

# Amendments to postponement of bankruptcy rules

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## Insolvency & Restructuring, Turkey

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### Introduction

On July 15 2016 Parliament enacted an omnibus bill which amended several laws. The Law on the Amendment of Some Laws to Improve the Investment Environment focuses on:

- reducing costs in relation to the investment environment;
- eliminating the legal differences in relation to R&D incentives;
- harmonising practices among financial institutions;
- encouraging foreign investment; and
- reducing the costs of establishing companies and opening branches.

Conversely, the law introduces new provisions regarding:

- the postponement of bankruptcy;
- the issuance of cheques; and
- bounced cheques.

This update focuses on the amendments regarding the postponement of bankruptcy.

### Postponement of bankruptcy

The postponement of bankruptcy is a mechanism regulated under the Enforcement and Bankruptcy Law that provides stock corporations and cooperatives with poor financial standing an opportunity to overcome financial difficulties and save their business. However, the Enforcement and Bankruptcy Law can also damage creditors' rights, as enforcement proceedings initiated for the collection of receivables against an applicant for postponement are suspended during this period, which unavoidably leads to misuse of the mechanism. Due to a drastic increase in the number of postponement applications in recent years, more detailed regulations and wider restrictions were required in order to preserve the exceptional nature of this mechanism. The major amendments that the omnibus bill introduced in this regard are as follows:

- Under the previous version of Article 179 of the Enforcement and Bankruptcy Law, a postponement application could be made if the company's debts exceeded the value of its assets. The bill amends this ambiguity and instead prescribes that the inability to cover debts should be determined through interim balance sheets created with regard to the potential sale price of assets.
- Due to the postponement-friendly approach of courts in some districts, companies previously moved their registered address to make applications in favourable jurisdictions. Following the changes, the commercial court where the applicant company's head office has been registered for over one year has jurisdiction.

- The courts want a concrete and reliable recovery plan supporting the possibility of the company's survival if a postponement is granted. The previous legislation provided no criteria that a recovery plan should meet. Conversely, the omnibus bill requires a recovery plan to include details of the objective resources and precautions, including the investment of new capital resources. Further, the recovery plan must also outline how operating expenses and working capital will be covered during the postponement period.
- The omnibus bill also aims to remove the delays that may occur during the trial process. In most postponement applications, the court will issue an interim injunction on the applicant's request, which halts the enforcement proceedings against the applicant during the trial. In order to enjoy this protection for a longer period, applicants previously refrained from submitting documents supporting the reliability of their recovery plan. To prevent this, the bill requires submission of the following along with the postponement application:
  - the due dates and details of existing debts;
  - the creditors' addresses;
  - inventory records and their waiting periods and values;
  - the most recent balance sheet and income statement submitted to the tax office;
  - a certificate of registry; and
  - other information and documents supporting the reliability and seriousness of the recovery plan.
- Unless these documents are submitted with an application within the two-week deadline, the court will deem that the need for postponement has not been proven and declare bankruptcy if the company is incapable of covering its debts.
- The omnibus bill similarly regulates that the applicant can revise the recovery plan only once during the proceedings.
- Under the Enforcement and Bankruptcy Law's former provisions, bankruptcy could be postponed for a maximum of one year; however, it could be extended for periods that the court deemed appropriate for a total of four years. However, under the new provisions, it is possible to extend the maximum postponement period of one year only once and for one extra year.
- Contrary to the former provision and Court of Appeals' precedents, the amended Article 179(a) of the Enforcement and Bankruptcy Law explicitly states that interim injunctions and provisional attachments which have been previously granted against the applicant cannot be enforced during the trial. Article 179(b) adopts the same approach for the period after the postponement has been granted.
- In order to balance the creditors' interests during this period, Article 179(a) also establishes that the term of the injunction granted at the time of the proceedings will be deducted from the term of the postponement.
- The decisions that the court can grant at the end of proceedings are clearly described in the new Article 179(a). Accordingly, the court can decide to:
  - postpone the bankruptcy if it concludes that the recovery plan is reliable and the applicant is worthy;
  - dismiss the request for postponement and the bankruptcy if it concludes that the applicant is capable of paying off its debts; or
  - allow the bankruptcy if it concludes that the applicant is incapable of paying off its debts, but it is impossible to recover them.
- With the introduction of a three-tiered court system in Turkey, **(1)** a new article has been added to the Enforcement and Bankruptcy Law regarding the legal remedies that can be granted by the court. Accordingly, the applicant (whether the debtor or the creditor) can appeal the decision before the regional appellate court within 10 days from the service of the decision. The other persons concerned can do the same within 10 days from the announcement of the decision in the *Trade Registry Gazette*. It is possible to refer the regional appellate court's decision to the Court of Appeals.

## Comment

As a legal mechanism open to the misuse of debtors, the limitation of applications for the postponement of bankruptcy has been on Parliament's agenda for some time. The omnibus bill aims to establish stricter norms for such applications, but also to make filing for concordat a more attractive option than the postponement of bankruptcy.

Although the Enforcement and Bankruptcy Law's new provisions entered into force with immediate effect on July 15 2016, applications for the postponement of bankruptcy were prohibited by Decree-Law 669 dated July 25 2016 for the duration of the state of emergency. During this three-month period from July 20 2016, applications for the postponement of bankruptcy will not be considered. Further, according to Decree-Law 673 dated August 15 2016, during the state of emergency the courts cannot grant a decision for the postponement of bankruptcy or decide for an interim injunction.

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## Endnotes

(1) Although the foundation and duties of regional appellate courts were regulated under Act 5235 dated September 26 2004, the regional appellate courts did not start functioning until July 20 2016. From this date, regional appellate courts have been functioning as the ordinary appeal courts. Conversely, the Court of Appeals will act as the court establishing jurisprudence and dealing with appeals under limited circumstances.

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