



Share Transfers from Shareholders' Perspective: Share Transfer Restrictions in Limited Liability Companies and A Brief Comparison with Joint-Stock Companies

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I. Introduction

In general, most of the provisions of the Turkish Commercial Code No. 6102 ("TCC") stipulated for joint-stock companies are also applicable to the limited liability companies. Having said that share transfer is one of the crucial topics that creates huge difference between limited liability companies and joint-stock companies. In this article, we will focus on ordinary share transfer procedure and applicable share transfer restrictions in limited liability companies and will address a brief comparison of share transfer restrictions with registered shares of non-public joint-stock companies.

II. Ordinary Share Transfer Procedure in Limited Liability Companies

In accordance with Article 595 of the TCC, in limited liability companies, share transfer arrangements giving rise to the obligation of transfer of shares from one party to another shall be in the form of written agreement. In addition, share transfer agreements must be executed before the notary public. The purpose of such notarization step is approval of signatures belonging to the transferor and transferees affixed on the share transfer agreement by the notary public.

For transfer of the shares, approval of the general assembly is also required, unless otherwise agreed in the articles of association. The transfer of the shares does not become valid unless it is approved by the general assembly. As per Article 616 of TCC, giving such approval is foreseen among non-transferable powers of the general assembly. As it is deemed that limited liability companies conceptually have a narrower structure than joint-stock companies, the lawmaker seeks affirmative opinion and approval of the general assembly for the share transfers. In practice, the trade registry directorates require the general assembly resolution to be signed by both transferor shareholders and transferee shareholders.

Once the share transfer agreement is duly executed in a written form before the notary public and the share transfer is approved by the general assembly through a general assembly resolution, the share transfer and

associated general assembly resolution must be registered with the trade registry and the share ledger of the company should be updated accordingly.

As share transfers of limited liability companies are subject to registration with the trade registry, the publicly available trade registry records clearly indicate and disclose existing shareholding structures of the limited liability companies. Therefore, the current shareholding structure of a limited liability company can be always checked from publicly available trade registry gazettes.

III. Share Transfer Restrictions in Limited Liability Companies

Pursuant to Article 595/4 of TCC, share transfers in a limited liability company might be entirely banned through articles of association of the company. Such a provision might be included in the articles of association at the incorporation phase of the company or by way of amendment of the articles of association at a later stage. Moreover, in accordance with Article 595/3 of TCC the general assembly might decline share transfer approval request of the parties without giving any reason unless articles of association of the requires otherwise.

As per Article 595/5 of TCC, if share transfer is prohibited or the general assembly does not approve the transfer, then the shareholder, which intends to transfer its shares, reserves to the right to withdraw from the partnership by pursuing relevant procedures in the TCC. Consequently, such shareholder may not transfer its shares, but it may opt for leaving the partnership.

It is also important to note that Article 595/1 of TCC point outs that the share transfer agreement might include (i) additional payment and ancillary payment obligations, (ii) aggravated or extended prohibition of competition provisions, (iii) right of first refusal, (iv) pre-emptive right, (v) redemption right, (v) call option rights and (vi) contractual penalty, besides transfer obligation of the shares, depending on mutual agreement of the transferor and transferee. For the cases where additional payment and ancillary payment obligations are stipulated in a share transfer agreement and the transferee is unable to give necessary guarantee to evidence its payment ability, the general assembly might decline share transfer approval request of the parties in accordance with Article 595/6 of TCC.

IV. Comparative Analysis of Share Transfer Restrictions in Limited Liability Companies with Joint-Stock Companies

Share transfers restriction concepts introduced by the TCC for limited liability companies and joint-stock companies are not alike with each other. Unlike limited liability companies, the principle of free transferability of shares applies for joint-stock companies.

Having said that, this freedom might be limited to some extent to ensure a fair balance between the shareholders' interest and the company's interest. For this purpose, the TCC has introduced (i) legal limitation and (ii) contractual limitation concepts. Such concepts mean that share transfers in joint-stock companies cannot not be further banned or restricted.

Article 491 of the TCC is briefly as follows: "*Registered shares, equivalent of which have not been fully paid, may be transferred only with the approval of the company*". As the company phrase in said article implies the board of directors, it could be inferred that said article grants an exclusive authority to the board of directors, and if there is any doubt regarding the transferee's ability to pay the equivalent of registered shares in question and the guarantee requested by the board of directors cannot be provided, the board of directors may decline approval of the share transfer. Such authority granted to the board of directors is the legal limitation in connection with share transfers in joint-stock companies. In terms of implementation of the legal limitation, it is not necessary the company's articles of association to include a specific provision thereof. In other words, the board of directors might reject approval of the share transfer if the relevant conditions exist.

On the other hand, Articles 492 and Article 493 of TCC point out contractual limitation circumstances in connection with share transfers in joint-stock companies. Accordingly, said articles allow that it might be stated in the articles of association of a joint-stock company that the shares may be transferred only if such transaction is approved by the board of directors; however, the board of directors may only reject approval of the share transfer by (i) asserting a significant and objective reason stipulated in the articles of association or (ii) offering to buy and acquire the sale shares on account of the company, other shareholders or third parties over their real value. In this context, the board of directors cannot refrain from approving the share transfer without giving any reason and the rejection must be based on such limited grounds. Moreover, for implementation of the contractual limitation, the articles of association must include a specific and well-designed provision. As the TCC describes content of the applicable contractual limitation, other limitations fall beyond such limitation is deemed invalid.

V. Conclusion

In light of the foregoing, it is obvious that in limited liability companies, share transfer is organized in a more restrictive manner than joint-stock companies. Moreover, the TCC has a conservative approach in terms of keeping shareholding structure of a limited liability stable at the discretion of general assembly and consequently, it provides more flexible ground to limited liability companies in terms of share transfer restrictions. On the contrary, the freedom concept prevails for share transfers in joint-stock companies save for certain exceptions and as a rule, aggravated share transfer restrictions are not considered valid by the

TCC. From this point of view, the transferability of shares in limited liability companies has been structured differently in joint-stock companies.

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