

# Concordat: An Introduction to Turkish Restructuring Law

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## Introduction

Concordat, known as *Konkordato* in Turkish, is a legal mechanism re-introduced in Türkiye in March 2018, following the abolition of the "bankruptcy postponement" mechanism. It aims to assist "honest debtors" who are unable to meet their obligations due to economic crises or other circumstances, by facilitating an agreement with creditors under judicial supervision.

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1 Recent economic downturns, including the COVID-19 pandemic, have led to a significant increase in Concordat applications in Türkiye, especially in the last couple of years. In this article, we will examine the subject matter mainly from the perspective of creditors of a debtor that went under the protection provided by the Concordat mechanism.

## A. Types of Concordat

The current Enforcement and Bankruptcy Law (No. 2004)<sup>1</sup> (hereinafter "the Law") outlines three main types of Concordat proceedings:

**a. Ordinary Concordat:** This is the most common type, where a debtor (before actual bankruptcy) seeks an agreement with creditors for debt repayment through discounts ("haircuts") or extended.

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<sup>1</sup> It should be kept in mind that, after almost a decade-long work by leading academics and experts, there is currently a draft Enforcement Law open for public discussion. Still, for at least the near future, the existing rules in the Enforcement and Bankruptcy Law will continue to regulate the Concordat sphere.

**b. Concordat after Bankruptcy:** This type allows a debtor, already declared bankrupt, to seek an agreement with creditors within the bankruptcy proceedings with the hope to reverse bankruptcy.

**c. Concordat by Abandoning Assets:** In this process, the debtor's assets are transferred to liquidators for sale or management by creditors, after which the debtor is released from their remaining debts.

In practice, Ordinary Concordat is commonly used, and the other two mechanisms can be rarely seen.

## **B. Stages of a Concordat Process**

The stages of Concordat have been regulated in great detail in the Law. It is crucial to grasp the different stages of Concordat in order to take the right action in each stage to protect the rights of the creditors.

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### **I. Concordat Request and Temporary Moratorium**

A debtor (or, less commonly, a creditor) may submit a Concordat request to the Commercial Court of First Instance in the city of its residence. Courts have been recently rejecting requests if the applicant has changed its residence just before making the Concordat application with the hope to deal with a more Concordat-friendly court. Hence, “forum shopping” is no more allowed.

The applicant must provide a comprehensive set of documents, including:

- a. A preliminary plan detailing the proposed repayment schedule, (payment via partnership shares or rights in the debtor company or another group company is also allowed),
- b. Documents reflecting the debtor's financial status, such as the latest balance sheet, income statement, cash flow statement, and lists of all assets, liabilities, and their due dates,
- c. A list of creditors, specifying the amounts owed to them and whether they are secured or not,

- d. A comparative table showing the estimated amount of funds creditors would receive under the Concordat proposal versus in a potential bankruptcy scenario, and
- e. A "reasonable assurance report" prepared by an independent audit firm, providing reasonable assurance that the proposed plan is achievable.

The courts, after verifying the *prima facie* completeness (not necessarily accuracy) of the above-listed documents and a deposit required for costs, usually grant a temporary moratorium. This period typically lasts three months and can only be extended once for another two months. This "relief period" generally halts enforcement actions against the debtor.

Creditors have seven days from the announcement of the temporary moratorium to submit written objections to the court. These objections must be well-substantiated with concrete evidence.

## **II. Appointment of a Concordat Commissioner**

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A Concordat Commissioner (or a board of three commissioners, with one mandatorily being an independent auditor in this case) is a court-appointed trustee in Concordat proceedings to supervise the debtor's actions and operations and protect the assets of the debtor.

## **III. Definite Moratorium**

Following the Commissioner's report on the Concordat application and a court hearing, if the Concordat process is deemed likely to succeed, a definite moratorium is granted. This typically lasts one year and can be extended once by an additional six months, for a total maximum period of 18 months (however, multiple Concordat proceedings are possible if the circumstances require so).

The definite moratorium may be terminated if the aimed improvement is not achieved, or if the debtor acts against the creditors' interests.

#### **IV. Creditors' Board**

The court may form a Creditors' Board to advise the Commissioner. This Board oversees the Commissioner's activities, provides recommendations, and reports to the court, but, unlike the Creditors' Assembly, it is not a decision-making body.

#### **V. Creditors' Meeting and Voting**

Within the definite moratorium period, the Commissioner calls a Creditors' Assembly where the debtor presents a refined Concordat Plan. This plan outlines the debtor's proposal for debt repayment, which may involve demands for a discount on the debt, deferred repayment terms, or a combination of both.

Creditors vote on the said plan. For approval, the Law requires a qualified majority as follows:

- Half of the registered creditors by number AND half of the total amount of registered claims, or
- One-fourth of the registered creditors by number AND two-thirds of the total amount of registered claims.

Only creditors whose claims are affected by the Concordat Plan can vote. Certain claims, including the claims of certain employment or family law related creditors, the debtor's spouse and children, and the spouse's parents and siblings, are excluded from this calculation. Secured claims are only considered for their unsecured portion, determined after the valuation of the collateral. Disputed or conditionally dependent claims are included based on the court's decision, without prejudice to future judgments.

#### **VI. Court Approval and Execution**

The competent court reviews the plan for approval after it is accepted by the required majority. However, this approval is not automatic. The Concordat Plans that offer overly long repayment terms or do not include legal interest, even when accepted by

creditors, may be rejected by courts in order to protect the rights of the dissenting creditors.

The Law stipulates that several conditions must be met for the approval of a Concordat Plan, including:

- a. The Concordat Plan must have been accepted by the necessary quorums.
- b. The proposed repayment amount must offer creditors a better outcome than they would achieve in a bankruptcy scenario.
- c. The proposed repayment amount must be proportional to the debtor's resources.
- d. Certain employment and family law related claims and debts incurred with the Commissioner's permission during the moratorium must be fully paid or adequately secured, unless such creditors explicitly waive this right.
- e. The court costs and fees associated with the approval must be deposited by the debtor.

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Upon final approval, the Concordat becomes binding on all creditors. The debtor then begins executing the Concordat Plan, retaining the assets and making payments according to the agreed schedule.

If the Concordat is rejected by the court, however, and the reasons for bankruptcy are present for the debtor, the court *ex officio* declares its bankruptcy.

## **VII. Court Approval for Certain Transactions**

The debtor's discretionary powers are significantly restricted during Concordat. Without court permission, the debtor cannot establish pledges, act as a guarantor, make gratuitous dispositions, or transfer/encumber significant assets (such as immovable property, crucial movable assets, and permanent business fixtures). Any such unauthorized transactions are null and void.

## **VIII. Annulment of Concordat**

If the debtor fails to comply with a specific payment obligation towards a creditor under the approved Concordat Plan, such an affected creditor can initiate legal action for the partial annulment of Concordat for themselves. If the Concordat was obtained through fraud or deceit, or the debtor acted in bad faith, any creditor can request the complete annulment of the Concordat which will be applicable to all creditors. Both partial and total annulment proceedings require a new lawsuit. If total annulment occurs, depending on the circumstances, the court may *ex officio* declare the bankruptcy of the debtor.

## **C. Creditor's Rights and Limitations**

### **I. In General**

When a debtor goes under the protection scheme provided by Concordat, creditors' rights and ability to pursue claims are significantly impacted. During both temporary and definite moratoriums, most enforcement and bankruptcy proceedings against the debtor are generally halted, those already initiated are put on hold, and no new ones can be initiated. However, certain claims (related to employment and family law) can still pursue attachment.

Pre-moratorium attachments that have not yet been converted into cash are lifted upon the Concordat Plan becoming binding.

Secured creditors can initiate or continue enforcement proceedings. However, they cannot proceed with preservation or sale measures during the moratorium, but interest continues to accrue on their claims.

### **II. Suspension of Interest Accrual**

Unsecured creditors face a suspension of interest accrual from the date of the definite moratorium, unless the Concordat Plan specifies otherwise.

### **III. Restructuring Secured Debts**

The Law allows for negotiations with secured creditors to restructure their debts through principal reductions, interest rate changes, or extended payment terms. If a two-thirds majority of secured creditors by outstanding credit amount consents, the agreement becomes binding on all secured creditors, including those who dissented. The dissenting creditors will not have to accept a reduced interest rate than the originally determined one in their original agreement with the debtor, however, they will be subject to the longest maturity agreed upon with the consenting secured creditors.

### **IV. Existing Contractual Arrangements**

Under Article 296 of the Law, a debtor's initiation of Concordat proceedings is not a valid ground to terminate an existing contract, even if such a clause is stipulated in the contract between parties. Provisions making Concordat application a breach, an event of default, a reason for termination, or making a debt due are null and void. In the same parallel, the beneficiaries of letters of guarantee granted in favor of a debtor which initiated Concordat proceedings are not allowed to demand payment merely because the debtor has done so. Only when the debtor has not fulfilled their obligations, which needs to be assessed by the Commissioner, payment under letters of guarantee can be demanded. The debtor, on the other hand, can, with the Commissioner's and court's permission, terminate overly burdensome continuous contracts that hinder the Concordat Plan's aim, with any resulting compensation being subject to the Concordat Plan.

### **V. Foreign Currency Debts**

When a creditor of a debt denominated in a foreign currency starts judicial proceedings against a debtor in Türkiye, the debt amount needs to be converted into Turkish Lira as the courts and enforcement offices only deal with the official currency of the country. As Concordat mechanism is spread over a substantial period of time, determining the date of conversion is crucial as the foreign

exchange rates fluctuate. In Concordat proceedings, foreign currency debts were earlier converted to Turkish Lira at the exchange rate of the Central Bank of the Republic of Türkiye on the date of the temporary moratorium, i.e. at the beginning of the Concordat process. However, following a recent ruling by the Court of Cassation, debts denominated in foreign currencies are now converted to Turkish Lira on the last day of the 15-day period allowed for registering a claim against the debtor.

## **VI. Disputed Claims**

If a claim registered by an alleged creditor is partially or wholly disputed by the debtor, the Commissioner prepares a disputed claim report. Creditors with disputed claims can file a separate lawsuit within one month starting from the announcement of the court's approval decision for Concordat Plan.

## **VII. Third-Party Collateral and Co-Debtors**

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As mentioned above, interest accrual on unsecured claims generally stops from the date of the definite moratorium, unless the plan states otherwise. However, Article 303 of the Law provides that the dissenting (but not the consenting) creditors retain all their rights against co-debtors or third parties who provided collateral in favor of the debtor. This includes the right to claim full interest from such third parties.

## **VIII. New Debt during Moratorium**

Debts incurred after the temporary moratorium decision with the Commissioner's permission are not subject to the Concordat terms. In case of default of such debt, they can be subject to enforcement proceedings even during the moratorium. They are also prioritized in payment, coming immediately after certain employment and family law related claims and before all other claims.



### **IX. Criminal Charges for Debtor's Misconduct**

The Law includes provisions for criminal charges for debtors who engage in fraudulent activities to harm creditors, or cause or exacerbate their insolvency through gross negligence or excessive spending. There are also penalties for making false declarations, violating payment terms, or failing to provide assets to the bankruptcy.

### **X. Appeals for Concordat Decisions**

Decisions regarding Concordat (e.g., granting moratorium, approval, annulment) can be appealed to the Regional Court of Appeal within two weeks, and then to the Court of Cassation again within two weeks.

### **Conclusion**

As can be seen above, navigating a debtor's Concordat process requires a proactive and informed approach. Creditors should seek expert legal counsel to understand their specific rights and obligations, effectively participate in the process, challenge dubious practices, and ultimately try to maximize their recovery. As the legal landscape surrounding Concordat and the restructuring law in general in Türkiye is highly dynamic, the amendments in the regulations, new rulings and interpretations should be closely followed.

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