Effect of the Prime Ministry's Circular 2012/15 on Mining Law with Respect to Precedent Decision for Stay of Execution

The Circular numbered 2012/15 published in the Official Gazette on 16 April 2012 ("Circular") stipulates *"with respect to immovable properties owned by or subject to disposal by 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, 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 shall be subject to prior approval shall from the Prime Ministry."*

Pursuant to the Circular with regards to state owned immovable property the Prime Ministry's approval must be obtained prior to any kind of transaction which is to the benefit of third parties. Despite the Circular being very brief its scope and application is extensive. Its scope is so extensive that transactions that are subject to approval do not only apply to those that benefit natural persons but also apply to disposals that are beneficial to public organisations. Virtually, all state owned immovable property before the *"bird even leaves the nest"* shall be subject to prior approval from the Prime Ministry. In practice as public officials are not prepared to bear any responsibility they have applied the Circular strictly and to the letter, so that it has surpassed its real objective and no flexibility has been allowed in its application.

To say that the mining industry is the sector most severely affected by the Circular would not be wrong. Administrations dealing with licence and forrest clearance applications request the Prime Ministry's opinion and despite a response not being received for months, most of the responses especially regarding licence applications are concluded with a negative opinion without any reasoning or grounds. Although most of the time the relevant administration rejects the applications on the basis of the Prime Ministry's opinion, the opinion of the Prime Ministry is concealed from the applicant. These long and uncertain processes causing ambiguity have discouraged investment in the mining sector which is a sector that attracts large investments. In this respect, when one considers the sector's contribution to the country's economy, the real scope of damage and potential damage can be appreciated. During the first years of the Circular's implementation the mining sector tried to negotiate the annulment of the Circular but in spite of all efforts as a result of the negative outcome many cases regarding application of the Circular are being resolved through judicial means and referred to court.

Application of the Circular, in other words licence and forrest clearance applications that are rejected on the basis of the Circular are clearly unlawful. In accordance with the fundamental legal principle of the hierarchy of norms; it not possible for a circular which is the lowest legal norm to take precedence over a vested right that has been granted by law which is the highest legal norm. Therefore, rejection of applications that have satisfied all criteria stipulated under law is undoubtedly unlawful. The crucial point here is that the application must be in compliance with the law.

In the event the aforementioned events are experienced the following judicial action should be taken; upon rejection of the application made to the administration or being considered to have been rejected due to the administration's failure to finalise an application in time. Legal action in the administrative courts must be initiated within sixty days of service of notice of the administration's decision to reject the application or its failure to finalise an application in time amounting to a rejection. If the application is not made in time the right to initiate such action shall be lost. Two of the administration's acts can be subject to judicial action and put forward in the same lawsuit petition. The first act is the

Prime Ministry's negative opinion, the second is the administration's rejection based on the Prime Ministry's opinion. Initiating the legal action as an application for a Stay of Execution is most beneficial and the main crux of the case should be that it is not possible for the Circular which is the lowest legal norm to take precedence over a vested right that has been granted by law which is the highest legal norm.

A precedent decision for Stay of Execution rendered as a result of the above mentioned legal process demonstrates the Circular is unlawful;

APPLICANT FOR A STAY OF EXECUTION (CLAIMANT): .....

ATTORNEY : ATT. ERHAN EGEMEN - Nida Kule Göztepe K:23 Kadıköy/İSTANBUL

OPPOSING PARTY (DEFENDANT) : 1- ENERJİ VE TABİİ KAYNAKLAR BAKANLIĞI

ATTORNEY : ATT. NURNİGAR SİPAHİOĞLU - Centre/ANKARA

2- PRIME MISINSTRY ATTORNEY: ATT. GÜLTEN BOSTAN

SUMMARY OF CLAIM: With regards to the rejection of the application……numbered made by the Claimant company, for a II (b) Group mining exploration licence for ER:….,….,…. numbered mining sites located within the boundaries of …. Province, …..District and the Prime Ministry's finding …. dated and …..numbered which was the basis of the rejection, an application for annulment and a stay of execution has been requested as all legal conditions were satisfied and all documents were complete, therefore it was unlawful to use the Circular of the Prime Ministry as grounds and the aforementioned Circular is unlawful as it restricts provisions vested in law.

SUMMARY OF DEFENSE : Pursuant to the Prime Ministry Circular No. 2012/15 and dated 15/06/2012 the Prime Ministry's approval must be obtained for applications, the information and documentation related to the Claimant's application was sent to the Prime Ministry and the response …..dated and …..numbered was negative as in its opinion, which is the subject of these proceedings, that the Claimants application for a Mining Licence was not considered suitable, therefore the rejection is legal and the Claimant's application for annulment and stay of execution should be dismissed.

IN THE NAME OF THE TURKISH NATION

Before…….Administrative Court:

The claim has been initiated by the Claimant company as an application for annulment and stay of execution with regards to the rejection of the Claimant company's application for a II (b) exploration licence for ER:….,….,…. numbered mining sites located within the boundaries of …. Province, …..District and the Prime Ministry's finding dated ….. and numbered….. which was the basis of the rejection.

Article 27 sub-section 2 of the Administrative Hearing Procedural Law No 2577 states; if implementation of the administrative process will result in difficult to remedy or irreparable damages and the administrative process is explicitly unlawful, after hearing the defendant's defence or after the time to submit a defence has expired, the Constitutional Court or Administrative Court may decide to grant a stay of execution by stating its grounds and in its decision to grant a stay of execution it is

obliged to detail the reasons why the process is explicitly unlawful and in the event that the process is implemented the difficult to remedy or irreparable damages the Claimant will suffer.

Pursuant to the aforementioned Article to grant a stay of execution; implementation of the administrative process must result in difficult to remedy or irreparable damages and the administrative process must be explicitly unlawful and both these conditions should occur at the same time. Additionally, in the event of deciding to grant a stay of execution, in its grounds the court is obliged to detail the reasons why the process is explicitly unlawful and the difficult to remedy or irreparable damages that will be suffered.

In this respect; firstly why the process is explicitly unlawful and if implemented what the difficult to remedy or irreparable damages will be should be determined, after which, whether these conditions exist at the same time must be determined.

With respect to the contention that dated ….. and numbered….. process, which is the subject matter of these proceedings, is explicitly unlawful;

As per Article 16 sub-section 1 of the Mining Law No. 3213 titled "ınıtıal applıcatıon and lıcensıng"; II (b) Group mines shall be explored under an exploration license, and as per sub-section 5; the application for an exploration license for II (b) Group mines not exceeding 100 hectares shall be made to the General Directorate, as per sub-section 7; applications shall be made directly or online to the General Directorate for sites that are limited by determined points based on the coordinates of 1/25.000 scaled topographical map, the applicant shall be informed of the available portion of the requested site on the date of application and the licence shall be granted within 2 months provided that a mining exploration project is submitted which includes the preliminary assessment report and financial sufficiency required for carrying out exploration and provided the fee and security deposit have been paid. In the event that fee and security deposit is not paid and these documents are not complete, the sites will become available to other applicants.

As per Article 5 sub-section 1 of the Regulation on Mining Activities Permission titled "Fundamental principles regarding permission"; procedures and principles to be applied for permission required for mining exploration and production will be governed by this Regulation, as per sub-section 2; ministries and public institutions and organizations shall execute their duties and authority to issue approvals and grant extensions for mining activities and shall conclude licence applications according to the provisions of the laws and this Regulation and unless regulated by laws, international treaties or this Regulation, shall not carry out duties based on matters that are within other administrations jurisdiction, authority or responsibility, as per sub-section 3; except as set forth under provisions this Regulation and relevant provisions of other laws, ministries and public institutions and organizations shall not obstruct mining operations and shall not place restrictions that exceed those in this Regulation in regulations it shall issue, sub-section 1 of Article 7 titled "Exploration Activities" regulates that except for permission required under the Law and Regulation mining exploration activities are not subject to permission required under the scope of other legislation; and Article 16, details the documentation required during the application to be made to the General Directorate for exploration activities.

As per sub-section 3 of Article 8 of Regulation on the Practice of Mining Activities titled "General Application" an application shall be made to the General Directorate for a II (b) Group mining exploration license, as per Article 9 titled "Assessment of applications for an exploration

license/certificate"; an application for an exploration license/certificate maybe carried out by payment of licence request fee (in Annex Form-2) providing an undertaking (sample provided in Annex Form-2) and submitting a petition in 3 copies directly to the General Directorate or online using the application form available on the General Directorate's website, as per sub-section 2; the site applied for, shall be assessed in consideration of existing rights attached to it, the result of the application shall be announced on the General Directorate's notice board and website within 2 months of the day after the application is submitted and the applicant shall not separately be notified in writing.

The Prime Ministry's Circular numbered 2012/15 published in the Official Gazette on 16/06/2012 sets forth "with respect to immovable properties owned by or subject to disposal by 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, 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 shall be subject to prior approval shall from the Prime Ministry."

Upon reviewing the file; the Company's authorised representative applied for a II (b) Group mining (Marble) exploration licence for ER:....,....,.... numbered mining sites located within the boundaries of .... Province, ...District, following this it was requested that in the event there was no documentation or information missing the Defendant Administration issue the licence, in its response dated ..... and numbered..... it was notified that although there was no record of documentation or information missing the application had been rejected as in the Prime Ministry's opinion within the scope of the Circular numbered 2012/15 the application was unsuitable and as a result these proceedings were initiated.

With reference to the above mentioned statutory provisions, it is understood that II (b) Group mines can only be explored under an exploration licence and that for a licence an application must be made to the General Directorate of Mining Affairs, the administration to which the application is made, in consideration of existing rights attached to the site applied for shall announce the result of the application on the General Directorate's notice board and website. Additionally, pursuant to Article 7 of the Regulation on Permission for Mining Activities, except for permission required under the Law and Regulation permission to conduct mining exploration activities cannot be subject to permission required under the scope of any other legislation.

This dispute is as a result of the Defendant administration requesting permission from the Prime Ministry to grant the Claimant company's application for a II (b) group mining exploration licence and the application being deemed unsuitable within the scope of the Prime Ministry's Circular numbered 2012/15.

To resolve this dispute, whether an application for a mining exploration licence should be considered within the scope of the Prime Ministry's Circular needs to be determined.

Pursuant to Article 124 of the Constitution the Prime Ministry, the ministries, and public corporate bodies may issue regulations in order to ensure implementation of laws and by-laws relating to their jurisdiction, provided they are not contrary to these laws and by-laws.

As stated in doctrine (GÖZLER, Kemal. İdare Hukuku, C.I, Ekin Kitabevi Yayınları, pgs.1124-1145, Bursa 2003; GÖZÜBÜYÜK, A. Şeref, TAN, Turgut, İdare Hukuku C.I, Turhan Kitabevi, pgs.124-146, Ankara 2010; SEVGİLİ GENCAY, Fatma Didem. Adsız Düzenleyici İşlemlerin Normlar Hiyerarşisindeki

Yeri, AÜHFD, S.63, pgs.397-417.), aside from issuing regulations and by-laws related to their jurisdiction public administrations may also issue statutory instruments such as communiqués and circulars. However, there is no hierarchy of norms relationship between these instruments. The most prominent aspect of this hierarchy is that a statutory instrument cannot be amended or annulled by an instrument that is at a lower level.

The meaning of the hierarchy of norms is that all norms are listed in a hierarchy and connected to one another. A natural result of this is that a lower level norm cannot contain provisions that breach a higher level norm. In other words, regulatory acts of a lower norm, unless allowed by the higher norm cannot restrict use of rights provided by a higher norm. Therefore, it is not possible for the written response based on a statutory instrument issued as a "directive" which compared to a regulation has the characteristic of a lower level norm to amend or annul provisions regulated under law or by regulation.

In some situations, it is possible that matters are governed in general by a regulation which has the characteristic of a higher level norm and the details of such matters are regulated by a lower norm. In such situations, whether the administration authorised to issue instruments for matters regulated in general under the higher norm has used its discretion beyond the limits determined by the higher norm is subject to legal review. Hence, pursuant to Article 7 sub-section 4 of the Administrative Hearing Procedural Law No 2577 the fact that a statutory instrument has not been annulled does not affect the annulment of the act based on such regulatory instrument.

When legal review is conducted, independent to the literal meaning of text of the higher norm the purpose of the text should be interpreted and whether a right has been restricted or not should be determined.

In the matter at hand, with reference to the provisions of the above mentioned Law and Regulation, upon application for an mining exploration licence, the defendant administration once it has determined that all documents have been submitted should draw its conclusion in consideration of existing rights attached to the site applied for; there is no additional requirement for the permission of the Prime Ministry to be sought.

Therefore, with reference to the provisions of the above mentioned Law and Regulation, despite the fact that it regulates that upon application for an mining exploration licence, in the event all documents have been submitted, the General Directorate of Mining Affairs should draw its conclusion in consideration of existing rights attached to the site applied for, it has been noted that in breach of the hierarchy of norms, the Prime Ministry's Circular numbered 2012/15 regulates that the Prime Ministry's permission must be obtained.

In this situation; an application has been made for an exploration licence with the documents detailed in the regulation, although the General Directorate of Mining Affairs should draw its conclusion in light of the provisions of the Mining Law numbered 3213 and the above mentioned Regulation, the rejection of the Claimant's application which is the subject of these proceedings is found to be unlawful as it was based on the grounds that the Prime Ministry Economic Social and Cultural Affairs within the scope of the Prime Ministry's Circular numbered 2012/15 found the application to be unsuitable.

With regards to implementation of the administrative act, which is the subject matter of these proceedings, resulting in difficult to remedy or irreparable damages;

In the event that judicial protection is applied for against the administrative act through administrative courts, the judgement regarding the merits of the case should be enforceable and prevent individuals from suffering damages, thereby where the request to annul the administrative act with a view to prevent its implementation, by means of a stay of execution even though the legal standing of the administrative act remains, its implementation is suspended.

In this respect, with reference to the reasoning stated above the administrative act which is the subject of the proceedings and has been determined to be unlawful, from the perspective of the Claimant company it must be accepted that it will result in difficult to remedy or irreparable damages as it shall result in the Claimant company's commercial activities and processes being delayed and such delay will result in a violation of its rights.

For the above stated reasons; in the event the administrative act which is the subject of the proceedings which is clearly unlawful is implemented will result in difficult to remedy damages, pursuant to Article 27 of Law No. 2577 it was unanimously decided to grant a stay of execution without deposit of any security, and in accordance with sub-section 6 of the same Article, the right to object to this finding is available by applying to Eskişehir District Administrative Courts within (7) days of service."

The judgement of the Administrative Court provided the legal grounds for its findings and provides a precedent. However, despite the Administrative Court's favourable finding the ultimate solution would be annulment of the Circular as the above mentioned judicial route costs the investor on average 6 months of its time.