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PROTECTION OF SMES IN THE TURKISH COMMERCIAL CODE AND EU DIRECTIVE (2011/7/EU): ADAPTATION PROBLEMS AND ADVICES

Abdulkadir BULUT*, Mahmut BAYDAS** and Emrah AYHAN***

*Institute of Social Sciences, University of Selcuk, Konya/Turkey

**Institute of Social Sciences, University of Ataturk, Erzurum/Turkey

***Institute of Social Sciences, University of Inonu, Malatya/Turkey

Abstract

Turkish Commercial Code (TCC) was changed in 2011. While making this Code, almost every substance within the EU Directives has been taken into account. Particularly, Article 1530 of TCC recognized most of the rights provided to the small and medium sized enterprises (SMEs) and regulations by EU Directive. The arrangements within TCC were based on the EU Directive (2011/7EU) titled as “Commission Directive of 16 February 2011 on Combating Late Payment in Commercial Transactions”. In this study, it is argued whether the referred EU Directive was fully adapted to Turkish domestic law or not. In the study, it is mentioned that majority of the rules, regulations and SMEs rights arranged within EU Directive were regulated in TCC, and this induces many convergences between EU Directive and TCC. However, there are still some divergences because the arrangements of the EU Directive were not fully transferred to the TCC. Therefore, this study points out these divergences and convergences between EU Directive and TCC. Finally, we conclude the article by proposing some advices to avoid divergence problems between EU and Turkey legislations.

Keywords: Protection of SMEs, Turkish Commercial Code, EU Directive, convergences and divergences.

1. Introduction

The aim of Article 1530 of TCC (Turkish Commercial Code) is to accelerate the process for demanders in getting their assets from debtors as soon as possible (Atamer/Okutan Nilsson, 2013: 33). This aim can also be found in “Commission Directive (2011/7/EU) on combating late payment in commercial transactions”. The second and the seventh paragraphs of the Article 1530, which are regulating the conditions of late payment for goods and service procurement, are created in line with the EU Directive (2011/7/EU) that altered articles of the previous directive on combating late payments (2000/35/EC) implemented by European Parliament and of the Council in 19 June 2000 (Çağlayan, 2011: 152; Alp, 2002: 419; Yatağan, 2011: 5). EU Directive defines SME and aims to protect SMEs against large companies and public corporate entities (Yatağan, 2011: 5). However, it is criticized that Turkish government did not include protection of SMEs

against public corporate entities while transferring the arrangements of EU Directive into Turkish legislation (Atamer/Okutan Nilsson, 2013: 82; Çağlayan, 2013: 152). In addition, the conclusions of the EU Directive were regulated in the Turkish Commercial Code instead of Code of Obligations. This situation causes different consequences:

- 1) If it is not decided in the Code of Obligations or there is not any custom to pay interest, interest payment cannot be demanded (Yavuz/Acar/Özen, 2014: 110). In contrast, even if there is no determined decision about paying interest, interest payment can be demanded in Turkish Commercial Code (Ayhan/Özdamar/Çağlar, 2013: 62; Arkan, 2015:71; Karahan, 2015:59).
- 2) In the Code of Obligations, if there is no contrary agreement between parties, simple interest rate is demanded. The rate of simple interest and commercial interest rate are 9% in Turkey. On the other hand, parties can increase legal interest rate by 50%, while the can increase default interest rate by 100% according to Law of Obligations (Buz, 2013: 139). These interest rates within commercial transactions can be increased by parties without any limitation (Ayhan/Özdamar/Çağlar, 2013: 623; Arkan, 2015: 74; Karahan, 2015: 59). Moreover, there can be advance interest rate within commercial transactions. In this direction, it is stated in Article 1530 of TCC that “The interest rate and minimum amount of payment in the case of no decided default interest rate in a contract, or case of the related clauses being invalid are determined by The Central Bank of The Republic of Turkey in each January. The interest rate must be at least 8% higher than late payment interest rate for commercial transactions which are stated in Code on Legal Interests and Default Interests, dated 4 December 1984 law, numbered 3095” (Orbay Ortaç, 2014: 131; Turkish Official Journal, 1984). The basics of the Article 1530 of TCC are EU Directives (2000/35/EC and 2011/7/EU). The interest rate in these directives are decided as “at least seven points higher the late payment interest rate” in EU Directive (2000/35/EC) and “at least eight points higher than the late payment interest rate in EU Directive (2011/7/EU). Furthermore, these rates are interpreted within TCC as 8% higher than the late payment interest rate (Orbay Ortaç, 2014: 131).
- 3) In Code of Obligations, notification is necessary before pushing into default. On the other hand, there are clauses for pushing into default without notification in the Article 1530 of Turkish Commercial Code (Kılıçoğlu, 2015: 703; Aral/Ayrancı, 2013: 89).
- 4) In commercial transactions, adding interest on interest is possible in some cases but it is not possible to add interest on interest in any case within law of obligations (Kılıçoğlu, 2015: 714).
- 5) In Law of Obligations, if there are debtors more than one person which are responsible for one debt, each debtor becomes responsible for the half of the debt as a rule. In the same conditions, however, each person is responsible for the debt as a whole in Commercial Law (Arkan, 2015: 68; Karahan, 2015: 54).

2. The Definition of Small and Medium Sized Enterprises (SMEs)

In the Official Journal of the European Union, dated 20 May 2003, “Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small and Medium Sized Enterprises” was published, and in this document there is a common definition of the term SME (Small and Medium Sized Enterprise) in order to determine which enterprises can profit from the benefits of the European single market (Yatağan, 2011: 19). In the document, it is stated that “*The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises*

which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million...a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million...a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.” in Article 2 under Staff Headcount and financial Ceilings Determining Enterprise Categories section (European Commission, 2003: 4).

In 2002, Turkey as an EU (European Union) candidate signed “European Charter for Small Enterprises” and joined “Multi-annual Programme for Enterprise and Entrepreneurship-MAP, 2001-5” (Yatağan, 2011: 32). After these steps, Turkey started the adaptation process by new arrangements, and Turkey implemented “Regulation 2005/9617 concerning the definition, classification and qualification of micro, small and medium-sized enterprises” in 2005 (Turkish Official Journal, 2005). In this regulation, based on “Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small and Medium Sized Enterprises” (2003/361/EC), the term of SME is defined. According to regulation medium sized enterprises employ fewer than 250 persons, and have an annual turnover and balance sheet total not exceeding 40 million Turkish Lira. Microenterprises, on the other hand, employ fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed 1 million Turkish Lira. In addition, small enterprises employ fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed 8 million Turkish Lira.

The recent regulations on SMEs within the Turkish legislation can be found in TCC (Turkish Commercial Code). In Article 1522 of TCC, enterprises concerning their sizes were reconsidered, and the necessity of creating a new legislation regarding needs of current society with an objective of “creating competitive Turkish enterprises within international trade, industry, service and finance” is pointed out. (Turkish Official Journal, 2005). The Article states that new criterias defining SMEs is going to be prepared by the recommendations of TOBB (The Union of Chambers and Commodity Exchanges of Turkey) and KGK (Public Oversight, Accounting and Auditing Standards Authority). After that TCC regulation is going to determine which enterprises can benefit from subsidies arranged for SMEs.

Although Article 1530 does not apply to ordinary business, it does not mean that that it cannot apply to all commercial affairs. The rule only regulates the procurement of goods and services between merchants (Ayan, 2012: 731). On the other hand EU Directive does not only include the late payment within the procurement of goods and services between these merchants, but also late payment of goods and services between an enterprise and public organization (Atamer/Okutan Nilsson, 2013: 62; Yatağan, 2011: 33; Yatağan, 2013: 162).

3. SME Rights in TCC

In TCC, auditing standards are facilitated for SMEs and the protection tools have been implemented for SMES against late payments regarding their contracts with large companies (Ayan, 2012: 751). Therefore, the following facilities for SMEs are evaluated: facilities on auditing and protection on late payments.

3.1. Facilities on Auditing

Regardless of real and legal entity merchants operating in different sectors, all enterprises are obliged to prepare financial report or keeping commercial book adaptive to Turkish Accounting Standards based on UFRS (International Financial Reporting Standards). With this arrangement it is aimed to establish Turkish enterprises having sufficient capital, being open to competition, becoming stable against economic crises, and presenting financial tables reflecting the reality. Furthermore, the arrangement has potential to facilitate financial problems of SMEs which have difficulty in finding financial sources or which have to borrow expensive loans due to their financial tables incompatible with the international standards (Yatağan, 2011b: 83).

The arrangement has also opened a new area in which special and particular standards compatible with UFRS standards can be implemented due to preparation costs of financial reports for different sectors and enterprises in different sizes. In the same direction with Article 88; the regulations of merging, demerging and sectoral change which are arranged between Articles 135 and 194 provide opportunities for small enterprises to end up reporting and auditing processes about merging, demerging and sectoral change if their shareholders compromise unanimously (Yatağan, 2011b: s. 83).

As distinct from large scaled incorporated companies which were audited by independent auditing institutions, small and medium sized incorporated companies are audited by more than one certified public practitioners or independent accountant public practitioners (Yatağan, 2011b: s. 83).

3.1. Protection Against Late Payment

The best matching regulation between EU Directive and TCC is probably Article 1530 of TCC. The article protects SMEs against large enterprises, and it aims to ensure collection of SMEs' assets from debtors within 30 days or 60 days depending on different cases. Besides, there is no need to give notification to large companies which need pay their debts to SMEs by the article of TCC. That means there will not be unnecessary procedures for SMEs in collecting their assets from other companies.

Article 1530 is not arranged to be applied in all SME relations (Atamer/Okutan Nilsson, 2013: 82; Çağlayan, 2013: s. 152), rather it is arranged to be applied in some cases which is shown in Table 1 below:

Table 1: Application of Article 1530 of TCC in Different Cases

DEMANDER	DEBTOR	Article 1530 of TCC
SME	Large Company	<i>Applied</i>
SME	SME	<i>Applied</i>
Large Company	SME	<i>Not Applied</i>
SME	Consumer	<i>Not Applied</i>
SME	Public Institution	<i>Not Applied</i>
Consumer	SME	<i>Not Applied</i>

a. In cases of goods and service transactions between SMEs and large companies or between SME and ME, debtor company lapses into default without notification if it does not pay its debt on time determined on the contract despite the fact that demander already provided the necessary goods and services specified on the contract.

b. The large company, which lapsed into default, needs to pay interest to the SME due to its debt. And this additional interest to existing debt starts from the deadline for the payment or from the end of the contract, although, there is not such a condition in the contract (Orbay Ortaç, 2014: 120).

c. In case of no determined payment date or a determined payment period more than 60 days within the contract, the conditions of lapsing into default without notification for large companies, and the condition when demander SME gets interest are indicated in Table 2.

Table 2: The cases of lapsing into default for large debtor companies and when demander SME gets interest from large company

<i>The Interaction Types Between SMEs and Large Companies</i>	<i>The Cases of Lapsing into Default Without Notification for Large Debtor Companies and When Demander SMEs Get Interest from Large Companies</i>
1. Debtor company receives the billing or similar payment demand from the demander SME:	From the beginning of this demand, large company has 30 days to pay its debt; otherwise, interest is started to be added to main debt after these 30 days.
2. In case billing or similar payment demand date is undetermined:	Right after receiving goods or service from the SME, the large company has again 30 days; otherwise, interest addition starts again.
3. Debtor company receives the billing or similar payment demand from the demander SME before receiving goods and service:	The payment period of 30 days starts after large company receives goods and service from SME.
4. If the large company receives billing or similar payment demand after the agreement and examination period or before that period (with the condition of approval in selling process)	Until the end of 30 days after the agreement and examination period or before that period (with the condition of approval in selling process), large company needs pay its debt to the SME, otherwise, interest addition starts again.

d. The payment period, determined on the contract, should be maximum 60 days starting from the date that large company receives billing or similar payment demand after the agreement and examination period or before that period (with the condition of approval in selling process). However, this period can only be extended when debtor and demander can evidently determine a longer period without putting SME into an unjust situation; otherwise, the 60 days rule prevails.

e. The following cases are invalid according to TCC: condition in a contract which states that debtor is not responsible for the loss of demander in case of late payment or has limited responsibility; another condition states that debtor will not pay interest for late payment at all or will pay a small amount of interest in case of extreme liability.

f. If there is not a condition in a contract that determines default interest rate for the late payment to the demander, it is necessary to apply interest rate and minimum amount of expenses for collection of TCMB (Central Bank of the Republic of Turkey) which are announced each year in January. Interest rate must be more than 8% percent of interest rate for late payment within

business transaction which is determined in “Code on Legal Interests and Default Interests”, dated 4 December 1984 law, numbered 3095 (Turkish Official Journal 1984).

g. Installment payment condition within a contract between demander SME and debtor large company is invalid.

4. Convergences and Divergences between EU Directive (2011/7/EU) and TCC

TCC, implemented in 2012, was mainly based on EU Directive (2011/7/EU). Although most of the topics in TCC are similar to topics in EU Directives, there is a divergence due to different regulations within these topics. EU Directives are not binding for Turkey, rather they are advices given to Turkish government. Therefore, Turkey was mainly faithful in transferring issues in EU Directive (2011/7EU) about late payments into TCC but some different type of regulations can be observed. For instance, EU Directive and Article 1530 of TCC aim to protect SMEs against large companies (Atamer/Okutan Nilsson, 2013: 35). However, while EU Directive protects SMEs against public corporate entities too, TCC does not have such a rule because Article 1530 only applies to relations between SMEs and large companies. These convergences and divergences are explained more detailed on Table 3.

Table 3: Convergences and Divergences between EU Directive and TCC

<i>Convergences between EU Directive (2011/7/EU) and Article 1530 of TCC</i>	<i>Divergences between EU Directive (2011/7/EU) and Article 1530 of TCC</i>
<p>1. EU Directive and Article 1530 of TCC aim to protect SMEs against large companies</p>	<p>1. EU Directive protects SMEs against public corporate entities in terms of late payments; TCC does not have such a rule because Article 1530 only applies to relations between SMEs and large companies regarding goods and service procurements.</p>
<p>2. EU Directive and Article 1530 of TCC do not contain rules about consumers.</p>	<p>2. In EU Directive, if the demander applies to court or other responsible authorities to get the payment from the debtor, these legal authorities have obligation to accelerate payment process and start legal procedures within 90 days after the approval regardless of the amount of the debt. TCC does not include such a regulation.</p>
<p>3. The privileges given to SMEs against large companies by EU Directive AB also exist in Article 1530 of TCC.</p>	<p>3. Different from EU Directive, TCC does not permit payment period to exceed 60 days between demander SME and debtor large company.</p>
<p>4. EU Directive brought new rules and regulations for the law of obligations of EU member countries. Therefore, most of them implemented these rules and regulations within their domestic legislations.</p>	<p>4. The rules and regulations of the Directive are implemented in TCC but Article 1530 of TCC does not comprehend most of the contracts. For instance, the article does not apply to rental contracts. As a matter of fact, Article 1530 of TCC is regulated to apply contracts about goods and service procurements between SMEs and large companies.</p>

5. Advices and Conclusion

It is essential to have Article 1530 of TCC, protecting SMEs against large companies, within our legislation because the article has positive effects on commercial life and adaptation to EU acquis. However, the divergence between Article 1530 of TCC and EU Directive (2011/7/EU) can be criticized. The most significant difference is Article 1530 of TCC only applies to relations between SMEs and large companies regarding goods and service procurements. The article does not also apply to relations between SMEs and public corporate

entities so it does not protect SMEs against public corporate entities in terms of late payments. However, we meet many contradictions between SMEs and public corporate entities in reality.

Article 4 of EU Directive (2011/7/EU) protects SMEs against public entities by limiting the payment period (European Commission 2011). In Turkish legislation, public entities are mostly seeking public interest but sometimes they can target making profit. Some public entities were established with some specific regulations, and they can act as other companies in the market to make profit. These entities make some contracts with SMEs to get goods and services, and these contracts are called private law contracts. Conflicts caused by these contracts are solved by jurisdiction. Therefore, if the actions of public administration are not included in private law contracts, the law only protects public entities rather than SMEs which are need to be protected in case of late payment, so SMEs experience financial difficulty. In order to provide full protection for SMEs and adapt Turkish legislation with EU Directives in real terms, the Codes of Public Procurement Authority and Public Procurement Contracts should be changed (Yatağan, 2011b: s. 85).

According to justification of EU Directive (2011/7EU), the debtor does not choose to pay its debt if the payment period takes a long time. To prevent this situation, EU Directive demand adaptation of all member countries. The EU Directive asserts that if the demander applies to court or other responsible authorities to get the payment from the debtor, these legal authorities have obligation to accelerate payment process and start legal procedures within 90 days after the approval regardless of the amount of the debt. TCC does not include such a regulation, but some conclusions of “The Code of Execution and Bankruptcy” directive accelerates the payment period in the same situation (Yatağan, 2011b: s. 85). These conclusions has been added to Article 1530 of TCC to prevent from bankruptcies of SMEs by protecting them against large and strong companies which use late payment as a profit making tool.

Finally, EU Directive brought new rules and regulations for the Code of Obligations in EU member countries. Therefore, most of them implemented these rules and regulations within their domestic legislations regarding law of obligations. Most of the rules and regulations of the EU Directive are implemented in TCC but Article 1530 of TCC does not comprehend most of the contracts. For instance, the article does not apply to rental contracts. As a matter of fact, Article 1530 of TCC is regulated to apply contracts about goods and service procurements only between SMEs and large companies. To avoid these divergences between TCC and EU Directive, it is necessary to implement more comprehensive regulations within Turkish legislation.

References

Alp, Mustafa: (2002), “*Avrupa Birliği ve Alman Hukukunda Para Borçlarından Borçlu Temerrüdünün Şartları ve Temerrüt Faizi İle İlgili Değişiklikler*”, Prof. Dr. Kemal Oğuzman’a Armağan, İstanbul, s. 417-435.

Arkan, Sabih: (2015), “*Ticari İşletme Hukuku*”, Ankara.

Ayan, Serkan: (2012), “*6102 Sayılı Türk Ticaret Kanunu’nun 1530. Maddesi Gereğince Borçlunun Temerrüdü*”, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, C. 12, Özel Sayı, s.717-793.

Ayrancı, Hasan/ Aral, Fahrettin: (2014), “*Borçlar Hukuku Özel Borç İlişkileri*”, Ankara.

Buz, Vedat: (2013), “*Yeni Borçlar Kanunu’nda Borçların İfası ve İfa Edilmemesine İlişkin Değişikliklerin Değerlendirilmesi*”, TOBB Ekonomi ve Teknoloji Üniversitesi Hukuk Fakültesi Yeni Türk Borçlar Kanunu ve Yeni Türk Ticaret Kanunu Sempozyumu, (Derleyen: Çiğdem Kırca), Ankara.

Çağlayan, Pınar: (2011), “*Avrupa Birliği Yönergeleri ve Alman Hukukundaki Deneyimler Işığında Mal ve Hizmet Tedarikinde Geç Ödemenin Sonuçları (TTK M. 1530)*”, BATİDER, C. 27, S. 2.

Çağlayan, Pınar: (2013), “*Türk Ticaret Kanununun 1530’uncu Maddesi İle İki Ticari İşletme Arasında Para Borcunun Ödenmesine İlişkin Getirilen Yenilikler*”, TOBB Ekonomi ve Teknoloji Üniversitesi Hukuk Fakültesi Yeni Türk Borçlar Kanunu ve Yeni Türk Ticaret Kanunu Sempozyumu, (Derleyen: Çiğdem Kırca), Ankara.

European Commission: “*Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises*”, (2003/361/EC), Official Journal of the European Union, 20 May 2003.

European Commission: “*Commission Directive of 16 February 2011 on combating late payment in commercial transactions*”, (2011/7/EU), Official Journal of the European Union, 23 February 2011.

Karahan, Sami: (2015), “*Ticari İşletme Hukuku*”, 25. Baskı, Konya.

Kılıçoğlu, Ahmet M.: (2015), “*Borçlar Hukuku Genel Hükümler*”, 19. Baskı, Ankara.

Orbay Ortaç, Nurdan: (2014), “*6102 Sayılı Türk Ticaret Kanunu Çerçevesinde Ticari İşlerde Faiz*”, Ankara Barosu Dergisi, C. 2, s. 118-133.

Poroy, Reha/Yasaman, Hamdi: (2013), “*Ticari İşletme Hukuku*”, İstanbul.

Turkish Official Journal: “*Regulation 2005/9617 Concerning The Definition, Classification And Qualification Of Micro, Small And Medium-Sized Enterprises*”, No: 25997, 18.11.2005.

Turkish Official Journal: “*Code on Legal Interests and Default Interests*”, No: 3095, 19.12.1984.

Yatağan, Çiğdem: (2013), “*Mal ve Hizmet Tedarikinde Geç Ödemenin Sonuçları Açısından Faturaya ve 2011-7-EU Sayılı Yönerge İle Mevzuatın Uyumlaştırılması Amacıyla Yapılması Gerekli Değişikliklere Fransa Örneğinden Kısa Bir Bakış*”, TOBB Ekonomi ve Teknoloji Üniversitesi Hukuk Fakültesi Yeni Türk Borçlar Kanunu ve Yeni Türk Ticaret Kanunu Sempozyumu, (Derleyen: Çiğdem Kırca), Ankara.

Yatağan, Çiğdem: (2011b), “*Yeni Türk Ticaret Kanununun Kobi'lere Bakışı ve Kobilerin Finansman Sorunu Üzerindeki Olası Etkileri*”, Sosyal ve Beşeri Bilimler Dergisi, Cilt 3, No 2, s. 79-88.

Yavuz, Cevdet/Acar, Faruk/Özen, Burak: (2014), “*Borçlar Hukuku Dersleri Özel Hükümler*”, 13. Baskı, İstanbul.

Yatağan, Çiğdem: (2011), “*2011/7/EU Sayılı Topluluk Yönergesi ve 6102 Sayılı TTK'nın 1530. Maddesi Çerçevesinde Mal ve Hizmet Tedarikinde Geç Ödemenin Sonuçları*”, Ankara.