



Wholesale of the Substantial Amount of Assets in Non-Public Companies

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I. General Overview

According to Article 408/1 of the Turkish Commercial Code No. 6102 (“*TCC*”) the general assembly of a joint-stock company may take resolutions on matters explicitly stipulated in laws and the articles of association of the company. Article 408/2 of the TCC lists non-assignable duties and authorities of general assemblies of joint-stock companies. Accordingly, wholesale of the significant amount of company assets is listed in Article 408/2 (f) of the TCC as a non-assignable authority of general assemblies of joint-stock companies. Therefore, general assemblies of joint-stock companies must convene and adopt resolutions for wholesale of the important amount of company assets. Similarly, Article 538/2 of the TCC authorizes general assemblies of joint-stock companies for wholesale of the significant part of company assets during the liquidation. The Capital Markets Law No. 6362 and the Communiqué on Common Principles regarding Material Transactions and the Exit Right (II-23.1) (“*Communiqué No. II-23.1*”) exclusively regulate sales of significant amount of assets in publicly-held companies. Thus, in this article, our aim is to specifically focus on and reveal significant characteristics of wholesale of the substantial amount assets in non-public companies.

II. What Constitutes Substantial Amount of Assets?

Not all sales of company assets require a general assembly resolution in joint-stock companies, the general assembly resolution is only required for wholesale of “significant amount of company assets”. Under the TCC, there is no explicit definition on what constitutes a “significant amount of company assets” or how it should be evaluated. Therefore, determination of the significant amount of company assets creates ambiguity in practice, since the authorized company organ determines whether the contemplated sale transaction constitutes the significant part of company assets. During the term of the abolished Turkish Commercial Code No. 6762 (“*Abolished TCC*”), the 11th Civil Chamber of Court of Appeals ruled that the general assembly must adopt a resolution, in case the asset to be sold is the company’s sole asset or it is of great importance for the continuity of the company (decision dated February 13, 2006 and numbered 2006/1253). This matter is also controversial in the Turkish law doctrine and there is no consensus on what constitutes substantial amount of company asset. The Communiqué No. II-23.1 stipulates materiality criteria for asset transfers for publicly-held companies. In the Turkish law doctrine, there are some jurists arguing that provisions related to publicly-held companies should also be taken into consideration when determining “significant part of the assets” for non-public companies.¹ It is also argued in the doctrine that the transfer of movable and immovable properties, industrial property rights, such as, trademarks and patents, may prevent the continuity of the company and, therefore, general assembly resolution is required for transfer of these type of assets.² There is no doubt that the court will determine what constitutes the substantial amount of

¹ Çamoğlu, Ersin, Anonim Ortaklık Genel Kurulunun Devredilemez Yetkileri Kapsamında Önemli Miktarda Şirket Varlığının Toptan Satışı, Prof. Dr. Sabih Arkan’a Armağan, 2019, at 331-333.

² Özdamar, Mehmet, Anonim Ortaklığın Sahip Olduğu Malvarlığının Yönetim Kurulu Tarafından Topluca Devredilmesi, Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 2006, at 104.



company assets in case of a dispute.³ However, in order to enable the certainty in practice, Turkish lawmakers should stipulate what exactly constitutes the important part of company assets or how it should be assessed.

Article 616 of the TCC lists non-assignable duties and authorities of general assemblies of limited liability companies, similar to Article 408 of the TCC for joint-stock companies. However, wholesale of the significant amount of company assets is not listed in Article 616 of the TCC as a non-assignable authority of general assemblies of limited liability companies. Likewise, the TCC does not include any reference regarding the application of Article 408 of the TCC to limited liability companies. Therefore, it is disputed in the doctrine whether a general assembly resolution is required for wholesale of the substantial part of assets of limited liability companies. There are some jurists arguing that the lack of an explicit provision or a reference is intentional and, thus, a general assembly resolution is not required for wholesale of the important part of limited liability companies' assets. On the other hand, the Court of Appeals resolved during the term of the Abolished TCC that the general assembly resolution is required, in case the asset to be sold is the company's sole asset or it is of great importance for the continuity of the limited liability company (the 11th Civil Chamber of Court of Appeals' decision dated March 10, 2011 and numbered 2011/2497). In light of the foregoing decision and since there is no explicit provision on the criteria of "significant part of limited liability companies' assets", our explanations on substantiality for joint-stock companies may also be applied to limited liability companies.

III. What Constitutes Wholesale?

The TCC does not explicitly describe what should be understood from "wholesale" of the joint-stock companies' assets. Wholesale can be described as selling company assets at once in contrast to selling company assets one by one. Similarly, the 11th Civil Chamber of Court of Appeals ruled during the term of the Abolished TCC that the sale of an immovable at once requires aggravated quorum, whereas, the sale of an immovable by dividing into parcels requires ordinary quorum (decision dated January 30, 1985 and numbered 1985/270). Another significant point to mention on this matter is that the purpose of the transaction where an asset is sold one by one (*and not at once*) should be assessed on a case by case basis. Accordingly, transactions where an asset is sold piece by piece to the same person with the purpose of fraud against law in order to refrain from approval of the general assembly should be deemed as null and void.⁴ Moreover, since there is no explicit provision on determination of what constitutes wholesale of limited liability companies' assets, our explanations on what constitutes wholesale of joint-stock companies' assets may also be applied to limited liability companies.

IV. What is the Approval Process?

Under Article 418 of the TCC, unless a higher quorum is required by the TCC or by the articles of association of the company, general assembly convenes with the presence of shareholders representing one-quarter of the share capital and resolutions are adopted by a simple majority of votes in joint-stock

³ Biçer, Levent, Hamamcıoğlu, Esra, Anonim Ortaklıklarda General Kurulun Devredilemez Yetkileri Kapsamında Önemli Miktarda Şirket Varlığının Toptan Satışı ve Uygulama Alanı (TTK m.408/2-f), Kadir Has Üniversitesi hukuk Fakültesi Dergisi, 2013, at 40.

⁴ Biçer, Hamamcıoğlu, at 41-42.

companies. Similarly, Article 538/2 of the TCC introduces a qualified decision quorum (shareholders holding shares that represent 75% of the share capital) for wholesale of significant part of joint-stock companies' assets during the liquidation. However, Article 408/2 (f) does not stipulate a certain quorum for wholesale of significant amount of company assets, although it is listed as a non-assignable authority of the general assembly in the same article. Having said that, under Article 22/12 of the Regulation on Procedures and Principles of General Assembly Meetings of Joint Stock Companies and Participation of Ministry of Customs and Trade Representative in These Meetings ("**Regulation**"), wholesale of the substantial amount of company assets requires approval of shareholders holding shares that represent 75% of the share capital. It is suggested in the Turkish law doctrine that abovementioned provision of the Regulation is against hierarchy of norms, as the TCC does not introduce a certain quorum for wholesale of the substantial amount of company assets. On the other hand, some scholars in the doctrine argues that the qualified majority (shareholders holding shares that represent 75% of the share capital) applied to wholesale of significant part of company assets during the liquidation due to Article 538/2 of the TCC should also be applicable to all wholesale of substantial amount of company assets regardless of the company being in the liquidation process.⁵

V. What are the Sanctions?

Since it is not certain what constitutes the significant amount of company assets or how it should be assessed, the board of directors may adopt a resolution on wholesale of the significant amount of company assets contrary to Articles 408/2 (f) and 538/2 of the TCC. The TCC does not include an exclusive provision on the validity of board resolutions on wholesale of the substantial amount of company assets. Thus, validity of these resolutions and sales agreements are controversial in the doctrine. Although the TCC does not exclusively regulate validity of board of directors' resolutions on wholesale of the significant part of company assets, Article 391 of the TCC states that board of directors' resolutions related to non-assignable duties and authorities of the general assembly are considered invalid. Therefore, board of directors' resolutions on wholesale of the significant part of company assets are deemed invalid, since such matter is a non-assignable authority of the general assembly.⁶ It is suggested in the doctrine that it is possible for the general assembly to approve wholesale of the significant part of company assets conducted based on a board resolution and that asset transfers made with the approval of the general assembly should be considered valid from the beginning.⁷ It is also argued in the doctrine whether Article 371/4 of the TCC (*regarding protection of third persons in case of a transaction conducted by authorized signatories contrary to articles of association and general assembly resolutions*) would apply to transactions contrary to Articles 408/2 (f) and 538/2 of the TCC and asset transfers would be valid for the purpose of protecting third persons acting in good faith. Some scholars argue that if the general assembly adopts a resolution on wholesale of the significant part of company assets and the board members act contrary to such resolution while executing asset transfer, then, the third person acting in good faith should be protected and the transaction should be deemed valid. However, it is also suggested that if the general assembly does not

⁵ Tolga Ayoğlu, *Önemli Miktarda Şirket Varlığının Satışında Genel Kurul Kararının Hukuki Niteliği*, Kadir Has Üniversitesi Hukuk Fakültesi Dergisi, 2017, at 95.

⁶ Halil Ali Dural, *Anonim Şirketlerin Önemli Miktarda Varlığının Satışına İlişkin Genel Kurul Kararının İçeriği ve Kapsamı*, Prof. Dr. Hamdi Yasaman'a Armağan, 2017, at 232.

⁷ Dural at 238, Biçer/Hamamcıoğlu, at 47.



adopt a resolution on or approve wholesale of the substantial amount of company assets following the transaction, then such asset transfer should be considered invalid.⁸

VI. Conclusion

Articles 408/2 (f) and 538/2 of the TCC regulate wholesale of the substantial amount of assets of joint-stock companies. Accordingly, wholesale of the substantial amount of assets of joint-stock companies requires approval of the general assembly. These provisions have created ambiguity in practice, since there is no exclusive provision on what constitutes substantial amount and wholesale of company assets as well as whether wholesale of the significant part of limited liability companies' assets requires a general assembly resolution. It is also disputed whether these transactions require aggravated quorum in general assembly meetings. The Turkish law doctrine also discusses whether sales agreements executed contrary to the TCC provisions are binding on companies. Considering all discussions on the implementation of the TCC provisions on wholesale of the substantial amount of assets of non-public companies, it may be argued that Turkish lawmakers should make amendments to clarify the matter.

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⁸ Dural at 237, 238.