



## **AMENDMENTS TO THE ENFORCEMENT AND BANKRUPTCY LAW WITH THE LAW NO. 7343**

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Significant amendments have been made to the Enforcement and Bankruptcy Law No. 2004, which is still in force under the Amendment to the Enforcement and Bankruptcy Law and Certain Laws (accepted by the General Assembly of the Grand National Assembly of Turkey on November 24, 2021, and entered into force after publication in Official Gazette No. 31675 on November 30, 2021). These amendments are examined in detail below.

### **A. AMENDMENT TO THE STAY OF ENFORCEMENT**

Enforcement proceedings with judgment, which could be initiated with a court order or documents that possess a judgment's legal characteristics, differ from enforcement proceedings without judgment, in that they may not be suspended only with objection of the debtor. The debtor party wishing to suspend the proceedings must apply the legal remedy of stay of enforcement (postponement of execution). Before the amendment in the law that entered into force on November 30, 2021, an enforcement decision could be requested from the Regional Court of Justice or the Court of Cassation.

By the regulation that entered into force on November 30, 2021, stay of enforcement decisions shall no longer be requested from the higher court, but from the Enforcement Law Court in which proceedings were initiated. Thus, the workload of the Regional Court of Justice and the Court of Cassation shall be reduced and party grievances shall be prevented.

Further, if an appeal against rejection of the appeal request with prejudice is appealable, the effect of the stay of enforcement shall continue until the expiry of the appeal period. The amendment is clearly aimed to close a gap that lead to different results in practice.

In our opinion, with this amendment, the Enforcement Court making stay of enforcement decisions will speed up the process. However, the regulations do not mention whether a debtor should apply directly before the court or rather the enforcement manager should send the file ex officio to the enforcement court upon request. Essentially, the previous stay of enforcement procedure was extremely important since debtors were under the threat of foreclosure, and the amendment should have been written in a way that was free from uncertainty.



Further, the outcome filings in which the application process was completed by applying to a court of appeal or an appellate court has not yet been determined. In practice, requests for stays of enforcement are rejected in filings currently under appeal or appeal review due to the amendment in the law. In our opinion, before the amendment in the law, a regulation concerning completed filings should have been introduced, and it should have been considered necessary for the authority to issue a stay of enforcement verdict in order to prevent possible loss of rights in that regulation.

## **B. AMENDMENT REGARDING PRESERVATION OF THE CLAIM TO RECOVER**

According to Law No. 2004, if seized goods were in the hands of a third party together with the debtor, said goods could be preserved despite the third party's claim to recover. The article of the law causing this practice has been amended as follows:

*“Article 97/a – (Annex: 18/2/1965-538/55 Art.): A person who holds a movable property is considered its owner. Even if the debtor and third parties hold the movable property together, the goods are considered in the possession of the debtor. (Additional third and fourth sentences:24/11/2021-7343/8 art.) **In this case, if the third party accepts the trusteeship, this property shall not be preserved. However, if it is decided to continue the legal proceeding under the first paragraph of Article 97, the property can be kept under preservation.**” (Emphasis added)*

If the third party accepts the trusteeship, the seized goods cannot be preserved. The preservation of the aforementioned goods only shall be possible when the enforcement court decides to continue proceedings.

This regulation shall ensure the legal and material protection of third parties outside the proceeding in our opinion. As a matter of fact, if the debtor held the goods before the amendment, the goods could be preserved despite the third party having a superior right to the seized goods. This situation shall be prevented by the new amendment, which aims to prevent victimization of third parties who are not prosecuted, under the presumption that "A person who holds a property is considered its owner" adopted in the Enforcement and Bankruptcy Law.



## C. SALE

### I. REQUEST FOR SALE

Article 106 of Law No. 2004 has been amended to include this statement: "*The creditor or debtor may request the sale of the seized property within one year from the date of the seizure*". The amendment increases the period for a sale request of movables to one year, making them the same as immovables. The article's next sentence applies a one-year period in terms of a debtor's rights in third parties.

The period for requesting sale shall be extended for one more year after expiry of the one year period in which a creditor may request the sale of goods that are not sold following the auction.

Accordingly, the creditor who has requested a sale once within the one-year sales request period ceases the sales request period, and therefore, the one-year sales request period shall not continue until the moment of non-realization of the sale. This period, ceased since the sale request, shall renew from the moment of non-realization of the sale. However, it should be noted that the extension of the period shall only be valid for the creditor, and the debtor must use her/his authority to request sales within one year of the foreclosure.

It is obligatory to pay for all appraisal and sales expenses (the fee in the price list to be brought into force every year by the Ministry of Justice) together with the sales request. If not, the request for sale shall be deemed invalid.

The price list to be issued by the Ministry of Justice shall be issued within six months from the effective date of the law containing the amendments. If sale is requested before the effective date of the price list, but the appraisal, preservation and sales expenses are not fully paid, it is obligatory to complete the expenses specified in the price list within one year from the effective date of this tariff and if the expenses are not paid within this period the sale request shall be deemed invalid.

Preservation, appraisal and the sales request must be made together and all expenses must be paid in advance in terms of registered motor land vehicles. Accordingly, if the entire cost of preservation is not deposited with the sales request, the sales request shall be deemed inexistant. Vehicles could be sold in a short time and decrease in value of the foreclosure shall be prevented by compliance with all requests herein.



If the amount deposited in cash with the sales request is found insufficient, a fifteen-day period shall be given to the entity requesting sale by the director of enforcement to make up for the deficiency, and if the deficiency is not covered within this period, the sales request shall be deemed inexistant.

It is crucial to note that while the period for requesting sales for seized movables has been increased to one year, the period for requesting sales in proceedings initiated by the liquidation of the pledged property is still six months, since the provision of Article 150/e of the Enforcement and Bankruptcy Law has not been amended. In our opinion, to ensure integrity, the period for a sale request should have been increased to one year in terms of proceedings initiated by liquidation of pledged property.

## **II. GRANTING THE DEBTOR THE RIGHT TO REQUEST A SALE**

Establishment of purchase by consent, which was not previously included in the Enforcement and Bankruptcy Law, entered into force as of November 30, 2021 with the addition of Article 111/a to the Enforcement and Bankruptcy Law by Law No. 7343. This article states that the debtor shall be able to request authorization for sale of seized property with her/his consent within seven days of notification of appraisal. In this case, the director of enforcement shall suspend sales operations after final appraisal of the property is complete, and then shall grant the debtor a fifteen-day extension. In cases where appraisal has not been conducted, the debtor may also request an appraisal.

When the debtor carries out an authorized sale, the sale price shall be *(i)* the amount corresponding to ninety percent of the appraised value of the seized property or *(ii)* the amount supplied by other creditors who have priority over the receivables of the creditor desiring the sale, whichever is higher. Furthermore, the buyer who has come to an agreement with the debtor is obliged to pay accrued follow-up costs for the seized property.

The buyer shall be obliged to produce the above-mentioned amounts within the fifteen days granted to the debtor. If the director of enforcement determines that the conditions of the sale are fulfilled, he or she shall send the file to the enforcement court immediately to approve the sale and to decide on transfer and delivery of the goods. The court shall deliver a final judgment regarding acceptance or rejection of the request to conduct examination of the file within ten days at the latest. After a decision of acceptance, ownership of the goods shall be transferred to the buyer, all liens shall be removed, and transfer and delivery transactions shall be performed. If the request is rejected, the deposited amount shall be refunded to the buyer.



If the creditor's consent is not sought when the debtor is granted authorization to request a sale, it is possible that the creditor may incur losses. In practice, it is observed that goods can be sold for much more than their appraised value when sold at auction. In this case, the debtor meeting only ninety percent of the appraised value of the goods for the sale price has been deemed sufficient, and the condition of obtaining approval from the creditor is not required. In our opinion, this issue should have been subject to the creditor's approval, because the creditor has an obvious interest in avoiding the probability of loss.

Since interpretation of the Provision 111/a, which authorizes the debtor in terms of sale, suggests that pledged or mortgaged goods are not covered, and since the current Provision 150/e, which regulates the sale of these goods, does not include a statement that the debtor can also request sale, it is understood that the debtor is not authorized to request sale of pledged movables or mortgaged immovables.

### **III. CONDUCTING SALES IN ELECTRONIC MEDIA**

Article 111/b was added to Law No. 2004 with Law No. 7343, and stipulates that sale of seized goods is to be made by auction on the electronic sales portal integrated with the National Judiciary Informatics System. The procedure for conducting all stages of the auction with electronic media has therefore been approved.

For the purpose of gradual implementation, regulation regarding the implementation of Article 111/b shall be issued within six months of the effective date of this Law.

Implementation of Article 111/b shall begin on the effective date of its regulation and shall be carried into practice throughout the country at the end of one year at the latest in the provinces or districts designated by the Ministry of Justice. These provisions shall be applied to the sales of goods seized after the transition date in the provinces and districts where implementation has begun. Previous provisions shall continue to be implemented in the sale of seized goods in places where the practice is not implemented and in the sale of goods seized before the transition date.

Previously, the auction process for sale of seized property began with bidding on electronic media and was completed with a physical auction. Now, the entire auction shall be completed electronically. Owing to the fact that all of the tenders shall be made with electronic media, broad participation shall be ensured, therefore it will be easier to sell the goods at their fair market value. In this way, both the interests of the creditor and the debtor shall be protected.



#### **IV. TERMINATION OF THE TENDER**

According to Article 281 of the Turkish Code of Obligations No. 6098, and the amendment made in Article 134 of Law No. 2004, only the creditor, debtor, those registered in the official registry of the seized property, restricted real rights holders, or those who participate in the tender by bidding may request the termination of tender from the enforcement court within seven days of the date of the tender, provided that they show an address within the country.

The phrase "related persons registered in the official registry" is used instead of "the persons in the land registry" in the second paragraph of the amendment, and the range of persons who can file suit for termination of the tender has been expanded.

The starting date of the maximum period for which a request for termination of the tender can be made has been set as the date on which the decision regarding the holding of the tender is announced on the electronic sales portal.

The enforcement court shall hold a hearing within twenty days from the date of the enforcement request upon the request for termination of the tender, and shall render a verdict even if the parties are absent. However, there is no need for the enforcement court to hold a hearing in cases that require dismissal on procedural grounds. A fixed ten percent fine, which does not grant the judge discretionary power, has been changed to "(...) a fine of up to ten percent of the tender price," and shall grant the judge discretionary power.

Cases that shall be sentenced with a fine are clearly defined in the provision:

- i. If termination is requested by other than the creditor, debtor, those registered in the official registry of the seized property, restricted real rights holders and those who participate in the tender by bidding,
- ii. If by the reason of a waiver in respect of persons other than the creditor, the debtor, those registered in the official registry of the seized property, restricted real rights holders requesting the sale,
- iii. In the event that it is decided to reject on the merits, the person requesting.

Termination of the tender shall be sentenced to a fine of up to ten percent of the tender price.



Requests for termination of the tender made by persons other than the persons accounted for in the law were previously subject to proportional fees over the tender price. Half of this fee shall now be deposited in advance when making a request. In case of termination of the tender, this fee shall not be charged to anyone else and the portion paid shall be refunded upon request. In case of rejection of the request for termination of the tender, the amount of the fee paid shall not be refunded and the remaining portion shall be collected from the person requesting the termination of the tender. Thus, unfair and malicious claims are averted without hindering freedom of claim.

Furthermore, for requests for termination of the tender made by persons other than those listed in the text of the law, it is obligatory to provide a guarantee of five percent of the tender price to cover possible loss for the persons concerned. If the request for termination of the tender is rejected and a claim for damages is not filed within one month of finalization of the decision, the court shall notify the revenue office for the collection of the fine under the provisions of Law No. 6183. If the revenue office does not collect the fine within three months of the date of notification, the guarantee received shall be returned to the relevant person upon request.

In the fourth paragraph of the current article, it was stipulated that if the complaint about termination of the tender is filed in a court without jurisdiction or authority, the court shall decide on lack of jurisdiction or lack of authority within ten days of the date of application, at the latest. The paragraph has been amended to state that the court which has rendered a verdict in order to prevent extending finalization of the tender shall send the file ex officio to the authorized or competent court.

The current "*Tender price shall not be paid to the creditors until the tender is finalized*" has been amended to "***The tender price shall not be paid to the creditors unless the tender is finalized and the subject of the tender is delivered to the buyer or made deliverable,***" and in cases in which the subject of the tender cannot be delivered or made deliverable, it has been decided that the tender shall be terminated by the director of enforcement and the price shall be refunded to the buyer.

Amendments to termination of the tender shall not be applied to requests that are already pending. However, the amendment to the fine shall also apply to requests for termination of the tender that are pending.