

JULY 2019

## Constitutional Court's Decision on the Liability of Members of Board of Directors of JSCs

The Constitutional Court ("the Court") granted a decision on May 30, 2019 regarding the applicant's claim that his accountability for the unpaid social insurance premiums of Joint Stock Company ("JSC") had infringed his right to property. The decision is published on the Official Gazette on July 19, 2019.

The Constitutional Court rejected the applicant's claim by stating that the applicant who is a member of board of directors ("BoD") shall be liable for the unpaid social security premiums of the JSC due to explicit provisions of the Law No. 5510 on Social Security and General Health Insurance and the Law on Collection Procedure of Public Receivables (Law No. 6183).

### Background of the Case

The applicant is a shareholder and used to be one of the BoD members when the public receivable arose and when it was payable.

Social Security Institution sent a payment order to all of the members of BoD including the applicant for the collection of unpaid social security premiums including the interest.

Applicant filed an objection against the order by stating that he did not have a power to represent the company before third parties, even if he was a member of BoD. Further, the applicant claimed that the company has sufficient assets to meet the unpaid public receivables. The objection was rejected by both court of first instance and the appeal court based on an expert report.

### Evaluation by the Constitutional Court

The Constitutional Court assessed the claim on violation of right to property in terms of legality, legitimacy and principle of proportionality of intervention under Turkish law as well as the established jurisprudence of Turkish courts and European Court of Justice.

The Court stated that the liability regime regarding public receivables of JSC has been regulated by the Law No. 5510 on Social Security and General Health Insurance ("the Law") and the Law on Collection Procedure of Public Receivables.

As a rule, members of BoD including the highest level managers or authorities and legal representatives shall be collectively and jointly liable for unpaid public receivables, if the social security premiums are not paid within the terms laid down in the Law. The Court emphasized that this rule aims to ensure the rapid and on-time collection of the social security premiums to secure employees' social security benefits. Hence, all the members of BoD at the time when the public receivable arose and when it was payable shall be liable for unpaid social security premiums regardless of whether they had a power of representation of the JSC before third parties.

The Constitutional Court also noted that as a BoD member, the applicant has the power to intervene and to secure the payment of due and payable social security premiums during his term of membership. Further, the applicant was obliged to ensure the payment as a BoD member.

The Court finally stated that there is a public interest on securing the collection of social insurance premiums by holding all the members of BoD jointly liable for unpaid social security premiums regardless of whether they had a power of representation or whether the company has sufficient assets. The Court also stated that due to the joint liability between the BoD and the company itself, the applicant has the right to have recourse, if he has to pay the unpaid public receivable.

### Conclusion

In the JSCs, the liability arising from debts and obligations belongs to the legal entity itself. However, the BoD members are held personally liable for unpaid public receivables such as social security premiums whether they have fault or they have a power of representation or not.

According to the decision given by the Constitutional Court, members of BoD including the highest level managers or authorities and legal representatives shall be collectively and jointly liable from unpaid social security premiums with the JSC itself. It is immaterial whether or not the company has sufficient assets or the BoD member has a power of representation.



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