

# Secured Lending in Turkey: Pledge over Bank Accounts

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## Introduction

Commercial transactions are becoming ever more intricate as opposed to what is expected from comprehensive legislative works; and bridging the gap, between merchants, created by the distrust emerging from the commercial obscurity of the features of parties they are engaging with, is of great importance in order to better facilitate the transactions. The need to secure payments and obligations arising from contracts has begotten several remedies in the course of time. A very peculiar one among these remedies is establishing a pledge over bank accounts.

Pledge over a bank account is, in nature, a type of pledge on receivables, inasmuch as a debtor-creditor relationship is established between a bank and a depositor when a customer (hereinafter may also be referred to as “depositor”) deposits an amount of money in his bank account. This approach finds its grounds in the Article 3 of the Banking Law numbered 5411 (“BankL”). In this article, deposit is defined as “money accepted by announcing to the public, verbally or in writing or in any manner, in return for or without a consideration or to be returned on a certain date of maturity or whenever it is called.” As the BankL emphasizes on the fact that the deposit will be *returned on a certain date of maturity or whenever it is called*, it puts bank into the position of the debtor of the underlying relationship, which is the deposit of money into the bank account by a customer. Likewise, the cash deposit in the bank account embodies the receivables of this contractual relationship. Therefore, when a pledge is established over the bank account, it can be regarded as a pledge over the receivables of the customer.

In this article, we aim to foster an understanding of the pledge over the bank accounts and the principles applied thereto in legal practice in Turkey.

## Definition and Background

In Turkish Law, receivables can be secured with personal guarantees or collateral securities. A pledge over assets grants the creditor the authority to sell the pledged asset and collect his receivables in case the debtor fails to pay his debt. As is the case with other securities, the sole purpose of the pledge is to satisfy the creditors' receivables.

Pledge over receivables is considered to be a beneficial type of security especially for the loans given by credit institutions. Pledge over receivables is regulated within the Turkish Civil Code numbered 4721 ( "TCL"). As pledge over bank accounts is regarded as a pledge over receivables, the relevant provisions of the TCL must be taken into consideration in this regard.

The principles underlying the pledge over receivables and the rights associated thereto must be analyzed for depicting the legal scope and implementation of the pledge over bank accounts.

The first principle prevalent over the pledge over receivables in Turkish law is the principle of being secondary. The principle of being secondary means that a pledge established over receivables is legally existent as long as the receivables subject to the pledge have legal validity. In other words, if the assets under the pledge cease to legally exist, due to any reason, then the pledge over the assets will be groundless. In this regard, it is also important to note that when the deposits subject to pledge are transferred to a third party, the pledge over deposits is also transferred to the said third party without the need of concluding an agreement specifically for the transfer of pledge. However, it is also possible for the parties to determine that the pledge will be excluded from such assignment. Hence, an agreement concluded for this purpose will be the proof of waiver of pledge rights. Nonetheless, it is not legally possible to assign the pledge right to a third party without transferring the deposits subject to such pledge.

The second underlying principle of pledge over receivables is the principle of definiteness. This principle means that the scope of the pledge and the receivables over which the pledge is established must be definite. Therefore, when a pledge is established over a bank account, the deposits subject to the pledge must be clearly specified within the pledge agreement.

The principle of being auxiliary, in the context of pledge, means that the assets subject to the pledge cannot be liquidated by the creditor unless the debt becomes due and the debtor fails to pay his debt. Therefore, the creditor is not authorized to collect his receivables from the pledged asset until the contractual non-performance on the debtor's side occurs.

The fourth principle, the principle of indivisibility, signifies that the pledge over receivables cannot be divided based on the partial payments made by the debtor.

When a pledge is established over deposits in a bank account, such deposits constitute the subject of the pledge as a whole; and even if the debtor fulfils a part of his obligations and/or makes a partial payment, the pledge over the deposits does not automatically diminish in proportion to the payment made. Until the obligation secured with the pledge over deposits is fulfilled as a whole, the pledge continues to be legally binding and existent.

The last principle in this context is the principle of priority. In Turkish law, it is possible to establish more than one pledge over the deposits. In this case, according to the principle of priority, the right to collect receivables through the pledged deposits is determined and distributed to the creditors based on the establishment dates of each individual pledge. However, this principle is not an obligatory one. Based on agreements concluded between the debtor and creditors, the ranking of the pledges over the deposits can be altered.

### **Pledge Agreement**

A pledge over a bank account can be established with a pledge agreement concluded between the owner of the deposit and the creditor, which is mostly the bank keeping the deposits for the debtor. A pledge can also be established over a bank account by a legal act or court decisions; however, the establishment of pledge in this way is rarely encountered. In practice, it also can be seen that the pledge over bank accounts is established in favor of third parties other than the bank. Nevertheless, it should also be noted that the fact that the bank has pledge right over the deposits does not give the bank the power of disposition on the deposits. The pledgee bank can only invoke to the pledged deposits in case of a non-performance of the obligations of the debtor.

The receivables subject to the pledge must be cashable and transferable. In TCL, it is stipulated that the pledge can be established only over the transferable rights. If this stipulation is not met, then no pledge can be established over the relevant right. The condition of being transferable means that the transfer of the deposits is not prohibited by a law or an agreement. Therefore, a pledge agreement by which a pledge is established over non-transferable deposits will not have legal effect and bear consequences.

The specific bank account over which the pledge is established must be determined within the pledge agreement; otherwise, a provision in the agreement stipulating that the pledge is established over all bank accounts of a person will be null and void. Because, in that case, the principle of definiteness stated above, will be violated.

It is also possible to establish pledge over prospective deposits. When the prospective deposits are embodied in the bank account, the relevant pledge agreement becomes binding for those deposits. However, in this case, at least the

prospective deposits subject to the pledge agreement must be determined or determinable.

### **Scope of Pledge**

There is no specific rule in the TCL that defines the scope of the pledge over bank accounts. Therefore, general rules of the TCL applying to the pledge over receivables apply to the pledge over bank accounts as well.

According to the TCL, the pledge over bank account provides assurance to the pledgee for the main receivables as well as the contractual interests, overdue interests and expenses for legal proceedings. Furthermore, if the underlying relationship between the debtor and creditor stipulates a penal clause, then the pledge over bank account covers the amount stipulated within the penal clause as well.

The main subject constituting the scope of a pledge over bank account is the total deposits in the relevant bank account. However, if parties prefer, it is also possible to establish the pledge over a partial amount of deposits in the bank account. Unless otherwise agreed, the accrued interest of the deposits in the bank account also falls within the scope of the pledge.

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### **Annotation of Pledge**

When the bank is not a party to the pledge agreement, the consent of the bank for such pledge is not required. In such case, after the parties conclude the agreement, they should inform the bank of the pledge and the bank can add annotation to the records of the account accordingly. When the bank is a party to the pledge agreement, upon the conclusion thereof, the bank annotates the pledge on the relevant bank account.

### **Termination of Pledge**

Pledge over bank accounts may terminate due to a variety of reasons. These scenarios are set out below:

#### **a. Termination of Receivables**

When the pledged receivables cease to legally exist, the pledged established thereupon also terminates. Because, in this case, the subject of the pledge is abolished. However, closing the bank account over which the pledge has been established may not automatically terminate the pledge. Especially, the fact that the bank account is closed or the deposits therein are withdrawn without having the consent of the pledgee does not affect the legal existence of the pledge. In this case, the bank will be held

responsible for the damages incurred by the pledgee. Nevertheless, if somehow, the bank has not been informed of the pledge established over the bank account, then the bank cannot be held responsible.

**b. Waiver of Pledge Right**

The pledgee may terminate the pledge by renouncing his pledge right. However, the waiver of pledge right does not automatically terminate the receivables secured with the pledge. The receivables being the main subject of the underlying relationship between the debtor and creditor remains valid regardless of the existence of pledge.

**c. Merger of Pledgee and Pledgor**

If the pledged deposits transfer to the pledgee based on an agreement concluded between the parties, as the pledgee and pledgor will become the same person, the pledge automatically ceases to exist. Likewise, in case the owner of the bank account established pledge over his account for the debt of a third party, if the owner of the account pays the debt himself and removes the pledge in this manner, as he obtains the rights of the creditor upon the payment he actualized, and as the creditor of the receivables secured with the pledge and the creditor of the pledged deposits become the same person, the pledge over the bank account terminates.

**d. Foreclosure of Pledged Deposits**

Pledge over bank accounts terminates as the foreclosure of the pledged deposits is realized and the receivables of the creditor is satisfied.

If the power of sale foreclosure is granted to the creditor with the pledge agreement, or with another agreement concluded thereafter, the creditor can execute the foreclosure process himself and collect his receivables from the money acquired as a result of foreclosure.

If no power of sale foreclosure is granted to the creditor, then the creditor must start legal proceedings for the foreclosure. The competent authority for the proceedings, i.e. enforcement offices, conduct the foreclosure process; and at the end thereof, the creditor can collect his receivables from the money acquired as a result of foreclosure.



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