

# OBLIGATIONS ABOUT CEASING THE TRADE AND THE CONSEQUENCES

**C**EASING THE TRADE MEANS GIVING UP FROM operating a commercial undertake on behalf of the owner or to close down the commercial undertake all together. In order to protect creditors from the bad faith of the merchants who cease the trade, the procedure after ceasing the trade was detailed under “Merchant of Ceasing the Trade” on the Bankruptcy and Enforcement Law numbered 2004 Article 22.

First of all, we should define merchant according to Turkish Commercial Code. In the New Turkish Commercial Code numbered 6102 (“New TCC”), the merchant is separately defined for both the real person and the legal entity. The real person is defined in Article 12 of the same legislation. According to this clause; “the person is a merchant who manages a commercial undertake for himself even partially”. As can be seen from the definition, in order to be called merchant, there has to be commercial undertake and it has to be managed by a person at least to a certain extent.

The legislation about legal entity is regulated under the New TCC Article 16/1 and commercial partnerships, associations operating a commercial undertaking in order to realize their objectives, charitable foundations and organizations and establishments founded by public legal entities such as the State, the provincials government, the municipality, in order to be commercially operated or managed in accordance with the provisions of civil law in accordance with the law under which they have been constituted shall also be considered as merchants.

For the purpose of this paper, we briefly mentioned the description of the merchant without going into details and differences. According to the Article 44 of the Bankruptcy and Enforcement Law (B.E.L.), the merchant who ceases the trade;

- Must report that he ceases the trade in fifteen days to Trade Register Office that he is registered to,
- Must declare of property with all assets and liabilities and all creditor’s names and addresses to Trade Register Office.

This obligation is only for the merchants who cease the trade, not for the inheritors. They don’t have to report the ceasing the trade and declaration of property to the Trade Register Office. On the other hand, if the inheritors do not continue to run the deceased’s trade, then they have to report the situation with declaration of property in fifteen days to the Trade Register Office.

Upon receipt of the declaration of property, the concerned authority will inform the land or ship registers and the Turkish Patent Institute and Turkish Bankers’ Association; and thereupon, an annotation of restriction of the rights of assignment for a period of two months will be entered and recorded in the relevant register. Despite this limitation, the creditors can distraint on these properties or they can ask these properties to be included in bankrupt’s estate if the merchant goes bankrupt in this two month period.

## Responsibility

A duty or obligation upon one moral, or legal accountability in to behave correctly in respect of ability or authority to act or decide take decisions independently.

There is a minor detail that should be mentioned here. If the merchant who ceases the trade did not declare a certain property thinking that this property is illicit for distraint while it isn't, then he is exposed to the consequences that implied in B.E.L. article 337/a because what properties are illicit or not is left to the bailiff to decide not to the debtor.

The obligations of the merchant who ceases the trade are not limited to the abovementioned items. According to the same article, for two months after the declaration of property date the merchant who ceases the trade can not dispose on the properties that are lawful for distraint. Then what happens to the transactions between the debtor and the third person during this two month period? The transactions between the debtor and the bonafide third person are considered valid. However, the law brings a limitation to that; the wife and husband, ancestor and offspring, the relatives until the second degree (this degree is included) with posterity or relative by marriage, between the adoptive and the adopted child can not assert the good faith. It is legislated as an absolute presumption that never available of demonstration of the opposite. On the other hand, according to the Supreme Court various precedents; someone who should have known the merchant's situation in the nature of life can not assert the good faith.<sup>1</sup>

Despite the merchant who ceases the trade can't dispose on the property which is lawful for distraint for two months, for certain situations such as if the property a) can be deformed, b) preservation is costly, and c) likely to depreciate in value, after declaring the property, the merchant can apply to court for foreclosure decree to be given and if it is granted, the sale can be performed by the bailiff.

According to the same law (B.E.L.), it is considered a misdemeanor and penalized accordingly if the merchant who ceases the trade doesn't perform his obligations. (B.E.L. 337/a)

The misdemeanor of ceasing the trade is an optional type of misdemeanor and it is based on a complaint. In other words, it can't be prosecuted by ex officio. It is an optional type of misdemeanor and the consequences are based on the behavior and considered a misdemeanor if one of actions that are listed on B.E.L. 337/a takes place. Also it is misdemeanor that can only be done by the merchants. Therefore, in order for a misdemeanor to be considered a crime under law one of the factors stated below should take place;

- Omitting the declaration of property
- Understating the value of existing property in the declaration the property

- Omitting the declaration of property which is in assets or their value during the levy or bankruptcy
- To dispose on the property within the forbidden period which is for two months after the declaration of property in B.E.L. 44/III.

Let's mention the common mistakes done in declaration of property and things can be done to avoid them. When the merchant reports such circumstances to the Trade Register Center, the explanatory statement about the goods and assets should be well done. If there is no explicitness about properties that are declared, the obligation of declaring the property doesn't count even if it is published in the Trade Registry Gazette. After the merchant makes his obligations which is reporting and declaration of property, the situation is published in the Trade Registry Gazette and announced with the appropriate resources in where the creditor resides. The expenses of this announcement should be paid by the merchant. According to the law, the merchant who doesn't pay the expenses of the announcement is considered as if he did not declare his property. If this announce was not published in where creditor resides, it also considered that the merchant hasn't fulfilled his obligation. For instance, if the creditor's commercial center is in İstanbul and this report of ceasing the trade is published in Izmir Trade Registry Gazette, it is assumed that the merchant hasn't fulfilled the obligation of reporting.<sup>2</sup>

According to the second subsection of B.E.L. 337/a, the debtor can't be penalized where it is demonstrated that the creditor hasn't harmed because of this action. In other words, this is a required condition for a penalty. Therefore, it's not enough that one of the abovementioned actions is actualized to be penalized; the condition for the creditor to be harmed is also looked for. The burden of proving this is on the debtor. So the creditor doesn't have to demonstrate that he is harmed for penalizing the debtor. From this point of view, the debtor (the merchant) who disposes on the property that is mentioned in the declaration of property in this particular two months cannot be penalized if his other properties are enough to pay his debts.

The moral element of this crime is the general intent. Since the negligence of this cannot be envisioned by the law, it is accepted that this crime can not be committed negligently. For the defendant to be penalized, it is necessary that the act must have been performed with a wrongful intention, done on purpose, and should harm the creditor.

We have mentioned before that this misdemeanor can only be committed by a merchant. On the criminal cases that are opened for ceasing the trade, it is searched that if the defendant is really a merchant or not. The Supreme Court of Appeal's opinion has altered in recent years with

regards to the case that the defendant is the representative of the debtor company. According to the Supreme Court, the result such case is not "ceasing the trade" but rather "ending the partnership relationship".<sup>3</sup> For this reason, it isn't not possible for the managers and authorized officers to commit this misdemeanor since it would be to say that they have the obligation mentioned on B.E.L. article 44 which would be obliging the law. The penalty for such would be other than "ceasing the trade" which are stated in the same law's article 331 (the penalty for the debtors who devalue the existing with the intent to harm the creditor), article 333/a (providing a individual benefit on bankruptcy and composition of debts), article 345/a (the penalty of those who have to ask the bankruptcy of the corporation) and it is also possible to penalize them for fraudulent bankruptcy and fraud which is stated in the Turkish Criminal Law numbered 5237.

Another issue that should be mentioned here is that the merchant must "actually" cease the trade to be penalized. The Supreme Court requires that those who cease the trade "actually" for penalty and it should be reported so in fifteen days to the Trade Register Office that he is registered to.<sup>4</sup> To determine the actual state of the company in question, the background check should be done by the judicial police and the status of the taxpayer searched from the tax office that he is registered to. It is also searched by the judicial police if the company is doing business in different address or not. Accordingly, The Supreme Court does not act on only by the report that is provided by the Trade Register Office when deciding the acquittal for the misdemeanor of ceasing the trade.<sup>5</sup>

The petition right for this misdemeanor is on the creditor who is harmed by this. The third person who doesn't have debt/credit relationship can't complaint with regards to this misdemeanor.

The petition right falls in three months starting from the known date for the misdemeanor and at any rate, one year after the date the crime is committed. But, how is the date of misdemeanor determined? The time of the misdemeanor is determined when the collection agency who goes to debtor's house for levy and reports that the debtor was not found in that address and when police confirms that the debtor aban-

doned the address.<sup>6</sup> It is also necessary to note that, one cannot complain in fifteen days pass after the date of ceasing the trade that is mentioned B.E.L. 44.

Even though there are many different views in doctrine with regards to the delegable court, the Supreme Court's main opinion and the prevailing doctrine is that the jurisdiction and the authorized court is the enforcement court where the executive proceeding is done. The creditor who is harmed by the misdemeanor must apply to the enforcement court where the executive proceeding is done by written or verbal application. As a matter of fact, in one of The Supreme Court's decisions is in like manner way and 'the crime for ceasing the trade' was not necessary to press a charge with an accusation; it is convinced that the judgment can be done with a petition to the Enforcement Court.<sup>7</sup>

The penalty for this misdemeanor which is stated in L.E.B. article 337/a is an "imprisonment from three months to one year". When looked at, since this penalty is a short time imprisonment-according to Turkish Criminal Law (T.C.L.)-, it can be converted to the optional sanctions which are mentioned in article 50 of T.C.L or it is possible to postpone the imprisonment.

According to B.E.L. article 310, the bankrupt is considered who acted with negligence in some occasions and he can be penalized according to T.C.L. The reckless bankruptcy is stated in article 162 of T.C.L. and if the bankruptcy takes place due to the bankrupt's fault, it is called "reckless bankruptcy" and the merchant is be penalized from two months two one year. The case of omitting the declaration of property is one of conditions of "reckless bankruptcy" according to B.E.L. article 337/a and the merchant can be penalized with this misdemeanor as well.

**SOURCES:**  
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- <sup>1</sup> Action of Nullity and Objection 03.05.1967 D., 4983/5129 (RKD.1967/7-10, 2/2, p:256)
- <sup>2</sup> Action of Nullity and Objection 03.06.1969 D., 6194/6115 (ABD. 1969/6, sh:1171)
- <sup>3</sup> Civil Department no. 16 of the Supreme Court 24.10.2011 D. 934/6408 ; Civil Department no. 16 of the Supreme Court 28.12.2009 D. 5504/9066
- <sup>4</sup> Civil Department no. 16 of the Supreme Court 29.12.2008 D. 9503/8640
- <sup>5</sup> Civil Department no. 16 of the Supreme Court 05.06.2007 D. 1395/2170
- <sup>6</sup> Civil Department no. 17 of the Supreme Court 08.04.2004 D. 386/4353
- <sup>7</sup> Civil Department no. 16 of the Supreme Court 10.04.2007 D. 1383/1225