

## **THE PRELIMINARY INVESTIGATION PHASE IN TURKISH LAW CIVIL ACTIONS**

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### **Abstract:**

The preliminary investigation phase which became effective with a particular law is a new phase to the actions in Turkish Law. Its written and implementing procedures have been embodied in separate articles. The lawsuit phase is a new procedural action in Turkish Civil Procedure Law. In this study, the research shall be conducted only pursuant to the rules determined in the Civil Procedure Law. Only written proceeding and simplified procedure are included in the CPL. Previously existing accelerated procedure and oral proceeding were terminated. The preliminary investigation phase for the both procedures has been addressed separately. In the research, only the rules of preliminary investigation with respect to these two proceedings have been discussed. The rules other than these were not included in this study. The issue is important and the Turkish Law is regulating the issue in details. The Article is going to explore the issue of the preliminary investigation in Turkish Civil Law.

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**Keywords:** Preliminary investigation, Turkish Civil Procedure Law, Civil actions

### **Introduction**

The preliminary investigation phase has recently entered into force in actions of civil courts.

This phase began to be implemented in civil actions opened since the date of October 1, 2011<sup>1</sup>. The Civil Procedures Law (CPL)<sup>2</sup> entered into force on the date specified above as a new law.

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<sup>1</sup> About the preliminary investigation please see: Karşlı A., Medeni Muhakeme Hukuku Ders Kitabı, İstanbul 2011 p. 447 and p. 629-630; Kuru B./Arslan R./Yılmaz E., Medeni Usul Hukuku, Ankara 2011 p. 339;

The preliminary investigation phase which became effective with this particular law is a new phase to the actions, and its written and implementing procedures have been embodied in separate articles.

Since this lawsuit phase is a new procedural action, the research shall be conducted only pursuant to the rules determined in the CPL. Only written proceeding and simplified procedure are included in the CPL. Previously existing accelerated procedure and oral proceeding were terminated. The preliminary investigation phase for the both procedures has been addressed separately. In the research, only the rules of preliminary investigation with respect to these two proceedings have been discussed. The rules other than these were not included<sup>3</sup>.

The preliminary investigation phase of the CPL has been embodied in between the Articles (Art.)<sup>4</sup>137 and 142 for the written proceedings and in the Art. 320 for the simplified procedures.

### **I. The Preliminary Investigation Phase in The Written Proceeding**

The preliminary investigation shall be conducted after the mutual submission of petitions. During the preliminary investigation, the court investigates the conditions of the action and the preliminary objections, determines clearly the matters of dispute, carries out the necessary procedures for the pretrial procedures and for the parties to present and collect their evidence to the court, and for the actions that it can dispose unrestrainedly over the parties, instigates a compromise agreement and takes a record of such matters (Art.137/1).

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Pekcanitez H./Atalay O./Özekes M., Hukuk Muhakemeleri Kanunu Hükümlerine Göre, Medeni Usul Hukuku, Ankara 2011 p. 373; Muşul T., Medeni Usul Hukuku, Ankara 2012 p. 287 and p. 496.

<sup>2</sup> The Civil Procedures Law shall be referred to as CPL hereafter.

<sup>3</sup> For example: the provision of the Art. 352 of the CPL consists of the preliminary investigation. This particular provision is as follows: subsequent to the preliminary investigation on the file to be conducted by the civil chamber of the regional court of justice, for the files it is determined that the investigation should be conducted by another chamber, the decision is definitive, the application is not done within its period, the conditions for the application are not met, the reasons or the grounds of applications are not submitted, the necessary decision shall be made. The file deemed as not possessing any of the deficiencies above shall be opened for investigation. The provision of the Art. 379 of the CPL is about the new trial which is an extraordinary legal remedy applied against definite judgements and the heading of the article is preliminary investigation of the application. The related provision is as follows: upon the new trial application, subsequent to inviting and hearing the parties, the court reviews itself whether the application is done within the legal period, whether the judgement which is intended to be canceled via the new trial is a definite judgement, and whether the grounds asserted for the new trial are among the grounds specified in the law. In case that one of the conditions above is not met, the judge shall dismiss the action before the consideration of the merits. Please see also Art.147, Art. 156, and Art. 353 of the CPL

<sup>4</sup> The abbreviation ‘Art.’ shall indicate only the related articles of the CPL.

Unless the preliminary investigation is complete and required decisions are made, the investigation shall not be commenced nor shall the date of trial for the investigation be assigned (Art.137/2).

The court principally shall render a judgement pursuant to the file for the conditions of the action and the preliminary objections, and if necessary, may hear the parties about this issue at the preliminary investigation trial before rendering a judgement (Art.138).

After the mutual submission of petitions and the conclusion of the investigation specified in the Article 137 and 138, the court shall determine the date of trial for the preliminary investigation and notify the parties. In the summon issued, in addition to other issues relating to the trial summon and its results, the parties shall be further warned about making the necessary preparations for a compromise agreement, and that in case, only one of the parties attends the trial and demands to continue the proceeding, the inattentive party cannot object the procedures conducted during the trial in its absence and the other party may extend or change its allegation and argument without the consent of the inattentive party (Art.139).

The judge, if sees necessary, shall hear the parties during the preliminary investigation trial in order to render a judgement about the conditions of the action and preliminary objections; and then, pursuant to the allegations and arguments of the parties, determines individually the issues over which the parties agree and disagree. Subsequent to the determination of matters of dispute, the judge instigates a compromise agreement; in case s/he reaches to the conclusion that there shall be accomplished a result about this issue, shall assign for once a new date of trial (Art.140/1-2).

At the end of the preliminary investigation trial, the record of trial shall include whether the parties has accomplished a result from the compromise agreement procedure, and the content of matters of dispute in case a result is not accomplished. This particular record of trial shall be signed by the parties present at the trial. The investigation shall be conducted on the basis of this record of trial (Art.140/3).

The preliminary investigation shall be concluded by a single trial. Under unavoidable circumstances, a new date of trial shall be assigned for once (Art.140/4).

During the preliminary investigation trial, the parties shall be granted the two weeks long peremptory term in order them to present the evidence they included in the petition to the court or to prepare the documents to be brought from elsewhere. In the event that the above issues are not redeemed in the provided peremptory term, it is decided to render that such evidence is dispensed (Art.140/5).

The parties shall extend or change their allegations and arguments freely for the rejoinder and surrejoinder petitions; yet for the preliminary investigation phase, the express consent of the other party is required. In case that one of the parties does not attend the preliminary investigation trial unexcused, the present party may extend or change its allegation and argument without the consent of the inattentive party. Subsequent to the conclusion of the preliminary investigation phase, the allegation or argument shall not be extended or changed. The provisions on amendment and the express consent of the other party in relation to extending or changing the allegation and argument shall be reserved (Art.141/1-2).

Subsequent to the conclusion of the preliminary investigation trial, before commencing the investigation, the judge shall render a judgement by reviewing the foreclosures and objections and exceptions about the period of limitations (Art.142). Subsequent to the conclusion of the preliminary investigation phase, the investigation phase shall commence.

## **II. The Preliminary Investigation Phase in The Simplified Procedure**

The court, if appropriate, shall render a judgement on the basis of the file without inviting the parties to the trial (Art.320/1).

In case a judgement cannot be rendered, at the first trial, the court hears the parties about the conditions of the action and preliminary objections as well as the foreclosures and the period of limitations; and then, pursuant to the allegations and arguments of the parties, determines individually the issues over which the parties agree and disagree. Subsequent to the determination of the matters of dispute, the judge instigates a compromise agreement. Whether the parties come to an agreement and the content of matters of dispute in case the parties do not come to an agreement shall be included in the record of trial; the record of trial shall be signed by the parties present at the trial. The investigation shall be conducted on the basis of this particular record of trial (Art. 320/2).

With the exception of the trial specified in the Art. 320/2, the court shall conclude the hearing of the parties, reviewing of the evidence and conducting of the investigation procedures by two trials. The period between the trials shall be no longer than one month. Under unavoidable circumstances such as the prolongation of the expert examining due to the nature of the matter and the execution of the investigation procedures via rogatory, by indicating the grounds, the judge may assign the date of trial for the period after one month and hold more than two trials (Art.320/3).

For the actions subject to the simplified procedure, in case that the file of which the proceeding was decided to be canceled is dismissed subsequent to its renewal, the action shall be deemed as non-filed (Art.320/4).

### **Conclusion**

The preliminary investigation phase constitutes the second phase of the action after the petitions phase and the regulation of the law seems appropriate to the judicial economy. To be precise, this particular phase shall serve the aim of concluding the actions sooner and at a minimum cost (Art.30). In terms of the number of articles, the written proceeding has been embodied in a more comprehensive way in the CPL (Art.118-315) whereas simplified procedure has been kept more brief (Art.316-322). For the circumstances the related provision does not exist in the simplified procedure, the provision of the written proceeding shall be applied (Art.322). The same applies for the preliminary investigation phase. In one of the articles for the simplified procedure (Art.320), the preliminary investigation phase has been embodied. As for the written proceeding, the preliminary investigation phase has been embodied in more than one article (Art. 137-142). During the simplified procedure, Art. 320 shall be primarily applied for the preliminary investigation phase. For the circumstances this particular article (Art. 320) does not include the related provision, the preliminary investigation provisions of the written, and if necessary, other provisions shall be applied.

### **Bibliography:**

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