

CRIMINAL LAW RESPONSIBILITY OF LEGAL ENTITIES IN TURKEY

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Abstract

According to Turkish Law, only natural persons can be counted as perpetrators. Due to their characteristics, legal entities cannot directly commit crimes and cannot be perpetrators. Nevertheless, the criminal liability of the legal entities due to the actions of the persons who act on behalf of legal entities had been a hot topic until the Turkish Penal Code no 5237 came into force. Provisions about the legal entities' criminal liability in several penal codes other than the abovementioned Turkish Penal Code were another matter of the debates. Further, the Constitutional Court of Turkey held that legal entities' criminal responsibility was not unconstitutional. In the Code No 5237 that came into force on the 1st of June, 2005; it was explicitly stated that legal entities cannot be imposed with penal sanctions. Since criminal responsibility is personal, the legal entities, which do not have any ability to commit an offence, cannot be punished due to the actions of persons who act on behalf of legal entities. In other respects, according to article 20 of the Turkish Penal Code, security measures can be applied to legal entities whereas penal sanctions cannot be applied. By Turkish Penal Code Art 20, provisions regarding legal entities' criminal responsibility in other penal codes were repealed. However, it is hard to claim that the debate regarding criminal responsibility of legal entities is over for the doctrine. The security measures to be imposed on legal entities are prescribed in Art 60 of the Turkish Penal Code. Security measures to be imposed within Art 60 are following: Cancellation of permit and confiscation. In this paper, the conditions for legal entities' security measure responsibility; the debates in this regard and the provisions made will be examined.

Keywords: legal entities, confiscation, cancellation of permit, security measure, criminal responsibility.

JEL Classification: K14

1. Introduction

The term 'person' refers to the ownership of right. Initially it had been acknowledged that only the natural persons were entitled to be owner of the rights, however, by the passage of time, by force of the needs of the social life, it was acknowledged that legal entities that are formed of group of people or commodities could be counted as such 'persons' to obtain rights.

The people, that are physically embodied, are called natural persons, whereas the bodies or groups, which have a common purpose or principle, are called legal entities.

Since the legal entities cannot act themselves, the people act on behalf of them. This fact is the centre of the debate that whether the legal entities would be liable from the acts of these people. The responsibility of the legal entities is straightforward within private law and it is possible to see several provisions within the Turkish Code of Obligations and Turkish Civil Code. Nonetheless, the responsibility of the legal entities within the context of criminal law has been a matter of debate for long. The Turkish Penal Code, which came into force in 2005, specified that the only security measures responsibility applies to the legal entities. These measures will be analysed below.

2. Penalising legal entities

All legal actions and activities within the limits of operation fields and goals of the legal entities² are carried out by their bodies, their representatives, or by persons taking on tasks for the legal entity in its operational frame. As opposed to natural persons, the legal entities do not have human-specific ability of locomotion. Additionally, they lack of will³. Furthermore, since they don't

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² It is generally accepted that legal entities are the unions which have common purposes. Bkz.: Kangal, Zeynel T., *Tüzel Kişilerin Ceza Sorumluluğu*, Ankara 2003, 26; Centel, Nur/Zafer, Hamide/Çakmut, Özlem, *Türk Ceza Hukukuna Giriş*, 10th edition, Istanbul 2017, 248; Özay, İl Han, *Günüşiğinde Yönetim, XXI inci Yüzyılın İlk Çeyreğinin "Jön Türk" lerine*, Istanbul 2004, 120.

³ See: Hatemi, Hüseyin, *Kişiler Hukuku Dersleri*, 2nd edition, Istanbul 2001, 142, 143.

have the ability of locomotion, they are intrinsically not capable of perpetrating⁴. As a matter of fact, the reasons that set aside or reduce the criminal liability in our aforementioned Penal Code are designed for natural persons. In Turkish Law, it is accepted that legal entities who do not have the ability of locomotion, cannot be perpetrators.

In our law, it had been debated for years whether legal entities should be penalised because of the actions of their bodies; representatives or the persons who acts on behalf of the entity, until 1 June 2005, when the new Turkish Penal Code No. 5237 came into force. Further, the determination of the criminal liability of the legal entities in some other penal codes increased the tension of the debate. Moreover, in several occasions, the Constitutional Court has ruled that the criminal responsibility of legal entities is not contrary to the Constitution⁵. However, in the second paragraph of Article 20 of the Turkish Penal Code No. 5237, it is clearly stated that the penal sanction cannot be applied to the legal entities that are deemed non-perpetrators. Penalising legal entities, which lack the ability of committing a crime, owing to the actions of others is not expedient, since the criminal responsibility is personal. Nevertheless, it has been expressed in the in the second paragraph of Article 20 that it is possible to apply security measures against the legal entities as a consequence of the crimes committed. The security measures to be applied to legal entities in our law are stipulated in Article 60 of the Turkish Penal Code (TPC). However, in the doctrine some claim that if the security measures are to be applied to legal entities, then it means that the system acknowledged that they are capable of committing a crime as well. Since legal entities cannot commit a crime, it is argued that the security measures, which are somehow the sanctions for the committed crimes, should not apply. Other objections to the legal regulation are stated against article 249 of the Criminal Procedure Code, which regards to the representation of the legal entity⁶. In the doctrine, some claim that the security measures are based on penalisation in nature, therefore the system accepts the criminal liability of legal entities⁷. After Article 20 of the Turkish Criminal Code came into force, the provisions concerning the criminal responsibility of the legal entities established in the subsidiary criminal codes have been revoked. For instance, according to Code of Checks no. 5941, the banks are not imposed with criminal penalty; administrative fine is imposed on them (a. 7).

Although criminal responsibility for legal entities is not accepted, it is regulated that administrative fine shall be given to legal entities in cases where some crimes are committed for the benefit of the legal entity by an organ or a representative of the legal entity or, while not an organ or a representative, a person who takes on task in the operational frame of the legal entity⁸; provided that the act must not constitute a misdemeanour that requires a heavier administrative fine. The crimes causing the execution of the administrative fines are stated in Article 43/A of the Misdemeanour Code⁹. These crimes are fraud that regulated in Art 157 and 158 of the TPC; collusive tendering that regulated in Art 235; ‘fraud during the discharge of contractual obligations’ that regulated in Art 236; bribery that regulated in Art 252; ‘Laundering of Assets Acquired from an

⁴ Özgenç, İzzet, *Ceza Hukuku, Genel Hükümler*, 13th Edition, Ankara 2017, 197; Ünver, Yener, *Ceza Hukukunda Objektif Sorumluluk*, “Criminal Law Days, Turkish Criminal Code at 70th Anniversary , General Provisions (26-27 March 1997 Istanbul)”, Istanbul 1998, 133; Özen, Muharrem, *Türk Ceza Kanunu Tasarısının Tüzel Kişilerin Ceza Sorumluluğuna İlişkin Hükümlerine Bir Bakış*, <http://dergiler.ankara.edu.tr/dergiler/38/283/2585.pdf> (A.D. 10.09.2010), 80.

⁵ See at all of this: Centel/Zafer/Çakmut, 252-254. See for criminal responsibility: Ünver, 132.

⁶ Özbek, Veli Özer/Doğan, Koray/Bacaksız, Pınar/Tepe, İlker, *Türk Ceza Hukuku, Genel Hükümler*, 8th Edition, Ankara 2017, 205.

⁷ it is stated that criminal responsibility is accepted. See: Bayraktar, Köksal, *Türk Ceza Kanunu Tasarısına İlişkin Genel bir Değerlendirme ve Genel Hükümler Üzerine Birkaç Birkaç Eleştiri*, “TBB Türk Ceza Kanunu Reformu/TBB Turkish Penal Code Reform”, Second Book/İkinci Kitap, Ankara 2004, 29; Ermiş, Münip, *İfade ve Örgütlenme Özgürlüğü Açısından Tasarı*, “TBB Türk Ceza Kanunu Reformu/TBB Turkish Penal Code Reform”, Second Book/İkinci Kitap, Ankara 2004, 259, 260; Özcan, Onur, *Tüzel Kişilerin Ceza Sorumluluğu*, “Alman-Türk Karşılaştırmalı Ceza Hukuku/Das Strafrecht im deutsch-türkischen Rechtsvergleich, Dedicated to Prof. Dr. Köksal Bayraktar”, Vol. III, Istanbul 2010, 311.

⁸In Misdemeanors Law, it is accepted that perpetrator can be only a real person. See: Tiedemann, Klaus, *Strafrechtliche Grundprobleme im Kartellrecht*, “NJW”, 1979, Issue 37, 1849; Mitsch, Wolfgang, *Ordnungswidrigkeiten, Recht der Ordnungswidrigkeiten*, 2nd Edition, Berlin Heidelberg 2005, 55, 165; Többens, Hans W., *Die Bekämpfung der Wirtschaftskriminalität durch die Troika der §§ 9, 130 und 30 des Gesetzes über Ordnungswidrigkeiten*, “NSZ”, 1999, 6; Rebmann, Kurt/Roth, Werner/Herrmann, Siegfried, *Gesetz über Ordnungswidrigkeiten, Kommentar*, Vol. 1, 3rd Edition, Stand 2010, Vor § 1, en. 46.

⁹ See: Akbulut, Berrin, *Ceza Hukuku, Genel Hükümler*, 4th Edition, Ankara 2017, 340.

Offence' that regulated in Art 28; embezzlement that regulated in the the Article 160 of the Banking Code No:5411; smuggling that regulated in code no 5607, the crime that regulated in (ad) Art 5 of Petrol Marketing Code no 5015 and financing terrorism crime that regulated in Art 8 of the Anti-Terror Code no 3713. A fine from ten thousands TL to two million shall apply in the case of these crimes are committed for the benefit of the legal entities.

According to Misdemeanour Law¹⁰, in addition to the crimes, administrative sanctions shall apply to the legal entities because of the committed misdemeanours. The Art 8 of Misdemeanour Code stipulates that administrative sanctions may apply to legal entities due to the acts their bodies; representatives or the persons who acts on behalf of the entity. As mentioned before, the legal entities do not count as perpetrators; however, they are responsible from the acts of natural persons with regards to administrative sanctions. One may observe that personal liability in the TPC does not apply to Misdemeanour Code. Art 8 is a basic provision. It does not reveal the kind or scope of the sanctions. Likewise it does not necessarily impose sanctions. Hence, there are special provisions for each misdemeanour that shows the kind of the sanction.

3. Security measures on legal entities

3.1. In general

Security measures applied to legal entities¹¹ are regulated in Article 60 of the Turkish Penal Code. Not being able to be a perpetrator does not remove the consequent sanctioning for the legal entity. If it is legally recognized, it is possible that another natural person or legal entity is held accountable for the act carried out by another person. As a matter of fact, the legal responsibility of legal entities is accepted in both private and administrative law. Although criminal responsibility is not accepted in criminal law, it has been adopted to execute security measures to legal entities in cases where the crime is committed by an organ or a representative for the benefit of the legal entity.

The application of security measures on legal entities is accepted for various purposes. The act of the natural person is carried out for the benefit of the legal entity. All the benefits provided by the crime are transferred to the legal entity. There occurs an increase in the patrimony of the legal entity through the benefit provided unlawfully. By holding the legal entity responsible, it is aimed to take back the earnings obtained in such ways¹². In addition, the amount of damage or the danger of damage to the society or to persons caused by the acts committed for the benefit of the legal entity is much higher¹³. Therefore, continuing the acts committed by abusing the permit will result in the continuing acts of damaging or endangering the society or the persons. Security measures are implemented to eliminate this danger. Apart from these, by the sanction applied to the legal entity, it is aimed to indirectly prevent the acts of the body or representatives of the legal entity. It is a matter of impelling legal entities to be conscientious in the selection, control and instruction of persons acting for the legal entity. In this selection, it should be targeted that not only professional qualification, but also integrity and honesty are paid attention¹⁴.

3.2. Security measures

In the article no. 60 of the TPC, two security measures to be applied on legal entities are accepted. These are cancellation of permit and confiscation. However, in order to implement the security measure on the legal entity, regulation of the article 60 is not enough, the statement that the

¹⁰ It is controversial for the Turkish Law that whether Misdemeanour Law should be considered in the scope of Criminal Law. For detailed analysis see Akbulut, 68 ff.

¹¹ Legal entities are subjected to different distinctions. See: Yarsuvat, Duygun, *Tüzel Kişilerin Ceza Sorumluluğu*, "Dedicated to Prof. Dr. Sahir Erman", Istanbul 1999, 905-907; Kangal, 37-39.

¹² Mitsch, 167; *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten (KKOWiG)*, 3rd Edition, München 2006, § 30, en. 18

¹³ Mitsch, 172.

¹⁴ Göhler, Erich, *Ordnungswidrigkeitengesetz*, 15th Edition, München 2009, Vor § 29 a, en. 11.

security measure will be applied on the legal entity in the related crime type is also necessary. (TPC a. 60).

Cancellation of permit. For the application of the cancellation of permit measure, it is necessary to have a private legal entity acting on the basis of a license given by a public institution. For the legal entities subjected to procedure such as license, the cancellation of permit is in question. For example, security measure may apply if a GSM company gives some of the information about its customers to another company to take advantage¹⁵. Cancellation of permit will also be in stake in cases such as producing narcotics or stimulants in a company that is licensed to produce perfumes, money laundering in a bank licensed to banking activity, practicing usury in a company licensed to make jewellery. The implementation of security measures has not been accepted for public legal entities.

The crime must be committed by the affiliation of an organ or a representative of the private legal entity.

It must also be committed by abusing the authority provided by the activity permit. In the act contrary to the authorization given to legal entity, in the case in question, the starting point is that the perpetrator acts in the feature of the legal entity as an organ. The examination depends on whether it acts as an organ. When acting within the scope of the duty, it is necessary that the permission granted to the legal entity to be abused. If the act is carried out by taking advantage of an opportunity or of the duty, it is not in question to apply the measure to the legal entity due to the act of the organ or the representative. The crime must be committed through the transgression of the given authority or by an unauthorized activity.

The crime committed by the organ or the representative must be an intentional one. If the crime committed is a negligent offense, the cancellation of permit will not be in question.

There must be a gain for the benefit of the legal entity through committing an intentional crime. The legal entity must gain benefit from the offense that the organs or representatives committed by abusing the authority. If the person commits the crime for his/her own benefit, the cancellation of permit will not be applied to the legal entity.

The organ or the representative must be convicted of the intentional crime that they committed. It is not a matter of question to apply the cancellation of permit on the legal entity in a case where the natural person who commits the crime is not convicted. It does not matter whether the sentence is an administrative fine or imprisonment. Application of the security measure of the legal entity is not in question in cases where the perpetrator lacks the ability of fault or where the penalty is not the case for the other circumstances of punishment are not fulfilled. As can be understood from what is stated, the rule of hyperactivity (*Hyper akzessorietät*) is valid when applying the security measures on the legal entity. The existence of conviction is sufficient; it is not required to be fulfilled. It is also necessary to apply the cancellation of permit on the legal entity in cases where the short term imprisonment is converted to alternative sanctions or the sentence of imprisonment is delayed.

It is necessary that the court decides injunction. The measure of the cancellation of permit is given according to the conviction. If the court decides on conviction, it must also decide on the cancellation of permit for the legal entity. If the conviction is not granted, it is not possible to apply the cancellation of permit for the legal entity as a legal result¹⁶. The decision does not affect the existence of legal entity; it prevents the legal entity from the activity subjected to the permit¹⁷.

The application of the measure must be stated in the relevant provision regarding the crime in question.

In cases where the cancellation of permit may result in more severe consequences than the act committed, the judge may not enact these measures (TPC a. 60/3). That is, the principle of proportionality related to the cancellation of permit has been included. For example, the court may

¹⁵ Özbek/Doğan/Bacaksız/Tepe, 647.

¹⁶ Centel/Zafer/Çakmut, 720.

¹⁷ Özgenç, 880.

decide not to cancel the permit in a case where so many people would be unemployed (from preamble).

In the doctrine, regarding the cancellation of permit, it is criticized that whether the permit may be granted or the duration regarding the cancellation is not determined¹⁸.

Confiscation. The confiscation¹⁹ is stated in the second paragraph of Article 60. The confiscation rules will apply to the private legal entities as well as the natural persons in case of the crimes committed for the benefit of the legal entities. Here, in addition to the requirements for confiscation in Articles 54 and 55 of the TPC, the offense committed by the body or representative of the legal entity must be committed for the benefit of the legal entity. Furthermore, the legal entity must be a private legal entity. The principle of proportionality also applies to confiscation. In order for the confiscation to be enforced, it is also necessary to have clarity in the provision regarding the crime type.

4. Conclusion

In Turkish criminal law, criminal responsibility of legal entities is not accepted because they cannot be perpetrators. However, implementation of security measures is adopted. The security measures to be applied are regulated in Article 60 of the Turkish Penal Code. Apart from this, administrative fines on legal entities for certain crimes are accepted to apply. It is also possible to apply administrative fines on legal entities for the crimes committed by natural persons. As a result, it can be said that there is not a problem in Turkish law in terms of accepting the legal responsibilities of legal entities apart from criminal responsibility.

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¹⁸ Centel/Zafer/Çakmut, 720; Özbek/Doğan/Bacaksız/Tepe, 648.

¹⁹ For confiscation see: Koca, Mahmut/Üzülmez, İlhan, *Türk Ceza Hukuku Genel Hükümler*, 10th edition, Ankara 2017, 624 ff.