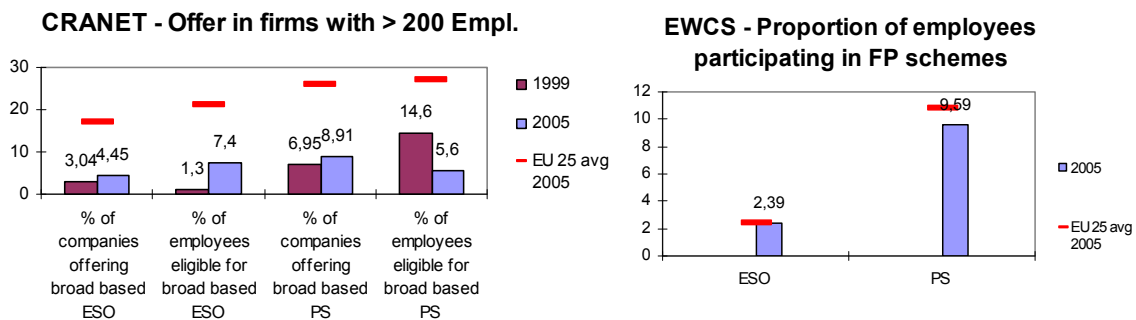


XXVIII. Turkey

On the whole, financial participation of employees has played a limited role in Turkey. Share ownership schemes have been implemented mostly in the context of privatisation and in multinational companies, while profit-sharing is found in private companies. Employees of many privatised enterprises have become share owners with incentives such as discounts, payment by instalments and loans being used. Anecdotal evidence has been found for the presence of ESOP-like schemes based upon associations and foundations which hold the shares of the employer company (for example, Adana Kağıt Torba Sanayii T.A.Ş. and Teletaş Telekomünikasyon Endüstri Ticaret A.Ş.) on behalf of employees, who acquire shares from contributions of company profit. The legal framework contains no special regulations concerning PEPPER schemes and some even inhibit their further development, although reforms of the Commercial Code are underway. Except for the tax deductibility of employers' contributions and specific tax exempt associations and foundations, there are no direct incentives for setting up PEPPER schemes.



According to a 2007 study of corporate governance in publicly traded Turkish companies, 3 to 4 per cent have employee share ownership programs, and 15 per cent have employee pension funds and other funds or foundations for retirement or unemployment insurance. Over 20 per cent of the companies have profit-sharing, though no distinction is made between broad-based schemes and those restricted to management (board members) (Küçükçolak and Özer, 2007, p. 5, p. 12: Table 7).²⁰¹

²⁰¹ The data results from a questionnaire based on the practices of corporate governance principles by the respondents, namely the Istanbul Stock Exchange (ISE) member firms and companies listed on the ISE, and a statistical evaluation of the findings. 115 members firms out of 205 and 243 ISE companies out of 308 were included.

1. General Attitude

Employee financial participation is not currently an issue for trade unions; their positions are inconsistent, probably due to lack of knowledge about the schemes available. Their attitude, however, can be described as generally positive, considering that, if the government would establish a consistent legal framework, employee ownership could benefit not only employees, but also the economy. On a national level, employees are represented by the Confederation of Rights of Turkish Workers' Trade Unions (Hak İş), the Confederation of Turkish Workers' Trade Unions (Türk İş) as well as the Confederation of Revolutionary Workers' Trade Unions (DISK). During the discussion of the Tax Reform of 1968, the Conservative Hak-İş had a more positive attitude towards employee participation than did the Türk-İş. Employers, generally, present themselves as opposed to employee participation, in particular to participation in decision-making and employee ownership, and most collective agreements are influenced by this attitude. They are, primarily, represented by the Turkish Industrialists' and Businessmen' Association (TÜSİAD) as well as by the Turkish Confederation of Employers' Associations (TİSK). However, according to a report of the TÜSİAD, participation of employees in privatisation is considered a positive factor in broadening income distribution and avoiding labour disputes (TÜSİAD, 2002; Gürol, 1994, p. 95). According to a survey conducted by the Capital Markets Board of Turkey in 2004²⁰² among the companies listed at the Istanbul Stock Exchange (ISE), 56 per cent of the responding companies were in favour of employee participation in the management of the company. Employee participation has been discussed by academics, politicians and trade unions since the tax reform of 1968.

The 58th Government (Justice and Development Party) in its instant action plan of 2002 encourages Turkish citizens working abroad to invest their savings in the privatisation of Turkish enterprises. According to the party programme, the intention is for companies subject to privatisation to be primarily offered to employees, along with certain other target groups. Accordingly, the Privatisation Law was amended by Law No. 4971 in 2003 to stipulate that employees can participate in privatisations conducted by public offers.

2. Legal and Fiscal Framework

Employee financial participation is covered by different laws; the recognised forms are profit-sharing, stock options and, to a limited extent, employee share ownership. Legislation permits employee share ownership in joint-stock companies during privatisation and in private companies through setting up welfare funds and mutual assistance funds for their employees' benefit. Except for tax deductibility on employers' contributions to special tax exempt associations and foundations, there are no direct incentives for PEPPER schemes.

²⁰² Survey on the Implementation of Corporate Governance Principles conducted by CMB of Turkey in 2004; 249 companies out of 303 responded to the survey.

a) Share Ownership

Privatisation (1984, 1994, 2003) – The privatisation programme in Turkey was initiated in 1983. Privileges for employees in connection with privatisation were introduced by Decree No. 18514 of the Public Participation Fund of 13 September 1984, regulating administration, usage and other issues. This decree allowed employees as well as the local citizenry to be included in the case of share sales.²⁰³ According to Decision No. 54 of the Housing Development and Public Participation Board of 30 April 1987, shares of enterprises to be privatised should primarily be offered to employees, local residents, and Turkish citizens working abroad. Pursuant to Art. 18 of the Privatisation Law²⁰⁴, privatisation could be conducted by sale, lease, the granting of operational rights, the establishment of property rights other than ownership, profit-sharing, and other legal dispositions depending upon the nature of the business. In the context of a share deal, the sale of shares to employees is expressly regulated and, depending upon the privatisation decision in each individual case, employees may be entitled to purchase shares at a discount and/or in instalments. Furthermore, Law No. 4971 of 15 August 2003 amended some laws and the decree law on the establishment and duties of the General Directorate of the National Lottery Administration, amending Art. 7 of the Privatisation Law to stipulate that employees can participate in privatisations conducted by public offer. In this context the possibility of granting credit to employees from funds of foundations set up by the employer company (see below ESOPs) according to Art. 468 and 469 of the Turkish Commercial Code²⁰⁵ (hereinafter referred to as CC) is important. Thus, acquisition on preferential terms, such as deferred payment in instalments, credit from established foundations and discounted prices, are amongst the possible incentives stipulated by privatisation legislation in order to leverage employee ownership in privatisation.

Private Companies (2003) – Turkish commercial law does not contain special rules for any business form on employee share ownership respecting share acquisition, limitation of the number of shares or the issuance of employee stock; therefore general rules apply. Nevertheless, the Corporate Governance Principles of June 2003 which are recommended by the Capital Market Board for adoption by individual listed companies do promote PEPPER schemes. Generally, corporations are not allowed to acquire their own stock (Art. 329 CC) and unlike regulations in other countries, exceptions from this general rule do not include special rules on employees' shares.²⁰⁶ Thus, even if freely disposable equity of the amount necessary for this purpose is available, Art. 329 CC is an obstacle to all schemes that enable employees to acquire shares if part of the price or the whole price of the stocks is paid for by the company (for example, acquisition below market price, free shares, premium, bonus, etc.). However, there is no restriction on offering shares to em-

²⁰³ In 1984 the first related Law No. 2983 was enacted, followed by Law No. 3291 in 1986. See <http://www.oib.gov.tr/baskanlik/yasal_cerceve_eng.htm>.

²⁰⁴ Law No. 4046 on the Implementation of Privatisation of 27 November 1994 as published in the Official Gazette No. 22124 on 27 November 1994 and most recently amended by Law No. 5398 of 3 July 2005 published in the Official Gazette No. 25882 on 21 July 2005.

²⁰⁵ Law No. 6762 dated 29 June 1956, enacted on 2 July 1956, published in the Official Gazette No. 9353 on 9 July 1956.

²⁰⁶ Art. 329 CC widening the exceptions is under consideration. In parallel the Capital Markets Law is subject to an amendment and in this case acquisition of own shares with the object to give them to their employees including by publicly held joint-stock companies is apparently under consideration.

employees on favourable conditions in the course of a capital increase provided that the price is not lower than the nominal value (Art. 286 CC). Furthermore, according to Art. 14/A of Capital Market Law, if the company's Articles of Association permit, publicly held joint-stock corporations may issue and offer to the public preferred non-voting shares. A foreign multinational company wishing to implement a financial participation plan for employees working in a subsidiary or companies of the same group in Turkey in accordance with the rules of the home country, must register the plan with the Capital Markets Board of Turkey, which will evaluate the application and approve or reject it. The sale should be conducted through an intermediary institution, for example, a bank, special financial institution or brokerage house.

Employee Stock Ownership Plans (ESOP) – Although genuine ESOPs have not been implemented in Turkey, ESOP-like schemes have been found. These are based upon associations or foundations which collectively hold the employer company's shares on behalf of employees, with the employer company making contributions from company profits to facilitate their acquisition. Pursuant to Art. 468 (1) CC, funds allocated for assistance to employees shall be set aside from the property of the company, and a foundation can be set up in accordance with the provisions of the civil law with the funds serving as its assets.²⁰⁷ As such, welfare funds or mutual assistance funds created for the benefit of employees are allocated to the foundation (or association) which in turn can invest in the stocks or other securities of the founding company. Thus the provisions of Art. 468 (1) and 469 (3) CC make it possible to overcome the constraints of Art. 329 CC which prohibits a company from acquiring its own shares. Further, the foundation deed may provide that the property of the foundation shall consist of a debt to the company, making it possible to finance the acquisition of shares by employees on credit. According to Art. 469 (3) CC, even if the Articles of Association contain no specific provision, the General Assembly can decide to set aside funds to establish assistance funds for employees. After setting up a foundation or other organisation for the benefit of employees, the founder company can provide resources either from profits on the basis of a General Assembly resolution or from optional reserves for social purposes. As a rule, allocations are to be regulated by the provisions on assistance funds in the Articles of Association. Employers' contributions to foundations (associations, etc.) that have been granted tax exemption by the Council of Ministers are tax deductible up to a maximum of 5 per cent of the current year's profit. Employees can also make individual contributions.

b) Profit-Sharing

Art. 323 of the Code of Obligations authorises any agreement that grants a share in profit to employees in addition to their basic fixed wage. In publicly-held joint-stock companies this may apply only if authorised by the Articles of Association (Art. 7 of a Communiqué of the Capital Markets Board of Turkey²⁰⁸ hereinafter referred to as DivComm). Joint-

²⁰⁷ In accordance with Art. 468 I and 469 III other than the aforementioned vehicle of a foundation also an association, a co-operative, a corporation or any other organisation for the benefit of employees may be used.

²⁰⁸ On Principles Regarding Distribution of Dividends and Interim Dividends to be Followed by Publicly Held Joint-stock Corporations Subject to Capital Market Law; Serial: IV, No. 27 published in the Official Gazette No. 24582 dated 13 November 2001, see Art. 8.

stock companies must retain 10 per cent of the net profit each year as a reserve until it equals 20 per cent of the capital ('first allocation', Art. 466 (1) CC). If dividends to shareholders exceed 5 per cent of the annual profit or if profit is not distributed as an entitlement from holding shares, for example, to employees, foundations, or company management, then an additional 10 per cent of the amount of profit to be distributed must be retained as a 'second allocation'. Joint-stock corporations with shares not traded on the stock exchange are required to distribute the first dividend principally in cash. However, companies not exempt from independent auditing²⁰⁹ can distribute the first dividend in cash and/or in the form of bonus shares (share-based profit-sharing). Corporations which partly or wholly prefer to distribute the first dividend in the form of share-based profit-sharing are required to obtain shareholder approval. Dividends of shareholders who did not exercise this right or had no opportunity to do so are paid in cash. In cases of making donations or distributing profit shares to foundations (see foundations discussed earlier in the ESOP section) another Communiqué of the Capital Markets Board of Turkey²¹⁰ further requires that these payments should not result in 'inconsistent' transactions²¹¹; that information on the donations needs to be given to shareholders at the General Assembly, and that all necessary information must be disclosed and published in the ISE Daily Bulletin.²¹²

c) Participation in Decision-Making

Turkish companies are not required to include employees in the corporate governance process, and there is no obligatory regulation on participation of employees in the management of the company. However, roughly one-third of traded companies do have a program for the participation of employees in management (Küçükçolak and Özer, 2007, p. 9: Table 3, p. 12: Table 7). The Capital Markets Board of Turkey Principles recommend that companies establish mechanisms and models to encourage stakeholders' participation in management, while giving priority to employees but without hindrance to company operations.

²⁰⁹ In accordance with Art. 3 (a) DivComm of the Communiqué on Principles Regarding Exemption Requirements for Issuers and Removal from the Board's Register Serial: IV, No. 9 published in the Official Gazette No. 22154 on 27 December 1994.

²¹⁰ Communiqué on Principles and Rules on Financial Statements and Reports in Capital Markets Serial: XI, No. 1 published in the Official Gazette No. 20064 on 29 January 1989.

²¹¹ Defined by Art. 15 (6) Capital Market Law: in the case of transactions with another enterprise or individual with whom there is a direct or indirect management, administrative, supervisory, or ownership relationship, publicly held joint-stock corporations shall not impair their profits and/or assets by engaging in deceitful transactions such as by applying a price, fee or value clearly inconsistent with similar transactions with unrelated third parties.

²¹² According to Communiqué on Public Disclosure of Material Events Serial: VIII, No. 20 published in the Official Gazette No. 21629 on 6 July 1993, amended with Serial: VIII, No. 39 published in the Official Gazette No. 25174 on 20 July 2003.