LEGAL FRAMEWORK FOR IN-KIND AND CASH AID PROVIDED BY ASSOCIATIONS

Rainbow Against Discrimination Association

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THE SITUATION FOR INDIVIDUALS, GROUPS OF INDIVIDUALS AND LEGAL ENTITIES

Situation from the Point of Aid Provider

A framework study shaped around the concept of 'aid' should inevitably start by answering the question 'what is aid'. However, despite the frequent discussions on procedural/irregularity and the imposition of administrative fines on individuals for receiving or giving irregular aid, aid is a concept that has not been defined at the legal level in Turkish law. Even Article 2 of the Law No. 2860 on Aid Collection, entitled Definitions, does not define 'aid'. Not only in this law, but also in the Law on Associations, which will be frequently mentioned in this text, or in the Turkish Civil Code. The only text we have on what constitutes aid is the Regulation on the Principles and Procedures of Aid Collection published by the Ministry of Interior and its paragraph 4/ğ. According to this, '*Aid: The giving or lending of a person or another private law or public legal entity or public institution or organization's assets in kind or in cash, directly or indirectly upon request, free of charge or on loan, in order to meet the needs of a person or another private law or public legal entity or public institution or organization*'.

When this definition is examined, it is seen that the following are mandatory elements of aid;

a) The presence of a person (providing aid),

b) The existence of cash or property of this person,

c) A third party in need,

ç) The existence of a direct or indirect request,

d) The existence of the will to give gratuitously or on loan.

What is important here is whether the aid is given **on loan or gratuitously**. It is clear that a relationship that is given reciprocally or as a loan, that is, a relationship that is given to be taken back or that includes the condition that something or money is given by the other party in return for this act of giving, can no longer be characterised as aid. In the Turkish Code of Obligations, the concept of loan is defined as '*a contract in which the lender undertakes to leave the use of a thing to the borrower for free and the borrower undertakes to return the thing after using it'*. The term 'gratuitous lending' refers to not obtaining any value in return for what is given to the other party.

On the other hand, there have been cases where the provincial organization of the General Directorate for Relations with Civil Society has qualified payments made by associations to service or goods vendors abroad in return for service procurement, dues paid due to membership to supreme organizations or royalty payments as 'aid' and imposed administrative sanctions for failure to notify the same, despite the fact that such payments are not defined in the law and cannot be qualified as aid according to the definition in the regulation.

The Turkish Civil Code, as a framework and basic text that shows the legal boundaries of the relations between persons, is a basic source of reference in the field of aid as in many other issues. However, although an association as a 'legal person or entity' is established in accordance with the Turkish Civil Code, the authority of state institutions, particularly the Ministry of Interior, over the association after the establishment phase makes the issue of legal legislation more important for associations.

Situation from the Point of Natural Person

It should be noted at once that, just as in the case of receiving aid, individuals have the greatest freedom in giving aid. Regardless of whether it is in cash or in kind, natural persons, with exceptions such as being under the age of eighteen or being restricted, can give aid to whomever they wish and do not need either a written rule or an authorization from an official authority to do so. They do not have to notify any organization after providing aid. This does not, of course, mean that giving aid has no legal consequences. Examples include the transfer of money for the purpose of committing a criminal offence, tax evasion, money laundering and the like. Of course, in these cases, the aid is no longer recognized.

However, the size of the aid, for example, providing a large amount of aid to one person or providing aid to a large number of people even if the aid is not provided in large amounts, may be subject to the need for clarification by official institutions, considering that this money mobility should be traceable. At this point, it is important to make the aid registered if possible except for compelling reasons; for example, through institutions authorized for money transfer such as banks or PTT, and to indicate in the explanation section of the transfer transactions that it is sent for aid purposes.

Mandatory reasons may arise when individuals are no longer able to send or receive money due to the institutions authorized to transfer money. For example, in cases of natural or man-made disasters such as earthquakes, floods, fires, etc., it may be a necessity to provide cash aid by hand. Even in this case, it would be good to record the aid transaction; this record should include the amount, time, date, and if it is given for a specific purpose, this purpose.

Although individuals are not subject to any restrictions in terms of giving aid, any tax, criminal or legal investigation and enquiry that may be in question for the aid recipient may require the information of the aid provider to be consulted. Against this possibility, it would be beneficial for natural persons to record their aid to another person, especially large-scale aid and frequent or widespread aid, even if it is medium and small-scale.

Situation from the Point of Groups of Individuals

Groups of individuals is a model of organization in Anglo - Saxon law and in Turkey they have a status problem. Therefore, although there is no provision preventing individuals from coming together to provide aid to a person or a group of people, the lack of status has resulted in such initiatives remaining in a very limited environment. Here, we can take solidarity motivated communities in rural structures with relatively small populations (such as communities of relatives, communities of neighbours, village communities, etc.) as an example. However, in terms of formalized and systematic aid flows, communities of individuals are not a functional method considering the structure of the legal system in Turkey.

Situation from the Point of Legal Person/ Entity

It should be noted that technically, there is no legal obstacle for companies to make donations and grants. In fact, in terms of tax legislation, commercial companies, whose purpose of existence is to generate income, can reduce the tax base by expensing donation and aid amounts under certain conditions. The limits and methods for this are detailed in the tax legislation.

There is no provision preventing co-operatives.

As mentioned above, legal entities are legal subjects of social life. Although we may think of different legal entities such as companies, co-operatives, associations and foundations, the focus of this study will be on associations established in accordance with Articles 56 and following of the Turkish Civil Code.

The Situation for Associations Subject To Turkish Law

For an association established in accordance with the Turkish Civil Code, the aid regulations are more detailed. The basic condition for an association to provide aid in cash or in kind is the existence of a provision in its statute. According to Article 58 of the Turkish Civil Code, the purpose of the establishment of the association; according to Article 4 of the Law on Associations, in addition to the purpose, the subjects of work to be carried out by the association in order to realize this purpose, the forms of work and the field of activity must be included. Therefore, the prerequisite for an association to provide aid in cash or in kind is the existence of a provision in the statute of the association. If the statute does not include aid among the objectives of the association and/or aid to the needy among the activities of the association, the aid provided by the association will be in violation of the statute.

What will happen in this case if the association has provided aid in cash or in kind, although aid is not included among its objectives and activities in its statute? This situation may cause the Chair and the members of the board of directors to be subject to the accusation of abuse of trust, as per Article 32/f of the Law on Associations. However, although it is open to interpretation, if the general assembly convenes with this agenda, releases the in-kind and in-cash aids made by the board despite the fact that it is not included in the bylaws, records that this is in accordance with the will of the general assembly and makes a corresponding amendment to the bylaws, it can be argued that there is a reason for compliance with the law for the members of the board and the chair of the association, since the decisions of the association that are not contrary to the law cannot be the subject of criminal law. This is because the general assembly is legally authorized to decide on the purpose and activities of the association.

While providing aid may be a general objective for the association, there may be restrictive provisions in the statute on giving aid limited to certain themes or in a certain way. For example, the statute may limit the recipients of aid to a certain group of people, such as aid to veterans, aid to the sick, aid to students. Or it may limit the recipients of aid to a specific type of aid, such as aid in kind, clothing aid, book aid, fuel aid. Therefore, if these limitations are included in the statute, the board of directors of the association must stay within these limitations. **If the subject of the aid is the provision of a product, the circulation of this product must not be prohibited or its supply must not be subject to special rules.**

For example, it is unthinkable to distribute drugs, which are prohibited for circulation, under the name of aid. Or, if a certain authorization condition must be fulfilled for the distribution of medicines, food, etc., it is no longer sufficient to have a provision in the by-law, but the application and authorization processes required by the specific legislation must also be completed. The distribution of all other necessities is possible.

There is no distinction according to whether the person to be provided aid is a citizen, a foreigner or a foreigner with a residence permit. There are no rules such as a special authorization or notification before the aid, especially for those whose recipient is located in Turkey. Therefore, **when providing aid to a person in need within Turkey, regardless of where the person is located in the country, there are no procedures such as prior notification or authorization.**

However, if the recipient is a legal entity organized in the form of an association, there is a distinction depending on whether the recipient is in Turkey or abroad.

It is obligatory for associations to notify the aid that they will send or provide abroad, regardless of the citizenship of the recipient and the amount of the aid. In other words, if an association registered in the association registry in Turkey is to provide aid to a citizen of the Republic of Turkey living abroad, it must notify the Governorate where it is registered through the system called DERBIS. Foreign associations that are permitted to operate in Turkey, have a representative office or open a branch in Turkey are also obliged to notify their headquarters or branches in another country in advance. The relevant article of the Regulation states that '*the money and aids sent abroad are also subject to notification in the same manner*', and thus requires the prior notification of not only the aids sent abroad but also the money for foreign associations. Therefore, the repatriation of money received from its headquarters but not used by a foreign association is also subject to the requirement of prior notification. The fact that the Regulation uses the expression 'money and aid' only for foreign associations easily leads us to the conclusion that domestic associations are required to notify only in the case of aids. However, due to the lack of unity of practice and arbitrary interpretation, domestic associations are forced to notify in advance the money they send abroad that is not aid.

Cash aids to be provided abroad exceeding one hundred thousand Turkish Liras or ten thousand Euros or equivalent foreign currency must be made through banks and other financial institutions or the Post and Telegraph Organisation Joint Stock Company. However, the aids to be made to countries where financial access is difficult can be made by declaring to the customs administration with the cash declaration form according to the relevant legislation without using financial institutions.

There is no norm preventing an association, which is not authorized to operate in Turkey, from sending aid from its accounts abroad to the accounts of natural persons in Turkey. This is because its main place of activity is not within the borders of the Republic of Turkey. However, what should be done if state institutions interpret this as unauthorized activity in Turkey? In principle, this has no legal consequences. In other words, if the foreign association is not active in Turkey in any way, this also means that it is not resident in Turkey and does not have a bank account in Turkey. In the negative scenario, there is a possibility of application of Article 32/g of the Law on Associations. Accordingly, '*Those who open representative offices or branches of foreign associations and non-profit organizations headquartered abroad in Turkey, carry out their activities, cooperate with them or accept them as members without the* *permission of the competent authorities shall be imposed an administrative fine of one thousand Turkish Liras and it shall be decided to close the branch or representative office opened without permission.'* As can be seen, there is an obligation to carry out the activity in Turkey, but the result of the counter-interpretation may be an administrative fine of 16,687.00 Turkish Liras for the year 2024, which will not be an applicable administrative fine in practice.

Finally, it is necessary to look at the recent amendments dated 31.12.2020 to the Law on Associations and the Law on Aid Collection, which were made on the grounds of the Financial Action Task Force (FATF) established within the OECD. This is because this situation has a content that may lead to the donor being held responsible for some actions of the aid recipient. Accordingly, it is prohibited to provide funds within the scope of Article 3 of the Law on the Prevention of Financing of Terrorism. Article 3 is an omnibus provision and includes acts that are considered terrorist offences under the 'Anti-Terrorism Law', which has been criticized by Turkey for being too vague and not meeting the legality criterion and has even led to violation decisions of the European Court of Human Rights. The propaganda offences, which cover a large number of acts in the Turkish Penal Code due to the references made in Articles 3 and 4 of the Anti-Terror Law, and which are also considered very broad and dependent on the interpretation of the interpreter due to the act regulated in Article 6, create a precarious and unpredictable ground where the aid donor can also be criminalized if the aid recipient is associated with these offences. On the other hand, the Law on the Prevention of Financing the Proliferation of Weapons of Mass Destruction will also cause some risks for the donor organization. If the aforementioned persons are under a terrorist investigation or prosecution, how should the aiding organization act? If the aiding organization establishes an aiding relationship for the prohibited acts of the aid recipient, it will undoubtedly be considered as a criminal act and will face administrative or criminal sanctions within the scope of the aforementioned laws.

However, in the context of Turkey's extremely unpredictable legal system, for example in the event of a natural disaster or similar situation where it is also impossible to obtain information on individuals, how should the donor act? Or should personal information such as criminal records be requested from the recipient? Since the state is exclusively authorized to collect information on persons and to punish them, associations, which are not authorized to collect information, cannot be expected to have information on the persons they provide aid. As a logical consequence, it would not be expected that a person who is part of a criminal organization would try to access the limited cash or in-kind aid provided by associations.

In our opinion, it is sufficient for the association to fulfil its responsibilities in terms of fulfilment of the legal obligations that the association must fulfil in relation to giving aid, and that the subject and amount of the aid is limited to the purpose of aid. On the other hand, before giving aid above a certain amount in terms of value, the association may use the service offered[1] on the website of the Financial Crimes Investigation Board of the Ministry of Treasury and Finance to investigate whether the person receiving aid is included in the list of those whose assets are frozen. However, as we have emphasized above, it is the duty of state authorities, not associations, to fight crime, punish criminals or gather intelligence on individuals. It is not legal for associations to undertake a mission that can be fulfilled by the state, which is an organized structure, with the means available to it. Therefore, what will happen if the recipient of aid uses this aid to commit a crime, even though the recipient is in real need and the aid is provided in accordance with the

[1] https://masak.hmb.gov.tr/bkk-ile-malvarliklari-dondurulanlar

conditions required by the association's statute and the law? Or which risk mitigation plan can the association implement to prevent this?

There is no risk mitigation plan to ensure this.

Just as a criminal who uses a municipal bus to move from one place to another in order to commit a crime cannot be held responsible for using a municipal service provided by the municipality, it would not be legal to hold an association that carries out aid activities in accordance with the law responsible for the misuse of the aid it provides against its knowledge and will.

However, in a country like Turkey, which lacks the rule of law and where investigations, lawsuits and criminal judgements contrary to the principles of criminal law and human rights are widespread, no measure can move the charitable association to a protected area.