

Prime Ministry's Circular regarding the Disposals of the State-Owned Immovable Properties and its Implementation

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Introduction

For the past two years the mining sector has been struggling with a legal uncertainty caused primarily by the Prime Ministry Circular No. 2012/15 issued in June 2012 (the "Circular"), which, in practice, made all transactions relating to State-owned lands subject to the approval of the Prime Ministry. Previously, the General Directorate of Mining Affairs (the "Mining Department") subjected only forestry permits and change of allocation purpose applications regarding State-owned lands to the Prime Ministry's approval; however, as the time passed, more and more transactions, including license and operation permit applications and license transfers, have been deemed to fall within the scope of the Circular and submitted to the Prime Ministry as an additional review procedure after the assessments of the Mining Department.

The exact wording of the Circular reads as follows:

"In relation to immovable properties subject to the ownership or disposal of public institutions and organizations (excluding Municipalities and special provincial administrations) or companies where fifty percent of its shares are held by public institutions and organizations, prior approval shall be obtained from the Prime Ministry for any acts of disposal such as sale, rent, easement, barter, assignment, transfer etc. of such immovable properties either to public institutions and organizations, foundations, associations or companies of such entities or any natural or legal persons."

The nature and effects of the Circular can be evaluated twofold, as follows:

I. The Circular lacks legal clarity and certainty

As can be seen from its wording, the Circular does not provide any details with respect to the Prime Ministry's scope of review on the applications. Therefore, the Circular lacks legal clarity and certainty. The principle of legal certainty, as a reflection of the rule of law, requires that every individual knows beforehand which legal rules they are and/or will be subject to, so that they can plan and shape their actions accordingly with confidence. In the decision of the Constitutional Court No. E: 2004/94 K: 2008/83, dated 20 March 2008, it is stated that the principle of legal certainty requires clarity; and defined clarity as follows: "The principle of clarity requires the obligations to be definite and clear both for individuals and for the government; and requires the rules to be set in such a way that it would allow relevant persons in a reasonable level to be able to foresee the outcome of a transaction, under present conditions." Taking into consideration this definition, it would not be wrong to conclude that the Circular does not provide the clarity and transparency expected from a piece of legislation.



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II. The Circular breaches the hierarchy of norms

The Circular itself and the way it is implemented by the Mining Department and/or the Ministry of Forestry seem contradicting with the hierarchy of norms principle. In the rule of law, all pieces of legislation must be structured on a hierarchy of laws and regulations; in other words, all legal rules have the force of law, but are not on the same level in terms of their significance and enforceability. In principle, lower-ranked legal acts must conform and be compatible with the higher-ranked laws or acts and must not violate or contradict them. As a natural result of such principle, each norm can only be superseded or amended by a norm either at its level or above it in hierarchy.

The rights and obligations of mining license holders as well as the duties and authorities of the Mining Department are governed by the Mining Law and its secondary legislation. Similarly, the duties and authorities of the Ministry of Forestry and how the state forests could be utilized by private persons are all governed by the Forest Law and its secondary legislation. With the said Circular, the executive organ, i.e. the Prime Ministry, introduces an additional review procedure restricting the rights of mining license holders or applicants contrary to the principles and procedures actually set forth by the Mining Law, Forest Law and other applicable secondary legislation. In other words, the Circular unlawfully jeopardizes the duties and authorities of the Mining Department and the Ministry of Forestry secured by their relevant laws.

As to our knowledge, such legal assessment has also been made recently by a first instance administrative court in Konya within the scope of a lawsuit initiated against the Mining Department.¹ The court decision basically cancels the subject matter transaction of the case due to the fact that the relevant transaction is based on the Circular, which is against the rule of law and hierarchy of laws. However, since the plaintiff did not request the cancellation of the Circular alongside the relevant individual transaction, the Court has no right to render any verdict, ex officio, in relation to the validity of the Circular. The decision has been appealed by the Mining Department and is currently pending before the High Administrative Court (Danıştay).

III. Certain vested rights are harmed

It has also been observed in practice that certain vested rights of mining license holders have been revoked by the Prime Ministry by way of the newly introduced review procedure pursuant to the Circular. As a de facto result of the legal certainty principle, laws that abolish a right that has been vested to individuals and institutions should enter into force in such a way that they would be applicable to transactions after their publication date. Otherwise, individuals would be forced to be in an ambiguous state; and the principle of legal certainty would be damaged.

IV. The Scope of the Circular is Misinterpreted by the Ministries

It is explicitly set forth in Article 168 the Constitution that natural wealth and resources are at the disposal of the State. Also, Article 169/II of the Constitution specifically envisages that State forests shall be managed and operated by the State. Accordingly, it can be argued that natural wealth and resources including mining basin and forestry lands, are not, due to the Constitution, at the disposal of the public institutions and organizations but the State itself, and therefore applications related to their disposals should not be subject to the approval of the Prime Ministry. As a matter of fact, the wording of the Circular itself limits its scope of applicability to "immovable properties subject to the ownership or disposal of public institutions and organizations". We believe that such contradiction also aggravates the unlawfulness of the implementation of the Circular subjecting all transactions relating to lands to the Prime Ministry's approval, as the Prime Ministry is merely the head of the executive organ, i.e. only one of the three basic branches constituting the State.

Conclusion

In the light of above it would not be wrong to conclude that the Circular and its implementation are contrary to law. However, despite the heavy and continuing criticism by investors and legal practitioners against the Circular, due to the reasons mentioned herein, it does not seem likely that the Circular will be revoked or abolished by the Prime Ministry in the near future. Therefore, it would be beneficial if, at least for the purposes of securing transparency, objective criteria are determined in respect of the implementation of the Circular.

¹ Decision of the 2nd Administrative Court of Konya dated 19 December 2013 with File No. 2013/930 and Decision No. 2013/1168.