

CHAPTER XI

RIGHT OF ESTABLISHMENT: CORPORATE BODIES

A-TREATY PROVISIONS

By virtue of Article 58 companies and firms formed in accordance with the law of a member state and having a registered office, central administration or principal place of business in the Community shall be treated for the purpose of establishment in the same way as natural persons. These comprise corporate bodies constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law except those which are non-profit making.

Whilst the member states are bound to abolish the existing restrictions and refrain from introducing any new restrictions¹ the Community must co-ordinate the safeguards which, for the protection of the interests of members and others, are required by the member states of companies and firms with a view to making such safeguards equivalent throughout the Community².

In order to promote the mobility of the corporate providers of service and to facilitate their establishment a Convention under Article 220 of the EEC Treaty on the Mutual Recognition of Companies and Bodies Corporate was signed in 1968 but it still awaits ratification. The failure of this measure made the harmonization of Company Law imperative.

B- HARMONIZING LEGISLATION

HARMONIZATION OF COMPANY LAW³

The complexity of the subject and the diversity of national laws have forced the Community to adopt a piecemeal approach to company legislation. This has been achieved so far:

(1) The First Directive⁴ deals with the duty of disclosure, the filing of accounts and other documents relevant to the formation of the company and the protection of the public as well as the obligations of company's officers;

(2) The Second Directive⁵ concerns the formation of public companies and the maintenance of capital;

(3) The Third Directive⁶ lays down the conditions required for the mergers of public companies registered in the same member state;

(4) The Fourth Directive⁷ deals with the annual accounts of limited liability companies, other than banks and insurance companies;

(5) The Sixth Directive⁸ deals with divisions of public companies and complement the Directive on mergers;

(6) The Seventh Directive⁹ regulates consolidated annual accounts of companies, other than banks and insurance companies;

(7) The Eighth Directive¹⁰ standardizes the auditing of companies most commonly involved in business in the EC;

(8) The Eleventh Directive¹¹ deals with disclosures and the accounts of branches of companies established in another member state or in a non-Community country;

(9) The Twelfth Directive¹² regulates the formation of private limited liability companies by individuals.

In addition to the nine directives on the statute book there is a regulation¹³ on the European Economic Interest Grouping with the object of facilitating, or developing, the economic activities of enterprises across the national frontiers without losing their independence but without making profits for the grouping itself and regulation 268/89¹⁴ providing for a European Company (*Societas Europea*) statute. It contains a complete code of law with the object of creating a European alternative to national company law. Such a company would be formed by the merger of companies from two or more member states, though individuals may become its shareholders on transfer of shares or an increase of capital. It could be created anywhere in the EC and would have the status of a public company registered at the Court of Justice. It would be managed broadly on the lines envisaged by the Draft Fifth Directive.

There are still on the table the following proposals:

- (1) The much controversial Fifth Directive which deals with the composition of the boards of public companies, the compulsory workers' participation in management, the annual general meeting, annual audit and the appointment of independent auditors;
- (2) The Ninth Directive on the conduct of groups of companies and the protection of employees, creditors and the minority interests in a dependent company;
- (3) The Tenth Directive concerning mergers between public companies registered in different member states;
- (4) The Thirteenth Directive on take-overs purporting to establish minimum rules for such operations;
- (5) The Partnership Directive purporting to extend the provisions of the Fourth and Seventh Directives to partnerships;
- (6) The Directive to amend the Fourth Directive to extend its application to Small and Medium-Sized Companies and to make its provisions less stringent;
- (7) The Shareholding Directive laying down minimum rules for the disclosure of changes in shareholding of listed companies.

In the light of the enacted and proposed Community legislation Turkish Company Law would have to be amended as follows:

C- HARMONIZATION OF TURKISH COMPANY LEGISLATION WITH EC LAW¹⁵

Turkish Company Law is considered to be a part of "commercial law". The first Turkish Commercial Code dated 1850 was a translation of the French Commercial Code of 1808. Under the Republic, Commercial Code 1850 was replaced by Commercial Code 1926, and in 1957 a third Commercial Code came into force replacing the 1926 Code.

The Commercial Code of 1956 is modelled on Continental civil law systems and is influenced by Swiss and German commercial law, in particular. "Commercial corporations" (companies and partnerships) are mainly dealt with in the Second Book of the Code. Besides there is a separate act for "cooperative companies" (companies generally formed by farmers and small entrepreneurs dated 1969¹⁶), and a modern "Stock Market Act" 1981¹⁷ which also applies to the listed public companies.

As explained above European Community company legislation was developed in two ways: Firstly a series of directives deals with the harmonization of existing national company laws of Member States, and secondly, certain regulations create new "European type" corporate bodies¹⁸ in addition (or as an alternative) to national corporate bodies.

Referring to the second way Turkish company legislation, which shares common characteristics with various other European company laws, is compatible with the supranational corporate bodies created by Community regulations.

Rules and principles which have been laid down by Company Directives on the other hand can be compared with Turkish legislation briefly as follows:

1- Annual accounts and duty of disclosure: Turkish company legislation concerning annual accounts and duty of disclosure adopts the same principles as the First and Fourth Company Directives.

Stock Market Act¹⁹ provides for disclosure requirements for companies listed on the stock market. Accordingly the Stock Market Commission laid down a series of standard rules. However these rules impose disclosure requirements only on listed companies, whereas in EC Directives the size of a company is taken as a criterion. Thus Stock Market Act sections 11 and 22 must be amended in accordance with the EC system²⁰.

2. Independent audition: A most criticized aspect of Turkish company legislation has been the lack of a qualified independent audition system. Until mid-nineteen eighties the only control of stock companies was made by a boards of auditors. In 1987 the Stock Market Commission remedied this gap with respect to the listed com-

panies²¹. The Stock Market Commission also laid down general rules and principles to be applied to such "outside audition" and Auditors. In 1989 a new law was adopted regulating the activities of persons who are engaged in accounting and auditing practice²². However, there are still criticisms, since the qualifications of auditors are not regulated in detail²³. The Eighth Company Directive could be considered as a model for Turkey in this respect.

3.Consolidation of accounts: Consolidation of accounts of holding companies is known in Turkish law, and some groups of companies do prepare and present such consolidated accounts²⁴. However there is no legal requirement for consolidation of accounts. This gap should be filled in line with the Seventh Company Directive.

4.Merger and division of companies: The Turkish Commercial Code provides detailed rules concerning merger of companies²⁵. Therefore implementation of the Third Company Directive will not pose a problem for Turkish law.

The same can be said for the (draft) Tenth Company Directive. A major concern for some Member States regarding (draft) Tenth Directive was the possibility of diminution of employees participation in their national laws²⁶. For the present, Turkish law does not make provision for employee participation in the management of companies.

On the other hand, Sixth Company Directive which regulates division of companies introduces a new concept for Turkish law.

5. Nullity of companies: The Turkish Commercial Code²⁷ complies with the provision of the First Company Directive concerning the nullity of companies.

6.Maintenance of Capital: The provisions governing the maintenance of capital in the First Company Directive have equivalents or very similar counterparts in the Turkish Commercial Code²⁸.

7.Doctrine of Ultra Vires: Turkish company law accepts the doctrine of ultra vires as a general principle which is applicable to all types of commercial corporations²⁹. This principle is incompatible with the First Company Directive sec.9 which amends that principle to a large extent.

8. Recognition of foreign companies: The Turkish Act on Private International Law and Civil Procedure³⁰ sec.8 provides that as a rule foreign company, which is recognized by the foreign state in whose country it maintains its principal place of business shall also be recognized in Turkey.

9. Single-member companies: Turkish law does not permit "formation" of single-member companies. On the other hand when all the shares of a stock company are held by one person, that company does not ipso jure become nullified, but an action must be brought by a creditor or by the Ministry of Commerce and Industry, demanding the winding up of the company³¹. Thus the detailed provisions of Twelfth Company Directive, which are compatible with the existing system, can easily be adopted in Turkish law.

10. Disclosure requirements for branches of foreign companies: Provisions of the Eleventh Company Directive concerning branches of foreign companies will have to be considered by Turkish legislature together with the parallel provisions of the First, Fourth, Seventh and Eighth Directives concerning subsidiaries of foreign companies.

11. Structure of companies: The Turkish company law provides for a single-tier board management system. Since the revised proposal of the (draft) Fifth Company Directive permits Member States to maintain a single-board system, Turkish law is in compliance with the proposed directive.

On the other hand, Turkish law does not make provision for employee participation in company management. In this matter, Turkish legislature can benefit from the Draft Fifth Directive to fill this gap in our company law.

NOTES

1 EEC arts. 52 and 53

2 Ibid art. 54(3)(g)

3 For details see F.Wooldrige, *Company Law in the United Kingdom and the European Community*, 1991 "In Turkish see E.Özsunay, "AET'de Ortaklıklar Hukukunun Antlaşmalar ve Yönergeler Yoluyla Uyumlaştırılması", *İktisat ve Maliye Mecmuası* Vol. XXVI, p.244 (1979)p; "AET'de Ortaklıklar Hukuunun Uyumlaştırılmasına Yönelik Birinci ve İkinci Konsey Yönergeleri", op.cit. Vol. XXVI, p.284 (1979); "AET'de Ortaklıklar Hukukunun Uyumlaştırılmasına Yönelik Üçüncü ve Dördüncü Konsey Yönergeleri", op.cit. Vol. XXVI, p.369 (1979); "AET'de Ortaklıklar Hukukunun Uyumlaştırılması Amacıyla Üzerinde Çalışılmakta Olan Yönergeler", op.cit. Vol. XXVII, p.413 (1980)

4 68/151, OJ.1968, 41

5 77/91, OJ 1977, L.26/1

6 78/855, OJ 1978, L.295/36

7 78/660, OJ.1978, L.222/11

8 82/891, OJ 1982, L.378/47

9 83/349, OJ 1983, L.193/1

10 84/253, OJ 1984, L.126/20

11 88/627, OJ 1988, L.348/62

12 OJ 1989, L.395/36

13 (2137/85, OJ 1985, L.199/1

14 OJ.1989

15 Updated and summarized from Ü.Tekinalp, "Türk Hukuku"nun Avrupa Topluluğu Ticaret, Şirketler ve Bilanço Hukuku ile Uyumunu" +Approximation of Turkish Law with Commercial Law, Company Law and Law of Company Accounts of the EC (October 1988). Avrupa Topluluğu Hukuku ve Türkiye'nin Uyumunu Semineri, İstanbul 1990, p.255-76. Ü.Tekinalp, "Avrupa Anonim Ortaklığı (S.E.) Düzeninde işçilerin yönetime katılmaları" İkinci Avrupa Hukuku Haftası, İstanbul 29-31 Mayıs 1978, İstanbul 1980 (İstanbul Üniversitesi Hukuk Fakültesi Avrupa Hukuku Araştırma ve Eğitim Merkezi Yayını) s.73-90 ; Ö.Teoman, 1975 Tarihli Son Tasarıya Göre Avrupa Anonim Ortaklığında Genel Kurul (Türk Ticaret Kanunu'nun ilgili Hükümleri ile Karşılaştırmalı Olarak), op.cit.s.91-126; H.Kabaalioğlu, A.T.'de Şirketler Hukuku ve Sermaye Piyasası Çalışmaları, Türkiye Açısından Bir Değerlendirme, İstanbul 1989,

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This part was written by Ali Cem Budak.

16 Official Gazette 10.5.1969, no.13195

17 Official Gazette 30.7.1981, no.17416; lastly amended by Public Law no.3794 (Official Gazette 13.5.1992, no.21227

18 i.e. European Economic Interest Grouping and European Company

19 Sections, 16, 16A and 22

20 There are also special provisions for duty of disclosure of banks, insurance companies and state-owned companies: see Bank Act sec. 51, Insurance Supervision Act sec. 39 and Decree on State-owned Companies no.233, respectively.

21 Regulation Concerning Outside Audition in Stock Market, Official Gazette 13.12.1987, no.19663

22 Public Law no.3568, Official Gazette 13.6.1989. This act does not necessitate any amendment in substance. Poroy: R.Poroy, Ü.Tekinalp and E.Çamoğlu, Ortaklıklar ve Kooperatif Hukuku, İstanbul 1993, p.314.

23 see A.S.Yüksel, Avrupa Topluluğu Hukuku ve Türkiye'nin Uyum Semineri, İstanbul 1990, p.249

24 see Tekinalp: R.Poroy, Ü.Tekinalp and E.Çamoğlu, Ortaklıklar ve Kooperatif Hukuku, İstanbul 1993, p.644-5

25 see sections. 146, 451, 452, 453, 454

26 However see (draft) Tenth Directive Article 1 (3)

27 sections 229 and 476. Cooperative Companies Act sec.98

28 see e.g. Articles 15,17 and 18 of the Directive and c.f. Commercial Code sections 470, 324 and 329, respectively. Other provisions concerning the maintenance of capital are included in sections 409, 516, 526, 528, 551 of the Commercial Code.

29 Commercial Code sec. 137

30 Public Law no.2675, Official Gazette 22.5.1982, no.17701

31 Commercial Code sec. 435