

NEWSLETTER

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THE LEGAL NATURE OF FIDUCIARY TRANSACTIONS FOR MANAGEMENT AND COLLATERAL PURPOSES VIA SHARE TRANSFER

The Legal Nature of the Fiduciary Agreement

Although the fiduciary agreement is not a type of contract explicitly regulated by law in Turkish law, it is a legal transaction frequently resorted to in practice, especially regarding company shares and real estate. It is based on the relationship of trust between the parties and its validity is accepted within the framework of the principle of freedom of contract under the Law of Obligations. In these agreements, a right or an asset element is transferred to a party temporarily and for a specific purpose; it is agreed that the relevant right shall be returned to the original owner upon the fulfillment of the conditions stipulated in the contract.

In terms of corporate law, fiduciary agreements are mostly structured for the purpose of taking over management, providing financing, or creating collateral through share transfer. In such transactions, although the share transfer appears to be a definitive sale on the surface, the true intention of the parties is not the permanent transfer of the ownership of the share, but rather leaving it to the fiduciary shareholder for a specific period and purpose. For this reason, it is of great importance in fiduciary agreements to regulate clearly and indisputably that the share transfer performed is not a definitive sale.

Transfer of Management Authority and the Duty of Loyalty

Upon the takeover of shares within the scope of a fiduciary transaction, the fiduciary shareholder often takes over the management and representation authority of the company both de facto and de jure. However, this authority must be exercised not for the purpose of acquiring ownership, but in line with the purpose determined in the agreement and within the framework of the obligation to observe the interests of the original shareholder. The most fundamental debt of the fiduciary shareholder at this point is the duty of loyalty. Behaviors contrary to the duty of loyalty—such as transferring the shares to third parties, pledging them, or making dispositions against the original shareholder—constitute a violation of the purpose of the fiduciary transaction and entail severe legal consequences.

In practice, fiduciary agreements are often linked to the need for capital. If the need for a capital increase arises during the period of the fiduciary transaction, it is possible for the capital increase amount corresponding to the transferred shares to be covered by the fiduciary shareholder. However, in this case, regulating in the agreement that the amount in question is clearly in the nature of a debt and can be offset against future dividend receivables of the original shareholder is an important safeguard that prevents the transaction from being characterized as a donation or a disguised sale.

Return of Shares and Protection of the Economic Balance

One of the most critical elements in fiduciary agreements is the provisions regarding the return of the shares. The obligation of the fiduciary shareholder to return the shares they took over to the original shareholder at the end of the determined period—often by stipulating a maximum period—without the need for any notice and without being subject to any condition must be clearly regulated. Otherwise, the risk arises that the fiduciary transaction may be characterized as a definitive sale and the recovery of the shares may become the subject of serious legal disputes.

In order to ensure the economic balance between the parties, it is also possible for the original shareholder to actually carry out the operational activities of the company during the fiduciary transaction and to receive a certain fee in return for this service. Clearly regulating that such payments are not in the nature of dividends or disguised profit distribution, but are in return for an actual and continuous service, significantly reduces the risks that may arise in terms of tax law.

Another element frequently encountered in practice is the advance payments made by the fiduciary shareholder to the original shareholder. Clearly stating that these payments are not the sale price but are in the nature of an escrow or an advance within the scope of the fiduciary transaction, and regulating that they will be returned exactly as they were on the date of the return of the shares or will be offset against dividend receivables, is vital for protecting the true nature of the transaction.

Confidentiality, Sanctions, and Conclusion

Confidentiality provisions also hold a separate importance in fiduciary agreements. The existence and content of the agreement, as well as the commercial, financial, and legal information of the parties, are often of a sensitive nature regarding the company's position in the market. Therefore, it should be clearly regulated that the confidentiality obligation will continue indefinitely, not only during the term of the contract but also after its termination.

Finally, the sanctions to be applied in case the fiduciary shareholder acts in violation of their obligations must be determined in a clear and deterrent manner. Mechanisms such as the immediate termination of the agreement, penal clauses, default interest, the automatic termination of management and representation authorities, and the automatic return of the shares transform the fiduciary agreement into a de facto applicable and secure legal instrument.

In conclusion, while fiduciary agreements are an extremely effective tool in terms of company management, financing, and collateral needs when structured correctly, they can lead to serious ownership, tax, and liability risks if they are regulated incompletely or incorrectly. Therefore, it is of great importance that fiduciary transactions, especially those regarding company shares, are regulated with an agreement that clearly reflects the true intention of the parties, has a strong return mechanism, and clear sanctions.

