

New provisions of the Turkish Code of Obligations regarding workplace leases

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Dear Clients, Colleagues and Friends,

The Turkish Code of Obligations dated 11 January 2011 and numbered 6098 (“**TCO**”) was published in the Official Gazette on 4 February 2011, entered into force on 1 July 2012 and introduced numerous ground breaking provisions concerning leases. In order to ensure a smooth transition, the application of some of these provisions were initially postponed for five years especially upon the request of shopping mall operators and real estate investment companies, which was later prolonged to eight years with Article 53 of the Law dated 4 July 2012 and numbered 6353 (“**Postponement Law**”). Thus, all these postponed provisions have now entered into force as of 1 July 2020.

In order for a lease agreement to fall within the scope of the postponement, it should have been executed in relation to a workplace and the lessee should qualify as a merchant (for individuals), private or public legal entity (“**Workplace Leases**”). Since Articles 340, 342, 343, 344, 346 and 354, which came into force on 1 July 2020, solely regulate residence and roofed workplace leases, expiry of the postponement period will only have effect on roofed workplace leases. For other workplaces, Articles 323, 325 and 331 of the TCO has entered into force.

The summary of articles of the TCO which have come into force for Workplace Leases as of 1 July 2020 is as follows

Assignment of the lease relationship (Article 323 of the TCO). The TCO necessitates for a lessee to obtain the lessor’s approval in order to assign the lease agreement to a new lessee. Pursuant to the newly introduced provision, the lessor may not refrain from giving its consent without a just cause, examples of which can be given as weak financial situation of the potential lessee compared to the existing one, usage of the leased property contrary to the one agreed in the lease contract, or conduct of high risk grade operation at the leased property.

Return of the leased property before the end of the lease term (Article 325 of the TCO). Any lessee evacuating the leased property prior to the end of its term is required to continue to pay the rental amount for a reasonable period that would enable the lessor to rent the property again. This provision is in line with the Supreme Court precedents adopted before the entry date of the TCO provisions, and thus does not make any difference in practice. However, the new article introduces for the lessee of the Workplace Leases to be released from such an obligation (and other liabilities provided under the lease agreement) by finding a replacement lessee who is reasonably expected to be accepted by the lessor, financially capable and ready to take over the lease.

Extraordinary termination based on a material cause (Article 331 of the TCO). This article provides both parties with the opportunity to terminate the lease agreement at any time during its term in case the agreement becomes unbearable for either of them. The most important novelty introduced with this provision is the possibility of terminating the lease agreements with indefinite term based on a material cause, and granting the authority to the judges to consider case specific conditions while evaluating the monetary results of the termination.

Prohibition of executing linked contracts (Article 340 of the TCO). A novelty under the TCO is a prohibition on the lessor to force the lessee to enter into contracts as a precondition of the lease agreement, which are not directly related to the usage of the leased property. This provision aims to prevent the lessor, which has more bargaining power, to impose additional obligations to lessee (e.g., to have the leased property insured to the benefit of lessor or to purchase certain services from office or shopping mall administration).

Provision of deposit by lessee (Article 342 of the TCO). Pursuant to this provision, the amount of deposit under a lease agreement cannot exceed three-month rental amount. Furthermore, the lessee will deposit this amount to a bank account which can be withdrawn only upon request of both parties, based on a finalised court decision or a debt collection proceeding. In case a commercial paper is provided as deposit instead of cash, such commercial paper will also be deposited with a bank.

Prohibition on amending the agreement to the detriment of the lessee (Article 343 of the TCO). The prohibition on the lessor's unilaterally amending the lease agreements other than the rental amount has also been applied to Workplace Leases as of 1 July 2020.

Determination of the rental amount (Article 344 of the TCO). Article 344 of the TCO, which regulates the methods of determination of the rental amount, was also indicated as one of the provisions that were postponed until 1 July 2020 as per the Postponement Law. However, pursuant to Article 59 of the Law No. 7161 on the Amendment of Tax Laws and Certain Laws and Decrees entered into force on 18 January 2019, the maximum increase rate for a TL rental amount increase was already applied for Workplace Leases, which was "average of change in consumer price index in the last twelve months". Additionally, the right of the lessor and the lessee, to request from the court in five year arrears, re-determination of the rental amount based on rentals paid for similar properties has also entered into force both for TL and foreign currency denominated lease agreements. This being said, it is not possible to increase the foreign currency denominated rental amount during the first five years of the lease agreement.

Prohibition on having provisions to the detriment of the lessee (Article 346 of the TCO). Article 346 of the TCO, which prohibits imposition of payment obligations to the lessee other than the lease amount and ancillary expenses, is also amongst the provisions that recently came into force. This article sets forth that contractual provisions such as penalty and acceleration of future rental fees in case of failure to duly payment of the lease amount are invalid for Workplace Leases from 1 July 2020 onwards.

Restrictions on the cause of actions (Article 354 of the TCO). Causes for terminating lease agreements through court proceedings is exhaustively provided in the law, which cannot be altered in detriment of the lessee.

Application of the amendments to the ongoing lease agreements. The provisions of the TCO entered into force marks a new era for commercial lease agreements. The Law regarding the Operation and Application Principles of the Turkish Code of Obligation dated 12 January 2011 and numbered 6101, regulating the application of the provisions of the TCO, sets forth that, in principle, provisions of the TCO shall not be applicable to agreements which are signed before the effective date of the TCO. Nevertheless, it is determined that the provisions in relation to default, termination or dissolution of a lease contract, and provisions related to public order and public moral shall be applicable to agreements signed before the effective date of the law. Therefore, the assessment on whether the provisions of existing lease agreements which are not related to these matters (e.g., default, termination, dissolution) will continue to be applicable, is important. In this respect, court decisions will provide guidance. In the meantime, it is worth noting that Supreme Court has precedents concerning the previous legislation whereby lease amount and lease term were deemed to be related to public order.

Please do not hesitate to contact us for any further information on this briefing.



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