

ASSIGNMENT OF SHARES AND SHARE CERTIFICATES IN JOINT-STOCK COMPANIES AS PER NEW TURKISH COMMERCIAL CODE NO. 6102

Turkish Commercial Code No. 6102 entered into effective as of 01.07.2012, has brought important amendments with regard to restriction of assignment of shares and share certificates by the articles of association. In new TCC, the amendment regarding this matter has been predicated on Swiss Code of Obligations. The provisions on the restriction of assignment of registered share or share certificates by the articles of association has been written in accordance with new comprehension considering the structure of joint-stock company and the legal order with regard to restriction of assignment of shares by the articles of association has been subjected to the changeover. In addition to this, the fact that the shareholders possessing minority shares have difficulty in assignment of registered shares and are inhibited from the disposition due to legal and factual obstacles sought despite of “the theory of division” are required the comprehensive amendments to apply.¹

Pursuant to relevant articles of the former Turkish Commercial Code, the company could reject the assignment of shares with a provision to be added to the articles of association and without showing any reason. As per Article 493/2 of TCC, it has been prescribed that the assignment of shares could be rejected when any important reason in terms of business subject of the company or economic independence of the establishment has occurred. Pursuant to new TCC, unless the important reasons included in the provision of law have occurred the shares shall not be assigned.

Pursuant to article 489 of the new TCC, the basic principle concerning the transfer of ownership of bearer share certificates is that the transfer of the share is only valid with regards to the company and third persons by the transfer of possession of the share. On the other hand, the basic principle concerning the transfer of registered shares is the transfer of registered shares without constraint. Pursuant to article 490 of the new TCC, unless otherwise stated in the law or articles of association, registered shares may be assigned notwithstanding any restriction.² In case the registered share is attributed to a nonnegotiable instrument, it is required to endorse the registered share and to declare the assignment for bearer shares in addition to the transfer of possession in order to transfer the nonnegotiable instrument.

¹ 6102 sayılı Türk Ticaret Kanunu ve 6362 sayılı Sermaye Piyasası Kanununa Göre Anonim Ortaklıkta Esas Sözleşmesel Bağlam, Necdet Uzel, 1. Baskı-İstanbul, Nisan 2013

² Prof. Dr. H. Ercüment Erdem Yeni Türk Ticaret Kanununda Payın Devrine İlişkin Yenilikler, Global Dergi, Kasım 2015

The provisions which enable the restriction and even the prohibition of the assignment of registered shares by articles of association have been regulated in favor of the shareholder. Although the effect of the context of articles of association is restricted it has preserved its place in the law due to the fact that it is required for joint stock companies. In the Turkish Commercial Code no. 6102, because of the difficulties which may occur by the changes on the transfer restrictions, in case the shares could be transferred, it has been enabled the shares to be purchased by the partnership.

Article 493 of the new TCC regulates the transfer restriction to be applied in terms of the registered shares which are not quoted to the stock exchange. According to this, the transfer of aforementioned shares could be rejected by asserting an important reason prescribed in the articles of association or offering the purchase of shares to the transferor at the real value. Hence, the regulation with regard to avoiding from registering the share transfer of the company to the share ledger without showing any reason has been abandoned.³

Important reasons inhibiting the share transfer have been stated in the second paragraph of article 493 of the Code. As per this article, in case the provisions of articles of association with regard to composition of shareholders justify the rejection of approval in terms of the subject of the company or economic independence of the establishment, the company may avoid from the approval of the share transfer.

The other situation in which the share transfer may be inhibited in the joint stock companies is stated in article 493/1 of TCC as the company offers the shares to be purchased at their real value on behalf of the company or other shareholders or third parties. Pursuant to article 493/3, it is stated that if the transferee avoids from declaring that he/she has received the shares on his/her behalf or account the company may reject registering the share transfer to the share ledger. In article 493/4 of the new TCC, it is stated that in case the shares are acquired by way of heritage, portion of the inheritance, the provisions of property regime between the spouses or compulsory execution, the company may only reject approving the share transfer by offering the shares to be purchased at their real value.

There have been two theories with regard to the situations in which the company do not approve the share transfer. One of the aforesaid theories is the theory of “division” and in case the company does not approve the share transfer, the share transfer shall be void in terms

³ Prof. Dr. H. Ercüment Erdem Yeni Türk Ticaret Kanununda Payın Devrine İlişkin Yenilikler, Global Dergi, Kasım 2015

of the company. As to the theory of unity, in case the company does not approve the transfer even the ownership of the share shall not pass to the transferee. It is regulated in the article 494 of the new TCC that in case the share transfer is approved by adopting the theory of unity, the ownership of the shares and all rights connected with the shares shall remain at the possession of the transferee.

I. VALIDITY OF RIGHT OF PURCHASE, PRE-EMPTION RIGHT, RIGHT OF REDEMPTION AND SUBSCRIPTION RIGHT

In joint stock companies, in practice, the shareholders sign a binding agreement between each other. These agreements which are only binding in terms of the shareholders include regulations with regard to right of purchase, pre-emption right, right of redemption and subscription right in favor of the shareholders. Although the shareholders include provisions in the articles of association in this respect so as to bring bindingness to the agreement which is made between each other, these provision which are not related to the structure of joint stock companies shall not be qualified as binding except the shareholders.

There have been two different opinions whether aforementioned rights shall be included in the articles of association. Within the scope of the provisions of context of articles of association, as opposed to the opinion which accepts that pre-emption right or subscription right may be entitled to the shareholders, it is particularly referred in the doctrine studies which have recently gained prevalence and constitute the majority opinion that such rights shall not be validly included in the articles of association pursuant to article 493/7 of TCC.⁴ Contrary to the effective provision in the former TCC, it is not possible to include right of purchase, pre-emption right, right of redemption or subscription right in the articles of association pursuant to the article 493/7 of TCC. It has been aimed to protect the interest of the shareholders preeminently by the new TCC.

The principle of share transfer without constraint has been guaranteed by the article 493 of TCC. While the shareholder transfers his/her shares it is not possible to inhibit the share transfer based on any reasons except the important reasons stated in the law. In this sense, in case the shareholder transfers his/her share to the other shareholder regardless of fulfilling this liability in spite of the existence of pre-emption right set forth in the articles of

⁴ 6102 sayılı Türk Ticaret Kanunu ve 6362 sayılı Sermaye Piyasası Kanununa Göre Anonim Ortaklıkta Esas Sözleşmesel Bağlam, Necdet Uzel, 1. Baskı – İstanbul, Nisan 2013

association it shall not be possible to bring forward this right to the shareholder who takes over the shares.

Pursuant to the complication prohibition of restriction of share transfer imposed by Commercial Code, the transferor shall not be forced to inform the current shareholders of his/her intention to purchase his/her shares by using subscription right and it is also not possible to transfer the shares to the persons prescribed in the articles of association by using any innovative right purporting as a right of purchase, pre-emption right and right of redemption. This content stated by the law of articles of association shall protect the shareholder from additional liabilities.

Pursuant to article 493/2 of TCC describing the general principle and important reason set forth in the article 493/7 of TCC, it shall not be justified that the request for approval and recognition with regard to share transfer may be rejected in case of not becoming a party to the shareholders agreement or that the provisions of articles of associations prescribing that it may be rejected are valid. It is not possible to consider the aforementioned rejection reason as an important reason within the meaning of article 493/2 of TCC. The amendments in TCC has been made the share transfer easier and has been prevented the additional conditions or liabilities to be imposed except those stated in the articles of association.⁵

REFERENCES

1. 6102 sayılı Türk Ticaret Kanunu ve 6362 sayılı Sermaye Piyasası Kanununa Göre Anonim Ortaklıkta Esas Sözleşmesel Bağlam, Necdet Uzel, 1. Baskı-İstanbul, Nisan 2013
2. Prof. Dr. H. Ercüment Erdem Yeni Türk Ticaret Kanununda Payın Devrine İlişkin Yenilikler, Global Dergi, Kasım 2015

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⁵ 6102 sayılı Türk Ticaret Kanunu ve 6362 sayılı Sermaye Piyasası Kanununa Göre Anonim Ortaklıkta Esas Sözleşmesel Bağlam, Necdet Uzel, 1. Baskı – İstanbul, Nisan 2013