THE EFFECTS OF COMMUNITY ACQUIS *(ACQUIS COMMUNAUTAIRE)* ON PROVISIONS OF THE NEW TURKISH COMMERCIAL LAW CONCERNING PUBLIC LIMITED LIABILITY COMPANIES

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Abstract

One of the most important recent changes in Turkish economical life is the new Commercial Law. The new Law serves as the most important medium for the approximation and harmonization of the Turkish company law to the company laws of the Member States. It allows the right of establishment and free movement of capital. The protection granted to the minority shareholders and creditors of the company has been strengthened. Corporate governance has been a key feature applicable to all enterprises. Single shareholder limited liability companies are allowed. As a result, the new regulation seems to correspond with the requirements of the community acquis and has been profoundly affected by the various directives regarding company law.

Keywords: Turkish commercial law, community acquis, public limited liability companies

Introduction

Companies are seen as key operators in the European market. As a member candidate of the European Union, Turkish company law needs to be able to provide rapid and flexible responses appropriate to the constantly developing business environment in the globe. To ensure this, Turkey has made a comprehensive reform in its company law which is mainly governed by the Turkish Commercial Law of 1956.

A harmonized European framework promotes a climate of confidence that is required for the smooth running of the single market, but it also represents a restraint on innovation and imposes additional administrative burdens on companies. This aim should be achieved

through various steps. Especially the new Member States have gone through fundamental reforms to facilitate a modern market economy while implementing the *acquis communautaire* in company law. Company law reforms in various countries initiate to make corporate governance more effective as a distinctive feature of the European company law. The new Turkish Commercial Law aims to integrate Turkish company law with European law and create an infrastructure compatible with Basel II as well as regarding the principles of shareholders democracy, transparency and other distinguishing features of modern company law principles.

As the third Commercial Law in the history of Turkish Republic, the part concerning public limited liability companies has been re-written[95]. The innovations are shaped in accordance with the EU Directives. The directives which shape the framework of Turkish Commercial Law are cited in the rationale. In the field of company law, directive 2009/101/EC[96] regulates safeguards providing for mandatory disclosure requirements, limiting the grounds for invalidity of the obligations entered into by companies, as well as limiting the grounds for nullity of public limited liability companies. The second directive[97] includes rules on the formation of public limited liability companies as well as the maintenance and alteration of their capital. The third[98] and sixth directives[99] harmonize national regulations for the protection of shareholders and creditors when a domestic merger or division concerning public and private limited liability companies is carried out. Fourth Council Directive is about the annual accounts of certain types of companies. According to this regulation, the annual accounts shall give a true and fair view of the company's assets,

[95] For an English translation of TCL articles concerning merger, spin-off and conversion as well as public limited companies in general see: New Turkish Commercial Code, A Blueprint for The Future (www.pwc.com/tr).

[96] Before 21 October 2009, the First Council Directive 68/151/EEC of 9 March 1968 was applicable. The first regulation from 1968 was about co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31968L0151:EN:NOT).

[97] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0091:EN:NOT

[98] Before 1 July 2011, the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies was applicable. This Directive has been substantially amended several times. In the interests of clarity and rationality the said Directive has been codified. The most important reasons for such review is to adjust the legal protection mechanisms throughout the EU especially concerning shareholders, employees' and creditors rights. Furthermore, the necessity for the extension of protective mechanisms to cover certain legal practices which in important respects are similar to merger, so that the obligation to provide such protection cannot be evaded is being aimed.

[99] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31982L0891:EN:NOT).

liabilities, financial position and profit or loss (Art. 2)[100]. Seventh Council Directive is on consolidated accounts[101]. Any undertaking governed by national law is required to draw up consolidated accounts and a consolidated annual report under the conditions cited in Art. 1 of this regulation. Eighth Council Directive[102] regulates the approval of persons responsible for carrying out the statutory audits of accounting documents. Eleventh Council Directive[103] is on disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State. Directive 2009/102/EC[104] is about single-member limited liability companies and requires Member States to recognize this in their domestic provisions. Last but not least, Council Directive 2001/86/EC[105] of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

According to the screening report, *"Turkey indicated that it does not expect any difficulties to implement the acquis by accession"*[106]. Regarding this observation, we will try to give a brief summary of the effects of EU Directives on Turkish public limited liability companies in the scope of new Turkish Commercial Law.

Mandatory Disclosure Requirements

The formation of a company commences with the preparation of the articles and minutes of formation in a notarial deed (TCL Art. 339/1) and completed with its registration in the commercial register (TCL Art. 354/1). In the application for registration, the address of company headquarters has to be stated and the power of representation of each member of the board of directors, whether they have a sole power of representation or whether they are only authorized to represent the company jointly with another member of the management board or a procuration officer shall be stated (TCL Art 354/1-b, f, g). Anyone is allowed to obtain from the commercial register an authorized copy of such documents (TCL Art. 35/1). This regulation is in line with the provisions of the Directive 2009/101/EC.

A declaration regarding incorporation shall be signed by the founders. This declaration shall be prepared in accordance with the principle of providing information in a true and fair view manner (TCL Art. 349/1). This declaration serves as an instrument of

[100] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31978L0660:EN:NOT
[101] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31983L0349:EN:NOT
[102] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31984L0253:EN:NOT
[103] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0666:EN:NOT
[104] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0102:EN:NOT. Before 21 October 2009: Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies.
[105] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0086:EN:NOT
[106] Screening Report Turkey, 10 May 2007, Chapter 6, Company Law, p. 2.

disclosure to secure the capital, to prevent the abuse of company in the benefit of the founders, to facilitate the audition of the company and liability suits[107].

The new TCC orders all capital stock companies to create a web site. If a company already has a web site, then it is obliged to reserve a part of this for "*information society"* services (TCL Art. 1524). This internet site shall be used for corporate announcements, publishing financial statements and reports. New transparency requirements also oblige small and medium-sized enterprises (SMEs) to establish web-sites and to visualize all data relevant to the company and in which shareholders and stakeholders have an interest. Access to the web site is available to everyone and ensures the right to access direct information via internet.

In Article 3 of the Directive 2009/101/EC, Member States are obliged to ensure that the filing by companies, as well as by other persons and bodies required to make or assist in making notifications, of all documents and particulars which must be disclosed pursuant to Article 2 is possible by electronic means. A pilot application for online registry of companies has started at the Mersin Chamber of Commerce[108].

Limiting The Grounds For Invalidity Of The Obligations Entered Into Or On Behalf Of The Companies

The articles of association must be signed by the founder(s) and their signatures must be authorized by a notary (TCL Art. 339/1). The minimum content of the articles to be found in a public limited liability companies association are shown so that that third parties may be able to ascertain basic information concerning the company, especially particulars of the persons who are authorized to bind the company (Directive 2009/101/EC).

Those who conduct transactions in the name of the company prior to registration shall be personally liable. In the case of more than one person acting, they are jointly and severally liable. However, if it is declared that such transactions are carried out on behalf of the company and if these are accepted by the company within a three month prescriptive period following registration, the company shall be exclusively responsible for these transactions (TCL Art. 355/2). This regulation is meets the requirements of the article 8 of the Directive 2009/101/EC.

According to the previous regulation, any transactions of a company which are outside the scope of the business activities shown in the articles of association were deemed

[107] Rationale of TCL Art. 349.
[108] Commission Staff Working Paper Turkey 2011 Progress Report, Brussels 12.10.2011, Chapter 6, Company Law p. 60.

as invalid. Such transactions were called as *"ultra vires"*[109]. An *ultra vires* transaction was considered beyond the purposes or powers of a public limited liability company and a corporation in general. The former legal view was that such acts were void. Under this approach a corporation was formed only for limited purposes and could do only what it was authorized to do in its corporate charter. Parallel to the regulation of the 2009/101/EC, *ultra vires* principle has been renounced[110]. Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs (Directive 2009/101/EC Art. 10; TCL Art. 371/2). But if the third party was aware that the transaction is outside the scope of activity or they were capable of being aware of the situation then this transaction does not bind the company (TCL Art. 371/2). Therefore obligations entered into in the name of the company are valid to the greatest possible extent in order to ensure the protection of third parties.

Limiting The Grounds For Nullity Of Public Limited Liability Companies

As a rule, a public limited liability company cannot be declared null and void. But if the interests of creditors, shareholders or public in general are being risked or violated during the incorporation process, on the requests of Board of Directors, The Ministry of Industry and Trade, the related creditor or shareholder the commercial court of first instance at the location of the company's headquarters shall rule on the termination of the company (TCL Art. 353/1). The foregoing right of action becomes time-barred if action is not brought within three months of publication in the Turkish Official Gazette of Commercial Register. This regulation is corresponding to the articles 11 and 12 of the Directive 2009/101/EC[111].

Corporate Governance

Corporate governance is a topic which is as old as the large companies. The starting point of corporate governance debate is the existence of a group of senior managers who are separate and distinct from the shareholders in large companies[112].

Corporate governance is one of the keys features of the new Turkish Commercial Code. It is applicable to all enterprises[113]. The new regulation addresses three dimensions of the problem: the conflict between managers and shareholders, the conflict between

[109] For ultra vires doctrine and its application in English law see: Paul L. DAVIES, Gover and Davies' Principles of Modern Company Law, 7th Ed., London 2003, pp. 130-142.
[110] See for further details: Ünal TEKINALP, The New Public and Private Limited Companies and The Essentials of Single-Member Company, 2nd Ed., Istanbul 2011, p. 143, nr. 12-83 ff.
[111] Rationale of TCL Art. 353.
[112] DAVIES (fn. 15) p. 291.
[113] New Turkish Commercial Code (fn.1), p. 9. About the understanding of corporate governance in Turkish legal system see: Ali PASLI, Corporate Governance in Public Limited Liability Companies, Istanbul 2004, pp. 61 ff.

controlling and minority shareholders, and the conflict between shareholders and non-shareholder constituencies[114].

The corporate governance approach of the new Law is based on four pillars: full transparency, fairness, accountability and responsibility[115]. The rights of shareholders to file lawsuits before the courts, access information and perform oversight have been insured through various effective mechanisms. The list of minority rights has been expanded. Representation possibilities for group of shareholders and the minority in the board of directors have been increased (TCL Art. 360)[116]. Last but not least, professionalization in corporate bodies has been fostered (TCL Art. 359/3).

Single-Shareholder Public Limited Liability Company

Another significant innovation introduced through the new Turkish Commercial Law is the single shareholder companies. In alignment with the EU Directive 2009/102/EC, a public (or private) limited liability company may be a single-shareholder company from the time of its formation, or may become one because its shares have come to be held by a single shareholder[117] (TCL Art. 338/1, 2). If all the shares are held by a single shareholder, board of directors shall be notified about the situation in writing within seven days beginning from the date of transaction causing this result (TCL Art. 338/2). The board of directors shall submit this notification within seven days to the commercial register for announcement. In this case, the name, place of residence and nationality of the sole shareholder shall be registered and announced (TCL Art. 338/2). This regulation also meets the requirements of the Directive 2009/102/EC.

The single-shareholder shall exercise the powers of the general meeting of the company (TCL Art. 408/3). Decisions taken by the single-shareholder shall be drawn up in writing in order to be valid (TCL Art. 408/3). These regulations reflect the principles in the EU Directive 2009/102/EC article 4.

Contracts between the single-shareholder and his company as represented by him shall be drawn up in writing. This rule shall not apply to operations considered day-to-day transactions[118].

[114] For further details concering these topics see: Reinier KRAAKMAN/John ARMOUR et al., The Anatomy of Corporate Law, A Comparative And Functional Approach, 2 nd Ed., New York 2009, pp. 57-113.
[115] New Turkish Commercial Code (fn.1), p. 9.
[116] New Turkish Commercial Code (fn.1), p. 9.
[117] For a detailed analysis of single-shareholder limited liability companies see: TEKINALP (fn. 15), pp.1 ff.
[118] New Turkish Commercial Code (fn.1), p. 11.

Detailed Regulation And New Possibilities In Structural Changes

The new Law includes major changes in the field of structural reorganizations, namely mergers (TCL Art. 134-158), divisions (TCL Art. 159-179) and change of corporate form (TCL Art. 180-190). Directive 2011/35/EU[119] and Swiss Merger Act from July 1, 2004 serve as a model to the new regulation.

The main purpose of the regulation is to increase the flexibility of businesses changing their legal form and transferring assets and liabilities to different legal entities[120]. The new Law is mainly concerned with the following corporate transactions:

- Statutory mergers,
- Demergers,
- Spin-offs,
- Transfers of a business or parts of a business where the assets and liabilities in question are transferred *ex lege*,
- Transformation of companies.

Common principles which should govern three types of structural changes are; nationality, corporate mobility and protection in general[121]. In the new Law, unlike Swiss regulation, cross-border transactions are not covered (nationality principle). Corporate mobility is allowed and has been regulated in detail. But the probably the most important innovation is the increased protection of shareholders and creditors[122] during structural changes.

[119] As the Third Council Directive 78/855/EEC of 9 October 1978 based on Art. 54(3)(g) of the Treaty concerning mergers of public limited liability companies has been substantially amended several times, in the interests of clarity and rationality the said Directive has been re-codified.

[120] Mergers and acquisitions are to be notified by the merging companies as well as the controlling and the controlled enterprises within the scope of the *"Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board"* (Communiqué No. 2010/4). The Board allows the transaction if it is not contrary to the aforementioned *Communiqué*. In case the transaction is contrary to the *Communiqué*, the Board takes measures and examines the situation in accordance with the Art. 7 of the Act No. 4054.

[121] New Turkish Commercial Code (fn.1), p. 15.

[122] From another perspective, the level of protection for shareholders and creditors seems to be overstated. "For instance, from the entrepreneurs' point of view, the protection of minority rights in the Merger Act seems to be somewhat exaggerated, which tends to reduce the intended flexibility. Furthermore, the easements for small and medium enterprises (SME) can sometimes put the creditors at a disadvantage" Hans Caspar von der Crone / Andreas Gersbach / Franz J. Kessler / Martin Dietrich / Claudia Fritsche / Katja Berlinger, www.fusg.ch - <http://www.fusg.ch/en/overview/background/index.php?datum=2003-08-22>, status: Aug. 22, 2003.

List Of Abbreviations

Art	Article
EEC	European Economic Council
edn	edition
et al.	et alii
fn	footnote
p	page
TCC	Turkish Commercial Law

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