

## **Liability of Board Members Without Representation Authority for Social Security Institution Debts**

The Turkish Constitutional Court rules in its decision dated May 30, 2019 and having the application number of 2015/11192 and also published in the Official Gazette numbered 30836 and dated July 19, 2019 (the “**Decision**”) that holding the board of director’s members, not having any representation authority, jointly and severally liable with the joint stock company for the Social Security Institution (“**SSI**”) debts does not violate proprietary right of the concerned member of the board of directors.

### **Relevant Legislation**

Liability arising out of the failure to pay the joint stock company’s public debts directly belongs to the company itself. Liability of the legal representatives for public debts, which are determined to be uncollectible from the company, is regulated under the reiterated Article 35 of the Law on Collection Procedure of Public Receivables numbered 6183 (“**Law no. 6183**”). In accordance with the said article, total amount of the public receivables, which are determined to be uncollectible from the assets of the company, are collected from the personal assets of legal representatives regardless of whether they acted in fault or not.

On the other hand, due to the fact that Social Security and General Health Insurance Law numbered 5510 (“**Law no. 5510**”) sets forth special provisions concerning the SSI receivables, it has the priority to be applied before the Law no. 6183. Accordingly, pursuant to paragraph 20 of Article 88 of the Law no. 5510, in case the SSI receivables are not paid without just cause, senior executives or authorized signatories of the company, including members of the board of directors, and its legal representatives are jointly and severally liable together with the company itself.

### **Turkish Constitutional Court’s Decision**

The applicant applied to the Turkish Constitutional Court asserting that he does not have any liability for the unpaid SSI debts since he is not authorized to represent and bind the company although being a member of board of directors; and his proprietary right has been violated by directly seizing his personal assets without applying to the company’s assets first.

The Turkish Constitutional Court underlined that the Law no. 5510 involves special provisions and stated that the previous judicial decisions on the need to have representation and binding authority to be liable for the SSI debts were given about the SSI debts accrued before the Law no. 5510 entered into force. Within this scope, in order to ensure the effectiveness of the collection of the SSI debts, the Turkish Constitutional Court ruled that regardless of being a senior executive or not, merely being a member of the board of directors is sufficient to be primarily liable with the company itself from the said debts, accrued after the effective date of the Law no. 5510. In addition, the Turkish Constitutional Court also expressed that after paying the SSI debts, the concerned member of the board of directors has the right to recourse the same within the company in line with the principle of universal succession and accordingly decided that this liability does not impose an extraordinary burden on the board member personally.

## **Conclusion**

It has been decided that the board of directors' members, who do not have the right to represent and bind the company, are primarily liable for SSI debts, accrued after the effective date of the Law no. 5510, limited to the period in which they served. Thus, regardless of whether they have the authority to represent and bind the company, the SSI debts can be directly collected from the personal assets of the board of directors' members without applying to the joint stock company first.

Although this is the case, in order to determine that the interference in the proprietary right does not constitute a violation; it shall pass all tests, including effectiveness, necessity and appropriateness under the proportionality principle. In one of the dissenting opinions, it has been specified that where it is possible for the public institutions to collect the receivables from the assets of the company first as an easier interference, ensuring the public interest with a more serious interference does not pass the proportionality test; therefore, it is impossible to agree with the majority decision.