



# AMENDMENTS AND REFORMS TO THE BANKRUPTCY AND ENFORCEMENT CODE NUMBER 2004

## Introduction

With the Amendments to some codes in the Scope of Effectiveness of Judicial Services and the Suspension of the Plea and Penalty related to Crimes through Press Code Number 6352 ("Code"), Turkish Law came across some amendments and reforms. The most important amendment and reform to this Code is referred to as "omnibus bill" by the public, emerged through Bankruptcy and Enforcement Code Number 2004. Legislator's justification for the amendments and reforms was announced as following:

*"In the scope of amendments to the Bankruptcy and Enforcement Code; even though lots of amendments had been drafted since the beginning of The Bankruptcy and Enforcement Code number 2004, they had never reached radical and effective levels. Due to this, the code failed to respond to the needs and conditions of today's world. Also, the criticism about the shortcomings of the code and the complaints about the imbalance between obligee and obligor have been stated continuously in the doctrine and practice. With all the reasoning, eliminating the difficulties emerging from practice of the Bankruptcy and Enforcement Code, adapting to*

*the social and economic conditions of today's world by accelerating judicial process and, stabilizing the balance of interest between the obligee and obligor was the aim of the legislator in making this Code.*

*This Code was drafted in order to establish a more modern system of enforcement, provide an effective usage of National Judiciary Informatics System ("UYAP") during enforcement office transactions, eliminate the connection of enforcement and bankruptcy offices with cash, prevent the distraint of any kind of household goods belonging to the obligee and the other members of the house living with the obligee and, improve the condition of depositories."*

In this article, the amendments and reforms to the Turkish Bankruptcy and Enforcement Code number 2004 will be examined.

## Bankruptcy and Enforcement Code Article 8, Requirement of justification in the Decision of Enforcement Offices

The requirement of justification in all the decisions made by the Bankruptcy and Enforcement Office is inscribed in Article 8 of the Code.

In practice, enforcement offices stamped petitions as "request granted" or "request denied" using a standard stamp. However, this issue was subject to complaints and objections by the parties which lead to over workload at the enforcement courts. For that reason the legislator drafted this article compelling the enforcement offices to declare the justification of decisions, so that the workload of the enforcement courts is decreased and trust of public over judicial system is maintained.

The amendment was entered in force on 05.07.2012 which was the date of publication of the "Code" in the Official Gazette.

## Bankruptcy and Enforcement Code Article 8/a, Electronic Transactions

The phrase electronic transaction is new to Turkish Law. Through encouragement of the usage of electronic environment, the transactions of enforcement offices which took days will be completed in hours.

Effectiveness of UYAP nationwide and security of virtual documents via electronic signature are the two scopes of this facility.

In the era of rapid innovations in technology, it is inevitable to avoid technological reforms and adapt to system. With the emerging necessity, in 1998 the first computerisation started by the Minister of Justice. In order to progress more systematically and within plan, Information Technologies Department was established in 1999. The objectives of Information Technologies Department are stated in Article 22 (A) of the Code number 2992 which was drafted with the Code number 4674 dated 2001. UYAP innovation system began in two phases. In 2001 "UYAP I" project, which provides automation of Central Agencies of the Minister of Justice, was completed; then in 2005 "UYAP II" project, which covers judiciary and administrative agencies and, medical jurisprudence automation, began to operate. The Supreme Court, also, adopted the UYAP innovation system. Today, almost all of the judicial departments are using the UYAP system.<sup>1</sup>

Even though it seems as a big success in theory, the application of the electronic system causes serious problems in practice. Operation from a single centre and the length of operating system cause disruptions which mostly could not be fixed all day and lead to delays and interruptions of enforcement transactions.

With the European Union (EU) developments, electronic signature (e-signature) started to be used in our country. Parallel to EU Directive Number 99/93 EC, Electronic Signature Code Number 5070 was published in the Official Gazette dated 23.01.2004 and came into force. With this Code legal infrastructure of e-signature is established which regulates the implementation on the private and public sector. According to the definition of the Code, electronic signature refers to an electronic data, which is attached to another electronic data or has been logically connected to another electronic data and provides to confirm identification. E-signature has the effect of original signature, unless the provision states the necessity of original signature.<sup>2</sup>

In the process of legalization of e-signature and UYAP, the purpose of the legislator was to encourage the bankruptcy and enforcement offices and advocates to use UYAP and e-signature in order to accelerate and make the proce-

ture of enforcement and bankruptcy transactions more effective. With this motivation the legislator also altered the other provisions relating to UYAP and e-signature to prevent possible confusions.

These amendments will come into force six months after 05.01.2013, the publication in the Official Gazette.

**Bankruptcy and Enforcement Code Article 9, Payment and Conduction of Valuable Property**

In order to prevent possible misunderstanding and corruption at bankruptcy and enforcement offices, the amendment with the Code Number 6352 was made.

With this amendment, the payment to be remitted to the enforcement office must be made to the bank account determined by the Minister of Justice.

In addition, payments made by an obligor or a third person during distraint, will be transferred to the bank account until the end of the next working day.

Payments will be automatically transferred to the account of the obligee by the relevant bank within three days.

This amendment will come into force six months after 05.01.2013, the publication in the Official Gazette.

**Decrease of the Compensation Rate**

Denial of enforcement compensation, bad faith compensation and other similar compensations which were specified in the Bankruptcy and Enforcement Code have been decreased in rate from forty per cent to twenty per cent with the New Code.

Legislator stated the justification of the amendment as the forty per cent being too much for the current financial circumstances and hence they adjusted the new percentage according to the current economic climate.

Articles 67, 68, 68(a), 69, 72, 89, 97, 169(a) and 170 also amend the Bankruptcy and Enforcement Code.

The above amendment came into force on 05.07.2012 which was the date of publication of the “Code” in Official Gazette.

**Property that is not Leviable**

Property that is not leviable is drafted in Article 82 of Bankruptcy and Enforcement Act, as amended by Code Number 6352.

In the last paragraph of the Article, enforcement officers are given power to decide whether the property or right is leviable or not. It has been held in a judgement of the Supreme Court<sup>3</sup> that neither the enforcement manager nor the enforcement officer has the power to decide if property or right is leviable or not. The decision could only be made by the enforcement court if one of the parties instigated the complaints procedure. With the amendment now on, the power of decision making is given to the enforcement officers for the purposes of filling the legal gap. The parties who object to the decision of the enforcement officer must apply to the court to start the complaint procedure within seven days.

Amendment regarding business properties that are not leviable is as following; “The properties which are connected with intellectual work rather than physical work, to sustain financial operation could not be levied”. With this amendment the scope of leviable business properties is expanded.

With the amendments levying property at resident address is almost impossible. The property which is necessary for fundamental needs, except cash, negotiable instruments, gold, silver, gem, antics and ornaments, property of other member of the household cannot be levied. Enforcement offices interpret the meaning of the fundamental needs widely, and do not permit the levy of any property without considering if it is necessary for fundamental needs or not. However, if there is more than one property which are necessary for fundamental needs, then the more expensive one could be levied.

Levy of the property belonging to a resident of the obligee household is not allowed.

This amendment came into force on 05.07.2012 which was the date of the publication of the “Code” in Official Gazette.

**Bankruptcy and Enforcement Code Article 99, Possession of Third Party**

With this amendment, confiscation could not be possible without the permission of the third party if the third party claims ownership of the property which is the subject of levy by the obligee. If the obligee wishes to confiscate the property that third party claims ownership of, obligee must make an objection to the claim of the third party to the enforcement court within seven days. Unless the obligee sues the third party within seven days, the claim of the third party will be regarded as accepted by the obligee.

This amendment came into force on 05.07.2012 which

was the date of the publication of the “Code” in the Official Gazette.

**Bankruptcy and Enforcement Code Article 106, Time Limits for Requests**

One of the most important principles of Enforcement Law is speed. With the motivation of establishing this principle into Enforcement Law, the maximum time limit to request sale after the levy is amended to following: in immovable properties the maximum time limit of two years is reduced to one year, and in movable properties the maximum time limit of one year is reduced to six months.

This amendment will come into force six months after, 05.01.2013, the publication in Official Gazette.

I must mention Articles 112 and 123 in this section. In Article 112 the one month time limit for sale of movable properties after the request by obligee is extended to two months. In Article 123 the two months time limit for sale of immovable properties after the request by obligee is extended to 3 months.

This amendment will come into force six months after 05.01.2013, the publication in the Official Gazette.

**The Announcement of Sale and Proposition Taking Place in Electronic Environment**

When explaining the purposes behind UYAP and e-signature it was revealed that the aim was to encourage the use of technology. Further advancement in this electronic environment bears the same objective.

The sales at the enforcement offices are only publicised at the board by being displayed on the door of the office and during the sale they are announced three times at the door of the office to attract attention. However, as we know from experience, that kind of announcement has limited effect and results in the auction being carried out in the presence of a small number of people. For all these reasons, the properties are usually sold significantly under value.

Due to the drawback of the old legislation, the amendment states that the announcements of

auctions are to be broadcasted in the electronic environment in order to reach more potential buyers. Also with this amendment it is available to bid at the electronic environment which aims to increase the number of potential buyers and to prevent monopoly. In addition, to prevent false bids, legislator drafted a condition that the bidders pay 20% of the estimated value of the property.

Articles 114, 115, 124, 126, and 129 of Bankruptcy and Enforcement Code are amended in line with these details.

These amendments will come into force six months after 05.01.2013, the publication in the Official Gazette.

**Conclusion**

As stated in the justification of amendments, the amendments are drafted in the Enforcement and Bankruptcy Code Number 2004 to accelerate the enforcement transactions, encourage the usage of electronic environment, provide effective procedure and stabilize the balance between the obligee and obligor.

In the era of major improvements in technology and fast spread knowledge, it will not be wrong to say that the Code before the amendments was behind the time. Legislator has aimed to fix this problem with the amendments drafted in Code Number 6352; however, the amendments are still not sufficient. The field of legislation must be reorganized in light of criticism in doctrine and practice. In the legalization age of Turkey, it is possible to say that the movement will also affect the Bankruptcy and Enforcement Code.

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<sup>1</sup> <http://www.uyap.gov.tr/tanitim/tarihce.html>

<sup>2</sup> Analysis of E-signature Applications in Turkey and Proposals; Hüseyin Erol, M.Ali Akcayol, p.1

<sup>3</sup> Supreme Court Assembly of Civil Chambers, 2004/12-202 E., 2004/196 K