

INHERITANCE OF A COMMERCIAL ENTERPRISE TO A MINOR AND THE MINOR'S TITLE AS A MERCHANT IN ACCORDANCE WITH THE PROVISIONS OF THE TURKISH COMMERCIAL CODE

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In our legal system, the status of minors and interdicted persons holds significant importance, necessitating constant vigilance in both public and private law domains. Their legal status impacts themselves and extends to third parties affected by their actions. It's imperative to assess their capacity under the Turkish Civil Code and scrutinize relevant legislation in private law contexts. A comprehensive understanding of the Turkish Commercial Code and Turkish Civil Code provisions is crucial. This issue is particularly pertinent in commercial enterprises. While minors and interdicted persons can acquire the title of merchant, they are prohibited from actively engaging in commercial activities. Despite the perceived separation between public and private law, a holistic approach is necessary to accurately determine these individuals' legal status and actions under commercial law. The article first clarifies the commercial enterprise concept and its role in commercial law, drawing from scholarly opinions. Then, it delves into the conditions for minors and interdicted persons to become merchants, interpreting relevant TCC articles and analyzing Court of Cassation decisions. The final section examines the inheritance of commercial enterprises, particularly when inherited by a minor, interpreting relevant legislation to clarify pertinent issues.

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DEDOVANJE TRGOVSKEGA PODJETJA MLADOLETNIKU IN NJEGOV NAZIV TRGOVCA V SKLADU S DOLOČBAMI TURŠKEGA TRGOVINSKEGA ZAKONIKA

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V našem pravnem sistemu ima status mladoletnikov in odrasle osebe pod skrbništvom postavljenih oseb velik pomen, kar zahteva nenehno pozornost tako v javnopravnem kot zasebnopravnem področju. Njihov pravni status vpliva na njih same in se razteza na tretje osebe, ki so prizadete zaradi njihovih dejanj. Pomembno je oceniti njihovo sposobnost v skladu s Turškim civilnim zakonikom in skrbno preučiti relevantno zakonodajo na področju zasebnega prava. Celovito razumevanje določb Turškega trgovskega zakonika in Turškega civilnega zakonika je ključno. To vprašanje je še posebej pomembno v gospodarskih družbah. Čeprav lahko mladoletniki in odrasle osebe pod skrbništvom pridobijo naziv trgovca, jim je dejavno vključevanje v poslovne dejavnosti prepovedano. Kljub zaznani ločitvi med javnim in zasebnim pravom, je potreben za natančno določitev pravnega statusa teh posameznikov in njihovih dejanj v skladu s trgovskim pravom celosten pristop. Članek najprej pojasni koncept gospodarskih družb in njihovo vlogo v gospodarskem pravu, pri čemer se naslanja na strokovna mnenja. Nato se poglobi v pogoje za mladoletnike in odrasle osebe pod skrbništvom, da postanejo trgovci, tolmači relevantne člene TComC in analizira odločitve Vrhovnega sodišča. V zadnjem delu pa pregleda dedovanje gospodarskih družb, zlasti kadar jih podeduje mladoletnik, in tolmači relevantno zakonodajo, da se pojasnijo ustrezna vprašanja.



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1 The concept of commercial enterprise and merchant title

1.1 The concept of commercial enterprise

In Turkish law, the concept of commercial enterprise is not limited to economic relations or any other social sciences. With the undeniable reality of today's developing conditions, adapting the nature of law to this process has become a necessity rather than a demand. In our opinion, it would be wrong to consider many elements such as sales made through the e-commerce market and through information systems only as an »intermediation« activity. These activities also include production and consumption in addition to their intermediary nature (Bahtiyar, 2017, p. 1).

The commercial enterprise concept is outlined in article 11 of the Turkish Commercial Code (hereafter: TComC). The article reads as follows:

»A commercial enterprise is an enterprise, where the transactions are carried out continuously and independently, that aims to generate income which exceeds the limit that any tradesman enterprise is subject to.«

Based on the definition, it can be said that to be able to recognize the existence of a commercial enterprise, firstly, the existence of an enterprise for commercial activities and economic affairs is sought; secondly, it must have the purpose of providing an income exceeding a certain level and the activities to be carried out for this purpose must be continuous, and finally, it must be operated independently (Bozer & Göle, 2015, p. 7).

Although the above-mentioned issues appear as the elements of a commercial enterprise based on the wording of the legislation, it is observed in the doctrine (for recriticism see Tekinalp, 2008, p. 9 ff) that when these elements are listed, the aim to provide income is replaced by the element of providing economic benefits (Bozer & Göle, 2015, p. 8). The reason for this, in our opinion, is that the term economic benefit is based on a broader scope than the concept of providing income. In addition to this, some authors in the doctrine (Ülgen et al., 2015, (N.74) ve (N.94)) argue that it is inconvenient to prepare a system based on one system in terms of the way commercial law is addressed, and that each system will intersect with other systems in certain aspects. This view is appropriate because it is very difficult to say

that such a narrow definition will overlap with other branches of science or will be accepted. As the theory develops, putting it into a narrow mold will also limit the boundaries to be drawn by the law for commercial activities, thus increasing disputes.

1.2 Merchant title

The merchant is one of the concepts that forms the center of commercial law and plays a major role. The TComC drafted the merchant's provisions between articles 12 and 14. The title of merchant is important for determining the presumption of commercial business and implementing certain provisions stipulated in the TComC. Although our law introduces rules for both natural persons and legal entities, the issue will be addressed in the context of natural persons, as this is the part that is relevant to our research.

1.2.1 Acquisition of merchant title for natural persons

The acquisition of the title of merchant for natural persons is regulated under article 12 of our TCC. According to this article: *»a person who operates a commercial enterprise, even partially, on their own behalf is called a merchant.«* Based on the law's wording, first of all, to acquire this title, it is necessary to mention the existence of a commercial enterprise. Then, this commercial enterprise must be operated on behalf of a certain person, even partially (Arkan, 2021, p. 127). Clearly, the word *»partially«* is used for ordinary partnerships. Because in the case of an ordinary partnership, the business is partially operated for each partner (Berzek, 2013, p. 39).

While drafting the text of the TComC, it is observed that there is no requirement of capacity or registration in the trade registry or chamber of commerce in order to acquire the title of merchant (Kayar, 2013, p. 109). Therefore, any natural person who is of legal age and has the capacity of appeal shall be entitled to the title of merchant as long as they operate the commercial enterprise on their own behalf (Reform Serisi Yayın Kurulu, 2020, p. 54). From this point of view, it is concluded that for natural persons to acquire the title of merchant, a commercial enterprise must exist and this commercial enterprise must be operated on behalf of the person who owns it, even partially.

We have mentioned above that one factor that plays an active role in the acquisition of the title of merchant is to operate the commercial enterprise on one's own behalf. Accordingly, commercial representatives who operate a commercial enterprise on behalf of someone else will not be entitled to hold this title. That is to say, in cases where a commercial enterprise is operated or carried on through a representative, the title of the merchant will not belong to the representative but to the natural person on whose behalf the commercial enterprise is represented (Arkan, 2021, p. 129).

2 Merchant title in the case of minors and interdicted persons

2.1 Acquisition of merchant title by minors and interdicted persons

The TComC does not impose any specific legal capacity requirement in order to qualify as a merchant. Since every person who is an adult, has the power of discernment and who is not interdicted has the capacity to act (Turkish Civil Code (TCivC), article 10), they may acquire the title of merchant by fulfilling the requirements stipulated in the law. Therefore, the law does not require full capacity to acquire the title of merchant, nor does it require registration in any official registry. From this point of view, it would be appropriate to say that minors or interdicted persons may also acquire the title of merchant. As mentioned above, it should be noted here that minors or interdicted persons cannot operate the commercial enterprise themselves. Because even though they are entitled to hold the title of merchant, it is not possible for minors and interdicted persons to operate the commercial enterprise by themselves. However, it is possible for these persons to operate these businesses on their own behalf and accounts through a legal representative.

2.2 Analysis of the issue within the context of article 13 of the TComC

We have already mentioned that in the event that a commercial enterprise is operated through a commercial representative or an attorney, the title of merchant belongs to the natural person represented, not to the representative. The situation will not be different for minors and interdicted persons operating a commercial enterprise that they own or inherited through their legal representatives. Article 13 of the TComC states that:

»The legal representative who operates the commercial enterprise belonging to minors and interdicted persons on their behalf is not considered a merchant. The title of merchant belongs to the represented. However, the legal representative shall be liable as a merchant in terms of the enforcement of criminal provisions.«

Therefore, it is impossible for the legal representatives who operate the commercial enterprise owned or inherited by minors and interdicted persons to have the title of merchant. It has been stipulated both in TCivC, and the TComC stipulate that the title of the merchant shall belong to the minor or interdicted person on whose behalf the business is operated.

Although it is stipulated that they cannot have the title of merchant, in terms of criminal sanctions, the legal representatives of minors and interdicted persons shall be under penal liability. Because, in the last paragraph of article 13 of the TComC, the legislator explicitly refers to this situation. In the event of non-compliance with the legal norms or rules that the commercial enterprise must comply with, if the work or actions performed constitute criminal liability, this criminal liability will be incurred not against the minor or interdicted person, but against the legal representative who performs transactions on behalf of the minor or interdicted person (Reform Serisi Yayın Kurulu, 2020, p. 54). Therefore, in cases such as the bankruptcy, fraud, or tax evasion of a commercial enterprise owned by a minor or an interdicted person and operated by their legal representative, the legal representative will be held liable. In our opinion, it would be reasonable to say that one of the factors behind the introduction of this provision is the principle of individual criminal responsibility (for the same opinion, see Hirsch, 1939, p. 128).

It should be noted that article 13 of the TComC only applies to persons who have a legal representative (Arkan, 2021, p. 130). In the event that a minor or an interdicted person operates a commercial enterprise without a legal representative, it will not be possible to say that these persons have the title of merchant (Arslanlı, 1959, p. 46; Erem, 1971, p. 74; Arkan, 2021, p. 130). Because when we review articles 14 and 15 of the TCivC, respectively, the articles are as follows:

»Those who do not have the power of discernment, minors and interdicted persons do not have the capacity to act.« and »Without prejudice to the exceptions specified in the law, the acts of a person who does not have the power of discernment do not have legal consequences.«

Therefore, since minors and interdicted persons do not have the capacity to act, it is not possible for them to be held liable for these actions or activities.

2.3 Analysis of the issue within the framework of the Court of Cassation decision

In our opinion, it would be beneficial to analyze a decision of the Court of Cassation dated 2004 (for Supreme Court (Yargıtay) Decision: Y.2.HD, 22.03.2004, E.2004/2052, K.2004/3561) to understand the issue. When we examine the case regarding the decision, we see that the plaintiffs' children were born in 1995, were not yet of legal age at the date of the decision and opened a commercial enterprise on their behalf; they stated that they would transfer movable, immovable and vehicles related to the business to the minor and requested the appointment of a trustee, and that the child's ability to incur debt through a legal transaction between the child and the parents or between the child and a third party for the benefit of the parents depends on the participation of a trustee and the approval of the judge; the plaintiffs claim that if the interests of the legal representative and the interests of the minor or interdicted person conflict in a particular matter, the guardianship authority will appoint a representative trustee; they also claim that the mother and father are the legal representatives of the minor and that the establishment of a written judgment is contrary to the procedure and the law while a representative trustee should be appointed for the minor.

3 Inheritance of a commercial enterprise to a minor

Our law has no particular regulation regarding the transfer of a commercial enterprise by inheritance. However, if the transfer of a commercial enterprise to third parties is possible under our law, it would be appropriate to say that the transfer by inheritance is also possible (İmregün, 2005, p. 12; Cengil, 2016, p. 102).

Article 599 of the TCivC reads as follows:

»The inheritors acquire the inheritance as a whole upon the death of the legator in accordance with the law. Without prejudice to the exceptions stipulated in the law, the inheritors directly acquire the real rights, receivables, other property rights, possession over movables and immovables of the legator and become personally liable for the debts of the legator. Designated inheritors also acquire the inheritance upon the death of the legator. The legal inheritors are obliged to deliver the inheritance to the appointed beneficiaries in accordance with the provisions on possession.«

Therefore, the inheritance is transferred to the inheritors upon the legator's death. For this reason, the transfer has a place in the law. According to the principle of integrity, following the article 11(3) of the TComC, it is not necessary to carry out the mandatory disposition transactions separately for the transfer of the commercial enterprise, and there is no objection to the transfer of the enterprise as a whole to be subject to legal transactions. Therefore, the commercial enterprise is transferred to the inheritors as a whole, together with both tangible and intangible elements. In addition, the procedures and protocols regulated in the legislation and related to the transfer of the commercial enterprise are not applicable to the transfer by inheritance. Because this transfer by inheritance is realized legally in accordance with the principle of universal succession. The death of the legator results in the transfer of the commercial enterprise to the inheritors.

The first people to have a say in the division of the inheritance upon the death of the legator are undoubtedly the inheritors (Ozanemre Yayla, 2011, p. 224). The inheritors can decide how and to what extent the inheritance will be divided (Kılıçoğlu, 2009, p. 307). However, this freedom of inheritors should not breach the mandatory provisions of the law (Kılıçoğlu, 2009, p. 309). The situation will certainly be the same for a commercial enterprise that is subject to inheritance. The inheritors may leave the commercial enterprise to a sole person or they may share it collectively. As mentioned above, in accordance with the principle of integrity, the commercial enterprise should be transferred and shared in such a way that it can continue its activities or in a manner that will maintain its continuity.

Although the inheritors have the first say in the distribution of the inheritance within the framework of freedom of will (Kılıçoğlu, 2009, p. 309), today, it is not always possible to make a joint decision in the distribution process. At this point, upon the request of one of the inheritors, it is also appropriate in Turkish law (TMK Clause 650) for the judge to request this distribution to be finalized. Upon this request, the judge determines the assets and liabilities in the estate and then determines the value. After this valuation, two situations arise. In the first one, the assets are sold and the amount obtained is distributed to the inheritors according to this value determination; in the second one, the assets may be allocated to a single person. In terms of commercial enterprise, the first issue to be examined should be the value of the enterprise. Because when the commercial enterprise is evaluated as a whole, it is a very valuable structure. Therefore, the inheritors will not benefit from the

distribution of this structure. For this reason, the fact that the commercial enterprise does not cease to exist, in other words, not to be distributed, always stands out when the potential to generate income for the inheritors is taken into consideration.

Share allocation is applicable pursuant to article 650(3) of the Turkish Civil Code. The article reads as follows:

»The inheritors shall form shares from the property of the estate according to the number of heirs or kins. If there is no agreement, each of the inheritors may request the settlement of the shares from the magistrate court. In determining the shares, the judge shall take into account local customs, the personal circumstances of the inheritors and the will of the majority. The allocation of shares shall be made in accordance with the agreement of the inheritors. If this is not possible, then a lot shall be drawn.«

It should be noted here that in the absence of an agreement, the judge cannot allocate shares at their own discretion. However, according to some authors in the doctrine if an application is made to the judge for share allocation, the judge has the authority to allocate shares to the inheritors directly. We also believe that this approach is correct. Because a commercial enterprise is an important economic entity and an organization that undeniably impacts commercial life. It is important that its activities continue and its functioning is not impaired. At this point, it would be the most appropriate decision that the person who will undertake this task or the person to whom the shares will be allocated should be the person who has this competence. The judge is the most competent person to determine this in the dispute. Therefore, in our opinion, it would be appropriate to leave such discretion to the judge.

It is unnecessary to have full capacity to act to qualify as a merchant. We have already mentioned that minors and interdicted persons also acquire the title of merchant and have the title of merchant. It should be noted that such persons cannot operate the commercial enterprise on their own behalf and account, their legal representatives must carry out transactions on their behalf and activity. Although the merchant title belongs to the minor and the interdicted person, the legal representatives carry out the activity and make transactions at this point. Likewise, in the case of voluntary representation such as commercial proxy and commercial representative, they carry out the affairs of the commercial enterprise on behalf and account of the merchant; they do not carry the title of merchant themselves (Bilgili & Demirkapi, 2016).

Although it is impossible for minors and interdicted persons to actually operate the commercial enterprise transferred to them by inheritance, it is legally permissible for them to manage it in their own names and accounts when it is transferred by inheritance. For example, if the commercial enterprise of the father is inherited by a minor, the minor may inherit the commercial enterprise in its entirety under the existence of the principle of integrity. However, it should be noted that the presence of a legal representative is also required for the minor to carry out the continuity and sustainability of the commercial enterprise. Because the legal representative must maintain the commercial enterprise on behalf and account of the minor. In the event that the minor, who inherited the inheritance, carries out the commercial enterprise on their own behalf and account, even partially, these acts will be deemed not to have been carried out, as the transactions they carry out will result in incapacity within the framework of the TCivC. As we have mentioned, if criminal liability arises as a result of the transactions carried out by the legal representatives on behalf and account of the minor; here, the criminal liability of the legal representative will come to the fore, not the criminal liability of the minor and the interdicted person.

4 Conclusions

Articles 12-14 of the TCOMC regulate the qualifications of natural persons to have the title of merchant. Accordingly, persons who operate a commercial enterprise on their own behalf and account, even partially, if not entirely, are entitled to the merchant title. The TCOMC takes the concept of commercial enterprise as a basis for the acquisition of the title. Therefore, the commercial enterprise plays a role in the classification of the merchant since the first condition for the acquisition of the title is the existence of a commercial enterprise. Based on article 12 of the TCOMC, three elements stand out and these are as follows: the existence of a commercial enterprise; the sustainability and continuity of the commercial enterprise; and finally, the operation of the commercial enterprise, even partially, on one's own behalf and account. In addition, our legislation does not stipulate any qualification or registration requirement for acquiring the title of merchant. It follows that the registration to be made here is explanatory, not constitutive. In addition, as a natural reflection of the fact that it does not stipulate any capacity requirement, it is possible for minors and interdicted persons to own a commercial enterprise and acquire the title of merchant.

Although minors and interdicted persons acquire the title of merchant, they can't operate the commercial enterprise on their own behalf and account. Therefore, their legal representatives operate the commercial enterprise by acting on their behalf and account. It should be noted that the minor and the interdicted person hold the merchant title. Although it is the legal representatives who carry out the transaction and carry out the activity, the title of merchant belongs to minors and interdicted persons. In article 13 of the TComC, criminal liability is established. Accordingly, legal representatives who carry out or operate commercial enterprise activities on behalf and account of minors and interdicted persons are not merchants, and in addition, when a criminal liability arises due to the activities of the commercial enterprise, the burden is on the representative. In other words, if there is a breach of an obligation that the commercial enterprise is obliged to comply with and the criminal liability for this is regulated by law, the legal representatives acting on their behalf are responsible, not the minors and interdicted persons.

Any particular regulation does not stipulate the inheritance of a commercial enterprise, but since it may be passed on to third parties through the transfer of the enterprise, it is also possible that it may be subject to inheritance. Although most of the regulations regarding inheritance are applied at this point, the procedures regarding the transfer of the commercial enterprise through sale will not be applied to the transfer of the commercial enterprise by inheritance. Since the transfer in this case is already legal. The death of the legator results in the transfer of the commercial enterprise to the inheritors.

Because when the commercial enterprise is evaluated as a whole, it is an invaluable structure. Therefore, it is difficult to state the benefit of the inheritors in the distribution of this economic structure. For this reason, the fact that the commercial enterprise does not cease to exist, in other words, not to be distributed, always stands out when the potential to generate income for the inheritors is considered. In addition, following the principle of integrity, the commercial enterprise should not be considered a separate structure but a whole and should be transferred accordingly.

Although it is impossible for minors and interdicted persons actually to operate the commercial enterprise inherited by inheritance, it is legally permissible for them to pass it on to their own names and accounts when acquired by inheritance. For example, a 15-year-old person who is not yet of legal age, may inherit the commercial

enterprise inherited by the legator under the umbrella of the principle of commercial enterprise integrity. At this point, it should be noted that the existence of a legal representative is required for the minor to ensure the continuity of the commercial enterprise and its activities. As we have mentioned, the legal representative must maintain the commercial enterprise on behalf and account of the minor.

In the event that the minor who inherited the commercial enterprise, even partially, conducts the commercial enterprise on their own behalf and account, these acts will be deemed not to have been carried out, as the transactions they carry out will result in incapacity within the framework of the TCivC. As we have mentioned before, if criminal liability arises as a result of the transactions carried out by the legal representatives on behalf and account of the minor; here, the criminal liability of the legal representative will come to the fore, not the criminal liability of the minor and the interdicted person.

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