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The Demise of the Ultra Vires Doctrine in Turkey: a Reality? or an Illusion?

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ÖZET

Yeni Türk Ticaret Kanunu 125. maddesinin ikinci fıkrası şirketlerin faaliyet konusu dışında kalan işlemlere de taraf olabilmesini sağlayan bir hüküm getirmiştir. Türk hukuk doktrinindeki baskın görüşe göre, Yeni Türk Ticaret Kanunu'nun 125. maddesinin ikinci fıkrası ile birlikte ultra vires doktrinin uygulaması Türk şirketler hukukundan tamamen kaldırılmıştır. Ancak baskın görüşün aksine, bu çalışma Yeni Türk Ticaret Kanunu'nun ultra vires doktrinin Türk şirketler hukukundaki tüm izlerini ortadan kaldıramayacağını tartışmak amacını taşımaktadır. Yeni kanunda doktrinin uygulanmasının Türkiye'de halen devamlılık arz ettiği izlenimini yaratan bazı hükümler mevcuttur. Bu açıdan, Yeni Türk Ticaret Kanunu'nun 125. maddesinin ikinci fıkrası yalnızca ultra vires doktrininin "sözleşmeye taraf olabilme ehliyetinin aşılması" olan birincil anlamını ortadan kaldırma işlevine sahiptir. Ultra vires doktrininin "Temsil gücünün aşımı" olan ikincil anlamı ise Yeni Türk Ticaret Kanunu'nun 210(3), 233(1) ve 371(2). maddeleri kapsamında muhafaza edilmektedir. Bu doğrultuda, bugün ultra vires doktrininin şirketlerin ehliyetlerine değil; şirketlerin temsiline ilişkin süregelen bir mesele olduğu sonucuna ulaşılabilecektir. Sonuç olarak, bu çalışma ile de lege ferenda açısından doktrinin uygulanmasının Türkiye'de devam ettiği izlenimini yaratan Yeni Türk Ticaret Kanunu hükümlerinin, yasa koyucunun ultra vires doktrinini Türkiye'de tamamen ortadan kaldırma amacına ulaşmasına binaen yürürlükten kaldırılması gerektiği önerilmektedir.

ABSTRACT

The new Turkish Commercial Code adopted article 125(2), which entitled companies to engage in every kind of transaction even if they fall beyond the objects clause of the company. The predominant view in Turkish legal literature asserted that by virtue of the article 125(2) of the Turkish Commercial Code, the application of the doctrine has been removed completely from Turkish company law. On the contrary of the predominant view, this paper aims to argue that the new Turkish Commercial Code is unable to remove all the traces of the ultra vires doctrine in Turkey. There are still some provisions in the new code, which give the impression that the application of the doctrine is continuing in Turkey. In this respect, section 125(2) of the new Turkish Commercial Code has a function to abolish only the primary meaning of the ultra vires doctrine in Turkey, which is an excess of contractual capacity. The secondary meaning of the ultra vires doctrine, which is an excess of representation power, is preserved by virtue of articles 210(3), 233(1) and 371(2) of the new Turkish Commercial Code. Therefore, it can be concluded that today the ultra vires doctrine is not continuing as a matter of capacity of companies; but it is continuing as a matter of representation. All in all, this paper suggests that, de lege ferenda, the provisions of the new Turkish Commercial Code, which give the impression that the application of the doctrine is continuing in Turkey, should be abrogated in order to attain the legislator's aim of abolishing the ultra vires doctrine in Turkey completely.

Introduction

The corporate laws of countries, which embrace the free market economy, have a tendency to change throughout history.[1] In order to attain economic progress and ensure the sustainability of the free market economy, countries have embarked on introducing radical reforms to their corporate laws. As a result of such a reform movement, rules, which lost their efficiency, impaired the free market economy and hindered the commercial growth of a country, have been abolished promptly.[2] The ultra vires doctrine in corporate law is such a concept. Briefly, according to the ultra vires doctrine, the acts of corporations, which are beyond the scope of powers of corporation, are void.[3]

Turkey, as a candidate country for European Union membership, initiated a reform movement for its company law in order to be in line with the acquis communautaire and eliminate some outdated rules, which inhibited its economic development. The reform movement culminated in the enactment of the new Turkish Commercial Code on 1 July 2012. One of the most important innovations of the new code is the abolition of the ultra vires doctrine in Turkey.[4] According to the predominant view in Turkish company law, the new Turkish Commercial Code has abolished the application of the ultra vires doctrine in Turkey by adopting article 125(2), which grants unlimited contractual capacity to commercial companies.[5] Nonetheless, according to another view, which is supported by some groups of reputable company law scholars in Turkey, the application of the doctrine has not been removed completely from Turkish company law, and there are still some provisions in the new code which give the impression that the application of the doctrine is continuing in

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[1] Stephen J. Leacock, 'The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph' (2006) 5 DePaul Bus. & Comm. L.J. 67

[2] ibid 69

[3] Paul L. Davies, *Gower and Davies: Principles of Modern Company Law* (8th edn, Sweet & Maxwell 2008) 153

[4] Turkish Commercial Code 2012, s.125 (2) (TR)

[5] Burcak Yildiz, 'The Legal Capacity of Companies under the Draft of the New Commercial Code and in This Context, evaluation of the Appropriateness of the Ultra Vires Rule in Commercial Code Art. 137' (2006) 55 Ankara Üniversitesi Hukuk Fakültesi Dergisi 321, 337

Turkey.[6] In the light of all these findings, the main purpose of this paper is to argue that the new law is unable to remove all the traces of the ultra vires doctrine in Turkey. Accordingly, today the ultra vires doctrine is not continuing as a matter of capacity of companies; but it is continuing as a matter of representation. Therefore, this paper suggests that, de lege ferenda, the provisions of the new Turkish Commercial Code, which give the impression that the application of the doctrine is continuing in Turkey, should be abrogated in order to attain the legislator's aim of abolishing the ultra vires doctrine in Turkey completely.

It is important to state at this point that this subject is chosen because of two main reasons. Due to the fact that the new Turkish Commercial Code has come into effect as of 1 July 2012, the discussions with regard to the abolition of the ultra vires doctrine in Turkey are very new for Turkish legal literature. Therefore, the main aim of this paper is to provide a detailed and complete work regarding the fate of the ultra vires doctrine in Turkey. Secondly, since the subject of this work includes different and contradictory ideas, this will help create a work to stimulate discussion in Turkish legal literature.

This paper will include three main chapters. In the first chapter, the study will try to introduce the concept of ultra vires. Then, it will deal with the rise and fall of the ultra vires doctrine in the U.K. The ultra vires doctrine originated in English common law and the application of it spread to numerous countries. Furthermore, the new Turkish Commercial Code copied some provisions of the U.K Companies Act 1985 while bringing about a reform in the application of the doctrine. Because of these two aforementioned reasons, this study intends to describe the historical development of the doctrine in the UK, before initiating an analysis of Turkish law.

The second chapter will start with scrutinizing the provisions of the Turkish Commercial Code dated 1956 with regard to the formulation of the ultra vires doctrine. Then, six different justifications for the necessity of the complete abolition

[6] Gizem Alper, *Türk Özel Hukukunda Ultra Vires İlkesi (Anlamı ve Kapsamı)*(1st edn, Vedat Kitapçılık 2013) 56-59

of the doctrine in Turkey will be outlined. Finally, the provisions of the new Turkish Commercial Code, which facilitate the abolition of the doctrine in Turkey, will be demonstrated. In this part, the arguments of the academicians who support the view that the application of the ultra vires doctrine is completely removed from Turkish company law will be presented.

In the last chapter, this paper will try to find an answer to the question regarding whether the new Turkish Commercial Code has completely abolished the ultra vires doctrine or if it still has specific provisions that may remind us of the application of the doctrine. In this part, articles 233(1), 371(1) and 210(3) of the new Turkish Commercial Code will be highlighted as an indication that today the ultra vires doctrine is not continuing as a matter of capacity of companies; but it is continuing as a matter of representation.

1.The Ultra Vires Doctrine in the UK

1.1 The Concept of Ultra Vires

The ultra vires doctrine is a legal device, which was firstly introduced in the 19th century by English common law[7]. According to the doctrine, a company is unable to legally engage in a business activity, if this specific business activity is not stated in the objects clause of the company's memorandum of association.[8] Even though such a business activity falls outside the scope of the company's objects clause, if a company persists in carrying it on, conducted transaction between the parties can be declared ultra vires by the courts. The consequence of ultra vires transaction is that the contract between the parties is declared absolutely null and void.[9] When the transaction is declared ultra vires and void, acquiring the unanimous consent of all shareholders

[7] Lutz-Christian Wolff, 'The Disappearance of the Ultra Vires Doctrine in Greater China: Harmonized Legislative Action or (simply) an Accident of History' (2003) 23 Nw. J. Int'l L. & Bus. 633, 635

[8] Stephen Griffin, 'The Rise and Fall of the Ultra Vires Rule in Corporate Law' (1998) 2 Mountbatten Journal of Legal Studies 5

[9] Len Sealy and Sarah Worthington, *Cases and materials in Company Law* (10th edn, Oxford University Press 2013) 87

cannot help to turn such an ultra vires transaction into an intra vires one.[10] As a result, it can be deduced from the aforementioned information that the ultra vires doctrine has the legal effect of restricting a company's legal capacity as a result of its objects clause.

1.2 Historical Development of the Ultra Vires Doctrine in Common Law

1.2.1 The Rise of the Ultra Vires Doctrine in Common Law

Historically, *Ashbury Railway Carriage and Iron Company v Riche* [11] has been considered as a cornerstone of the ultra vires doctrine in the UK.[12] In this case, the objects clause of the company restricted the capacity of the company to make and sell railway carriages and wagons. However, the directors of the company intended to engage in a contract with Riche to construct a railway line in Belgium. In the end, the directors of the Asbury Company rejected to fulfil their obligations, which arose from the construction contract, on the grounds that the intended transaction fell outside the scope of the company's objects clause. The court held that since the company's objects clause did not empower the company to construct railways, the transaction was ultra vires and therefore the contract was void.[13] Furthermore, the court emphasized that such a contract could not turn into a legally binding contract by unanimous consent of shareholders.[14]

'In the *Ashbury* case',[15] Lord Cairns justified the application of the ultra vires doctrine by asserting that the doctrine provided a protection to shareholders and company creditors.[16] Pursuant to section 12 of the Companies Act 1862, the memorandum of association could not be altered. Accordingly, the ultra vires doctrine, which was reinforced by section 12 of the 1862 Act, ensured prospective shareholders that their

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[10] Simon Goulding, *Company Law* (2nd edn, Cavendish Publishing Limited 1999) 156
[11] (1875) LR 7HL 653
[12] Janet Dine and Marios Koutsias, *Company Law* (6th edn, Palgrave Macmillan 2007) 41
[13] ibid
[14] ibid
[15] *Ashbury Railway Carriage* (n 11)
[16] Jill Poole, 'Abolition of the Ultra Vires Doctrine and Agency Problems' (1991) 12 CoLaw, S. 43, 49

investment would not be wasted on unauthorized activities and it provided that the company could only engage in business activities which were stated in the company's objects clause. [17] Gower described this protection as follows '... the ultra vires doctrine ensured that an investor in a gold mining company did not find himself holding shares in a fried fish shop'.[18] If directors of the company insisted on engaging in a business activity which fell beyond the objects clause, shareholders could either seek to obtain an injunction in order to preclude the intended activity or an order for winding up[19] the company on the grounds that the company's main object had failed.[20] As to creditor protection, the ultra vires doctrine provided a protection for the corporate creditors by ensuring that the obtained credits would only be used in business activities, which were stated in the objects clause of the company. [21] As a result, the intended goal of the doctrine was to create a direct and reliable shield for shareholders and creditors and promote their interests.

1.2.2 The Fall of the Ultra Vires Doctrine in Common Law

Unfortunately, it has been generally accepted that the doctrine could not serve its aims effectually. First of all, the ultra vires doctrine has been considered as a barrier to engage in profitable business activities, which were not stated in the company's objects clause, in the period when the statutory law did not allow companies to alter their objects clause.[22] Due to the fact that the doctrine did not allow companies to deviate from their objects clause and prevented them from pursuing much more potentially profitable activities, it has been claimed that actually the doctrine could not promote the interest of the shareholders. Dignam put it in the following way: 'if a company's object stated it was to be a sweet shop it could not then legally become a coal merchant even if that was much more profitable use of the company's

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[17] FHI Cassim, 'The Rise, Fall and Reform of the Ultra Vires Doctrine' (1998) 10 S. Afr. Mercantile L.J. 293

[18] LCB Gower, JB Cronin, Aj Easson and Lord Wedderburn of Charlton, *Gower's Principles of Modern Company Law* (4thedn, Sweet & Maxwell 1979) 165

[19] The action for this type of winding up order is now adopted in s122 (1) of the Insolvency Act 1986.

[20] Griffin (n 8) 8

[21] ibid

[22] Leacock (n 1) 78

resources'.[23] Secondly, it has always been argued that the ultra vires doctrine was an effective device for the protection of creditors. Nonetheless, creditors, unlike shareholders, were neither entitled to ask for an injunction to hinder the company from engaging in an ultra vires transaction nor empowered to obtain a winding up order from the court on the grounds that a company's main object had failed.[24] This practice was embraced in *Mills v Northern Railway of Buenos Ayres Co*[25] where the court held that unsecured creditors were deprived of a right to preclude the company to enter into an ultra vires contract though the contract jeopardized their debt.[26] As a result, since the strict application of the ultra vires doctrine could not serve its intended goal, the judiciary embraced a flexible approach when dealing with the doctrine.

The first example for a departure from the strict interpretation of the ultra vires doctrine, which was accepted 'in *Asbury*',[27] was seen in *Attorney General v Great Eastern Railway Co*[28] In this case, the House of Lords declared that business activities, which are incidental or consequential to the company's stated objects, should not be regarded as ultra vires.[29] This case has crucial importance for the historical development of the doctrine as it is the first attempt to weaken the strict approach of 'the *Asbury* case'.[30] Furthermore, the new drafting techniques also assisted companies to get around the ultra vires doctrine.[31] In order to circumvent the doctrine, companies started to draft their objects clause as detailed and widely as possible, with the intention of encompassing all of the business activities, which the company might wish to be involved in.[32]

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[23] Alan Dignam, *Hicks & Goo's Cases and Materials on Company Law* (7th edn, Oxford University Press 2011) 172
[24] Griffin (n 8) 8
[25] (1870) 6 Ch App 621
[26] Cassim (n 17) 295
[27] *Ashbury Railway Carriage* (n.11)
[28] (1880) 5 AC 473 (HL)
[29] ibid
[30] *Ashbury Railway Carriage* (n.11)
[31] Cassim (n 17) 296
[32] ibid 295

In *Cotman v Brougham,*[33] the company's objects clause involved 30 subclauses, which enabled the company to engage in a wide variety of business activities.[34] In addition, at the end of the objects clause, it was added that each subclause must be deemed as a separate and independent clause and therefore they could not be '... limited or restricted by reference to any other sub-clause or by the name of the company'.[35] In this respect, none of the subclauses stated in the objects clause would be interpreted as subsidiary or ancillary to any other object.[36] That kind of drafting technique was applied in order to avoid the main objects rule of the construction. Pursuant to this rule, in the case of the ambiguity of the main object of the company, the name of the company or first set of objects stated in the objects clause of the memorandum of association was examined in order to determine the main object of the company.[37] All subsequent statements in the objects clause would then be considered to be powers of the company, which could only be validly exercised for the purpose of furthering the main object.[38] With the help of 'the *Cotman* case',[39] in which the court upheld the validity of the aforementioned drafting technique, the application of the ultra vires doctrine was narrowed.

Later, in *Bell Houses Ltd v City Wall Properties Ltd*[40] the scope of a company's contractual capacity was enormously widened with the acceptance of the 'subjective objects clause'.[41] In the memorandum of association, the objects clause of the company empowered the board of directors to engage in any business activities which are profitable and advantageous in the opinion of the board of directors. Danckwerts LJ sets out the rationale of his decision as follows:

> On the balance of the authorities it would appear that the opinion of the directors if *bona fide* can dispose of the matter; and why should it not decide the matter? The shareholders subscribe their money on the basis of the memorandum of association and

[33] [1918] AC 514 (HL)
[34] Dine and Koutsias (n 12) 41
[35] ibid
[36] Griffin (n 8) 10
[37] Dine and Koutsias (n 12) 42
[38] ibid
[39] *Cotman* (n 33)
[40] [1966] 2 Q.B. 656
[41] Griffin (n 8) 11

> if that confers the power on the directors to decide whether in their opinion it is proper to undertake particular business in the circumstances specified, why should not their decision be binding? [42]

As a result, Cassim stressed the importance of the *Bell Houses*[43] for the historical development of the ultra vires doctrine by asserting that it was the first step of the disappearance of the doctrine.[44]

1.2.3 The Confusion Between the Nature of an Ultra Vires Transaction and an Abuse of Corporate Powers

After describing the rise and fall of the application of the ultra vires doctrine in English common law, in this part, the paper intends to highlight confusion between ultra vires transactions and the act of unlawful exercise of corporate powers, by presenting specific court decisions. This issue constitutes an important part of the fate of the ultra vires doctrine due to the fact that identification and resolution of the confusion led to the demise of the practical importance of the doctrine.

As stated above, under the ultra vires doctrine, a transaction can be regarded as ultra vires and void only when the conducted activity is beyond the stated objects of the company, which are declared in the memorandum of association of the company. Therefore, determination of whether the specific transaction is ultra vires or not can only be made by examining the objects clause of the company. Nevertheless, in numerous cases, the courts could not draw a clear distinction between contractual capacity of the company and legitimate exercise of corporate powers.[45] If a specific activity exceeds the corporate capacity, the ultra vires rule steps in, yet in the case of unlawful exercise of corporate powers, the determination of whether or not the act of director is abuse of corporate powers is needed. In the latter case, the transaction can be declared as voidable but it ought not to be declared as ultra vires.

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[42] *Bell Houses Ltd*, (n 40) 690
[43] *Bell Houses Ltd*, (n 40)
[44] Cassim (n 17) 296
[45] Griffin (n 8) 12

Generally speaking, such confusion arose in situations '...where companies make gratuitous payments either as a donation or gift, or act as guarantor or give security for the indebtedness of another company in the group or an outsider'.[46] The first case which led to such confusion, is *Re Lee Behrens and Co Ltd.*[47] In this case, the company intended to reward the spouses of its officials with a pension, yet the court regarded the transaction as an ultra vires one. The court used a test in order to determine the validity of the transaction. The relevant tests were stated as follows:

> 1) is the transaction reasonably incidental to the carrying on of the company's business? 2) is it bona fide transaction? and 3) is it done for the benefit of and to promote the prosperity of the company? [48]

The judge held that providing a pension to spouses of the former servants of the company cannot be classified as a bona fide transaction due to the fact that it is not concluded for the benefit of and to promote the prosperity of the company.[49] In this point, Griffin alleged that Mr Eve J's fault in drawing a clear distinction between the contractual capacity of the company and the legitimate exercise of corporate powers led him to make a misappropriate judgment.[50] Under the doctrine of ultra vires, the examination of contractual capacity cannot be performed by taking into consideration good faith or the promotion of the prosperity of the company.[51] If the objects clause of the company encompasses the conduct of a specific transaction, then it cannot be considered as an ultra vires transaction. 'In the *Lee Behrens* case', due to the fact that the company had a power to provide a pension to specified people, the judge should not have declared the transaction as ultra vires.[52]

The confusion between corporate capacity and the abuse of corporate powers was maintained in the *Re David Payne & Co. Ltd.*[53] In this case, court held that, if the third party knew that the act of borrowing is conducted for the ultra vires purposes,

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[46] Dignam (n 23) 175
[47] [1932] 2 CH 46
[48] Dignam (n 23) 175
[49] *Re Lee Behrens* (n 47)
[50] Griffin (n 8) 12
[51] ibid
[52] ibid
[53] [1904] 2 Ch 608

even though such an act was within the capacity of the company, the transaction would be regarded as voidable.[54] The transaction would be enforceable only in a circumstance where the majority of the shareholders declared their consent to the transaction.[55] Accordingly, in a situation where a third party did not know that the directors of the company used the loan money for ultra vires purposes, the transaction would be valid.[56] In his judgment, Buckley J made a mistake by examining whether or not the loan money is used for ultra vires purposes. The company was entitled to become involved in a borrowing transaction as this is precisely stated in the objects clause of the company. In this case, the judge should only have analysed the objects clause of the company and should have given his judgment solely according to this assessment. 'The fact that the directors chose to apply the money to ultra vires purposes was a matter for which the directors could be called to account by the shareholders, as being a breach of their duties'.[57]

Finally, the confusion between ultra vires transactions and the concept of abuse of corporate powers was resolved in *Charterbridge Corporation v Lloyds Bank*.[58] Here, Castleford Ltd concluded a mortgage contract with Lloyds Bank with the intention of securing the indebtedness of different companies in the group, to which Castleford Ltd belonged. It is important to note that the mortgage was taken out on Castleford Ltd properties. However, without paying the mortgage, Castleford Ltd sold the properties to the Charterbridge Corporation. Later, Lloyds Bank claimed the properties from Charterbridge for the default in the mortgage payment. Charterbridge refused to fulfil its obligation by asserting that the mortgage transaction was ultra vires and therefore void. The argument of Charterbridge was based on the idea that the mortgage transaction was not conducted for the benefit of and to promote the prosperity of Castleford Ltd; on the contrary, Castleford Ltd engaged in a mortgage transaction for the benefit of and to promote the different companies in the same group. In his judgment, Pennycuick J rejected the application of the 'benefit test', which was first applied in *Re Lee Behrens*.[59] According to him, when determining

[54] Griffin (n 8) 11
[55] ibid
[56] ibid
[57] Dine and Koutsias (n 12) 43
[58] [1970] CH 62
[59] ibid 69

whether the company has a capacity to become involved in a specific transaction, the only instrument for reaching a conclusion is the company's objects clause. In this case, in the objects clause of Castleford Ltd, the company was explicitly entitled to engage in mortgage transactions. Therefore, it was held that the mortgage transaction was not ultra vires and it was enforceable. *Charterbridge Corporation v Lloyds Bank*[60] constitutes an important part of the development of ultra vires doctrine. In this case, confusion between the ultra vires transactions and the concept of abuse of corporate powers, which was seen in earlier authorities, was identified and resolved.[61] Moreover, the application of a 'benefit test' for the issues related to corporate capacity was rejected decisively.[62]

Unfortunately, after the *Charterbridge Corporation v Lloyds Bank*,[63] the confusion between ultra vires transactions and the concept of abuse of corporate powers was still maintained in some cases. In *Introductions Ltd v National Provincial,*[64] the judgement of Pennycuik J, the judge in the *Charterbridge* case, was not supported. In the objects clause of the company, its main object was stated as providing accommodation and services to overseas visitors. Beyond that, the objects clause entitled the company to borrow money. The subscribers added a statement providing that each subclause must be deemed as a separate and independent clause. Thereafter, Introductions Ltd requested the bank to get a loan in order to use it in its pig-breeding business. Additionally, the bank was provided with a copy of the memorandum of association of the company. Thereby, the bank was informed that the only business activity that the company was pursuing was the pig-breeding business. Accordingly, the bank was aware of all of the information regarding the company. The court of appeal held that the loan transaction was unenforceable. The first assertion of the court of appeal was that borrowing money was a power and not an object.[65] Secondly, it held that as the activity of pig-breeding was not precisely stated in the objects clause of the company, the company could not legally engage in a loan transaction conducted to pursue ultra

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[60] *Charterbridge Corporation* (n 58)
[61] Stephen Griffin, *Company Law: Fundamental Principles* (4th edn, Pearson Education Limited 2006) 113
[62] ibid
[63] *Charterbridge Corporation* (n 58)
[64] [1970] Ch 199
[65] Dignam (n 23) 173

vires purposes, i.e. pig-breeding business.[66] Furthermore, the court ruled that even though the objects clause entitled the company to engage in borrowing money activities, it was restricted in its legitimate business purposes.[67] As can be seen, such a judgment does not comply with the original ultra vires doctrine, which holds that solely the activities which fall outside the scope of the objects clause can be declared as void. As a result, *Introductions Ltd v National Provincial* is seen as a setback for the development of the doctrine.[68]

Even though the resolution of confusion between ultra vires transactions and an abuse of corporate powers, which was advanced 'in the *Charterbridge* case', was damaged by the judgement in *Introductions Ltd v National Provincial,*[69] in almost every case in the 1980s, *Charterbridge* approach has been followed.[70] The first example of this trend was seen in *Re Halt Garage*.[71] Here, the directors of the company, who were a married couple, owned all of the issued share capital. In the general meeting, the company used its precise power and granted remuneration to the directors. The wife became ill and could not fulfil her duty as a director but continued to receive her director's fee for three years, even though the company was struggling with financial difficulty and in the end declared its insolvency. The liquidator made a claim against the married couple to recover some of the payments made to them as directors' fees. The argument for this claim was based on the idea that such a payment was gratuitous and, therefore, ultra vires. Oliver J held that if the payments were not made in order to disguise the intended transaction and the power to make payments was genuinely exercised, the payments would not be regarded as ultra vires and void.[72] In this case, the judge also rejected to apply the 'benefit test', which was advanced in *Re Lee Behrens.*[73] In this way, when determining whether the payments were ultra vires or not, the judge did not consider whether they were bona fide and made for the benefit of the company. However, in his judgment, the judge held that some parts of the

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[66] ibid
[67] Leacock (n 1) 81
[68] ibid 80
[69] *Charterbridge Corporation* (n 58)
[70] Dine and Koutsias (n 12) 44
[71] [1982] 3 All ER 1016
[72] W, 'Ultra Vires in Modern Company Law' (1983) 46 The Modern law Review <http://www.jstor.org/stable/1095493> accessed 15 August 2014 204,205
[73] *Re Lee Behrens* (n 47)

payments, which were received by the wife, were ultra vires and must be recovered on the grounds that she was ill and inactive during the relevant period.[74] For this period, the received director's fee could not be considered as a genuine payment and must be seen as a gratuitous payment.[75] However, the court ruled that the payments, which were made to husband, were valid and must not be recovered.

Finally, in *Rolled Steel Products Ltd v British Steel Corporation*,[76] the judgment of Slade LJ resolved the confusion between ultra vires transactions and unlawful exercise of corporate powers permanently. His judgment made it clear that the application of the ultra vires doctrine was confined to cases which deal with contractual capacity issues.[77] In addition, it was held that issues, which deal with unlawful exercise of corporate powers, were omitted from the application of the doctrine. This development was important for narrowing the scope of the ultra vires doctrine and it has been argued that after 'the *Rolled Steel Products* case',[78] the practical importance of the doctrine died.

1.3 Legislative Reform Movement for the Ultra Vires Doctrine in the UK

1.3.1 General Background

While the common law was endeavouring to mitigate the problem arising from the strict application of 'the *Asbury* case',[79] statutory reform was also needed in order to resolve the problem peremptorily. However, since Parliament was slow to act, the first statutory reform of the doctrine was only carried out in 1948, after the recommendations of the Cohen Committee.[80] Prior to 1948, the alteration of the memorandum of association was not allowed. Consequently, any company, which wanted to pursue a profitable business activity not stated in its objects clause, was deprived of conducting it. Then, by enacting section 5 of the Companies Act 1948,

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[74] W (n 72) 205
[75] ibid
[76] [1985] 3 AII ER 52
[77] ibid 85
[78] Griffin (n 8) 16
[79] *Ashbury Railway Carriage* (n 11)
[80] President of the Board Of Trade, *Report of the Committee on Company Law Amendment* 1945 (Cohen Report, cmd 6659, 1945) para 12

legislators permitted companies, which were formed under that Act, to alter their objects clause by special resolution. This development provided such companies with considerable flexibility in pursuing future business activities.[81] However, it should be noted that even though this reform widened the contractual capacity of companies, it did not deal with the protection of third parties and the risk for them remained.[82] For instance, if a company believes that its objects clause is wide enough to cover the intended transaction and it engages in a transaction without altering its memorandum of association, in this situation, the company may refuse to fulfil its obligations and declare that the transaction, which was entered into with a third party, is void. In such an example, the third party would not have any instrument to protect itself.[83] Actually, the Cohen Committee recommended that companies should obtain the all natural person powers and the objects clause should not be the criterion for assessing the contractual capacity of companies.[84] If this idea had been followed, third parties would have been protected.

1.3.2 The Ultra Vires Doctrine Under the Companies Act 1985

Even though some efforts had been made in order to modify the ultra vires doctrine, the major reform for the doctrine was achieved after the admission of the United Kingdom into the European Economic Community.[85] Section 9 of the European Communities Act 1972 was enacted in order to be in line with the First Company Law Directive.[86] Subsequently, section 9 was re-enacted by section 35 of the Companies Act 1985.

Section 35(1)[87], which is the reformulation of the section 9(1) of the European Communities Act 1972, states that:

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[81] Griffin (n 8) 17
[82] ibid
[83] Griffin (n 8) 17
[84] Cohen Report (n 80) para 12
[85] Cassim (n 17) 297
[86] First Council Directive (68/151/EEC) [1968] OJ L65/8
[87] Companies Act, 1985 (UK)

'In favour of a person dealing with a company in good faith any transaction decided on by the directors is deemed to be one within the capacity of the company to enter into and the power of the directors to bind the company is deemed to be free of any limitation under the memorandum or articles.'

Section 35(2)[88] restates the section 9(2) of the European Communities Act 1972 in a following way:

'A party to a transaction so decided on is not bound to inquire as to the capacity of the company to enter into it or as to any such limitation on the powers of the directors, and is presumed to have acted in good faith unless the contrary is proved.'

With the enactment of section 35(1) of the Companies Act 1985, companies were now bound up with the transactions that their directors sought to engage in, even if such a business activity was not stated explicitly in the objects clause of the company.[89] Moreover, the aim of the section was to protect third parties from losses arising from a company's lack of capacity, in situations where the third party acted in good faith.[90] However, it should be noted that this section did not abolish the ultra vires doctrine completely.[91] The ultra vires doctrine still had the effect of protecting shareholders from ultra vires transactions. Shareholders could still restrict the company from entering into a transaction which it was not entitled to pursue, according to the objects clause. Therefore, it can be asserted that, although section 35 had the effect of abolishing the ultra vires doctrine in relation to third party dealings,[92] the effect of the doctrine in internal operations was preserved.[93]

As for section 35(2) of the Companies Act 1985, by enacting it, legislators aimed to abolish the constructive notice rule. This rule applied to companies incorporated under the Companies Act 1985. According to the constructive notice rule, anyone who dealt with those companies was deemed to have knowledge of their objects

[88] Companies Act, 1985 (UK)
[89] Leacock (n 1) 82
[90] Cassim (n 17) 297
[91] ibid
[92] Griffin (n 8) 19
[93] Cassim (n 17) 297

clauses.[94] By abolishing the constructive notice rule, section 35(2)[95] provided that third parties who do not have actual knowledge about the objects of the company can be considered as acting in good faith while conducting an ultra vires transaction with the company and they can be protected from the threat of ultra vires transactions.

However, it has been widely accepted that section 35[96] was not formulated effectively. Its wording not only created an ambiguity in practice but also '...added some complexities of an already complex and troublesome doctrine'.[97]

First of all, as stated above, section 35(1) was enacted in order to confer a protection upon third parties who deal with the companies in good faith. However, when the wording of the section is analysed, it can be seen that the meaning and the scope of the word 'dealing' is ambiguous.[98] It has been a matter of controversy in terms of whether the word 'dealing' covers gratuitous transactions such as gifts, donations and sponsorship or if is limited to commercial transactions only.[99] In *Re Halt Garage*[100] it is held that the word 'dealing' does not cover gratuitous transactions and its scope is restricted to commercial transactions.

Secondly, the interpretation of the phrase 'good faith' also created considerable difficulty. The courts needed to find an answer to the question of whether the actual knowledge of any restriction in the objects clause of the company would suffice in considering whether or not a third party had been acting in bad faith.[101] The Jenkins Committee[102] opted for the view that even though a third party had read the company's memorandum of association, if they were unable to appreciate or perceive that the intended contract was ultra vires and void, the third party should not be

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[94] Davies (n 3) 156
[95] Companies Act, 1985 (UK)
[96] Companies Act, 1985 (UK)
[97] Cassim (n 17) 299
[98] ibid 298
[99] ibid
[100] *Re Halt Garage* (n 71), 1024
[101] Griffin (n 8) 21; Leacock (n 1) 81
[102] President of the Board Of Trade, *Report of the Company Law Committee* (Cmd 1749, 1962) para 42(c)

regarded as acting in bad faith and they should not be deprived of a protection, which is provided for third-party dealings in section 35 of the Companies Act 1985.[103]

Finally, the term 'directors' needed an interpretation in relation to whether the section would apply to transactions engaged in by a collective board of directors or it would also cover the transactions entered into by any one or more directors who had the authority. The use of plural word, 'directors', led to such confusion. This confusion was resolved in *International Sales &Agencies Ltd v Marcus.*[104] The court held the transaction conducted by one single director would suffice to consider it as a transaction decided by the 'directors'.[105]

1.3.3 The Ultra Vires Doctrine Under the Companies Act 1989

The further progress in the reform of the ultra vires doctrine was made in the 1989 Companies Act. Before the adoption of the 1989 Companies Act, Professor Dan Prentice was appointed by the Department of Trade and Industry in order to give some recommendations. In his report, Mr Prentice suggested the complete abolition of the doctrine by providing companies with the capacity, rights, powers and privileges of a natural person.[106] Such a development would make the objects clause useless, and thereby would help to attain complete abrogation of the doctrine. Unfortunately, the Companies Act 1989 did not opt for conferring a company with the capacity of a natural person and did not remove the necessity of having an objects clause in the memorandum of association. On the other hand, the Act had its merits, in terms of redrafting the defective wording of section 35 of the Companies Act 1985.

The wording of section 35(1) of the Companies Act 1985, which was redrafted by section 108 of the Companies Act 1989, now states that: ''The validity of an act done by a company shall not be called into question on the ground of lack of capacity by

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[103] Cassim (n 17) 299
[104] [1982] 3 A11 ER 551
[105] Cassim (n 17) 298
[106] Department of Trade and Industry, *Reform of the Ultra Vires Rule: A Consultative Document* (1986), paras 17-18 [hereinafter 'Prentice Report']

reason of anything in the company's memorandum'.[107]

It should be noted that the new section 35, just like the old one, did not completely abolish the ultra vires doctrine in the UK. Even though it abrogated the ultra vires doctrine in relation to third party dealings, the doctrine was preserved internally. Accordingly, section 35(2) conferred a right on shareholders to restrict the actions of the company, which are beyond the scope of the objects clause. Therefore, it can be concluded that although the new version of section 35 of the Companies Act 1985 did not bring any developments regarding the complete abolishment of the doctrine, it was important in that it corrected the defective wording of the old one.[108]

First of all, in the old version the word 'dealings' was unclear in terms of whether or not it covered gratuitous transaction. In the new version, this ambiguity was resolved by substituting the word 'act' for the word 'dealings'.[109] In this way, the new version had the effect of covering both commercial and gratuitous transactions.[110]

Secondly, the new section 35 omitted references to 'transactions decided upon by directors of the company'; and in this way, it widened the scope of third party protection. Regardless of determining whether the transaction is decided by directors or not, third parties would be protected when they engaged in a transaction with any agent of the company.[111]

Finally, in the old version of the section 35, the term 'good faith' had created considerable difficulties. The new section 35 embraced a new approach in which acting in good faith would no longer be a condition of providing protection for third parties.[112] Regardless of investigating whether a third party had actual knowledge that the intended transaction fell beyond the scope of the objects clause of the company, the company could not challenge the transaction on the grounds that it exceeds the contractual capacity of the company.

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[107] Companies Act 1985, s.35 (1), as amended
[108] Cassim (n 17) 300
[109] John Charlesworth and Geoffrey Morse *Company Law* (15th edn Sweet &Maxwell 1995) 71
[110] ibid
[111] Cassim (n 17) 300
[112] ibid

Unlike Mr Prentice's suggestion,[113] the Companies Act 1989 did not opt to remove the necessity of having an objects clause in the memorandum of association. Nonetheless, in order to avoid the prolonged and effusive objects clauses, section 3A of the Companies Act 1989 enabled companies to introduce a standard form of objects clause, which encompassed every type of commercial transaction.[114] On the other hand, if a company wished not to pursue a specific type of business activity, it must have stated it as a limitation of contractual capacity in the objects clause. This limitation would not render such a transaction void when dealing with third parties, since this possibility is prevented by section 35(1) of the Companies Act 1989.[115]

As emphasized above, the new section 35 did not abolish the doctrine entirely; it chose to preserve the internal effect of the doctrine. Both section 35(2) and 35(3) assisted in fulfilling this aim. First of all, section 35(2) entitled shareholders to bring proceedings in order to inhibit ultra vires transactions.[116] Secondly, section 35(3) retained the fiduciary duty of directors to avoid entering into ultra vires contracts.[117] Accordingly, if an ultra vires transaction, which is engaged in by the directors of the company, caused a loss for the company, the shareholders would be entitled to ask for compensation from the directors for breach of their fiduciary duty. However, the shareholders can protect the directors from being liable by approving their transaction with a special resolution.

On the other hand, the new section 35 A of the 1985 Companies Act deals with a protection of third parties from transactions which are conducted by unauthorized directors.[118] It is widely accepted that the protection of third parties is not solely achieved by abolishing the doctrine in third party dealings. Third parties must also be protected from transactions, which are conducted by directors who are deprived of having authority to complete such a transaction.[119] This problem is mostly associated with the ultra vires doctrine. Accordingly, section 35 A of the act provides that:

'In favour of a person dealing with a company in good faith, the power of the board of

[113] Prentice Report, (n 106) Ch.V
[114] Griffin (n 8) 23
[115] ibid
[116] Cassim (n 17) 301
[117] ibid
[118] Leacock (n 1) 90
[119] Cassim (n 17) 303

directors to bind the company, or authorize others to do so, shall be deemed to be free of any limitation under the company's constitution.'[120]

In section 35 A, third parties are protected against limitations on the authority of the board by removing such limitations on the board's authority to delegate.[121] However, this sanction can only be applied on condition that a third party acts in good faith. Unlike the old section 35 of Companies Act 1985, the term 'good faith' is clarified in section 35 A (2). Thereby, any third party, who has actual knowledge that the agent of the company lacked authority to conduct a transaction, would not be considered as acting in bad faith. In order to consider that a third party is acting in good faith, they must understand the consequences of the limitations on the authority of the directors.[122]

1.3.3 The Ultra Vires Doctrine Under the Companies Act 2006

The last and the most significant reform movement for the ultra vires doctrine took place in the Companies Act 2006. This Act adopted the unimplemented suggestions of the Prentice Report. Accordingly, newly incorporated companies no longer have a necessity to set out their objects in their memorandum of association.[123] Unless the contrary is expressed, the company will have unrestricted contractual capacity.[124] This is the final step of the onerous and complex reform process in English company law. However, it should be noted that the companies incorporated before the Companies Act 2006 will still preserve objects clause limitations in their memorandum of association.[125] On the other hand, a company incorporated under the Companies Act 2006 can adopt limitations on its objects, although such limitations will not affect the

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[120] Inserted by s.108 of the Companies Act 1989 (UK). It should be noted in this point that the new section 35(1) and 35 A of the Companies Act 1985 deals with two different issues. While the new section 35(1) is dealing with contractual capacity of companies, section 35 A regulates the consequences of transactions which is conducted by unauthorized directors.

[121] Leacock (n 1) 90

[122] It can be seen that in the formulation of the section 35 A (2) of the Companies Act, legislator followed the recommendations of the Jenkins Committee. Hereof see footnote 103.

[123] Companies Act 2006, s.31 (1) (UK)

[124] Dignam (n 23) 168

[125] Dine and Koutsias (n 12) 36

validity of the transaction.[126]

Section 40 of the Companies Act 2006 deals with the transactions of directors who lack authority to conduct binding transactions with third parties. As stated above, the consequences of ultra vires transactions and transactions that are conducted by unauthorized directors are different. In situations where the intended transaction falls beyond the objects clause of the company, the transaction is rendered ultra vires and void. Nevertheless, in situations where directors act beyond their defined powers, the transaction is not void. However, directors can be found liable for breaching their fiduciary duties, unless shareholders ratify their breach of duty. The new version of this rule is drafted in section 40 of the Companies Act 2006 and it should be noted that the wording of the section has only minor changes compared to its predecessor, which is section 35 A of the Companies Act 1985. Pursuant to section 40 of the Companies Act 2006, if a director acts outside of their identified powers when conducting a transaction with third parties, such limitations will not have any effect on the validity of the transaction. However, only third parties who are acting in good faith can benefit from this rule. Within this context, identifying the scope of the term 'good faith' is important. Thereby, just like its predecessors, the Companies Act 2006 abrogates the constructive notice rule. Failing to investigate the company's articles and directors' powers will not be a factor for determining whether or not the third party's action is in bad faith.[127] Nonetheless, it should be noted that it is not clear what kind of behaviours would put third parties into the bad faith category. However, it is widely accepted that understanding and perceiving the consequences of the limitations on the authority of directors would amount to a presumption that a third party had acted in bad faith.

To sum up, as many countries, England also, opted to remove the application of the ultra vires doctrine from its company law in order to eliminate its detrimental effects in business life. The long and burdensome reform process of the ultra vires doctrine ended with attaining the complete abolition of the doctrine in UK. Section 31(1) of the Companies Act 2006, by removing the requirement of having objects for

[126] Companies Act 2006, s.39 (1) (UK)

[127] Davies (n 3) 156

companies, not only abrogated the ultra vires doctrine in third party dealings but also it dispensed with the internal application of the doctrine.

2.The Ultra Vires Doctrine in Turkey

After dealing with the rise and fall of the ultra vires doctrine in UK, now this paper starts to scrutinize the application of the doctrine in Turkey. As stated in the introduction part, due to the fact that Turkish legislation copied some provisions of the English company law, which are related with the ultra vires rule, this study aimed to analyze them firstly. Therefore, throughout this part there will be some references to English company law provisions.

2.1 The Application of the Ultra Vires Doctrine Under the TCC 1956[128]

The first application of the ultra vires doctrine in Turkey is seen in the Turkish Commercial Code Law No. 6762 which was adopted in 1956. Accordingly, article 137 of the code provided that

> 'Having legal personality, commercial companies shall be entitled to acquire all rights and undertake all obligations provided that such rights and obligations fall within the scope of activities indicated in their Articles of Association. Statutory exceptions regarding this matter shall be reserved'.[129]

The predominant view asserted that article 137 used to deal with the contractual capacity of companies.[130] According to this view, the scope of contractual capacity of any trade company is restricted by its objects clause. In other words, trade companies were not entitled to engage in transactions which fell beyond their objects clause. Even though legislators did not adopt a provision regarding the consequences of ultra vires transactions, it is accepted in the Turkish legal literature that ultra vires transactions are void and cannot be turned into intra vires transactions by acquiring

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[128] Turkish Commercial Code 1956 No: 6762 [hereinafter TCC 1956]
[129] Turkish Commercial Code 1956, s.137 (1) (TR)
[130] Oğuz İmregün, *Anonim Ortaklıklar* (4th edn, Istanbul Yasa Yayinlari 1989) 29,30; Hasan Pulasli *sirketler Hukuku Temel Esaslar* (10th edn, Karahan Kitapevi, 2011) 322; Jale Akipek, Turgut Akinturk, Derya Ates Kahraman, *Turk Medeni Hukuku: Cilt I, Baslangic Hukumleri, Kisiler Hukuku* (9th edn, Beta Yayinlari, 2012) 322

unanimous shareholder consent.[131] In the era of TCC 1956, in order to incorporate joint stock companies and limited liability companies, subscribers were under a duty to obtain authorization from various state authorities such as the Council of Ministers, the Ministry of Industry and Trade and the courts.[132] In the preamble section of article 137, legislators set forth that in order to preserve this authorization system, the adoption of the ultra vires rule is necessary. Moreover, it is claimed that the main rationale for the adoption of the doctrine is protection of third parties, shareholders and the economy of the state.

2.2 The Reasons for the Abolition of the Ultra Vires Doctrine in Turkey

Unfortunately, the ultra vires doctrine had been criticized harshly since the enactment of the TCC 1956.[133] In Turkish legal literature, many distinguished scholars put forward various reasons for the complete abolition of the ultra vires doctrine in Turkey. These reasons can be listed as follows:

i) Even though it is asserted that the TCC 1956 embraced an authorization system for the formation of companies, actually the normative formation system had been used in the era of TCC 1956.[134]

In the Turkish legal literature, it has always been claimed that the ultra vires doctrine is associated with the authorization system for the incorporation of companies. According to Alper, the application of the authorization system in the Anglo-Saxon law system culminated in the rise of the ultra vires doctrine.[135] In the authorization system, in order to incorporate companies, subscribers need to obtain permission from state authorities. In this system, state authorities have absolute discretion whether or not to allow the company to be incorporated. Generally, this system is applied in

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[131] Yildiz (n 5) 322
[132] Turkish Commercial Code 1956, s.299 (TR), repealed by Decree-Law No: 559 (June 27,1995)
[133] Yildiz (n 5) 323-337
[134] Oguz Imregun, *Kollektif, Komandit ve Sermayesi Paylara Bolunmus Komandir Ortakliklar* (1st edn, Yasa Yayinlari, 1989) s.28
[135] Alper (n 6) 56

states, which embraced a planned economic system or totalitarian system.[136] Accordingly, state authorities may allow a company to be incorporated only in specific industrial and commercial sectors. For instance, they reject the application of a company, which intends to engage in business in a sector, in which only a state monopoly is entitled to do so.[137] In these states, since the government aims to control the formation of companies, absolute discretion is given to state authorities. In this respect, the ultra vires doctrine is suitable for states which apply the authorization system.[138] By virtue of the ultra vires doctrine, which restricts the contractual capacity of companies in terms of their field of activity, the controlling power of the state remains after the formation process of the companies.[139] In English company law, the formation of chartered companies and statutory companies can be considered as examples of the application of the authorization system.[140]

Nonetheless, many distinguished scholars rejected the legislators' idea, which is revealed in the preamble section of article 137, that 1956 TCC embraced the authorization system.[141] First of all, in the TCC 1956 for the incorporation of a Collective Company[142] and Commandite Company,[143] the normative formation system is embraced. In the normative system, unlike the authorization system, state authorities do not have discretionary power regarding which companies should be incorporated.[144] A competent authority must give permission to be incorporated, if the conditions, which are imposed by legislation, are fulfilled.[145] This system is, generally, adopted by states, which embraced the free-market economy and is not in

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[136] Rajak Harry, 'Judicial Control: Corporations and the Decline of Ultra Vires' (1995) 26 The Cambrian Law Review 17, 19
[137] ibid
[138] Alper (n 6) 55
[139] Yildiz (n 5) 324
[140] ibid
[141] Imregun (n 133) 28; Yildiz (n 5) 325; Alper (n 6) 41
[142] Collective company is a type of commercial company formed under article 153 of 1956 TCC. For more information about collective company see: Usa Ibp Usa, *Turkey Company Laws and Regulations Handbook* (In't Business Publications 2009) 156
[143] Commandite company is a type of commercial company formed under article 243 of 1956 TCC. For more information about commandite company see: Usa Ibp Usa, *Turkey Company Laws and Regulations Handbook* (In't Business Publications 2009) 210
[144] Yildiz (n 5) 324
[145] ibid

accord with the ultra vires doctrine.[146] While the ultra vires doctrine restricts the capacity of companies in terms of its field of activity, the normative formative system liberalizes the company's formation process.[147] Due to having conflicting functions, it is accepted that the ultra vires doctrine should not be applied in countries where a free-market economic system is applied. Secondly, even though the 1956 TCC provided that joint stock companies and limited liability companies must be incorporated under the authorization system, Turkish legal literature widely accepted that there is no doubt that after the amendments in TCC 1956 which were made in 1995 and 2003, joint stock companies and limited liability companies would no longer be incorporated under the the authorization system.[148] In Decree-Law No: 559 (June 27 1995) the obligation of obtaining court authorization for the incorporation of joint stock companies and limited liability companies was abrogated. In addition to this, in 2003, the legislators dismissed the obligation of attaining permission from the Ministry of Industry and Trade. By virtue of these amendments, the authorization system was changed to the normative system for joint stock companies and limited liability companies. When all the aforementioned information was taken into consideration, it was widely accepted that the ultra vires doctrine should have been abolished in Turkey on the grounds that the doctrine was not in accord with the normative formation system, which was embraced for all types of companies after the 1995 and 2003 amendments to the 1956 TCC.

ii) Even though the most significant justification for the ultra vires rule is the protection of shareholders, it is claimed that the doctrine in fact cannot promote their interests sufficiently.[149] According to scholars who support the ultra vires doctrine, prospective shareholders decide whether or not to invest by examining the objects clause of the company's memorandum.[150] Therefore, the ultra vires doctrine provides protection for the shareholders by ensuring that their investments would only be used in business activities which are stated in the objects clause of the company.[151] This

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[146] Harry (n 135) 19
[147] ibid
[148] Mehmet Bahtiyar and Levent Bicer, 'Anonim Ortaklik Kurulus Sistemleri ve TTK 273 Degisikligi' (2004) 1 Maltepe Universitesi Hukuk Fakultesi Dergisi 393, 407
[149] Yildiz (n 5) 328
[150] ibid
[151] Gower and Others (n 18) 165

function of the doctrine secures shareholders' investment by precluding the company to engage in transactions, which are out of its realm of expertise. However, the ultra vires rule cannot protect the interests of shareholders sufficiently. In practice, companies started to draft prolix and effusive objects clauses in order to encompass every future business activity, which are out of company's zone of expertise. Thereby, the goal of the doctrine, which is protecting the investments of shareholders by impeding the company from embarking on a business venture that is out of its specialization zone, could not be achieved because of prolonged objects clauses.[152]

On the other hand, it has been asserted that the ultra vires doctrine has another important function, which is protecting the company from ultra vires transactions.[153] Due to the fact that such a transaction is regarded as void, there would not be any losses or damages arising from the ultra vires contract. In this respect, some scholars have indicated the risk of the complete abolition of the ultra vires doctrine. According to them, companies can become vulnerable to any losses or damages originating from the ultra vires transactions, after the abolition of the doctrine.[154] However, these claims cannot be accepted under the presence of the 1956 TCC provisions,[155] which empower shareholders to ask for compensation from directors.[156] Accordingly, if an ultra vires transaction, which is engaged in by the directors of a company, caused a loss for the company, the shareholders would be entitled to demand compensation from the directors for breach of their fiduciary duty. In the light of all these findings, it has been asserted that the ultra vires doctrine could not serve its main functions and should be abolished.[157]

iii) Thirdly, the protection of company creditors was one of the prominent justifications for the rise of the ultra vires doctrine, it has been claimed that actually the doctrine did not promote the interests of company creditors.[158]

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[152] Prentice Report, (n 106) 15
[153] Abuzer Kendigelen, *40. Yilinda Turk Ticaret Kanunu Semineri Tartismalari* (1998) 45
[154] ibid
[155] Turkish Commercial Code 1956, s.21 and s.330 (TR)
[156] Yildiz (n 5) 333
[157] ibid 333
[158] ibid 328

According to the creditor protection rationale, the ultra vires doctrine provides protection for the corporate creditors by ensuring that the obtained credits will only be used in business activities which are stated in the objects clause of the company.[159] However, due to the fact that the 1956 TCC enabled companies to alter their objects clause, companies had an opportunity to deviate from the initial objects and use obtained credit in business activities, which are not specified in the objects clause.[160] Therefore, the ultra vires doctrine could not be an effectual device for promoting the interests of company creditors. Due to all these facts, pre-eminent scholars of Turkish company law insist on the abolition of the doctrine.

iv) Another reason for the complete abolition of the doctrine in Turkey is that third parties are aggrieved by the application of the ultra vires rule.[161] It has been claimed that the ultra vires doctrine opts to promote the interests of shareholders over the interests of third parties.[162] Accordingly, when a third party and a company carry out an ultra vires transaction, the transaction is considered as void even if the third party was acting in good faith. In such a situation, the third party does not have any right to demand the performance of the transaction from the company. Accordingly, the third party, who is acting in good faith, cannot demand the loss originating from the ultra vires contract. As a result, it has been constantly argued that in circumstances in which the third party is acting in good faith, de lege ferenda, instead of protecting the interests of shareholders, those of third parties must be protected.[163] In order to realize this idea, the ultra vires doctrine should be abolished.

v) Moreover, one of the most crucial negative criticisms of the ultra vires doctrine in Turkey is that it does not accord with the reality of business life.[164] In this respect, it has been asserted that merchants that need to make a business decision promptly are unable to analyse the objects clause of companies in every single transaction.[165] The

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[159] Griffin (n 8) 8
[160] Turkish Commercial Code 1956, s.26 (TR)
[161] Yildiz (n 5) 328
[162] ibid
[163] Tugrul Ansay 'Anonim Sirketlerde Ehliyet Meselesi' (1960) 1 Ticaret ve Banka Hukuku Haftasi 67, 82; Halil Arsanli, *Kollektif ve Komandit Sirketler* (2nd edn, Istanbul Universitesi Yayinlari 1960) 81-82
[164] Yildiz (n 5) 329
[165] ibid

obligation of analysing the objects clause of companies decreases the number of conducted transactions and slows down the development of business in a country.[166] On the other hand, it has been argued that the doctrine creates an inflexible business environment for companies, which is also detrimental to the development of business in a country.[167] For instance, any specific business activity, which is stated in the objects clause of a company's memorandum of association, may become inessential after changes in the business environment. Similarly, any specific business activity, which is considered inessential and not stated in the objects clause of the company, can become an essential part for the 'main object' of the company. Besides, companies are deprived of conducting profitable business activities because of the application of the doctrine.[168] Consequently, the inflexible business environment that the doctrine has created is regarded as a detrimental to the development of business life in a country and because of all these reasons, it is argued that the doctrine should have been abolished.[169]

vi) Finally, Turkey, as a candidate country for European Union membership, accepted the obligation of adopting the acquis communautaire into its legal system. Article 9 of the First Council Directive 68/151 EEC of 9 March 1968 deals with the harmonization of the ultra vires doctrine in all member states.[170] Subsection 1 of article 9 provides that even though the intended transaction is not covered by the objects clause of the company, such a transaction shall be binding upon the company.[171] The main goal of the provision is protecting third parties from losses arising from the company's lack of capacity. By envisaging such a provision, the European Union intended to abolish the ultra vires application in third party dealings.[172] Moreover, due to the fact that all member states are under an obligation to adopt acquis communautaire in their legal system, article 9 was intended to create

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[166] Halil Arsanli, *Turk Hukukunda Devletciligin Anonim Sirketlerin Ehliyeti Uzerine Tesiri* (1st edn, Cumhuriyet Matbaasi 1942) 19
[167] ibid
[168] Ibid
[169] Yilmaz (n 5) 329
[170] First Council Directive (68/151/EEC) [1968] OJ L65/8
[171] Frank Wooldridge, *Company Law in the United Kingdom and the European Community: Its Harmonization and Unification* (1st edn, The Athlone Press 1991) 157
[172] Griffin (n 8) 18

harmonized ultra vires application across member states.[173] On the other hand, in article 9(2) legislators grant an exception to the main rule in the case of third parties acting in bad faith. Accordingly, while member states are adopting the article in their legal system, they are permitted to stipulate a provision whereby transactions which are conducted by third parties acting in bad faith can be regarded as ultra vires and void.[174] However, the disclosure of a company's memorandum of association would not suffice to prove that a third party was acting in bad faith. Consequently, Turkey, as a candidate country for EU membership, should have abrogated the objects clause restriction for determining the contractual capacity of companies and adopted a provision which is compatible with article 9 of the Directive 68/151 EEC.[175]

2.3 The Application of the Ultra Vires Doctrine Under the New TCC[176]

Even though there were numerous reasons for the complete abolition of the ultra vires doctrine, the Turkish Parliament acted slowly in introducing a reform of the doctrine. Until the enactment of the new TCC, which made a substantial reform in the application of the doctrine, the Turkish Supreme Court decisions and some practices in business life had found some solutions to mitigate the problem arising from the ultra vires doctrine. In this respect, first of all, the Turkish jurisdiction had embraced a flexible approach while deciding whether or not the carried out transaction is covered by the company's objects clause.[177] To illustrate, the Turkish Supreme Court held that business activities, which are not stated expressly in the objects clause of the company, could be regarded as intra vires transactions, if such business activity is connected with main object of the company or assists the realization of it.[178] The main rationale for such a ruling is expressed one more time in the Turkish Supreme Court 11th Civil Circuit decision dated 23.03.1982, numbered 231/1223. Accordingly, the opposite ruling would not comply with the reality of business life and would reduce

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[173] Wooldridge (n 166) 157
[174] ibid
[175] Yildiz (n 5) 337
[176] Turkish Commercial Code 2012 No: 6102 [hereinafter The new TCC]
[177] Metin Topcuoglu, 'Ticaret Sirketlerinde Konu Disi Islem ve Sonuclari' (2012) 2 S.D.U Hukuk Fakultesi Dergisi47, 50
[178] Turkish Supreme Court 11th Civil Circuit decision dated 23.03.1982, numbered 851/1225

the number of carried out commercial transactions.[179] Secondly, in practice, subscribers intended to draft prolix and effusive objects clauses in order to avoid the application of the ultra vires doctrine. By virtue of such a drafting technique, companies aimed to be empowered to carry out every future business activitiy without altering their objects clause.[180] Even though the aforementioned developments helped to mitigate the problem arising from the ultra vires doctrine, they could not solve the problem radically.

The radical solution for the application of the ultra vires doctrine in Turkey is realized with the enactment of the new TCC, which introduced a drastic reform of the doctrine. Article 125(2) of the new TCC now stipulates that 'commercial companies are able to enjoy all the rights and undertake all sorts of obligations within the scope of Article 48 of the Turkish Civil Code'.[181] According to article 48 of the Turkish Civil Code,[182] 'legal persons have the capacity of having rights and incurring obligations except those rights and obligations, which are inseparably, bound up with human nature, such as sex, age or family relationship'.[183] When both article 125(2) of the new TCC and article 48 of the Turkish Civil Code are taken into consideration, it is asserted that new law abolishes the ultra vires doctrine completely by changing the formulation of article 137 of the old Turkish Commercial Code,[184] which deals with the contractual capacity of commercial companies. Unlike its predecessor, the new TCC does not restrict the capacity of the company regarding its objects clause. From now on, although the objects clause of the company does not encompass the intended transaction, companies are now legitimately bound to the transactions. In other words, a transaction which falls beyond the objects clause of the company shall not be

[179] Turkish Supreme Court 11th Civil Circuit decision dated 23.03.1982, numbered 231/1223

[180] Topcuoglu (n 177) 50

[181] For English translation of Article 125(2) of the new TCC see: Pwc, 'A New Turkish Commercial Code: A Blueprint For The Future' (2013) <http://www.pwc.com.tr/en_TR/TR/publications/ttk-assets/pages/ttk-a_blueprint_for_the_future.pdf> accessed 21 January 2014, 45

[182] Turkish Civil Code 2001 No: 8049

[183] For English translation of Article 48 of the Turkish Civil Code see: Tugrul Ansay and Don Wallace *Introduction to Turkish Law* (5thedn, Kluwer Law International 2005) 87

[184] Yildiz (n 5) 337; Huseyin Turanli, 'The New TCC and Ultra Vires Priciple' (2012) 2 Regestra Journal of Commercial Law 49, 67; Hasan Pulasli, *Sirketler Hukuku Serhi, Cilt 1* (1stedn, Adalet Yayinevi 2011) 337

regarded as void. In light of all these developments, the predominant view in Turkish company law argued that by the enactment of the new TCC, the application of ultra vires doctrine in Turkey is abrogated.[185]

However, it should be noted in this part that unlike the predominant view, another view claims that the new TCC did not abolish the application of ultra vires doctrine completely.[186] There are still some provisions in the new TCC, which give a clear impression that the application of the doctrine is still preserved in some situations. According to this view, the only effect of the new TCC on the application of the doctrine is the alteration in the meaning of the doctrine.[187] In the era of the 1956 TCC, the ultra vires doctrine had an effect on the capacity of the company. By virtue of article 125(2) of the new TCC, the effect of the doctrine on the capacity of the company is abolished but the effect on the representation power of the directors is still preserved.[188] The detailed explanations for this view will be provided in the last chapter, which deals with the question of whether the new TCC has completely abolished the ultra vires doctrine or it still has some provisions that may remind us of the application of the doctrine.

At this point, it should be highlighted that, unlike the UK Companies Act 2006,[189] the new TCC does not remove the requirement of stating the objects of the company in the memorandum of association. On the contrary, articles 213(d), 305, 339(2)(b), 567 and 576(b) of the new TCC stipulate that the memorandum of association of every type of company must include an objects clause. In English company law literature, the abolition of the objects clause requirement is deemed necessary for the reform of the ultra vires doctrine.[190] In the UK, after the abolition of the objects clause requirement, it is ensured that companies entitled to obtain all rights and undertake all obligations. Nonetheless, in Turkish company law literature, the predominant view argues that without removing the

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[185] ibid
[186] Alper (n 6) 56-59; Fatih Bilgili and Ertan Demirkapi, *Ticaret Hukuku Dersleri* (2nd edn, Dora Yayincilik, 2012) 306
[187] ibid 56
[188] ibid 56-59
[189] Companies Act 2006, s.31 (1) (UK)
[190] Prentice Report, (n 106) Ch.V; Cassim (n 17) 315

objects clause requirement, the new TCC has abolished the doctrine completely.[191] According to this view, the formulation of article 125(2) of the new TCC reflects the legislators' aim, which is granting unlimited contractual capacity to companies.[192] In addition to this, proponents asserted that with the enactment of the new TCC, the objects clause of a company would not have any function in determining the scope of the company's contractual capacity; its main function would be assisting in determining the scope and the limits of the representation power of people who were authorized to represent the company.[193] This function is connected with article 371 of the new TCC, which provides that directors who are deprived of the representation power can be personally liable to the company for losses and damages arising from an ultra vires contract.[194]

In this respect, article 371(1) of the new TCC stipulates that those who are empowered to represent the company can conduct transactions with third parties on behalf of the company, if the objects clause of the company covers the intended transaction. It is generally accepted in Turkish company law doctrine that article 371(1) draws the line of scope of directors' representation power in joint stock companies and it does not have any effect on the contractual capacity of the company.[195] If a director engages in a transaction, which is not covered by the objects clause of the company, it is assumed that such a transaction is within the contractual capacity of the company but it falls outside the scope of the directors' representation power. The new TCC provided two important remedies for such transactions. The first of them is stipulated in the second sentence of article 371 of the new TCC. Accordingly, the company is entitled to ask for compensation from the directors for the losses and damages arising from the transaction, which is not covered by the objects clause of the company.[196] The main rationale for adopting such

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[191] Yildiz (n 5) 337; Turanli (n 184) 67; Pulasli (n 184) 337
[192] ibid
[193] Turanli (n 184) 67; Mustafa Ceker, 6102 sayili Turk Ticaret Kanununa Gore Ticaret Hukuku (7th edn, Karahan Kitapevi 2013) 330
[194] ibid
[195] ibid
[196] ibid

a provision is protecting the interests of shareholders and creditors of the company. Secondly, pursuant to article 371(2),

> Transactions conducted with third parties outside the scope of activity by those who are authorized to represent the company shall bind the company, provided it is proven that the third party was aware that the transaction is outside the scope of activity or they were capable of being aware as a requirement of the situation.[197]

In principle, if a director acts outside of his representation power when conducting a transaction with third parties, the company is bound by the transaction.[198] The exception to this rule is envisaged in situations where the third party is acting in bad faith.[199] Accordingly, if the third party was aware or capable of being aware that the transaction falls outside the representation power of a director, the company has a right to declare that it is not bound by the transaction.[200] In this respect, determination of bad faith has vital importance. According to the second sentence of article 371(2), the announcement of the company's articles of association shall not be solely sufficient evidence to prove acting in bad faith. By virtue of the article, Turkish company law abolished the constructive notice rule.[201] By not providing a criterion for the concept of bad faith, legislator aimed to leave this judgment to judges. Accordingly, determination of whether or not the third party is acting in bad faith will be made according to the specific conditions of every case.

To sum up, the predominant view in Turkish legal literature argues that the ultra vires application in Turkey is abolished after the enactment of section 125 (2) of the new TCC. With this development, now in Turkey, companies have unlimited contractual capacity and thus they can not be restricted to engage in any transaction which is not stated in the objects clause of the company.

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[197] For English translation of Article 125(2) of the new TCC see: Pwc, (n 181) 100
[198] Alper (n 6) 60, Turanli (n 184) 69
[199] ibid
[200] Turkish Commercial Code 2012, s.371 (2) (TR)
[201] For more information about constructive notice rule see: Davies (n 3) 15

3.Is the Doctrine of Ultra Vires Dead in Turkey?

The last chapter of this paper will mainly deal with the question of whether the new TCC has completely abolished the ultra vires doctrine or if it still has some provisions that may remind us of the application of the doctrine. As stated above, the predominant view in Turkey argues that by virtue of section 125(2) which embraces not restricting the contractual capacity of companies with their objects clauses and granting unlimited contractual capacity to them, the new law has erased the application of the doctrine completely from Turkish company law.[202] However, another view asserts that the developments in the new TCC have only changed the meaning of the ultra vires doctrine in Turkey.[203] They strongly insist that today the ultra vires doctrine is not continuing as a matter of capacity of companies, but it is continuing as a matter of representation.[204]

In this respect, the supporters of such a view point out that the meaning of the Latin phrase, ultra vires, is 'beyond powers' or 'an excess of powers'. Within the concept of company law, an excess of powers can be seen in two different circumstances. Firstly, 'an excess of contractual capacity' of a company can be seen in a situation where the company engages in a transaction, which falls beyond its contractual capacity.[205] Secondly, 'an excess of representation power' can be seen when the directors of the company have exceeded the powers delegated to them.[206] Therefore, they concluded that the application of the ultra vires doctrine encompasses not only 'an excess of contractual power' but also 'an excess of representation power'.[207] It is argued that such a classification is important for the Turkish company law due to the fact that two different consequences are provided for two different meanings of the ultra vires doctrine.[208] According to this view, section 125(2) of the new TCC, which grants unlimited contractual capacity to companies, has a function to abolish only the first

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[202] Yildiz (n 5) 337; Turanli (n 184) 67; Pulasli (n 184) 337
[203] Alper (n 6) 56; Bilgili and Demirkapi (n 86) 306
[204] ibid
[205] Joseph Donald Brandy, 'Doctrine of Ultra Vires, Its Nature, Elements and Modern Application' (1920) 54 Am. L. Rev. 535
[206] ibid
[207] ibid
[208] Alper (n 6) 6-7

meaning of the ultra vires doctrine in Turkey, which is 'an excess of contractual capacity'.[209] Nonetheless, when sections 233 and 371(2) of the new TCC are scrutinized, it can be deduced that the application of the ultra vires doctrine is still continuing as a matter of 'representation power'.[210] In addition to this, section 210(3) of the new TCC has been criticized strongly by the same group of scholars on the grounds that it is does not comply with the legislators' intention, which is granting unlimited contractual capacity to companies.[211]

First of all, article 233(1) of the new TCC provides that those who are authorized to represent the Collective[212] and Commandite[213] company are entitled to engage in all sorts of business and legal transactions on behalf of the company on the condition that such a transaction is covered by the objects clause of the company. According to this provision, the representation power of directors is restricted by the objects clause of the company.[214] The consequence of conducting a transaction, which falls outside the scope of the representation power of a director, is that the company is not legitimately bound to such a transaction, unless the company ratifies it. It has been claimed that there is a serious inconsistency between article 233(1) and article 125(2) of the new TCC.[215] In Turkish company law, companies can acquire rights and undertake obligations through the actions of their directors. Therefore, restricting the representation power of directors by means of the objects of the company means limiting the contractual capacity of the company by its objects.[216] In the light of this information, a group of distinguished scholars argued that article 233(1) ruled out the application of article 125(2), which envisages that companies are legitimately bound by with every sort of transaction even though they may fall outside the scope of the objects clause.[217] In addition to this, they asserted that section 233(1) is proof of the

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[209] Alper (n 6) 56; Bilgili and Demirkapi (n 186) 306
[210] ibid
[211] ibid
[212] Collective company is a type of commercial company formed under article 211 of the new TCC. For more information about collective company see: (n142)
[213] Commandite company is a type of commercial company formed under article 304 of the new TCC. For more information about commandite company see: (n143)
[214] Turanli (n 184) 68
[215] Alper (n 6) 56; Erdogan Moroglu, *Turk Ticaret Kanunu Tasarisi Degerlendirme ve Oneriler* (6th edn, Vedat Kitapcilik 2009) 169-170
[216] ibid 38
[217] Moroglu (n 215) 170

continuity of the second meaning of the ultra vires doctrine, which is 'an excess of representation power'.[218] Consequently, they strongly insist that today the ultra vires doctrine is not continuing as a matter of capacity of companies, but it is still continuing as a matter of representation.

Secondly, both article 371(1) and 371(2) of the new TCC are exemplified as a second piece of evidence for the assertion that the new TCC has not abolished the application of the ultra vires doctrine completely, and that it still remains as a matter of representation.[219] Article 371(1) embraced the same approach, with section 233(1) for joint stock companies. Accordingly, the representation power of the directors of joint stock companies is restricted by their objects. However, the consequence of conducting a transaction, which falls outside the scope of the representation power of a director in joint stock companies, is drafted differently. Accordingly, article 371(2)[220] stipulates that if the third party was aware or capable of being aware that the transaction falls outside the representation power of a director, the company has a right to declare that it is not bound by the transaction. In principle, if a director acts outside of his representation power when conducting a transaction with third parties, the company is bound by the transaction. The exception to this rule is envisaged in situations where the third party is acting in bad faith. In light of all these provisions, it has been argued that article 371(2) conflicts with article 125(2), which stipulates that the capacity of companies is unlimited. The right to declare that the company is not bound by the transaction gives the impression that the application of the ultra vires rule is preserved in the article 371(2).

As a result, both article 233(1) and 371(2) conflict with the assertion that the new TCC has completely abolished the ultra vires doctrine.[221] Due to the fact that both articles provide that a transaction, which falls outside the scope of directors' representation power, can be considered as invalid, some company law scholars

[218] Alper (n 6) 56-59; Moroglu (n 215) 170
[219] Alper (n 6) 60
[220] Drafting such a provision only for joint stock companies and limited liability companies yet omitting collective and commandite companies is criticized strongly in Turkey. In this respect, see: Sabih Arkan, 'Turk Ticaret Kanunu Tasarisina Iliskin Degerlendirmeler' (2005) 1BTHAE 41, 49
[221] Alper (n 6) 48; Arkan (n 220) 49; Moroglu (n 215) 169-170; Bilgili and Demirkapi (n 186) 306

argued that in the new TCC the application of an ultra vires doctrine still continues as a matter of representation.

The last provision illustrated as evidence for the assertion that the ultra vires doctrine has not been abolished completely from Turkish company law is article 210(3) of the new TCC. Pursuant to this article, the Ministry of Customs and Trade is authorized to initiate an action to dissolve or enjoin a company on the grounds that it engages in business activities, which are not covered by the company's objects clause. It is asserted that such a provision is detrimental to the adopted approach of the new TCC, which is the abolition of the ultra vires doctrine. Providing unlimited contractual capacity to companies in section 125(2), while authorizing the Ministry of Customs and Trade to initiate an action to dissolve or enjoin the company because of its conducted transactions, which are not covered by the company's objects clause, is seen as completely contradictory.[222] Therefore, de lege feranda, section 210(3) of the new TCC should be repealed promptly. Otherwise, the assertion that the new TCC has completely abolished the ultra vires doctrine cannot be supported in the face of article 210(3).

Conclusion

The ultra vires doctrine, which originated in English common law and is embraced by many countries, has lost its efficiency over time and become a barrier to the economic development of countries. In order to eliminate the detrimental effects of the ultra vires doctrine and to mitigate the problems arising from the strict application of *Asbury Railway Carriage and Iron Company v Riche*,[223] the courts of England endeavoured to weaken the application of the doctrine. With the decisions in the *Attorney General v Great Eastern Railway Co,*[224] *Cotman v Brougham*[225] and *Bell Houses Ltd v City Wall Properties* Ltd,[226] the scope of application of the ultra vires doctrine was narrowed in England. While the common law was striving to mitigate

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[222] Alper (n 6) 59
[223] *Ashbury Railway Carriage* (n 11)
[224] (1880) 5 App Cas 473
[225] *Cotman* (n 33)
[226] *Bell Houses Ltd* (n40)

the problem arising from the strict application of ultra vires doctrine, statutory reform was also needed in order to resolve the problem thoroughly. The long and onerous reform process in English company law culminated in the enactment of the Companies Act 2006, which removed the requirement of setting out the objects of the company in the memorandum of association and granted unlimited contractual capacity. It has been asserted that by virtue of these provisions, the application of the ultra vires doctrine in England is abolished.

While many countries, like England, were trying to introduce a reform movement for the ultra vires doctrine, also Turkey was also aiming to abandon the application of the doctrine in its company law. In this respect, article 125(2) of the new Turkish Commercial Code rejected its predecessor's approach, in terms of restricting the contractual capacity of commercial companies by their objects clauses, and adopted the policy that the contractual capacity of commercial companies is unlimited. In this respect, although the objects clause of the company does not encompass the intended transactions, the companies are now legitimately bound by the transactions. In the light of the aforementioned article, the predominant view in the Turkish company law argued that the application of the doctrine was erased completely from Turkish company law. Nonetheless, some distinguished academicians asserted that the application of the doctrine has not been removed completely from Turkish company law and that there are still some provisions in the new code, which indicate that the application of the doctrine is continuing in Turkey. According to this view, article 125(2) has the effect of abolishing only the primary meaning of the ultra vires doctrine, which is 'an excess of contractual capacity'. However, secondary meaning of the doctrine, which is 'an excess of representation power', is still preserved in articles 233(1), 371(1) and 210(3) of the new Turkish Commercial Code.

The findings of this paper has highlighted that, the new Turkish Commercial Code is unable to achieve its goal, which is completely abolishing the ultra vires application in Turkey. Therefore, this paper suggests that, de lege ferenda, the provisions of the new Turkish Commercial Code, which give the impression that the application of the doctrine is continuing as a matter of representation should be abrogated in order to achieve the aforementioned goal.

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