

Emergency buttons for business partners

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AVUKATLIK BÜROSU

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On 21 July 2016, the Council of Ministers of Turkey announced a state of emergency for the entire country due to the failed military coup which took place on 15 July 2016. Following such announcement, the state of emergency period has been further extended for an additional three months starting from 19 January 2017 as per the decision published in the Official Gazette on 5 January 2017.

As a consequence of the state of emergency, the Council of Ministers has decided to take several measures and to make a number of arrangements towards certain institutions and organisations pursuant to Article 121 of the Turkish Constitution and Article 4 of the Law no. 2935 on State of Emergency.

Such measures and arrangements were regulated under Decree Law no. 674 and then ratified by the Law numbered 6758 on the Modified Acceptance of the Decree Law on making Adjustments regarding the State of Emergency which was published in the Official Gazette dated 24 November 2016 (the "**Law no. 6758**"). Within this context, the Council of Ministers recently issued a new Decree Law numbered 687 on Taking Certain Measures within the Scope of the State of Emergency which was published in the Official Gazette on 9 February 2017 (the "**Decree Law no. 687**").

This brief note summarises the management process of the companies deemed to be having coherency with terrorist organisations and how business partners of such companies should deal with their receivables in this sensitive environment.

Pursuant to Article 19 of the Law no. 6758, the Savings Deposit Insurance Fund ("**TMSF**") will be assigned as an administrator/trustee to the companies deemed to be connected to terrorist organisations as per Article 133 of the Criminal Procedural Code (the "**CPC**"). Accordingly, the companies having coherency or communication with terrorist organisations and in which administrators/trustees are appointed will continue to be managed in accordance with commercial practices and diligence in line with the commercial law requirements until the finalisation of investigation and prosecution processes. In this respect, such companies will be managed by the managers/board to be determined by the relevant Ministry office under the supervision of TMSF. The managing board of such companies will be appointed and (if required) dismissed by the relevant Ministry office.

In addition to the above, the Communiqué on Determination of Implementation Procedures and Principles of Article 19 of the Law numbered 6758 which was published in the Official Gazette on 17 January 2017 (the "Communiqué") states that the appointed board of such companies are under obligation to either (i) appoint an independent auditor or a certified public accountant to prepare a financial status report including determination with regards to companies' assets, debts, financial status, market conditions, shareholding structures and any other operational problems or (ii) prepare such reports in order submit them to the relevant Minister. As the result of the concerned evaluation, in case it is determined that the subject company is not sustainable considering its financials, shareholding structure, market conditions and/or any other operational problems, the Minister then may decide to sell any or all of the company's assets or to liquidate the company in accordance with the principles set forth under the Communiqué.

On the other hand, the evaluation of the financials seems not only the reasons for determination of transfer or liquidation of the companies. The Decree Law no. 687 brought new evaluation criteria for a company whether it should be transferred or liquidated. Within this respect, if it is decided that shares and assets of the companies are seized as a result of the crimes defined under the relevant parts of the CPC, the Anti Terror Law numbered 3713 and the Law on Prevention of Financing of Terrorism numbered 6415, then the seizure procedure will be conducted through TMSF by sale and liquidation process of the concerned shares and assets of the companies. It is further stated that the management of such companies will be operated by their boards (i.e appointed administrators/trustees) during the sell and/or liquidation period and the income derived as a result of such sale and/or dissolution will be recorded as Treasury's revenue upon satisfaction of the creditors.

As concerns the liability of the appointed administrators/trustees, Article 37 of the Law no 6758 regulates that any persons/entities fulfilling their/its duties under the decree laws passed during the state of emergency are excluded from any civil, criminal, administrative and financial liability. That being said, the Communiqué determines the liability of the appointed administrators/trustees arising from their acts limited to the companies' assets and requires the administrators/trustees to manage the companies in accordance with commercial practices and diligence.

This contradiction on the exclusion/limitation of liability between two regulations might lead to confusion to determine the liability of the appointed administrators/trustees as board members. Since each of the appointed administrators/trustees are obliged to manage the companies in accordance with the commercial practice and diligence, a liability regime as set forth under the Turkish Commercial Code would certainly be needed so that they would be held responsible towards both the shareholders and company's creditors for the damage caused due to their breaches of their contractual and legal obligations.

In light of the foregoing, it is uncertain how the investigation and prosecution processes of the companies will finalise. However, within such uncertainty, it is suggested as a prudent precaution to those companies that are doing business with any such companies managed by TMSF, to develop close communications with the newly appointed boards in order to explore the opportunities to maintain possible structures to guarantee their receivables and collect their due amounts.

Görkem Bilgin
Managing Associate in Corporate and M&A Department
Gün+Partners

Sevim Gündoğan De Gols
Associate in Corporate and M&A Department
Gün+Partners

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