

Dematerialization of capital markets instruments and property right issue

Atty. Öykü Öcal

Under Capital Markets Law no. 6362 (“CML no. 6362”) capital markets instruments are defined as securities and derivative instruments as well as other capital market instruments designated in this context by Capital Markets Board of Turkey (“the Board”) including investment contracts.

In the simplest way, dematerialization can be defined as renouncing from printing capital markets instruments with certificates and to create records electronically corresponding to these instruments.

Pertaining to our legislation, regulations on dematerialization are stated under CMC no. 6362. Within the scope of the Article 13/4 of the Law it is provided that; capital markets instruments, which are not delivered until the end of the seventh year following the date when they started to be monitored on records, shall be transferred to the Investment Compensation Center (“ICC”) and the limited real rights on them shall be automatically regarded as terminated and they shall be sold within three months starting from the date when they have been transferred to the accounts of ICC. On the other hand, this part of the Article annulled through the decision of Constitutional Court no. E.2015/29, K.2015/95 that is published in the Official Gazette dated November 12, 2015 and no. 29530, on the grounds that the mentioned part of the Article constitutes opposition with the Articles 13 and 35 of Turkish Constitution.

With the annulment decision of the Constitutional Court, the property right issue regarding the dematerialization of capital markets instruments came up.

Hence, it is thought that the regulation stating; capital markets instruments which are not delivered until the end of the seventh year following the date when they started to be monitored on records shall be transferred to the ICC and the limited real rights on them shall be automatically regarded as terminated and they shall be sold within three months starting from the date when they have been transferred to the accounts of ICC, violates the property right which is under constitutional guarantee and violates the balance between public and personal interests.

With the annulment decision, the regulation was abolished as of November 12, 2015. In the current situation, capital markets instruments which are not delivered following the date when they started to be monitored on records shall not be transferred to the ICC and capital markets instruments which are not delivered shall be recorded and followed under “unknown shareholder” account.

Currently, there is no sanction applied against not delivering the capital markets instruments which are decided to be dematerialized. We are of the opinion that this

situation will interfere justified means and principles constituting the basis of dematerialization system of capital markets instruments.

Hence, although not transferring capital markets instruments, which are decided to be dematerialized, to the ICC and the aspect that they will continue to remain in the possession of the beneficiary, ensures protection regarding personal property right; it is thought that this situation damages the system that is planned to be established with dematerialization and injures public interests by constituting obstacles for forming a system in full performance.

Additionally, following the annulment decision, with the Law no. 6704, published in the Official Gazette dated April 26, 2016 and no. 29695, temporary Article 10 is added to CML no. 6362.

Within the aforementioned article, it is stated that the procedures and principles regarding the return of the capital markets instruments that are transferred to ICC as they are not delivered until the end of seventh year following the date they were decided to be monitored on records and payment of them in case they have been subject to sale by ICC, shall be determined by the Board.

As seen, required legal regulations are set forth by the Board following the annulment decision of Constitutional Court and progress on securing personal property rights beside the justified basis of dematerialization system are ensured. Return/payment process to beneficiaries by ICC is started.

Additionally, following the annulment decision of Constitutional Court, legal basis for transfer of the capital markets instruments, which are dematerialized but not delivered until the end of seventh year following the date they were decided to be monitored on records, to ICC is removed.

Within this scope, through the Regulation prepared by ICC considering unjust enrichments and general lapse of time provisions, provisions on procedures and principles regarding the return/payment of capital markets instruments transferred to ICC are asserted.

As per the mentioned Regulation, 10 years' time period is provided for beneficiaries as lapse of time in order to apply ICC. Accordingly, beneficiaries shall apply to ICC until September 07, 2026. At this point, we are of the opinion that the problem regarding the property right may arise again.

Hence, this time the Regulation is restricting the personal property right regarding the capital markets instruments that are transferred to ICC with a 10 years' time period. Therefore, there is a possibility that the reasoning existing in the Constitutional Court decision may rise up once again.