

**The Ability of Companies to Enter into Specific Transactions
(Limits of Corporate Powers) under Turkish Law:
The *Ultra Vires*¹ Doctrine**

When a company is first established, its shareholders may be confident that -through that company- they will be able to carry out any and all activities. In accordance with Turkish law, this would not be a right reasoning. One day, the said shareholders may suddenly discover that their “almighty” company is legally not capable of entering into a certain transaction, or even more strikingly, part of the transactions already executed by it are null and void. How can this be?

Article 137 of the Turkish Commercial Code (the **TCC**) is as follows:

“Having legal personality, trade companies shall be entitled to acquire all rights and undertake all obligations provided that such rights and obligations fall within the scope of activities indicated in their Articles of Association. Statutory exceptions regarding this matter shall be reserved.”

One can easily infer the essence of what is called the *Ultra Vires* doctrine from the above: Any company established in Turkey may carry out only the activities specified in its Articles of Association (**AoA**). The *Ultra Vires* doctrine (the **Doctrine**) restrains the ability of a company to enter into a contract or perform an operation that is beyond its corporate powers whose limits are determined by its AoA. Accordingly, any *Ultra Vires* act concluded by a company is considered to be invalid and thus does not confer any rights and/or obligations on neither the company nor third parties.

Although open to criticism, the Doctrine is widely recognized in Turkish law practice. Below you may find information on (i) the Doctrine; (ii) the way it is implemented by the Turkish Court of Appeals (the **Court**); and (iii) its fate under the Draft TCC.

I. The Doctrine under the TCC

Principle. The Doctrine was imported to Turkish law from the United Kingdom. As mentioned above, it is derived from Article 137 of the TCC and basically provides that a company may carry out only the transactions explicitly authorized by its AoA, which is registered with the respective Trade Registry and announced in the Trade Registry Gazette.

Scope. Pursuant to Turkish law, only collective partnerships (*kolektif şirket*), limited partnerships (*komandit şirket*), cooperatives (*kooperatifler*), limited liability companies (*limited şirket*) and joint stock companies (*anonim şirket*) fall within the scope of the definition of “Trade Companies” (*ticaret şirketleri*) and thus are subject to the Doctrine.

Consequence. In cases where a company performs a transaction that is beyond its corporate powers, such transaction would be an *Ultra Vires* act whose validity may be challenged on the ground that the company lacked the necessary power when the relevant transaction was performed. *Ultra Vires* acts are null and void, which means that they do not have any binding effect.

Post-approval of an *Ultra Vires* act by the shareholders of the relevant company does not rectify the nullity of the said act. The only way to overcome the nullity of an *Ultra Vires* act is (i) first to amend the AoA of the company in order to broaden its scope of activity and (ii) then re-perform the same act.

¹ Beyond the powers.

II. The Doctrine in light of the Precedents of the Court

The earlier judgements of the Court reflected a very strict implementation of the Doctrine. However, the Court subsequently realized that such an approach may hinder companies' ordinary course of business and obstruct their day-to-day management. By taking this very fact into account, it has softened its interpretation of the Doctrine.

For instance, the Court allowed companies to provide guarantee in favour of banks for credit debts and obligations of third parties even if a special wording, *e.g.*, *provision of guarantee for debts and obligations of third parties*, is not expressly set out among their scope and objective. The rationale behind this ruling is that commercial circumstances necessitate merchants to support other merchants to conduct their businesses and ensure their continuance. Therefore, provision of guarantee for credit debts of third parties is in the nature of ordinary business activities and is not necessarily required to be expressly specified in the scope of activities of their AoA. Nonetheless, in a more recent judgement, the Civil General Assembly of the Court brought a more restrictive interpretation of the Doctrine.

To sum up, it will depend on the circumstances of each case to determine whether or not the acts performed by a certain company are subject to the application of the Doctrine. Considering conflicting judgements of the Court and to be on the safe side, it would be advisable for companies to (i) include comprehensive scope and objective clauses and general clauses in their AoA allowing them to engage in any business; or (ii) amend their AoA where necessary before engaging in a potentially *Ultra Vires* activity. Consequently, they will be able to transform potential *Ultra Vires* acts into *Intra Vires*.

III. The Doctrine under the Draft TCC

The inconsistent and erratic application of the Doctrine so far seems to have caused the legislator to dismiss it: Article 125 of the Draft TCC, derived from Article 9 of the First Council Directive No. 68/151², abolishes the long-standing Doctrine set forth by the TCC. The said Article does not contain any special provision as regards companies' corporate powers and makes reference to the general rule on the capacity of natural persons stipulated in the Turkish Civil Code. Accordingly, once the Draft TCC is enacted, the Doctrine restricting the operational comfort of companies will be history, resulting in companies conducting business more freely.

² First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community published in the Official Journal OJL 65, dated 14 March 1968, pages 8 to 12.