding loans, the debtor may apply the court so that the court may rule that the agreement would be binding for the remaining financial creditors that have not signed the agreement, provided that certain further conditions are met. The creditors that have not signed the agreement may object to this application within 30 days.
  + If the creditors representing 75% or more of the total outstanding loans and the debtor enter into an agreement to preserve the status quo, such agreement would be binding also for the creditors that are not parties to such agreement, provided that certain further conditions are met.
  1. **Pre-bankruptcy Agreement**
* This mechanism applies in exceptional cases of insolvency and more generally certain other financial difficulties.
* This mechanism may be applied only if
  + the debtor is a private business enterprise;
  + the company’s asset have exceeded EUR 300,000 annually for the past 3 years;
  + the company’s gross turnover have acceded EUR 200,000 annually for the past 3 years; and
  + the company’s total liability, whether due or undue, exceed EUR 500,000.
* In this mechanism, the restructuring plan prepared by the debtor is agreed with the creditors before the court.
* The debtor must be a business enterprise meeting certain minimum limits as to value of assets, gross turnover and liability.
* The debtor may apply to the court to reach a pre-bankruptcy agreement with its creditors, and it may present the relevant documentation within 60 to 120 days (which may be extended for up to 60 more days) as to be determined by the court. The court may shorten this period, if the debtor’s activities turn out to be inadequate for such restructuring proposal.
* While deciding on the above-referenced period, the court may appoint a judicial restructuring specialist and require the debtor to provide certain information on monthly basis. This specialist will inform the creditors of the date of the relevant court session, and the scheme to be voted by the creditors.
* The restructuring scheme may require the restructuring of debts, the payment of such liabilities in various ways, the delivery of certain financial instruments to the creditors, the transfer of the debtor’s business to its creditors or other buyers, the management, the continuance of the debtor’s control over its business, and the sale of the debtor’s immaterial assets.
* The creditors are categorized into groups according to their economic interests and legal positions. The creditors in the same group must be treated equally, and the creditors from different groups may be treated differently.
* The secured creditors may partially collect their claims, if they would not be able to collect more when they foreclose the liens created for their benefit.
* No change takes place in the debtor’s existing management during such restructuring proceedings. However the debtor remains under the supervision of the court appointed expert, and it is required to get the approval of this expert and the court before entering into any extraordinary transaction.
* No proceeding may be launched for the purpose of having any action or transaction subject to such pre-bankruptcy agreement subjected to action for annulment of disposition.
* Any action and transaction taken or entered into under the pre-bankruptcy agreement (or even before such proceedings, if certain conditions are met) is exempted from criminal liability under the bankruptcy law.
* The creditors are prohibited from taking any legal action against the debtor (for stay of enforcement purposes or for interim measures) during the period between the debtor’s application and the court’s final approval to the agreement.
* Under certain conditions, the debtor may be allowed to borrow additional funds, which would have priority in repayment, without being required to present an independent expert report during this interim period (including the court’s approval). The debtor would be allowed to borrow additional funds if there is an urgent need for such additional funds, the lack of which would result in imminent and irreparable damages.
* Save for certain exceptional agreement, such as employment agreements, any existing agreement which has not yet been performed or which has been partially performed may be terminated or suspended (for up to 60 days, which may be extended for only once) and the counterparty of such agreement, who has performed any of their obligations thereunder, may be indemnified against its damages, provided that the debtor’s application for this purpose is approved by the court. After the approval of such agreement and its announcement at the companies’ register, the counterparty’s claims will have a priority.
* The capital adequacy rules under the Italian Law are suspended.
* Any creditor representing 10% or more of the total amount of receivables may propose a scheme alternative to that presented by the debtor, if no more than 40% (or 30% if it is proposed to continue the operations of the business under the proposal) of the unsecured receivables is to be paid out under the scheme proposed by the debtor.
* If the scheme involves the sale of the debtor’s assets, the court is required to conduct a competitive bidding process and collect bids. This will apply even when the debtor has already signed an agreement for such sale.
* Any company controlling or subject to the same control with the debtor will be excluded from voting during this process.
* The scheme must be approved by the court within 6 months following the debtor’s application, which may be extended for 60 more days.
* Restructuring under this mechanism requires
  + an independent expert report confirming the data serving as the basis of the restructuring agreement, and the restructuring agreement’s feasibility;
  + the affirmative votes of at least the creditors with voting rights, representing at least the absolute majority of the total value of receivables (including the secured or privileged creditors waiving their rights on securities), and if there are two or more groups of creditors, the affirmative votes of the absolute majority of these groups (provided that, if the creditors have submitted an alternative plan, the plan getting the highest votes would apply);
  + if the pre-bankruptcy arrangement requires liquidation, collection of at least 20% of the unsecured receivables under the restructuring scheme; and
  + the court’s approval.
* If there is no group of creditors and the creditors representing 20% of the total receivables do not approve the scheme, the court may still approve the plan and force the creditors voting against the scheme to accept the restructuring.
* The court may authorize the specialist to enforce the restructuring scheme if the debtor does not cooperate.
* If the pre-bankruptcy agreement is not approved, the court would declare the debtor bankrupt upon the application of a creditor or the prosecutor.
* If the debtor applies to the court regarding a pre-bankruptcy agreement, but receives an extension to submit the relevant documents at a later date, the debtor may submit the documentation for a restructuring agreement instead of the pre-bankruptcy arrangement within such extension. The stay of enforcement proceedings against the debtor continues to apply during this process and the capital adequacy principles under the Italian law does not apply.
* There are certain special rules applicable to pre-bankruptcy arrangements without liquidation. These are as follows:
  + The restructuring agreement must refer to the continuance of the operations of the business by the debtor, the sale of its assets to a new or existing company or participation of such companies in the operation of the business, or the sale of immaterial assets.
  + The restructuring plan may, under certain conditions, require the suspension of the payments to senior and secured creditors for a period no longer than 1 year.
  + The launch of this proceeding does not lead to the termination of any existing agreement, and any arrangement requiring the contrary is in effective.
  + The debtor may bid in public tenders under certain conditions, such as being authorized by the court, or receiving an affirmative opinion from a court appointed expert, if any.
  + The debtor may file an application with the court, demanding to be authorized to pay out its outstanding debts arising from its previous purchases of goods and services, provided that an expert confirms that the continuance of the supply of such goods and services is vital for the business, and it would help the debtor to pay out its outstanding debts. If the funds to be used by the debtor for such payments would not be repaid or would rank after the creditors’ claims, no authorization would be required.
  + Such a special pre-bankruptcy arrangement requires an independent expert’s confirmation that the continuance of the debtor’s business would be better for paying out the creditors’ claims; and the relevant restructuring plan should contain a projection of income, expenditure, required funding and debt service ratio.
  1. **Prodi Law/ Marzano Law**
* They apply to insolvent large firms.
* A scheme to be prepared for this purpose may require the sale of assets or the restructuring of outstanding liabilities (including by way of incorporating a subsidiary by using business’ receivables, or making an arrangement with creditors etc.).
* The debtor is managed by a single or three experts during this process.
* The creditors would be prohibited from taking legal action against the debtor.
* Any additional financing that may be obtained during the interim period may have a priority in repayment or guaranteed by the state.
* Particularly Italian groups of companies may be restructured under this plan.
* Criminal penalties for bankruptcy apply.
* A debtor’s liabilities may be restructured under this mechanism if
  + Certain thresholds as to the total amount of liabilities and the number of employees are met;
  + The Minister for Economic Development gives certain authorizations;
  + The creditors with the vote to right and representing 50% or more of the outstanding liabilities give their approval, and if there are groups of creditors, at least the simple majority of the groups give their approval; and
  + The court approves the scheme.
  1. **EU Legislation**

1. As a result of long standing efforts, the European Parliament and the European Council adopted the EU Restructuring Directive in June 2019 for setting the framework for preventive restructuring, giving a second chance to entrepreneurs for restructuring, bankruptcy or liquidation, and increasing their efficiency. Please find below brief information on the principles that the member states are required to adopt and reflect to their national legislation by the end of a certain period.

* The EU Restructuring Directive sets forth certain provisions on
  + The framework of preventive restructuring mechanism that may be used by debtors in financial difficulty, when they face the risk of insolvency, in order to prevent their bankruptcy and maintain their business;
  + Certain procedures on the liquidation of the liabilities of insolvent entrepreneurs; and
  + More efficient procedures for restructuring, bankruptcy and liquidation.
  + “Restructuring” under the EU Restructuring Directive sets forth certain measures regarding the restructuring of debtor by changing the composition, conditions or structure of debtor’s assets, liabilities and share capital structure, including sale of debtor’s assets or business, or certain changes in debtor’s operations.
* Insurance companies, reassurance companies, lending institutions, investment companies, central clearing banks, central depositories, certain financing institutions, governmental institutions, persons that are not entrepreneurs, and other persons with certain qualities are prevented from applying for the mechanisms under the EU Restructuring Directive as a “debtor”, and this directive does not apply to such persons.
  + However the EU Restructuring Directive grants the member states a discretion right to decide on the aforementioned “scope” to a certain extent.
* Moreover the member states may issue regulations excluding outstanding or future liabilities owed to current or former workers, the liabilities arising from family law, and debtor’s liabilities arising from tort, from the scope of any restructuring arrangement.
* According to the EU Restructuring Directive, debtors need to access clear and transparent early warning tools so that they may detect any possibility of insolvency and take action without delay. The member states may use state of the art IT tools for notification and communication purposes in order to grant such access.
  + The early warning tools mentioned above may include warning mechanisms informing debtors of their delay in certain payments, consultancy services to be provided by governmental or private institutions, or supporting accountants and/or tax/social security institutions that may have information on debtor under the local law to inform debtors of such negative developments.
  + The member states are required to grant debtors and their employees and consultants access to the information on the existence of such early warning systems and the procedures and measures for restructuring and liquidation.
* Any debtor facing the risk of insolvency should have access to “preventive restructuring” regulations to prevent insolvency and restructure their debts in order to ensure the continuance of their business.
  + A debtor who has been subjected to a sanction as a result of their breach of accounting or bookkeeping duties may be required to take certain measures to prevent such breaches as a precondition for such measures, so that such debtor’s creditors may access to the necessary information before taking any decision during the restructuring negotiations.
  + Applicant debtors may be required to take a “sustainability test” so that debtors that do not aim at ensuring sustainability can be disqualified, provided that it is possible to apply such test without detriment to such debtors’ assets.
  + A member state may also restrict the number of applications that a debtor may file in connection with the restructuring mechanism.
  + Any restructuring mechanism to be established under the EU Restructuring Directive may contain one or more procedures and/or measures, some of which may be conducted outside the court.
  + In any event, it is necessary to ensure that the restructuring mechanism to be introduced affords a balanced protection to not only debtors’ rights but also the rights of other parties. Provided that this condition is met, the involvement of judicial or administrative authorities in the restructuring process may be restricted.
  + Any restructuring mechanism under the EU Restructuring Directive should be triggered only upon debtor’s application.
    - The member states may also authorize creditors or workers’ representatives to apply for this purpose. However such application should require debtor’s approval, unless such debtor is a small or midsized business.
* During the restructuring proceedings, debtors’ assets and daily operations of their businesses should fully or partially be kept under control.
  + The relevant judicial or administrative authority decide, when necessary and on a case by case basis, to involve a professional specialized on restructuring in the relevant proceedings.
  + The appointment of such a professional to provide assistance to debtor or debtor’s creditors during the negotiation and preparation of the restructuring scheme should be mandatory when
    - The creditors are prohibited from taking legal action against the debtor, and the relevant authority finds the appointment of a professional necessary for the protection of the related parties’ rights;
    - A group approving the restructuring would force another group that does not approve, to a restructuring; or
    - The debtor or the creditors (bearing any and all expenses related thereto) request such appointment.
* In order to support the preventive restructuring negotiations, debtors should be allowed to apply for a temporary prohibition of legal actions against them.
  + However the relevant judicial or administrative authority should have the option to dismiss such application, when it finds that this is not necessary or it would not support the negotiations.
  + Such prohibition of legal actions should be applicable to all creditors, including, but not limited to, secured and privileged creditors. However it should also be possible to apply such prohibition to only certain receivables or certain groups of creditors on a case by case basis.
    - In principle, debts owed to workers should be excluded from the scope of such prohibition in any case. However it should be possible to subject such receivables to such prohibition, if equivalent protection is afforded to such creditors.
    - In cases where such stay of enforcement proceedings is applied in a limited manner, it may applied only to creditors informed in accordance with the applicable local law regarding the restructuring or such stay of enforcement proceedings.
  + In cases where taking a legal action does not jeopardize the restructuring or the business or where such stay of individual enforcement proceedings would unfairly jeopardize the rights of the relevant creditors, it should be possible not to apply this ban regarding certain claims or certain groups of creditors.
  + This stay of enforcement proceedings should be applicable for a certain period, which should be no longer than four months.
    - A judicial or administrative authority should be authorized to decide to extend this period or impose a new stay of enforcement proceedings, upon the application of the debtor, the creditors, or a professional appointed in connection with this mechanism. However this option should be applicable only clearly predefined circumstances, and the EU Restructuring Directive refers to cases where the negotiations regarding the restructuring scheme has progressed to a certain stage, the continuance of the stay would not unfairly jeopardize the claims of the affected parties, or no general bankruptcy proceeding has been launched for liquidating the debtor.
    - The term of such stay must not exceed twelve months in total, including any extension or renewal.
  + The relevant authority may lift the stay of enforcement proceedings, if
    - the stay does not efficiently support the restructuring scheme negotiations (for example, it is evident that the creditors holding the sufficient majority to avoid the restructuring do not support the scheme);
    - the debtor or the appointed specialist files an application to that effect:
    - this would unfairly jeopardize one or more creditors’ rights, provided that this is clearly set forth in the applicable legislation; or
    - a creditor would become insolvent as a result of such stay, provided that this is clearly set forth in the applicable legislation.

A member state may also prevent the lifting of such stay for a certain period of time up to 6 months.

* + Any regulation requiring the debtor to file for a bankruptcy proceeding that would result in its liquidation, during the term of this stay of enforcement proceedings, would not apply during the term of this stay.
  + During the term of this stay for enforcement actions, creditors are prevented from applying for bankruptcy proceedings that would result in the liquidation of debtor.
  + The stay of enforcement actions may be regulated in a manner that such stay does not apply to the setoffs in the relevant financial sector, energy or goods market.
  + The expiration of the stay of enforcement proceedings before the approval of a restructuring plan should not result in a bankruptcy proceeding that may result in the liquidation of the debtor, until and unless the other conditions under the applicable local legislation are met in each case.
  + During the term of the stay of enforcement proceedings, creditors are prohibited from terminating, maturing relevant debts under, refraining from performing their obligations under, or making any unfavorable amendment to, any agreement which is vital for the continuance of the debtors’ daily operations and the suspension of which may interrupt the debtor’s operations (such as supply agreements) by simply referring to
    - the debtor’s nonpayment under such agreement;
    - the debtor’s preventing restructuring filing;
    - the debtor’s application for stay of enforcement proceedings;
    - the launch of the restructuring proceeding or
    - the application of the stay of enforcement proceedings.

This stay of enforcement actions may be extended to immaterial agreements.

* + - The member states may afford additional assurances to contractual creditors affected by this principles.
* Any restructuring scheme to be filed by a debtor should contain the following information:
  + The debtor’s identity;
  + The breakdown of the debtor’s assets and liabilities as of the date of the filing of the restructuring plan, including, but not limited to the value of the assets, an explanation on the debtor’s economic status, the workers’ status, and the reasons, and the scope, of the debtors’ financial difficulties;
  + The claims and interests of the parties affected by, and included in, the structuring plan (presented either one by one, or in groups categorized according to the relevant liabilities);
  + The groups of creditors, and the value of the claims and interests of each group, if applicable;
  + The parties that are not affected by the scheme, and the relevant reasons;
  + The identity of the restructuring specialist to be appointed, if applicable;
  + The conditions of the restructuring scheme, particularly including the following:
    - The proposed restructuring measures, and the duration of each measure;
    - The rules regarding the information to be provided to and by the workers’ representatives;
    - Possible dismissals and short term recruitment arrangements, if applicable;
    - The debtor’s projected cash flow, if required under the local legislation;
    - The proposed additional borrowings required as a part of the scheme, and why they are necessary for the application of the scheme.
  + The detailed explanation why the restructuring scheme is reasonably expected to prevent the debtor’s insolvency and ensure the continuance of its business, provided that the member states may demand the certification of such scheme by an external specialist or an appointed restructuring expert.
* Debtors should be entitled to present a restructuring plan, regardless of the party initiating the restructuring process. However creditors and appointed restructuring experts should also be authorized to propose restructuring schemes.
* Parties affected by the restructuring scheme should have the right to vote on the adoption of the plan and parties not affected by the plan should not be entitled to vote.
  + In any event, no voting right should be granted to the debtor’s shareholders, the creditors ranking after unsecured creditors under an ordinary liquidation procedure, or the related parties of the debtor or its business (that has a conflict of interest under the local law).
  + In any case, secured and unsecured creditors should be categorized under separate groups, and the parties affected by the restructuring scheme should be categorized under separate groups according to their sufficiently common interests to be established based on verifiable criteria. Accordingly workers should be regarded as a separate group.
  + The relevant judicial or administrative authority is required to inspect the voting rights and the groups of creditors created, when an application is filed for the approval of the restructuring plan. It is also possible for the Member States to foresee that this examination should be carried out at an earlier date.
  + A restructuring plan is approved when the simple majority of the creditors in each group of creditors, representing at least the half of the total amount of liabilities owed to such group. The member states may also call for the approval of more than half of the creditors in group.
    - The member states may increase such majority requirements up to 75% of the value of receivables or the number of creditors, depending on the situation.
* The member states are required to call for the approval of the relevant judicial or administrative authority so that a restructuring scheme that
  + has an impact on the rights or interests of the related parties voting against the scheme;
  + requires additional borrowings; or
  + requires the dismissal of more than 25% of the workforce under the applicable legislation,

may become final and binding for the related parties.

* + The conditions for the approval of such authorities should be determined in advance and should include, as a minimum:
    - The plan should have been approved in accordance with the aforementioned procedures;
    - All creditors that have reasonable common interests should be treated equally and in consideration of their claims;
    - All affected parties should have been notified in accordance with the applicable local legislation;
    - If there are any creditor that does not approve the plan, such creditor should not be left in a position worse than what the creditor would have been in, if the debtor had been liquidated or any other alternative to restructuring had been applied; and
    - Such additional borrowing must be required for implementing the restructuring scheme, and not unfairly jeopardize the creditors’ interests.
  + The relevant authorities should be authorized to reject the restructuring scheme, if it does not reasonably allow the debtor to avoid insolvency or ensure its sustainability.
* In order for a restructuring scheme to be binding on the groups of creditors that have not approved the scheme, the following conditions must be met:
  + The scheme shall have been by the authorities in accordance with the principles described above.
  + The scheme should have been
    - approved by the majority of the groups of affected related parties, where at least one of these groups is composed of secured creditors or creditors ordinarily ranking before any group of unsecured creditors; or otherwise
    - approved by at least one (unless the local legislation of the member state require a higher number) of the affected groups or (if set forth under the applicable legislation) the groups whose rights are jeopardized, provided that such group is not one of the groups consisting of the debtor’s shareholders or which would be unable to make any collection or would forfeit their interests.
  + The group that does not give its approval should be treated equally with the other groups at the same rank and better as compared to the lower ranking groups.
  + No group of creditors should receive more than their claims or interests.
* If the shareholders are to be prevented from voting as creditors, the member states should take precautions to avoid the shareholders from preventing the approval of the restructuring plan by the creditors, or its approval and enforcement by the relevant authorities.
* The judicial or administrative authority involved in the process should be authorized to rule for the appraisal of the company, only when
  + The creditors that have not approved the scheme would not be in a worse condition as compared to what they would have been in if other alternatives to liquidation or restructuring had been applied; or
  + Certain conditions required for forcing a dissenting group of creditors to approve the restructuring are not met.
  + An authority should be authorized to take such a decision, only after taking the opinion of, or appointing, competent experts.
* A restructuring scheme duly approved, and confirmed by the relevant authority applies to all creditors covered by such scheme. Creditors that are not included in the approval process will not be affected by the scheme.
* The decision of the relevant authority confirming the restructuring scheme may be appealed at a higher authority.
  + However such appeal does not result in the stay of the enforcement of the restructuring scheme.
  + The authority hearing the appeal may find the restructuring scheme ineffective, or confirm the same with or without making any modification thereon.
* Protection should be afforded to any additional funds borrowed during the restructuring proceedings. Accordingly, if the debtor becomes insolvent at a later date,
  + - Such funding transaction should not be regarded as ineffective, revocable or unenforceable; and
    - Those providing such funds shall not have any legal, administrative or criminal liability just because such funding is against the interests of the majority of the creditors (and provided that some other conditions required under the local law has not been met).
  + Such rules may become applicable only after the confirmation of the restructuring scheme.
  + Those providing additional funds shall have a priority in repayment during the bankruptcy proceedings that may be launched on a later date (as compared to the creditors in the same rank or the senior creditors).
* A transaction reasonable and necessary for the negotiations regarding the restructuring should not be held ineffective, revocable or unenforceable if the debtor becomes insolvent at a later date, on the sole basis that such transaction is against the interests of the majority of the creditors (and provided that some other condition required under the local law has not been met).
  + Such actions particularly include, but are not limited to
    - Any payment and reimbursement of the fees and expenses incurred in connection with the negotiation, approval and confirmation of the restructuring scheme;
    - Any payment and reimbursement of the professional consultancy fees and expenses closely related to the restructuring;
    - Any payment of the liabilities towards workers arising from the works already performed;
    - Any other payment or distribution made in the ordinary course of business.
* In the event that debtor faces the risk of insolvency, administrators should consider
  + The rights of the creditors, shareholders and other interested parties;
  + The steps required to be taken to avoid insolvency and
  + The requirement to refrain from willful or severely negligent actions that may jeopardize the sustainability of the business.

**E. India**

Under a new law that entered into force in India in 2016, restructuring is a process conducted with the involvement of certain public authorities with the purpose of restructuring the liabilities of insolvent companies (the “**IR**”).

* The restructuring process under the IR is initiated by the application of the debtor or the creditors to the court, after the default of the debtor. This application may be filed when the amount of the relevant liability exceeds ₹ 100,000 (approximately USD 1,390).
* If the court entertains the application,
  + The debtor’s board of directors is suspended, and all authorities of the board is transferred to an IR specialist; and
  + Enforcement proceedings are stayed throughout the term of the restructuring (180 days, which may be extended up to 270 days), in order to prevent the creditors from resorting to legal remedies.
* The IR specialist then announces the launch of the restructuring proceeding, and establishes a creditors’ committee, which is to decide, at its first meeting, whether or not to appoint the IR specialist as the final specialist to conduct the restructuring proceeding.
* The specialist appointed by the creditors’ committee then prepares an informatory document containing information on the audited up-to-date financial information and the other relevant information of the company, and invite certain creditors (who have a right to do so under the applicable legislation) to present a restructuring scheme.
* The restructuring scheme presented by the interested parties and meeting the criteria set in the specialist’s invitation would then be presented to the court by the specialist, if it is approved by 66% of the creditors’ committee.
* If the restructuring scheme meets the criteria set forth in the applicable legislation, the court confirms the plan approved by the creditors.
* Under the IR process, the priority order of claims and payments are as follows:
  1. IR and/or liquidation expenses;
  2. Secured creditors and workers;
  3. Unsecured creditors;
  4. Debts owed to the state;
  5. Other liabilities;
  6. Privileged shareholders; and
  7. Other shareholders.
* Any restructuring to be conducted under the IR process must be completed within 180 days following the relevant application (which may be extended for once for a period of 90 days). If the restructuring is not completed by the end of such period, the debtor company would be liquidated.

**14**

**17**

**28**

**44**

**00**

Court appointment of the IR specialist

Entertainment of the application, and the stay of enforcement proceedings

Creditors having their claims listed

Creditors’ committee established by IR specialist

IR specialist’s invitation of creditors to have their claims listed

Court Filing

Drafting official documents to be presented to court

**35**

**270**

Creditors’ committee’s first meeting and appointment of a specialist

Presentation of informatorymemorandum by specialist

Presentation of restructuring plans

Court confirmation of the plan

Liquidation of debt, if not restructuring within 189 (+90) days

**51**

**65**

**150**

**180**

**F. World Bank Principles**

Considering that effective regulations on rights of debtors and creditors and restructuring systems were required in various countries during the global financial crisis of 2001, the World Bank conducted a study with certain countries and collaborating authorities and institutions, and created the World Bank Principles.

The World Bank Principles, which were revised and updated regularly in line with the needs of the changing sector since the date of its issue, and most recently revised in 2015, are a set of rules that may be adapted and transferred to many country’s legal systems, considering the unique characteristics of each country and market, but can be observed uniformly between legal systems, containing basic principles regarding debt collection, execution of securities and restructuring, which provides an effective protection of the rights of debtor and creditor.

This part of this Report describes the main principles proposed to be adopted within the framework of countries' restructuring processes in accordance with the World Bank Principles. These principles have been presented as general as possible within the framework of the World Bank Principles, and the application of each in the relevant country law can differentiate in accordance with the characteristics of the relevant restructuring process.

1. ***Basic Principles and Objectives***

* Although restructuring mechanisms may differ according to the approach of each country, they should essentially have the following key features and objectives:
  + Compliance with the general legal system and commercial structure of the country concerned;
  + Maximizing the value of the debtors’ assets and the collections by the creditors;
  + Ensuring the effective liquidation of unsustainable enterprises, the liquidation of which would allow the creditors to make higher collections; and allowing the corporate restructuring for sustainable enterprises;
  + establishing the necessary balance between liquidation and corporate restructuring, and when necessary, facilitating the switch from one approach to the other;
  + ensuring equal treatment of creditors in similar situations, whether domestic or foreign;
  + ensuring that the restructuring is resolved quickly, effectively and impartially;
  + preventing the abuse of restructuring mechanisms;
  + preventing early foreclosure by individual creditors who wish to act quickly;
  + applying a transparent process that expressly requires and consistently adopts information exchange and risk sharing;
  + as a part of a predetermined process, recognizing creditors’ acquired rights and the raking among them; and
  + laying the infrastructure necessary for international restructuring processes, and ensuring the recognition of foreign transactions.

1. ***Notification; and Right to Information***

* The effective protection of the rights of the parties in the restructuring processes requires that all parties concerned are aware of the issues that affect their rights, that they have access to the necessary information and that their objections are heard.
  + In this respect, the restructuring system should have a mechanism of notice to the parties in a reasonable manner and to give a reasonable amount of time. At the same time, it would be appropriate to have an objection and review mechanism that can ensure a quick, effective and impartial resolution of disputes in order to resolve the issues that the parties may object to. Although these objections do not automatically lead to the stay of the restructuring process, the authority hearing such objection (i.e. the court) may be authorized to stay the process if it deems necessary.
  + The borrower is required to provide information on its business and financial affairs to the court, its creditors and other parties that may be affected by the process.
  + It should be allowed to integrate professional experts into the restructuring process for analyzing, evaluating and developing the information to be relied on when taking important decisions, and the impartiality and independency of such professionals’ actions should be assured.

1. ***Eligibility***

* Restructuring option should be open to all enterprises and corporations, including those owned by the state. Borrowers excluded from restructuring should be limited, clearly defined and subject to separate laws or special provisions in the relevant legal system.

1. ***Filing; Access to the System***

* Application to the restructuring system should be effective and cost-effective. Accordingly, both the debtor and its creditors should be given the opportunity to request the restructuring of such debtor.
  + The criteria for the initiation of the process and the principles for the establishing insolvency should be clearly defined by law. Although the generally preferred criteria for restructuring is an inability to pay out debts when due, it would be reasonable to offer the restructuring option when the fair market value of the debtor’s assets is not sufficient to cover its debts.
  + Debtors should be allowed to benefit from the restructuring system when they certificate that they meet basic criteria, such as not being able to pay out their debts, or having financial difficulties.
  + In cases where the restructuring process is initiated by creditors, the debtor must be notified without delay, have the opportunity to submit any objection to such application, and the court must promptly decide whether to continue with such process.

1. ***Temporary Measures; Effects of the Initiation of the Restructuring Process***

* It should be allowed that interim measures necessary and adequate to protect the debtor’s assets and stakeholders’ rights, during the period between the filing and the final decision of the court.. In any case, it will be appropriate to make the necessary notifications to the parties whose rights are affected by these measures.
* The initiation of the restructuring process should prevent the debtor from unauthorized disposal of its assets, and the creditors from taking action by exercising their rights against the debtor.
  + It is recommended to implement the stay of enforcement proceedings during liquidation and corporate restructuring procedures, with the purpose of maximizing return of the assets. However, it is required that the stay of enforcement proceedings should in any event be limited and applied for a definite period, the balance between the creditors’ rights and the interest related to the correct application of the restructuring process should be assured, and the exemptions that the court may grant upon the application of the relevant parties should be clear. In general, it is recommended that the actions that are exempted from the stay of enforcement proceedings must be limited and clearly determined.

1. ***Administration of the Debtor***

* In restructuring processes involving the liquidation of the debtor, it is recommended that the management of the debtor be replaced by a liquidator and that the liquidator is authorized to manage the debtor's assets to a certain extent, considering the interests of the creditors. However different countries may adopt different approaches, such as:
  + Appointing an independent liquidator that has the full control over the process;
  + Leaving the debtor’s management rights entirely to its existing management; or
  + Appointing an independent and impartial liquidator to supervise the debtor’s management.

In a system where the second or third alternative is adopted, all management powers would be transferred to the liquidator, if the debtor’s management acts inadequately, negligently or otherwise improperly.

1. ***Creditors, and Creditors’ Committee***

* The roles and rights of creditors should be clearly defined. The rights of creditors need to be protected in such a way as to ensure their participation in the process, and the process should be protected in such a way as to ensure the monitoring of the process by the creditors for a fair and proper process, and in practice, it is preferred to appoint a creditors’ committee to exercise such rights, particularly when there are numerous creditors involved in such restructuring.
  + In a system where there is a creditors’ committee, it would be appropriate to determine the duties and powers of such committee, the rules regarding which creditor can participate to the committee, its meeting and decision-making quorums, and its meeting procedures. This committee should be consulted on extraordinary issues, heard while taking material decisions, granted a right to request the necessary information from the debtor and authorized to transfer such information to other creditors.

1. ***Management of Assets***

* All assets of the debtor (including those encumbered and those acquired after the start of the restructuring process) need to be subject to restructuring, except for certain assets that are explicitly exempt under the relevant legislation.
* Following the start of restructuring process, the court or the liquidator should be allowed to take measures to protect the debtor's assets. Where necessary, it should be possible to sell the assets free and clear of any encumbrance (in a manner maintaining the priority among creditors in the distribution of the proceeds of such sale).

1. ***Continuance of Business***

* The debtor should be allowed to operate in the ordinary course of its business, but transactions that are outside such ordinary course should be subject to supervision/inspection.
* In order to meet the needs of the debtor’s business, provided that the necessary measures are in place, the debtor should be given the opportunity to borrow reasonable funding and such borrowing should exceptionally have a priority in repayment.

1. ***Fate of the Existing Agreements***

* In order to achieve the objectives of the restructuring process, the system established should allow the intervention in the performance of any contract, where neither of the parties have performed their obligations thereunder. Such interventions may result in the continuation, termination or assignment of the contract.
* In order to benefit from important contracts, it may be considered to give the liquidator an opportunity to perform these contracts and to assume the obligations thereunder. In addition, any clause that allows the termination of contracts in the event of the initiation of or filing for a restructuring process should be deemed unenforceable, with certain specific exceptions.
* It would be appropriate to set forth certain exceptions to the right to intervene in any contract subject to the system, provided that it is clearly defined, such as using the offsetting rights, maintaining irreplaceable contracts or contracts requiring performance by the relevant party in person due to their nature, or the introduction of special rules for employment contracts.

1. ***Revocation of Transactions***

* After the start of a restructuring process, transactions that are not in line with the debtor’s ordinary course of business and that are made without the necessary approvals should be revocable, and there should be limited exceptions to such revocability, in order to protect the interests of the other interested parties.

1. ***Rights and Privileges of Interested Parties***

* The rights of the creditors and the ranking of their claims must be determined under the relevant legislation before the start of the restructuring process, in order to ensure commercial predictability; and they should also be recognized in connection with the restructuring process. It should be possible to deviate from these principles, only for reasonable grounds, such as supporting the corporate restructuring of the debtor or maximizing the proceeds of the assets.
* The priority of the secured creditors should be maintained, and the receivables of these creditors should be made paid out without delay.
* The proceeds of foreclosure should be distributed among the unsecured creditors without giving priority to any of them, after distributing such proceeds to secured creditors considering the securities created in their favor. While doing so, the debts owed to the state should not be given priority over the debts owed to private persons, and if such priority is to be given, the number of privileged creditors should be kept to a minimum.
  + In this context, it should be noted that workers are of high importance for a business, and a balance should be ensured between the rights of the workers and those of the creditors.
* In a transaction involving liquidation, the owner or the shareholders of the enterprise should not receive any payment until and unless the debts owed to the creditors are fully paid out.
* The creditors should be notified of the process, and the mechanisms by which they can raise objections should be low-cost, effective and rapid. In any case, there should be a system for the detailed examination and resolution of these objections and disputes and the structuring process should not be stalled while waiting for the resolution of such disputes.

**IV – (2) Enforcement Law Mechanisms**

The option granted to the creditors to initiate enforcement proceedings regarding unpaid liabilities, and particularly the filing alternatives provided to the creditors within the scope of foreclosure when the debts are foreclosed, are governed by different regulations under different supranational and national legal systems.

The Turkish enforcement law provides specific enforcement options to the relevant creditors in connection with special liabilities, such as secured liabilities, liabilities secured by the pledges on the shares of companies governed by the Capital Market Board regulations and liabilities established under court order; however we believe that it may be beneficial to analyze the enforcement law mechanisms adopted and applied by the aforementioned foreign legal systems, with the purpose of introducing a new approach to debt collection proceedings that delay as a result of the troubles in the Turkish financial sector.

* 1. ***EU Legislation***

### In 2002, the European Parliament and the European Council issued the Financial Collateral Directive to establish a uniform set of rules applicable in the European Community for creating and foreclosing “financial collaterals” that is to be basically composed of cash and securities, and accordingly contribute to the financial stability of the European Community.

### Basic Principles of the Financial Collateral Directive

* As a principle under the Financial Collateral Directive, the European Parliament and the European Council requested the member states not to abolish the Financial Collateral Directive’s principles pertaining to the merits, while transferring such principles to their local legal systems, This aims at ensuring the legal certainty and enforceability of financial collateral arrangements.
* In order to facilitate the creation of any financial collateral, the Financial Collateral Directive prohibits the imposition of any condition for such creation, other than the transfer of the control of such asset to the person receiving such collateral or any other person acting on behalf of such person. As particularly explained in the Financial Collateral Directive, this specifically avoids any formality requirement for creating a collateral.
  + This aims at facilitating the creation of collaterals, however it is further mentioned in the Directive that it may be required to endorse the underlying asset or make an entry to the relevant registry in order to ensure the transaction security in the financial sector, and such requirements would not be regarded as a formality. Financial collateral arrangements should in any event be in written form, so that they can be demonstrable.
* The Financial Collateral Directive provides fast and informal enforcement options to collateralized creditors, and aims to protect financial stability in cases where the liabilities are not paid, and to prevent the debtors defaulting under the agreements relating to their financial liabilities from cross defaulting under the financial collateral arrangements. However in order to balance the wide range of enforcement options afforded to creditors, the Financial Collateral Directive enables the member states to authorize their local courts to decide on the foreclosure procedure after the foreclosure and to have a discretionary power on the appraisal of the collateral. Accordingly this makes it possible to subject any foreclosure and the proceeds thereof to the inspection of a governmental authority, although the creditors may exercise their rights on the collaterals without delay, and without being required to follow any official procedure.

### Scope of the Financial Collateral Directive

* **Financial Collateral Concept:** 
  + Under the Financial Collateral Directive, financial collaterals may be in the form of (i) cash, (ii) financial instruments or (iii) receivables under loan arrangements.
    1. For the purposes of the Financial Collateral Directive,
       - “cash” means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits;
       - "financial instruments" means shares in companies, other securities equivalent to shares in companies and bonds and other forms of debt instruments that traded in the capital market, and any other securities which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange and others securities which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments
       - “repayment claims” refers to any claim arising from lending arrangements by credit institutions.
    2. The definitions listed above reveal that financial collateral arrangements and accordingly the Directive on Financial Collateral Arrangements do not apply to liens (mortgage) on rights in rem (ownership or usufruct), a commonly used and preferred type of collaterals in the Turkish market. Nevertheless, we believe that this directive may be taken into consideration in connection with share pledges (on publicly traded or private shares) and account (deposit) pledges.
       - It may be reasonable to include mortgages in such arrangements, given that in most legal systems, rights on real estates (ownership, usufruct or pledge) are registered, and official authorities are involved in every stage of any change in such records. Given the importance of real estates, the speedy and unofficial procedures under the Directive on Financial Collateral Arrangements justifiably do not apply to liens created over real estates, and this is in line with many national legal systems.
       - Considering the enforcement law mechanisms and foreclosure options of the EU member states that are also examined in this Report, we see that the basic principles set forth in the Directive on Financial Collaterals and the enforcement options provided therein may be applied to different types of collaterals, such as mortgages (if reasonably applicable).
* **Financial Collateral Arrangements:** Financial Collateral Arrangements cover any and all financial collateral arrangements, either in the form of title transfer financial collateral arrangements or in the form of security financial collateral arrangements.
  + Title transfer financial collateral arrangement refers to an arrangement under which a collateral taker acquires full ownership and all related rights of financial collateral from a collateral provider for the purpose of securing or otherwise covering the performance of relevant financial obligation.
  + Security financial collateral arrangement refers to an arrangement under which the full ownership of the financial collateral is not transferred to collateral taker, and remains with the collateral provider.
* **Parties to Arrangement:** Each party to a financial collateral arrangement governed by the Directive on Financial Collateral Arrangements (as a collateral provider or a collateral taker) must belong to one of the following categories:
  1. the member states’ public authorities, including those charged with the management of public debt and collecting deposits from customers, excluding publicly guaranteed undertakings;
  2. a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank, the International Money Fund and the European Investment Bank;
  3. a financial institution subject to prudential supervision including credit institutions, investment firms, financial institutions, insurance undertakings, undertakings for collective investment in transferable securities, management companies;
  4. Central counterparties, settlement agents or clearing houses; and
  5. Persons other than natural persons, including unincorporated firms and partnerships, provided that the other party to the financial collateral arrangement is an institution as defined above.

### Certain Rights under the Financial Collateral Arrangements according to the Directive on Financial Collateral Arrangements

* Under the Directive on Financial Collateral Arrangements, provided that it is provided under the security financial collateral arrangement, collateral taker may exercise a right to use (as if he/she is the owner) and dispose (transfer) over any cash or financial instrument given as financial collateral in accordance with the provisions of the said arrangement. Where a collateral taker exercises such right, he thereby incurs an obligation to (i) transfer to the collateral provider equivalent collateral to replace the original financial collateral at the latest on the due date for the performance of the relevant financial obligations; and (ii) if and to the extent that the terms of a security financial collateral agreement so provide, set off the value of the equivalent collateral against and apply it in discharge of the relevant financial obligations.
  + For the purposes of the Directive on Financial Collateral Arrangements, “equivalent collateral”
    1. In relation to cash, means a payment of the same amount and in the same currency;
    2. In relation to financial instruments, means financial instruments of the same issuer or debtor, forming part of the same issue or class and of the same nominal amount, currency and description or, where a financial collateral arrangement provides for the transfer of other assets following the occurrence of any event relating to or affecting any financial instruments provided as collateral, those other assets.
* The Directive on Financial Collateral requires the member states to enforce any financial collateral arrangement in the form of a transfer or the relevant settlement provisions.
  + Under the Directive on Financial Collateral Arrangements, “close-out netting provision” means a provision of a financial collateral arrangement or a statutory provision by which
    1. the obligations of the parties are (i) accelerated as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value or (ii) terminated and replaced by an obligation to pay such an amount; and/or
    2. an account is taken of what is due from each party to the other, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.
* According to the Directive on Financial Collateral Arrangements, no financial collateral arrangement shall be treated as invalid or reversed on the sole basis that
  + Such arrangement was made on the day of the commencement of winding-up proceedings or reorganization measures, but prior to the order or decree making that commencement; or
  + Such arrangement was made in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or the taking of any other action in the course of such proceedings or measures.
* A financial collateral arrangement that has come into existence after the moment of the commencement of winding-up proceedings or reorganisation measures shall be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor should have been aware, of the commencement of such proceedings or measures.
* Without prejudice to the foregoing, the Directive leaves unaffected the option of voidance of financial collateral arrangements within the scope of the general rules of national insolvency law in relation to the voidance of transactions.

### Enforcement of Collaterals under the Directive on Financial Collateral Arrangements

* Under the Directive on Financial Collateral Arrangements, the collateral taker shall be able to realize any financial collateral provided under the relevant contract or regulation:
  1. Cash by setting off the amount against the relevant financial obligation; and
  2. Financial instruments or loan receivables by
     + 1. Sale of the collateral asset, or
       2. Appropriation of such asset, and applying their value in discharge of the financial obligations.
  + Appropriation is possible only if:

1. this has been agreed by the parties in the security financial collateral arrangement; and
2. the parties have agreed in the security financial collateral arrangement on the valuation of the financial instruments.
   * Under the Directive on Financial Collateral Arrangements, the manners of realizing the financial collateral shall be without any requirement to the effect that:
     1. Prior notice must have been given;
     2. The terms of the realization be approved by any court, public officer or other person;
     3. the realization be conducted by public auction or in any other prescribed manner; or
     4. any additional time period must have elapsed.
   * The options to realize collaterals as provided under the Directive on the Financial Collateral Arrangements apply to any (i) corporate reorganization, or (ii) winding-up proceedings under the national law applicable to the collateral provider or the collateral taker. For the purposes of the Directive on Financial Collateral Arrangements:
     1. "reorganization measures" means measures which involve any intervention by administrative or judicial authorities which are intended to preserve or restore the financial situation and which affect pre-existing rights of third parties, including but not limited to measures involving a suspension of payments, suspension of enforcement measures or reduction of claims; and
     2. "winding-up proceedings" means collective proceedings involving realization of the assets and distribution of the proceeds among the creditors, shareholders or members as appropriate, which involve any intervention by administrative or judicial authorities, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory;

Accordingly financial collateral takers may realize financial collaterals under the Directive on Financial Collateral Arrangements, and collect the debts owed to them, even after the launch of any of the aforementioned processes, such as bankruptcy, deferred bankruptcy, concordat or winding up.

* + Notwithstanding the foregoing, the Directive on Financial Collateral Arrangements prohibits the member states from imposing additional conditions precedent to the realization of financial collaterals, however this does not prevent such member states to conduct the relevant realization and appraisal in a commercial reasonable manner.
  1. **UK**

### Collateral Alternatives

* Under the UK legal system, it is possible to create mortgage on properties (in a manner covering any property that may be acquired at a later date under a different scope) and liens on chattels, transfer ownership as collateral, create pledges over financial instruments (including company shares), or transfer their ownership of those for collateral purposes. The creation of each of these collaterals is subject to a different procedure depending on the receivable secured and the scope and characteristic of the asset subject to such collateral.
* Subordinating liabilities is a structure used for collateralization. The subordination may require contractual arrangements where certain subordinated creditors (such as shareholders, those lending working capital etc.) accept that their receivables will not be paid until and unless the full payment of the senior creditors (such as lenders funding projects).
  + Such subordination may be created structurally when the subordinated creditors lend not to the main debtor but its shareholder (holding company) without the need of concluding an agreement between the creditors. As an element of this structure, senior creditors ensure that the rights of the creditors lending to such shareholder are subordinated, by prohibiting the debtor from distributing dividends to its shareholders or transferring cash, before paying out its debts to such senior creditors in their agreement with the debtor.

### Enforcement of Collaterals

### Sale by Receiver:

* Appointment of a receiver is a method often used for enforcement of collaterals in the UK. Unless there is a provision in the relevant collateral arrangement on the contrary, the collateral taker may, without applying to a court, appoint a receiver, who would realize the collateral.
  + **Right to appoint a receiver**: The right to appoint a receiver generally arises from a collateral arrangement. However under certain conditions, the applicable legislation may authorize a collateralized creditor to appoint a receiver for the purposes of realizing a collateral. In certain other (very few) occasions, the court may appoint upon the application of a party when it finds it fair and appropriate. However in cases where the receiver is appointed under the applicable legislation, not a collateral arrangement, this right arises after the expiration of a prescribed period.
* There are certain ambiguities in the regulations governing the appointment of receivers for realizing any collateral asset that is not a real estate. Therefore almost every collateral arrangement in practice clearly refers to the collateral taker’s right to appoint a receiver.
  + **Receiver’s Powers:** Receiver is authorized to receive the returns on the collateral assets (such as company shares or real estates) or sell such asset to a third party and collect the proceeds of such sale, and pay such return or proceeds to the secured creditor.
* The powers of a receiver is generally set forth in the relevant collateral agreement, and vast powers may be given to receivers in practice. These powers may include those to acquire the ownership of, or sell an asset, manage the debtor’s business, preserve the collateral asset, have the collateral asset repaired, take out insurance for such asset, become a party to a lawsuit or an arbitration proceeding, become a party to agreements, terminate agreements, and exercise any right arising from the ownership of the collateral.
  + In cases where a receiver is appointed solely based on the applicable legislation, the receiver is not authorized to sell the collateral asset. In such cases, the receiver may only receive the return on the relevant asset, and transfer the same to the creditor for the discharge of the relevant obligation.
  + In cases where the receiver is appointed by a court decision, the appointing court determines the authorities of such receiver.
* The receiver exercising the authority to sell the collateral asset is required to sell it at the highest price reasonably possible, however is not required to follow a bidding procedure. The receiver has the sole discretion to choose the method of sale.
  + **Timing of the Receiver’s Appointment**: In the event that the right to appoint a receiver arises from a collateral agreement, when and how such appointment is to be made is set forth by such agreement. In practice, it is assumed that the right to appoint a receiver arises when the creditor becomes entitled to realize the relevant collateral.
* In cases where the relevant agreement does not include a specific clause but a receiver is to be appointed based on the applicable legislation, such appointment may be made once the secured obligation becomes due and payable.
  + **Responsibility for the Receiver’s Actions**: Whether appointed based on a collateral agreement or the applicable legislation, the receiver is the representative of the debtor. Accordingly the creditor is not responsible for the receiver’s actions, and the agreement on the sale of the collateral asset is legally executed between the debtor and the buyer (if the receiver has the power to sell such asset).
* The responsibility for the receiver’s actions belong to the debtor, not the receiver or the creditor, provided that the receiver acts in accordance with the powers granted to them.
* Notwithstanding the aforementioned representation relationship, the receiver is responsible for performing the debtor’s obligations under any agreement to which the receiver enters into in the name of the debtor (based on the powers granted to the receiver). However such responsibility may generally be eliminated in agreements such as the sale of real estate by incorporating a clause in the relevant agreement placing the responsibility on the debtor, rather than the receiver acting as the representative of the debtor.
* The receiver may claim damages from the secured creditor appointing such receiver for any liability that the receiver may incur while performing their duties. Therefore secured creditors are advised to take into consideration their possible liability for damages before choosing to appoint a receiver for realizing the collateral.
* Upon the winding up of the debtor, the receiver is no longer authorized to act as the debtor’s representative, but the receiver’s duties and powers do not terminate. Starting from the beginning of the winding up process, the receiver is liable under the agreements to which they are a party, and takes any relevant action in their own name.
  + **Restricting the Right to Appoint a Receiver:** In the event that the relevant collateral is not governed by the Directive on Financial Collateral Arrangements, it is not possible to realize a collateral by the virtue of a receiver, in the event that an administrator has been appointed for the debtor providing such collateral, given that such administration process results in a stay of enforcement proceedings, which is binding for all creditors.
  + **Distribution of the Proceeds Collected by the Receiver**: The order of priority to be applied to the distribution of the proceeds collected by the receiver is set forth either under the relevant collateral agreement or in the applicable legislation (if the receiver has been appointed based on the applicable legislation).
  + **Receiver’s Responsibilities**: Under the UK Law, a receiver is held responsible towards the secured creditor appointing such receiver. Therefore in cases where there is a conflict of interest between the debtor and the creditor, the receiver is required to act in a manner serving the creditor’s interests. The receiver’s responsibility towards the debtor requires the debtor to act fairly, reasonably and in good faith (which requires the receiver to sell the collateral asset at the highest price reasonably possible).
* However the receiver does not have the responsibility to delay the sale or improve the condition of the collateral asset to obtain a higher price so that the debtor may receive a portion of the proceeds of such sale after paying out the relevant debt to the creditor.

### Power of Sale:

* Subject to the provisions of the relevant collateral agreement or the conditions set forth under the applicable legislation, the collateral taker may have the right to directly sell the underlying asset. In such event, the creditor that has the power to sell the collateral asset is required to sell such asset at the best price reasonably possible, however it is not required to follow any bidding procedure.
  + The creditor may directly intervene in the process for determining the sale price of the collateral asset, however this would impose a higher responsibility on the creditor as compared to that it would have in the alternative where the asset is to be sold by the receiver, given that the receiver would no longer be held responsible regarding the sale process in the first case.
  + **Basis of the power to sell:**
* Legislation: The power that a secured creditor may have to collect its outstanding receivables from the proceeds of the sale of a collateral asset may arise from the applicable legislation.
  + First of all, it should be noted that, as in the mechanism arising from the applicable legislation regarding the appointment of a receiver, there are ongoing debates on whether this power of sale covers any collateral that is not a real estate. Therefore it is advisable to set forth and regulate this power in the relevant collateral agreement in any case.
  + The right to sell under the applicable legislation arises if the debtor
    - defaults in payment for three months after their receipt of the creditor’s notice requiring payment;
    - fails in paying interest for two months; or
    - breaches any other obligation under the agreement underlying the collateral, other than the obligation to pay principal or interest.

However the aforementioned conditions are not mandatory, and the creditor may be allowed to exercise this right without waiting for a certain period, by way of regulation in a collateral agreement involving the right of sale.

* Common Law: Accordıng to the common law in the Anglo-Saxon legal system, a creditor holding certain types of collateral rights may have the right to exercise the power to sell even if the relevant agreement does not refer to such power, or the conditions required under the applicable law are not met.
* Agreement: The power of sale may be set forth in the relevant collateral agreement and it may be agreed that the creditor would be required to meet the more favorable conditions in order to exercise this power, as compared to those set forth under the applicable legislation (in terms of timing and conditions precedent).
* Court Decision: A creditor may have a collateral asset sold by filing an application with the court. It is experienced that in the UK jurisprudence, the courts authorize such sale if a delay would entail the risk of a decrease in the proceeds of such sale.
  + **Responsibilities of the Creditors exercising the Right of Direct Sale**: The secured creditors, while exercising their right to sell, are required act in good faith, act appropriately to sell the asset at the best reasonable price, act with reasonable care and skill, and treat the debtor fairly.
* In cases where the creditor acts in accordance with these responsibilities, the court does not intervene in the sale process upon the objection of the debtor. However the courts supervise the sale process in order to ensure the protection of the interests of other interested parties (such as the creditors with second ranked collaterals). On the other hand, creditors are not required to take into account the interests of persons who do not have any interest (such as unsecured creditors) in respect of the asset subject to collateral.
* Within the scope of these obligations, the secured creditor is not authorized to sell the collateral asset to themselves even if it is the only interested buyer, unless and until there is a court order allowing such sale. If the underlying asset is sold to a subsidiary of the creditor, the buyer would be required to prove that the sale was made in good faith and any and all measures necessary for ensuring the highest price on the date of the sale have been duly taken.
* The secured creditor does not breach its obligations when it decides not to exercise the right of sale, or acts in accordance with their own interests when determining the timing of such sale if it decides to exercise such right. When deciding to sell the relevant asset, the creditor is not required to take into consideration whether such date would be ideal for the sale, whether the deference of the sale would guarantee better market conditions and consequently a higher sale price, or whether the debtor may suffer a loss in the event of a delay.
* The collateral agreements may contain clauses avoiding the creditor’s liability in relation to these obligations, however it is legally debatable whether such contractual clauses can actually exclude such liability.
  + **Distribution of Proceeds of Sale**: A creditor exercising their right of sale is required to distribute the proceeds of sale in the following order: the secured liabilities in the prior ranks / degrees, the sale related expenses, the liabilities owed to such creditor, the secured liabilities in the later ranks / degrees. The balance, if any, is required to be paid to the debtor.
  + **Consequences of the Sale**: The sale of the collateral by the creditor results in the transfer of the title to such asset to the buyer, and at the same time, terminates the security created thereon in favor of the secured creditors in the lower ranks / degrees, and the debtor’s right of redemption.
* Therefore secured creditors may choose to exercise the right of direct sale even if they appointed a receiver for the sale, given that the receiver would not be authorized to sell the collateral in a manner resulting in the release of any lower ranked / degreed encumbrances.

### Appropriation / Taking of Possession

* According to the UK common law and legislation, a creditor holding a certain security right (mortgage) may directly collect its secured receivables by appropriating the collateral asset.
  + Under the applicable legislation and common law, this right arises when the security interest is created, and does not require the underlying liability to become due and payable. On the other hand, it is recognized that until the conditions for realizing the collateral are met, the right of the creditor to appropriate the asset can only be exercised to protect the collateral asset, and cannot be used as a method for realizing such collateral.
  + Certain clauses may be incorporated to collateral agreements in order to authorize the creditor to appropriate a collateral asset in addition to the limited number of other assets referred to in the applicable legislation and case law. Such rights are generally regulated so as to arise upon the debtor’s default.
  + In practice, how the value of the collateral asset is to be determined when exercising the right to appropriate is determined in the relevant collateral agreement. Although there are some valuation rules referred to under certain regulations, the valuation rules in all standard documents deviate from such regulations, and determined by the agreement of the parties.
  + This right is exercised through litigation or (albeit rarely) by taking possession of the relevant asset, if this is physically possible. In general, this second option is only available for abandoned assets.
  + In practice, appropriation is not often preferred by creditors, given that they refrain from taking responsibility for the collateral assets (such as environmental claims related to real estates, or social responsibilities of the companies, where they will consequently be shareholders).

### “Administration”

* In cases where a security right is created over all or substantially all of a debtor’s assets in favor of a creditor, such creditor may appoint an administrator to the company, without applying to a court, based on such creditor’s right to realize the collateral. After the appointment of an administrator to the company, the company’s assets are sold by such administrator and the creditor does not have the right to directly intervene in the sale. This mechanism results in the stay of other enforcement proceedings, therefore it is a commonly used alternative in the UK, and believed to be maximizing the proceeds of sale.
  + This mechanism allows the realization of collaterals, and it also serves as a restructuring option for the company in general as to be explained in detail in this Repost in Section III – (1).B.(iii) below.
  + The stay of enforcement proceedings do not apply to the realization of the collaterals under financial collateral arrangements governed by the Directive on Financial Collateral Arrangements.

### C. United States of America

* Section 9 of the US “Uniform Commercial Code” and the applicable law in general afford certain foreclosure sale options.

### Foreclosure Sale under Uniform Commercial Code (“UCC”)

* The UCC is a law reflected to the state law of each state in the US (with minor changes in certain states), and aiming at creating a uniform system on the foreclosure of collaterals under Section 9.
* Foreclosure sale under the UCC is an out of court foreclosure method (unless there is a dispute on the liability secured by such collateral).
* Foreclosure sale of collateral under the UCC has certain advantages in terms of speed and low costs, particularly as compared to bankruptcy or quasi bankruptcy proceedings that may be taken against a debtor. However this foreclosure method may also be regarded as disadvantageous, given that bankruptcy proceedings may interrupt this procedure, the relevant debtors may object to sale in the future since the sale is made out of court, it is not available to unsecured creditors and there is no guarantee that the collateral asset would be sold at the highest price available.
* Foreclosure under the UCC is a method available for only movable assets, including, but not limited to, company shares. The foreclosure sale of collaterals in the form of real estate is not governed by the UCC, and subject to certain systems varying in each state.
* Under the UCC, foreclosure may be in the form of sale, leasing, licensing or other disposal of the collateral asset, either as is or after commercially reasonable preparations or processing, by the secured party, upon an event of default.
* The sale to be conducted under the aforementioned set of rules must be commercially reasonable. This reasonability test applies to all elements of the sale (including, but not limited to, method, timing, venue and other conditions).
  + Noncompliance with such criteria may result in a judicial intervention in such sale, or liability for damages. There is also a risk that a sale conducted in breach of the applicable procedural rules may be revoked on a later date during a bankruptcy (or a similar) proceeding. Gıven that the foreclosure sales under the UCC are not based on a court order, it is important that those conducting such ensure that the sale would be “commercially reasonable”.
  + A foreclosure sale under the UCC would be deemed “commercially reasonable” if the collateral asset was sold at its current price in the relevant market on the relevant sale date in accordance with the procedures common in the relevant market, or the sale was conducted in accordance with reasonable commercial customs between the people who purchase and sell such assets.
  + Also the approval or confirmation of the sale by a court, a creditors’ committee or a creditors’ representative may also make such sale commercially reasonable. However such approval is not a must for meeting the condition of being “commercially reasonable”.
  + “Commercially reasonability” is checked on a case by case bases, however the case law accepts the facts that an investment bank was consulted, an offering circular was issued, the potential buyers were duly contacted, and the proposed sale was announced in the local and national newspapers and commercial journals as matters pointing out the “commercial reasonableness” of a foreclosure.
  + In practice, the relevant creditors generally appoint a professional that is to determine the methods to be applied for ensuring the “commercial reasonability” of such sale.
* A creditor that is to conduct a foreclosure sale under the UCC has two options: public sale or private sale.
  + If the creditor wishes to personally purchase the collateral asset, then they may do so in (i) a public sale, or (ii) a private sale, provided that the collateral asset is customarily sold in a recognized market or subject to a generally accepted standard price.
* A creditor that is to sell a collateral asset under the UCC is required to notify the foreclosure, at least 10 days before such sale, to
  + The debtor;
  + The secondary obligors, if any; and
  + (If the collateral is other than consumer goods),
    1. any other person from which the secured party has received a notification of a claim of an interest in the collateral; and
    2. Other secured creditors (under the applicable legislation).
* If the proceeds of sale does not fully pay out the collateralized liability, then the debtor will continue to be liable for the outstanding balance, while any portion of such proceeds exceeding the liability would be transferred to the debtor.
  + On the other hand, in order avoid the risk of lowering the sale price (as compared to a sale made to a third party) when the secured creditor sells the collateral asset to one of its related parties, the deficiency regarding the secured liability after the sale of the collateral asset would be calculated based on the amount of proceeds that would have been realized in a foreclosure to a third party other than related persons.
* The expenses of such sale, and the reasonable legal fees incurred in connection therewith would be paid out from the proceeds of the sale.
* The foreclosure sale of a collateral asset under the UCC does not automatically lead to the release of any encumbrance thereon. The creditor does not give any representation or warranty regarding the collateral asset (being sold) during the sale (unless the creditor agrees otherwise). However, this aspect of the foreclosure sale under the UCC may lower the amount of proceeds.
* The secured creditor may appropriate the collateral asset without a sale, if the secured creditor and the collateral provider agrees into an agreement to that effect and no interested party puts an objection forward to the secured creditor in relation to such sale.
  + This process does not involve any public sale or a court’s intervention, and therefore there is no rules applying to the appraisal of collateral asset. Accordingly whether the appropriated asset would cover all or a part of the secured liability would be determined by the mutual agreement of the parties.
  + If the debtor does not respond within 20 days following their receipt of the creditor’s proposal on the appropriation of the collateral asset, it would be assumed that the debtor has agreed to the appropriation of the collateral asset, provided that the value of the asset covers the full amount of the outstanding liability. However if the creditor proposes to appropriate the ownership of the collateral against only a part of the outstanding liability, then such proposal would not be deemed to have been accepted by the debtor unless they expressly do so.
  + This method is based on the mutual agreement of the parties, and therefore cost effective, and the risk of disputes is lower.

### Sale through receiver

Under the US law, a third party may be appointed as the receiver of a debtor’s assets.

* There are various types of receivership, however in the most common one in practice, a receiver is appointed in response to a creditor’s claim before the court. In such event, the powers of such receiver is determined by the court. There are no specific criteria for deciding to appoint a receiver, however in practice, the courts generally consider, when issuing such an order, whether the appointment of a receiver would be fair, and in any event, refer to the applicable legislation.
  + In practice, the federal courts generally consider whether the creditor filing the application has a valid claim, whether the collateral provider has been engaged in any fraud, whether the collateral asset is under the imminent risk of loss, damage or devaluing, whether other legal remedies are insufficient, the balance between the damages (of the parties), the creditor’s chance of success in the relevant legal proceeding, and the possibility of any irreparable damage to the creditor’s interests on the collateral asset.
* Such receiver is an officer of the court appointing them, and has a duty of care towards all creditors of the debtor.
* Generally a receiver is charged with establishing the debtor’s assets and liabilities, controlling and managing such assets, and assuming the role of the debtor’s manager.
* The receiver is authorized to sell or otherwise dispose the debtor’s assets.
  + The receiver may conduct such sale in the form of a public sale or a private sale. However when the receiver is to sell a real estate, the restrictive regulations in the bankruptcy legislation, such as the condition to have the real estate appraised, apply to such sale by the receiver.
* Receivership aims to consolidate the debtor and all related companies and their assets under a single transaction and under common control.
* The court may temporarily stay enforcement proceedings in order to support the actions to be taken by the receiver. However the appointment of a receiver does not automatically lead to such stay.

**D. France**

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|  | Company Shares | Real Estates | Receivables |
| Public auction | Available by the virtue of a service provider, registered broker or court appointed official. | The court’s confirmation is required for the sale of the asset. Voluntary sales are conducted in the presence of a notary public, while forced sales are conducted before a court. | Available by the virtue of a registered broker or a court appointed official. |
| Appropriation | Available only if mutually agreed by the parties. No confirmation of the court is required. | Available only if mutually agreed by the parties. No court order is required. | Available only if mutually agreed by the parties. No confirmation of the court is required. However secured creditor may continue collecting the proceeds of pledged receivables until the discharge of the relevant liability. |
| Judicial Foreclosure | Shares may be transferred to a secured creditor, if an application is filed with the court for this purpose. | Asset may be transferred to a secured creditor, if an application is filed with the court for this purpose. | Receivables may be assigned to a secured creditor, if an application is filed with the court for this purpose. |

**E. Germany**

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| --- | --- | --- | --- |
|  | Company Shares | Real Estates | Receivables |
| **Public Auction** | There is a public sale procedure governed by mostly mandatory regulations. | Forced public sale is available under the supervision of the court. As an alternative, an administrator may be appointed to manage the asset, collect the rental income, and distribute the same to the creditors. | The public auction mechanism is not applied to receivables, however an administrator may be appointed to collect the receivables and distribute the same to the creditors. The administrator, as far as it is applicable, may notify the relevant debtors to make any future payment directly to the secured creditors. |
| **Private Sale / Appropriation** | Available if the parties agree after the acceleration of the loan, subject to certain statutory conditions. | Available if the parties agree after the acceleration of the loan, subject to certain statutory conditions. | Not applicable. |

**F. Ireland**

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| --- | --- | --- | --- |
|  | Company Shares | Real Estates | Receivables |
| **Sale by Receiver** | A receiver may be appointed to sell the asset concerned in accordance with the applicable legislation or under the relevant security agreement. The court does not intervene in the sale, as long as the sale is made in accordance with the market conditions. It is not required to be in the form of a public sale. Receiver is required to sell the asset at the highest price available, and therefore receivers generally prefer to get an independent appraisal report and/or conduct a public sale in the relevant market. | A receiver may be appointed to sell the assets concerned in accordance with the applicable legislation or under the relevant security agreement. Receiver is required to sell the asset at the highest price available, and therefore receivers generally prefer to get an independent appraisal report and/or conduct a public sale in the relevant market. | An administrator may be appointed to sell the receivables concerned subject to the conditions of the relevant security agreement. |
| **Private Sale / Appropriation** | No court confirmation is required if it is agreed in the relevant share pledge agreement that the relevant share certificates would be kept by the creditor, and the shareholder would furnish the creditor with a transfer form signed by such shareholder. | A court confirmation or the mortgagor’s approval is required, unless agreed otherwise in the relevant security agreement. Given the liabilities regarding real estates, mortgagees generally refrain from appropriating real estates. | When a receivable is assigned for as a collateral, the creditor may appropriate the receivable without a court confirmation. Receivables that are due and payable may also be subject to setoff. |

**G. The Netherlands**

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| --- | --- | --- | --- |
|  | Company Shares | Real Estates | Receivables |
| Public Auction | The shares may be sold in the presence of a notary public. There is no court involvement. | The shares may be sold in the presence of a notary public. There is no court involvement. | Very rarely sold through a public sale. |
| Private Sale | Requires either a court confirmation or the approval of the collateral provider after default. Share transfer must be conducted under a notarized agreement. | After the announcement of the auction, the relevant parties may apply to the court, requesting authorization for a private sale. Upon the authorization of the court, the share transfer must be conducted under a notarized agreement. | Very rare, but may be subjected to a private sale with a court confirmation or the collateral provider’s approval. |
| Appropriation | Available through a court order. | Not applicable. | Very rare, but may be subjected to a private sale with a court confirmation or the collateral provider’s approval. |

**H. Spain**

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|  | Company Shares | Real Estates | Receivables |
| Public Auction | Conducted in the presence of a notary public. There is no court involvement. | Conducted in the presence of a notary public. There is no court involvement. | Conducted in the presence of a notary public. There is no court involvement. |
| Judicial Sale | It may be requested the sale is made by the court through public auction. | It may be requested the sale is made by the court through public auction. | It may be requested the sale is made by the court through public auction. |

**I. Poland**

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| --- | --- | --- | --- |
|  | Company Shares | Real Estates | Receivables |
| Judicial Sale | A court appointed officer conducts the sale within the scope of a process commenced by a court order unless the owner of the asset concerned signs a declaration accepting foreclosure. | A court appointed officer conducts the sale within the scope of a process commenced by a court order unless the owner of the asset concerned signs a declaration accepting foreclosure. | A court appointed officer appropriates the funds in the account within the scope of a process commenced by a court order unless the owner of the asset concerned signs a declaration accepting foreclosure. |
| Appropriation | Possible only with the mutual agreement of the parties. It is a process without court involvement. | Not applicable | Possible only with the mutual agreement of the parties. It is a process without court involvement. |
| Public Auction | Possible only with the mutual agreement of the parties. Conducted by a court appointed officer or outside the court by a notary public. Not applicable to certain types of companies. | Not applicable | Not applicable |
| Private Sale | Possible only if agreed under the relevant security agreement and only in accordance with the conditions agreed therein. | Not applicable | Not applicable |

**J. Czech Republic**

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| --- | --- | --- | --- |
|  | Company Shares | Real Estates | Receivables |
| Public Auction | Public auction may be conducted only by the virtue of a licensed broker. | Available. | Available |
| Direct Sale | Available only when mutually agreed by the parties. The pledgee is subject to a professional duty of care in order to ensure a fair value price. | Available only when mutually agreed by the parties. The pledgee is subject to a professional duty of care in order to ensure a fair value price. | Available only when mutually agreed by the parties. The pledgee is subject to a professional duty of care in order to ensure a fair value price. |
| Sale by the Virtue of a Broker | If the shares are traded at a European regulated stock exchange, they must be sold at such stock exchange, or outside the stock exchange but at the price determined in such stock exchange. | Not applicable. | Not applicable. |
| Judicial Sale | May be sold by a court. | May be sold by a court. | May be sold by a court. |

**K. Finland**

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| --- | --- | --- | --- |
|  | Company Shares | Real Estates | Receivables |
| Private Sale | A private sale without court intervention is possible. | Not applicable. | A private sale without court intervention is possible. |
| Appropriation | Save for the transactions under the Directive on Financial Collateral Arrangements, appropriation is prohibited. | Not applicable. | Creditor may acquire the collateral receivable’s ownership within the scope of right to sell. |
| Judicial Sale | Must be conducted in the form of a public auction based on an enforceable court decision, by the virtue of a court appointed officer in accordance with the applicable law. Under certain conditions, the court appointed officer may appoint a private broker, auction officer or investment bank for this purpose. | Must be conducted in the form of a public auction based on an enforceable court decision, by the virtue of a court appointed officer in accordance with the applicable law. Under certain conditions, the court appointed officer may appoint a private broker, auction officer or investment bank for this purpose. | Must be conducted in the form of a public auction based on an enforceable court decision, by the virtue of a court appointed officer in accordance with the applicable law. Under certain conditions, the court appointed officer may appoint a private broker, auction officer or investment bank for this purpose. |

**L. Sweden**

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|  | Company Shares | Real Estates | Receivables |
| Private Sale | Only possible if mutually agreed by the parties in the relevant pledge agreement. However there are conditions under the applicable regulations such as that the pledgee must offer to the pledger the release of the pledged assets, and the sale must be conducted at a reasonable price under the circumstances on the date of sale. | Not applicable | Only possible if mutually agreed by the parties in the relevant pledge agreement. However there are conditions under the applicable regulations such as that the pledgee must offer to the pledger the release of the pledged assets, and the sale must be conducted at a reasonable price under the circumstances on the date of sale. |
| Auction / Public Sale | Collateral taker may have the assets sold by the virtue of an enforcement office, if not agreed otherwise in the pledge agreement or the foreclosure sale does not take place under an bankruptcy process. | May be subject to foreclosure sale by the virtue of an enforcement office. | Collateral taker may have the assets sold by the virtue of an enforcement office, if not agreed otherwise in the pledge agreement or the foreclosure sale does not take place under an bankruptcy process. |

SUGGESTED RESTRUCTURING AND ENFORCEMENT SYSTEM FOR THE TURKISH LEGAL SYSTEM

| **Restructuring Processes** | | | | |
| --- | --- | --- | --- | --- |
| In the preceding sections of this Report, we have analyzed the main aspects of the local regulations of certain countries, including the US, the UK, Italy and India[[2]](#footnote-2), and the relevant regulations of the EU, the restructuring mechanisms and/or principles referred to in the relevant studies of the World Bank. Please find below our suggestions regarding the details of a restructuring system that we believe would respond to legal and commercial demands, considering the Turkish Law, and particularly the current situation of the Turkish financial sector. | | | | |
| Subject | | | | Suggestions |
| **Infrastructure** | | **Regulatory Basis** | | Requirements of restructuring filings, such filings’ possible effects on debtors and creditors (particularly restricting effects), the process, the courts’ role in such process, and other basis details should be clearly defined by law.Accordingly amending the EBL, already regulating concordat and bankruptcy, and thereby including the proposed restructuring mechanism in the legislation would be more appropriate in terms of legislative systematics.Moreover it is also possible to issue detailed regulations on the implementation of this procedure outlined in the relevant law.  * We also believe that the BHDS and the BAT may publicly comment on, detail and explain the law and the relevant secondary legislation by issuing opinions, directives and recommendations (together with the proposed modifications thereon, if any), so that the legislation on restructuring may be better understood by the sector and applied in accordance with the proposed principles. |
| **Purpose** | | It is advisable not to keep the main purpose of the proposed restructuring mechanism at a level of “insolvency” meeting the conditions of bankruptcy or having a risk of substantially meeting the bankruptcy conditions. In fact, the interim period up to such financial position gives significant damages to not only debtors but also creditors, and it would be difficult for a debtor that has already reached the point where their assets do not cover their liabilities, and that is under the threat of bankruptcy to enter into genuine restructuring negotiations with their creditors.The mechanism to be established should aim at restructuring the liabilities of debtors that are unable or having difficulties in paying out their liabilities and preventing debtors from being insolvent, with the purpose of minimizing the relevant parties’ damages resulting from such financial difficulties and ensuring the efficiency of the restructuring in compliance with the relevant legislation in cases where the debtor can reach an agreement in principle with the majority of its creditors or creditor groups regarding certain liabilities.Which debtors will be the targeted audience of the restructuring and which financial difficulty level will be taken as the minimum threshold are not legal, but economic and commercial issues. Accordingly it is necessary to get information from the consultants regarding the details of the debtors in the sector that need to restructure their debts, but cannot do it using the existing mechanisms; and the matter should be discussed in consideration of such information.In any event, one of the purposes of this restructuring option is to prevent the liquidation and the cease of the operations of debtors, and ensuring the continuance of their business by rehabilitating them. For this purpose, it should be made sure that any and all measures to be taken regarding debtors’ existing agreements, stay of enforcement proceedings and restructuring serve to the purpose of ensuring the continuity of debtors’ businesses and operations, so that restructuring would actually be used as a genuine agreement and a sustainable platform for rehabilitation, and not simply as a tool for idealizing creditors’ chances of collecting the debts owed to them.Our recommendations explained in the present section of this Report aim at establishing a sustainable and continuous restructuring mechanism (like concordat), rather than a temporary “crisis mechanism” that would be applied for a certain amount of time (like the “Framework Agreement” system). In other words, the restructuring mechanism to be introduced to the applicable legislation should be effective and accessible without being limited as to time.This restructuring mechanism may be used for ensuring a business agreement between the debtor and the majority of the debtor’s creditors before launching legal proceedings, so that the dissenting creditors may be included fairly in this process and the restructuring may be concluded without delay. The restructuring mechanism may be used as a tool to speed up the private restructuring processes.The lending conditions set forth in the banking legislation may be revised to prevent debtors from reaching this stage when they need their liabilities restructured, although such conditions are not a part of this restructuring mechanism. For example the Banking Law No. 5411 limits the amount that may be lent to a real person, a legal entity or a risk group with 25% of such borrower’s equity. Accordingly it may be useful to impose certain aggravated liabilities and even sanctions to certain debtor groups that has already exceeded a certain liability threshold or whose borrowings have been subjected to close monitoring as a result of a default, such as introducing new borrowing restrictions, or requiring such groups to set aside more provisions.It is also possible to provide certain incentives to such debtors regarding the payment of public debts, which cannot be restructured under this mechanism, in the event that they succeed in repaying their restructured debts. |
| **Launch of the Protecc by Debtor and/or Debtor’s Creditors** | | Every debtor meeting the criteria set forth in the applicable legislation should be allowed to apply for restructuring their liabilities.The applicable legislation makes this opportunity available to debtors under the relevant legislation, however we find it necessary and useful to launch information initiatives in the sector with the support and cooperation of the relevant professional organizations and other relevant institutions, so that all relevant debtors in the sector may be made aware of this opportunity.Additionally the EU Directive on Restructuring contains a principle requiring the introduction of early warning systems. Considering this principle, it is possible to require significant creditors to inform their debtors of such possibility after certain events of default, or require debtors’ independent audit companies or financial consultants to provide such information. In any event, such persons that are to be required to provide information should not be held responsible in the event that a debtor does not file for restructuring, or makes a deficient or insufficient filing, does not correctly proceed with the restructuring and/or the restructuring becomes insufficient, provided that they have duly complied with their obligation to inform such debtor.On the other hand, a debtor requiring to restructure their liabilities is mainly responsible for the relevant financial difficulty. Therefore it will be fair not to impose serious sanctions on creditors regarding such information duties that may be imposed on them, so that debtors may be prevented from avoiding their responsibilities claiming creditors’ failure in complying with such duty.The existing risk center of the Banks Association of Turkey which already contains various up-to-date data (such as information on rejected borrowings or nonpayment) may be used for informing the creditors in the financial sector of the financial situations of the debtors in the said sector, and ensuring the communication between such debtors and creditors, when necessary. |
| It is possible to consider also allowing creditors to file official applications in order to launch restructuring proceedings regarding certain debtors, given that in a situation where it is required to restructure a debtor’s liabilities, but the debtor does not cooperate regarding restructuring, such debtor’s creditors would have no choice but to apply for bankruptcy or concordat, which would have more severe consequences as compared to restructuring.It is evident that the debtor in a restructuring proceeding is required to be cooperative (regardless of the party filing for restructuring). After the creditor’s application for restructuring the debtor’s liabilities, the debtor would be required to personally present their financial and other information and the relevant restructuring plan, and conduct the relevant negotiations. However in the event that the debtor does not perform its duties after the application of their creditors, the restructuring proceedings would not proceed.Given that the restructuring mechanism aims at sustaining the debtor’s business, we recommend you to ensure that the debtor maintains the control of their business (subject to certain supervision or intervention options available to the creditors or the relevant court/expert). We therefore would not advise you to include administration or other similar mechanisms to this structure that the debtor does not participate in (with the agreement of the majority of the creditors).In order to eliminate this problem to a certain extent, it may be considered as an alternative to authorize certain creditors (the debts owed to whom exceed a certain threshold to be mentioned in the relevant legislation, or which is a bank or a financial institution) to offer a restructuring plan when filing such an application. In this alternative, the restructuring proceedings may become difficult if the debtor refrains from providing the relevant documentation, or stalls or suspends the relevant negotiations. |
| **DEBTORS** | | **Eligibility of the Debtor** | | In addition insolvent debtors or debtors with payment difficulties, debtors facing the risk of insolvency and wishing have their liabilities restructures may also be allowed to use this option.As required under the Framework Agreement and the relevant secondary legislation, banks, financing companies, financial leasing companies, factoring companies, public institutions and agencies, certain CMB regulated companies (such as intermediaries) and real persons that are not merchants may be excluded from this restructuring mechanism, given that the restructuring of the liabilities of certain companies with special characteristics (and operating under certain licenses in regulated markets) are subject to specific rules separate from the rules applicable to ordinary debtors in the sector, and such restructuring should be considered as a part of a mechanism governed by the special legislation applicable to such companies.Additionally, you may consider requiring compliance with further criteria, so that the liabilities that a debtor may propose to restructure exceed a certain monetary threshold, or a certain percentage of the total amount of such debtor’s liabilities.As an alternative, you may consider limiting the number of applications for the same restructuring mechanism that a debtor may make within a certain period of time.For this purpose, a debtor that has successfully restructured their liabilities by using this mechanism may be allowed to restructure the same liabilities only after a certain period of time, or only after repaying a certain amount of the restructured liabilities. |
|  | **Ranking and Admission** | | The preliminary evaluation on whether or not to launch restructuring proceedings regarding a particular debtor should be conducted by a commercial court of first instance.This preliminary evaluation should be limited to whether or not the relevant application has been duly made, so that the restructuring procedure may be conducted between the debtor and the creditors and supervised by the court, unlike the liquidation procedure which is conducted directly by the court.However in order to prevent the abuse of this restructuring mechanism, the court may be authorized to check whether the restructuring plan presented by the debtor is capable of preventing the debtor’s insolvency and bankruptcy, and ensuring the continuance of the debtor’s business, and also appoint an independent auditor to issue a report (a feasibility report) on the accuracy of the information provided as the basis of such plan.The feasibility report should cover any and all liabilities of the debtor, regardless of the creditors to be included in the restructuring under the restructuring scheme (including, but not limited to, the liabilities that are not recommended to be restructured and that can be paid on their original due dates).This evaluation should be performed by a recognized financial consulting company to be appointed as an expert by the court, and internationally accepted criteria and the sector where the debtor conducts its activities should be taken into consideration when choosing the financial model to be used for restructuring.Additionally a comparison should be made between the possible percentage of the liabilities to be paid in the event of the debtor’s bankruptcy and the possible percentage in the event of the debtor’s restructuring, so that the creditors may be informed and the evaluation may be made accordingly. | |
| **Group Restructurings** | | It is also advisable to also allow groups of companies, instead of only one company, to apply for restructuring (reasonably considering the relevant creditors and the liabilities owed to them), given that in many restructuring proceedings today, it is a commercial and financial requirement to restructure two or more group companies at the same time by transferring their liabilities within the same group in order to improve the financial situations and ensure the continuance of the businesses of the relevant debtors.If group restructuring is to be allowed, then the eligibility criteria to be applied and the feasibility report to be issued by an auditor should cover all companies proposed to be included in such restructuring, as to be clearly required under the applicable legislation.Additionally, the process should be flexible, so that the debtor may include certain group companies in and exclude certain others from the proposed restructuring, and change the scope of the restructuring in accordance with the creditors’ comments before the finalization of the group companies to be finally subject to the restructuring. | |
| **CREDITORS** | **Creditors that may participate in/that are affected by the restructuring** | | Any and all creditors other than public creditors should be included in the restructuring mechanism. In any event, the possible effects of the restructuring proceedings on the creditors involved (such as stay of enforcement proceedings) may be regulated differently depending on the characteristics of the creditors.Notwithstanding the foregoing, the creditors to be included in a restructuring plan should be determined in accordance with the relevant restructuring application and the restructuring scheme to be proposed. | |
| **Categories of Creditors** | | Different categories of creditors, each with reasonable amount of common attributes, should be mentioned in each restructuring application, so that each category of creditors will have the chance to independently negotiate and evaluate certain restructuring conditions, and approve or reject the restructuring scheme accordingly.In any event, the applicable legislation should treat secured and unsecured creditors and, if applicable, the debtors’ shareholders or the creditors in the same group of companies under separate categories, and such categorization would serve as a common starting point for the categorization of the creditors.Accordingly the applicable legislation may clearly refer to the subordinate nature of shareholders or creditors in the same group.The debtor filing the application should be allowed to categorize the creditor groups, given that it is the only party that is fully informed on all of the creditors. On the other hand, the creditors should be allowed to object to their categorization before the court and/or the court should be authorized to check the adequacy of this categorization. | |
| **Including the Creditors in the Process** | | It is important to duly notify any and all creditors that are covered by the restructuring scheme and that may be affected from the stay of enforcement proceedings.The creditors should also be given to the opportunity to object to the information provided by the debtor regarding the relevant liabilities, collaterals and other details, and such objections should be resolved promptly by the court following an expedited procedure. Otherwise any dispute on any information that may be important for the negotiations and the relevant voting may jeopardize the continuance and successful completion of the process. | |
| **RESTRUCTURING** | **Supervision/Audit** | | As explained in more details below, the restructuring mechanism is expected to have significant effects, such as staying enforcement proceedings and forcing dissenting creditors or a category of creditors to restructuring (as explained above) in a way similar to the effects of restructuring in the compared legal systems. Considering its possible consequences, it should be made sure that such an important process is conducted in accordance with the law applicable to its merits and the relevant procedure, all important decisions should be given by a court, and the court should appoint one or more specialists or “restructuring experts” that are to generally supervise the debtor (including, but not limited to, the debtor’s assets, liabilities and balance sheet).Such professionals’ required qualifications (such as educational backgrounds, licenses, minimum experience in the debtor’s sector and/or no conflict of interest) and the duties to be assigned to such professionals should be clearly set forth in the applicable legislation, and they should be appointed by the court after hearing the opinions of the creditors. Such professionals should be regarded as public officers, and they should have important liabilities towards not only the debtor but also the creditors.It may be considered to assign such responsibility regarding such professionals’ performance of their duties to the relevant ministry, so that any claim related to such professionals breach of law may be directed to such ministry (where the relationship between such professional and the ministry will be governed by the applicable administrative law).It may also be considered to establish a specialized court or appoint a specialized judge regarding the restructuring mechanism, so that the process may be expedited, given that judges specialized on the relevant legislation will be involved and the disputes will be submitted to such a court or judgeship only hearing restructuring related issues. | |
| **Restructuring Tools** | | It would be advisable not to restrict the restructuring tools that may be used in a restructuring scheme, given that each restructuring may require different tools, depending on the creditors, the composition of the creditors, the corporate structure or share capital of the company or group companies, the commercial positions of their shareholders, the commercial expectations or preferences of the creditors or any other variable. Such tools may include waiver of claims, creation of a collateral pool, converting liabilities into a subsidiary, or intervention in the company’s management.Although this is not directly relevant to the legislation on enforcement and bankruptcy, the legal basis of the actions to be taken regarding the restructuring, including those given as examples above (excluding the typical actions, such as changing the repayment schedule or extending new loans) should be supported by the applicable legislation.Accordingly the relevant legislation should cover certain issues, such as the conditions that would apply in the event that the creditors renounce their claims, the duties that may be imposed on the creditors in the event of such renouncement under the restructuring mechanism referred to herein (regardless of whether such renouncement is approved by each creditor, or forced by the majority of the creditors), the mechanisms regarding creditors’ involvement in the management of companies, and certain structures that may be used regarding creditors’ acquisition of debtors’ shares and/or businesses, such as special purpose companies and funds.Regarding the actions taken under a duly approved restructuring scheme, it would be wise to prevent the creditors who are not covered by such scheme or who have voted against the same from filing a lawsuit for revoking such actions. | |
| **Appraisal** | | To the extent necessary for the proposed restructuring scheme, the debtor’s assets and other assets (including but not limited to real estate and company shares) used or to be used for securing the debtor’s liabilities should be appraised by independent appraisal companies holding real estate appraisal license issued by the Capital Market Board, or other appraisal firms or investment banks, as the case may be.In the event that the creditors (in the same group or in different groups) have serious allegations that the applicable conditions have not been met, they should be given the opportunity to apply to the court, which should be authorized to have a second appraisal report. | |
| **Expenses** | | It may be provided that any and all expenses regarding the restructuring process (including, but not limited to the expenses related to the court procedures, the consultants/auditors/experts appointed, the relevant meetings, and the actions taken regarding the restructuring) would be paid by the debtor, and these expenses will be paid out from the proceeds of the disposals made under the restructuring scheme, if any, and they would be paid out first in the event that the restructuring scheme is not successful and the debtor bankrupts. | |
| **CONSEQUENCES AND LIMITATIONS** | **Preserving the Situation / Stay of Enforcement Proceedings** | | In order to provide a stable structuring platform for the negotiations and to prevent certain creditors from gaining unfair advantages by not cooperating in the negotiations, it would be reasonable to preserving the then current situation, and prevent the creditors from enforcing any legitimate right that they may have against the creditor, and starting legal proceedings.On the other hand, any prescription period applicable to the claims subject to the stay of enforcement proceedings should be suspended, any running of the period of time set by a statute of limitations should be paused, and relevant regulations should be issued to prevent the expiration of such claims.It would be useful to append certain new provisions to the Enforcement and Bankruptcy Law in order to support the maintenance of the then current situation. For this purpose, the launch of the process for preserving the then current situation may be announced publicly, or registered with a certain registry, or the relevant debtor may be provided with a certificate showing the launch of such procedure, in order to protect the debtor’s reputation, so that the debtors may stop any enforcement proceeding that may be launched against them during such process. In any event, it would be reasonable to provide the relevant creditors with a similar certificate when such process is suspended or over.The process for preserving the then current situation may include the prohibition of any change in the relationship between the debtor and the creditors (other than the liabilities under the applicable legislation, such as the liability to categorize borrowings) as compared to the position as of the time of the restructuring application, any collection of principal amount and/or interest, or the launch of any debt collection proceeding, such as attachment, bankruptcy or foreclosure of pledged assets.However it would be fair to not to require the banks to set aside higher provisions for their receivables that they would need to categorize under a lower class, and suspend this requirement until the end of the stay of the enforcement proceedings.On the other hand, it may be more appropriate to authorize the court to consider the ongoing negotiations and the creditors’ rights to be restricted as a result of the process, before deciding to launch the process for preserving the then current situation (and the stay of enforcement proceedings), rather than requiring the court to launch the process upon the submission of all necessary documentation by the debtor.The risk of disproportionately restricting creditors’ rights as a result of variable commercial requirements of the restructuring may be prevented by authorizing the court to decide on which prohibitions to apply with groups of creditors, when deciding on preserving the situation, as in the EU Directive on Restructuring.In any event the applicable legislation should clearly set forth the duration of this measure to preserving the situation, the possibility of the extending this term in exceptional cases, and the maximum duration of such measure.If the then current situation is preserved for too long, the debtor may abuse this opportunity; while if the duration of such measure is too short, the stay of enforcement proceedings would not be effective. Accordingly it is important for the court to duly consider the circumstances surrounding the debtor and the creditors as well as their financial conditions, when deciding on the duration of this measure.It should be made sure that a clear notice is given to the creditors upon the court’s decision on the application of the measure to preserve the situation, together with the bans to be applied.It should also be appropriate to allow the creditors or the relevant expert to apply to the court to lift this process regarding certain transactions or certain creditors/groups of creditors considering the changes in the relevant circumstances (in the event that a ban does not properly serve to the purpose of supporting the restructuring negotiations, or in the event that a creditor would become insolvent as a result of such ban).In the event that this concept of preserving the situation is introduced to the applicable legislation, it would be necessary to decide on this concept considering the banks’ obligations to re-categorize the repayment obligations of such debtor under the applicable banking regulations. In the event that the debtor’s borrowings are re-categorized, the court should decide whether deferring or collecting the repayment of the principal amount/the interests would be more appropriate for preserving the situation, and instruct the banks accordingly.It may also be considered to introduce a legal principle to the relevant legislation, indicating that bilateral restructuring deals that the debtor may conduct with certain creditors in accordance with the equal treatment principle would not breach the preservation of the existing situation.Debtor’s right to resort to the restructuring mechanism should not be restricted by debtor’s obligation to take certain actions related to technical bankruptcy. Therefore it may be considered to authorize the court to suspend the debtor’s obligation to call the shareholders to a general meeting as a result of the decrease in the debtor’s share capital. | |

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|  | **Control over the Debtor** | The main purpose of restructuring would be preserving the debtor’s business and affairs, therefore any structure automatically resulting in the debtor’s loss of control over their business or assets, any chance in the debtor’s control or management, or the transfer of the debtor’s management to a certain group of creditors, the court or a specialist would not serve this purpose.However in cases where the debtor intentionally or negligently damages their creditors or the debtors management is insufficient or negligent or otherwise takes inappropriate actions, but the debtor’s creditors still find it useful to preserve and restructure the debtor’s business, the creditors should be allowed to apply to the court, which would transfer the debtor’s management to a restructuring expert. In any event, the debtor and their executives would be liable for their illegal actions.On the other hand, it would be appropriate to have the debtor’s business and affairs supervised by experts; given that the debtor is in financial distress and has already jeopardized the rights of their creditors. Accordingly the court should decide on which actions of the debtor would be subject to the approval of such expert, and which others would call for the authorization from the court. Such important transactions may include intergroup cash transfers, non-arm’s-length transactions, additional borrowings or asset sales.In the event that the approved restructuring scheme requires the sale of a collateral asset or the creation of a security right in favor of two or more creditors, security right can be released; however, such collateral taker or the secured party should be given priority in repayment, prepayment or collateralization. It should also be considered to release the security rights only after payment to relevant secured parties, in order to protect the interests of such secured parties. |
| **Additional Borrowings** | The debtor may need to borrow additional funds to maintain their business and successfully apply the restructuring scheme (not only before, but also after the approval of the restructuring scheme). The applicable legislation should refer to this point, and provide a clear list of the conditions (such as necessity) that the debtor is required to meet in order to be permitted (by a court or an expert, during the process up to the approval of the restructuring scheme) top make additional borrowings.The criteria that the court or the expert is to consider before authorizing additional borrowings may include the necessity of such additional borrowing for the implementation of the restructuring plan, or the possible immediate and irremediable damages that may arise in the event that the debtor is not allowed to borrow such additional funds.In line with the examples given regarding the foreign legal systems, and in order to encourage the creditors to participate in the restructuring and support the debtor, such additional borrowings should be given priority in repayment and collateralization (even when the relevant funds are lent by a party other than the creditors subject to the restructuring scheme), and treated as a liability with priority over the other liabilities of the debtor, if the restructuring fails and the bankruptcy proceedings are launched.In order to mitigate the legal risks faced by the creditors that may provide additional funding to support the debtor (in accordance with the restructuring regulations), it should be ensured that such funding transaction would not be regarded as ineffective, revocable or unenforceable if the debtor later becomes insolvent; and those providing such additional funding should not be held liable, in the event that such additional funding is against the interests of the creditors in general. |
| **Outcome of the existing agreements** | There should be certain legal provisions preventing the counterparties of the agreements that are required for preserving the debtor’s business and affairs from terminating such agreements, accelerating the debtor’s obligations thereunder, suspending such counterparty’s performance thereunder, or unilaterally making certain modifications on such agreements, on the grounds that the debtor has applied for restructuring, the restructuring procedure has been launched otherwise, or the debtor is unable to perform its obligations during the restructuring process; and such contractual provisions resulting in the foregoing should be held ineffective.In addition to the foregoing, the debtor should be allowed to unilaterally terminate or suspend any agreement that would jeopardize the implementation of the restructuring scheme, with the confirmation of the relevant expert or the court, provided that the counterparty of such agreement has not performed their obligations thereunder.On the other hand, any counterparty incurring damages as a result of the foregoing should be given priority in the payments to be made out of the proceeds of the restructuring scheme, and in the bankruptcy proceedings that may be launched in the future if such scheme becomes unsuccessful. |
| **CLOSING** | **Voting and Approval by Creditors** | Any and all creditors affected by the restructuring plan should have voting rights pro rata the amounts of their receivables.The restructuring conditions that affect certain groups of creditors should be voted and approved separately by each of these groups.Such approval may be given by the simple majority or a qualified majority of such group, or made subject to certain thresholds related to the value of such creditors’ receivables, or it may be considered to require the approval of a certain number of creditors.The creditors that would not be able to make any collection under the restructuring scheme may be regarded as rejecting the scheme, while those that would be able to fully collect the amounts owed to them may be regarded as approving such scheme, and they may be prevented from voting otherwise.It may be considered to deprive the debtor’s shareholders and related parties from such voting right, even when they are the debtor’s creditors and affected by the restructuring scheme.In the event that a restructuring scheme requires a creditor to lend further funds to the debtor, such creditor’s affirmative vote to such scheme and the approval of the scheme with the required majority of the creditors should not be sufficient to force such creditor to lend such additional funds, considering the importance of the liabilities and responsibilities of lending under the banking regulations.It would be advisable to introduce certain new legal provisions, so that the approval of certain restructuring actions, such as the waiver of certain amounts of principal payments and/or interests, the release of guarantors, the decrease of the relevant collaterals etc. would not be regarded as embezzlement; and accordingly the creditors would be more willing to take initiatives regarding the restructuring scheme.It would be advisable to set a certain time limit for the approval of the restructuring by the creditors.It may also be considered to set a quorum for any decision (e.g. consulting an expert) that the creditors may be required to give during the interim period before the final confirmation of the restructuring scheme. |
| **Forcing the Creditors (in the same group or in different groups of creditors) to Approve the Restructuring** | The approval of the restructuring plan by the required majority of a group of creditors should be binding for all creditors in the same group, provided that the composition of such group is correct, and the creditors in the same group are not treated differently (without a legitimate reason) under the restructuring scheme.It may also be considered to introduce an additional mechanism, where a group of creditors approving the restructuring scheme can force a group of dissenting creditors to accept the restructuring, provided thatthe restructuring plan has been approved by (i) the majority of the relevant affected parties, and at least one of the approving parties is composed of secured creditors or any other group that inherently has priority over unsecured creditors; or (ii) at least one of the groups that the scheme has negative impacts on, provided that such group is neither composed of the debtor’s shareholders nor one of the groups that are expected to receive no payment or satisfy no interest, considering the value of the debtor’s assets (or to be expected being in this condition according to the dissolution ranking);the dissenting group of creditors would be treated equally with the other groups in the same rank, and better as compared to the lower ranks;no group of creditors would receive more than what it claims; andthe restructuring scheme does not unreasonably discriminate certain groups of creditors, and is fair for all dissenting groups.A restructuring scheme may be treated as a fair scheme for any group of secured creditors, ifsuch group maintains the relevant collaterals, and receives a cash payment no less than the current value of their receivables; orthe members of such group are authorized to acquire the title to the collateral assets, and set off their value against their receivables (as an exception to “*lex commissoria”*); orthe creditors in such group receive a value corresponding to their claims.The receivables of the debtor’s shareholders and group companies should come after the receivables of the debtor’s other secured and unsecured creditors, and they should be paid after the full payment of such other creditors’ secured and unsecured receivables. If necessary, the debtor’s shareholders and group companies may be required to refrain from collecting such receivables and contribute the same to the debtor’s share capital (in the case that it is in line with the relevant technical bankruptcy regulation as well, without the classification of capital investing under advancement or borrowing). It may be considered to introduce the concept of subordination among creditors to Turkish legal system. |
| **Judicial Confirmation** | Once the approval of the restructuring scheme by the creditors, the restructuring process should be monitored in order to prevent any breach of the applicable principles or procedures, and any unfair or discriminative treatment (that may not be regarded as reasonable, considering the differences between the groups of creditors). The restructuring scheme should be subject to a final confirmation by the court, and then become binding for the relevant groups of creditors.It may also be considered to require the monitoring of the developments during the restructuring process by an expert, who would periodically report such developments to the relevant court and creditors. |
| **Non-Approval of the Restructuring** | If the automatic result of the non-approval of a restructuring plan is the launch of bankruptcy proceedings against the debtor, debtors may refrain from resorting to this option. Therefore it is advisable to design the restructuring mechanism without the threat of bankruptcy, but allow the court to decide on the debtor’s bankruptcy if it finds the debtor to be acting in bad faith, or if the relevant circumstances require the debtor’s bankruptcy.On the other hand, an expedited bankruptcy procedure may be introduced for debtors failing to restructure their debts. |
| **Mechanisms under the Enforcement Law** | | |
| In Turkish law, foreclosure of a collateral is possible only through certain procedures requiring the involvement of enforcement offices or courts.  On the other hand, the examples in the Anglo-Saxon law and the continental European law regarding enforcement and foreclosure reveal that in certain cases, an alternative mechanism could be considered under which the law recognizes and supports parties’ wills to mutually decide, considering the necessities of business life, to foreclose certain collaterals (privately, without the involvement of an enforcement office or a court).   * As an alternative to the foreclosure of pledged assets by the virtue of an enforcement office, the applicable legislation may allow the appointment of a receiver for this purpose, in order to maximize the proceeds of such foreclosure in the then applicable market conditions, and speed up the foreclosure based on the mutual agreement of the parties.   + Such legislation allowing the appointment of a receiver for foreclosure should refer to the collateral agreement entered into between the parties. Such collateral agreement should refer to certain authorities, such as the authority to receive the proceeds of or sell the pledged asset, and the authority to apply such proceeds to the secured liabilities; in which cases it would be possible to appoint a receiver or launch foreclosure proceedings (such as default, event of default or acceleration, provided in any event that the relevant payment obligation is due); the remuneration to be paid to the receiver; and the order of priority in the application of the proceeds.   + The duties assigned to such receiver should be set forth in the relevant collateral agreement. According to the compared legal systems, receiver may be required to sell the pledged asset at a price corresponding to the best reasonable price available. Such duties of the receiver towards the creditor appointing them may be agreed under the relevant agreement.     - A receiver’s duties towards the debtor may be acting in good faith (such as selling the pledged asset at a price corresponding to the best reasonable price available), and acting fairly and reasonably.   + It would be reasonable to appoint such receiver as the representative of the collateral provider (that would be the debtor, in the event that the collateral provider is the debtor), given that the collateral provider holds the title to the collateral asset to be foreclosed. Accordingly the agreement entered into with the receiver, that is to act as the representative of the collateral provider, would have direct legal consequences regarding the collateral provider. Provided that the contractual principles related to the appointment of such receiver are duly complied with, the secured creditor would not be responsible for any action taken by such receiver (that is not such creditor’s representative).   + The principles regarding the appointment of, and the actions to be taken by, receiver reflect the generally accepted approach and contractual structures in the international practice. In any event, these points are subject to the mutual agreement of the parties, and therefore it would be required to introduce certain provisions to the relevant legislation authorizing parties to collateral agreements to decide on such points.     - This would allow the parties to enjoy their freedom of contract, and mutually design a collateral structure allowing the foreclosure of the collateral assets by the virtue of a receiver. Given that the concept of receiver would be introduced to Turkish law, it will no longer be possible to object to such appointment (as the general framework is established and the aforesaid structure is evidently allowed).     - The applicable legislation should set forth that the administrator’s authority to foreclose must be agreed in the relevant agreement. Such agreement should set forth certain elements, including, but not limited to, the procedure to be followed when appointing the administrator, the appointment of the administrator as the debtor’s representative, the irrevocability of the authorities granted to the creditor regarding the administrator’s appointment and authorization (such as the administrator’s authority to sell), the principles applicable to the pricing of the sale to be performed by the administrator and the method of sale to be applied.     - It should also be ensured that the applicable legislation sets forth that the assets that the administrator will possess in the name of the debtor would be kept separate from the personal properties of the administrator, and they would not be seized, pledged or assigned in connection with the administrator’s liabilities.     - The applicable legislation should also refer to the minimum duties of an administrator towards the debtor and the secured creditors, such as the duty to sell the collateral at the reasonably best price available, and the duty to act fairly and in good faith.       * If Turkish legal system is to allow a secured creditor, who is not a first degree/rank creditor, to appoint an administrator, the legislation may also include provisions prohibiting such administrator from selling the collateral at a price not satisfying the creditors in the prior degrees and ranks.   + In international practice where the authority to appoint an administrator is not granted under an agreement, but the applicable legislation, and where the creditors may appoint an administrator either directly or by applying to the court, such auditor is not authorized to sell the collateral, but collect the income generated by such collateral and transfer the same to the creditors. If such a mechanism where the parties’ agreement is not required for the sale of collaterals by the virtue of an administrator is to be introduced to Turkish Law, the authorities to be granted to the administrator should be limited. On the other hand, it would be hard to take into consideration any and all potential cases and therefore it would be recommendable to allow the parties to an agreement to agree on the appointment of an administrator to sell the relevant collaterals, and make it possible to appoint an administrator under the applicable legislation only when there is no such agreement. * In order to expedite the foreclosure sale of collateral assets, and maximize the proceeds of such foreclosure, another alternative (in addition to foreclosure by the virtue of a receiver) can be introducing a private sale (direct sale) option that may be exercised by the collateral taker.   + The aforementioned conditions applicable to the administrator as mentioned above should also apply to the relevant secured creditor in the private sale mechanism. All points referred to above regarding administrators must also be taken into consideration regarding secured creditors that are to sell collateral assets by using the aforementioned private sale mechanism. It may be considered to allow the parties to a collateral agreement to mutually decide on the conditions for such private sale, the procedure to be followed, the secured creditor’s authorities and responsibilities about the sale under the applicable legislation.     - In order to ensure such secured creditor’s compliance with their duty to ensure the “best reasonable price”, it may be considered to introduce a legal mechanism requiring the sale of such collateral asset at a price not lower than that applicable in the stock exchange or any other recognized market where the asset is traded (as a restriction of the parties’ freedom of contract).   + In a manner similar to the approach explained above regarding the sale of collateral assets by the virtue of an administrator, a procedure may be defined to automatically authorize, considering that the requirements under the regulation are fulfilled, the collateral taker to privately sell the collateral asset or apply to the court for such purpose upon the debtor’s default, if the agreement between the parties does not directly refer to such authorization. * The appropriation of the collateral asset by the collateral taker upon the nonpayment of the secured liability is a part of the private sale mechanism accepted under Anglo-Saxon law and, as an alternative method of foreclosure the continental under European Law (as explained above regarding the “Directive on Financial Collateral Arrangements”). Under his mechanism, the secured creditor (the collateral taker) may directly appropriate the collateral asset and set off its value against the liability owed to such creditor.   + In principle, this mechanism contradicts with the prohibition of *lex commissoria* under Turkish Law, and is used exceptionally regarding the shares of publicly traded companies governed by the Capital Market Law, and there are certain other regulations allowing the appropriation of pledged movable properties under certain circumstances. Otherwise, appropriation is possible only when the collateral provider and the collateral taker mutually agree on it once the underlying debt becomes due and payable, and therefore it cannot be used when such debt is not yet due. On the other hand, certain European countries, whose legal systems also refer to the prohibition of *lex commissoria*, allow appropriation, particularly regarding company shares and cash, under the Directive on Financial Collateral Arrangements.   + Accordingly, it may be considered to legally allow the contractual right of appropriation (before the underlying liability becomes due), particularly for cash (bank deposits) and company shares, but not for real estate or other properties that may be related to public order. On the other hand, one of the collateral types most commonly used in the financing sector in Turkey is mortgage over real estates, and in practice, the foreclosure procedures are stalled by unreasonable claims of the parties. Therefore, it may be considered to introduce certain provisions to the applicable legislation allowing the appropriation of mortgaged real estate under certain objective and clear conditions. * In Turkish legal practice, particularly in multi-bank financing structures, the creditors secure their rights through various share pledges, mortgages, account pledges, assignment of receivables, subordination, assignment of subordinated receivables, pledges over movable properties and other collaterals, where they rank in various orders and this results in various operational problems as well as significant problems in foreclosure. Therefore “security agent” concept, which is an established concept in Anglo-Saxon law, may be introduced to the Turkish legal system (based on an existing legal right, such as admitting an uncertain liability, succession of the creditor, fiduciary ownership or grounding on any other legal basis). Under this structure, the creditors choose a security agent among themselves and such security agent signs the security agreement in the name of all creditors, and the security rights under such agreement are created in favor of the security agent. The relevant inter-creditor agreement sets forth the principles and procedures that the security agent is to follow when foreclosing the relevant collaterals, and the instructions that the remaining creditors may give to the security agent.   + This is a commonly used structure used in financing transactions under Turkish Law, which however does not technically refer to “taking collaterals as a representative of others”, and there is no precedent in practice. As a result, there may be certain legal concerns about the collaterals to be subject to this structure. Accordingly it may be considered to introduce certain legal provisions to the applicable legislation in order to allow a structure where two or more creditors may reach an agreement to appoint one of them as their representative to act in accordance with their instructions regarding the foreclosure of collateral assets, and the application of the proceeds of such foreclosure. This would not only erase the concerns, but also allow creditors to quickly take action, particularly in the foreclosure stage.   + It would be useful to provide that the collaterals are independent from the security agent’s assets, considering the possibility of the security agent’s bankruptcy. * The energy legislation generally authorizes the banks lending to licensees to step in, and demand the transfer of the licensor’s license to anther legal entity. As far as we are concerned, this mechanism has never been used so far, and the EMRA has not expressed its opinion regarding the conditions required to be met in order to exercise this authority. Even when the EMRA entertains such an application, the underlying legal provisions are still not applicable to the guaranteed financing, and the banks are only allowed to demand the transfer of the relevant license to another legal entity.   + Accordingly this step-in option, which is set forth in the applicable legislation, but which has not yet been detailed or applied, is not much suitable for the “appropriation” or “intervention” structures that the financial creditors wish to have introduced to the applicable legislation; however it may be considered to allow the banks to intervene in the management of debtors until the foreclosure of the relevant collaterals or the reconstruction of the debtor (as an interim measures) by filing an application with the relevant authorities (in cases where irremediable damages may arise and urgent intervention is required). | | |

1. For the maximum prescribed periods applicable to restructuring mechanism in different legal systems, please refer to the relevant country’s section below. [↑](#footnote-ref-1)
2. We have collected the information provided here regarding the foreign legal systems other than the US, UK, and Italian legal systems referred to in this Analysis (such as the EU legislation, the World Bank principles, and Indian law) from different resources, and hereby present the same only for informatory purposes, without making any legal analysis thereon considering the relevant legal system. We recommend you to get legal opinion from lawyers specialized on such foreign law systems for the analysis, interpretation, and verification of the information that we provide herein, and for further information on the updates, if any. [↑](#footnote-ref-2)