An Overview of Minority Rights in the Joint Stock Company under the Provisions of the New Turkish Commercial Code

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1. Introduction

Turkish Commercial Code (TCC) no. 6102 was accepted on January 07, 2011 and put into practice on July 01 that year with the exclusion of few exceptional clauses. It has been only five years since its exercise; however, it is relatively a short period of time for an essential code like this to be fully comprehended and practiced. Therefore, TCC no. 6102 may still be qualified as a 'new' one. Concerning the company law, this new commercial code has brought about a number of improvements and alterations some of which are related to the minority rights which caused many faults during the period the previous code was in use.

The profitability, efficiency and investment strategies of companies do not only concern the shareholders but also the countries whose nationality these companies belong to [1]. Following limited liability companies, joint-stock companies are the second most preferred type of company structure in Turkey. This type of companies, which are favoured for sizeable investments on account of their capital and operational structures, has a key role in Turkish Law. Besides, foreign investors who opt for doing business in Turkey choose either to start a joint-stock company or to partner up with an already existing one. For such an actuality, it is of paramount importance to provide proper operations of these companies that hold the majority of the total capital.

The principle of majority dominates the operations of joint-stock companies. However, the provision of a balance among the shareholders in the given system is required in order to protect and exercise the rights of minorities. In this regard, TCC no. 6102 has been reviewed the rights of minority shareholders in the light of the principle of shareholding protection. The new regulations enhanced the existing rights in accordance with content, scope and effectiveness (TCC Draft, General Preamble (1/324):31) and minorities were offered several new rights.

Minority rights in joint-stock companies are not meant to empower minority shareholders against the majority but to protect minorities against the power of the majority and to ensure these rights. As in many continental European countries, these rights fall into the category of 'protective rights (Tekinalp, 1988:231). The minority rights that had been impractical due to many formalities in the former Turkish Commercial Code acquired a better dimension in the new TCC.

2. The Concept of Minority

According to the principle of majority, the shareholder(s) possessing 51% of the capital in joint-stock companies is (are) defined as the controlling shareholder. As opposed to that, a minority is defined as the shareholder(s) representing a specific amount of the capital in respect to benefiting from the rights provided in the code. In the new TCC, a minority is the shareholder(s) who hold at least 10%, or in publicly held companies 5% of the capital (TCC, Art. 399/4-b, 411/1, 420/1, 439/1, 531/1, 559/1). On the other hand, in cases where the articles of association offer rights to minorities, those shareholders who will be defined as minority have to be stated in the articles of association (e.g. TCC, Art. 360/1).

In joint-stock companies, the rights are categorized as individual, majority and minority rights depending on their usage. However, the aforementioned minority rights must not be confused with the individual rights each shareholder has. Once the majority and more

than one person gather, the majority will be provided to ensure the minority rights and it will be possible to use the minority rights. However, if this rate is represented by only one person, it is possible for him or her to exercise these rights (TCC Draft, Art. 360:166). In single-member joint-stock companies, it is impossible to discuss minority rights.

No essential difference exists between the former and the new TCC with respect to the capital ratio a minority has to represent. TCC no. 6102, unlike its predecessor, does not include any extra procedures such as entrusting the certificates of stock to a bank in order to exercise the minority rights. The alterations and the improvements are more of the scope of minority rights.

Minority rights appear in the new TCC from the establishment to the termination of joint-stock companies. These minority rights enforced by laws are among the rights which are impossible for shareholders to withdraw. Besides, more minority rights may be provided in the articles of association.

The minority right in the TCC have either mandatory or sometimes relative mandatory character. While the regulations regarding the exercise of minority rights are mandatory rules, the TCC Art. 411/1, which specifies the ratios of the shareholders to be considered as minority, has a relative mandatory character. In other words, the counter regulation of the aforesaid article is possible only if it is agreed upon in favour of minority shareholders. In this circumstance, a smaller ratio may be enabled to exercise minority rights if a clause is inserted in the articles of association.

Minority rights are qualified as negative if they prevent an agreement despite the vote of the majority, and affirmative if they serve assistance to an agreement in the case of nonexistence of a majority. In this context, it is possible to state that except for the right to compromise and release of those who are responsible on account of the company establishment, which will be discussed in details shortly, and the right to prevention of the provision of the qualified, all the remaining minority rights may be qualified as affirmative.

3. The Rights of Minority Shareholders

3.1. The Right to Representation in the Board of Directors (BoD)

TCC, Art. 360/1 enabled the minority to be represented in the BoD providing that it is stated in the articles of association, which is one of the improvements in the TCC no. 6102. As a result, this exercise, which was not included in the former TCC yet still in *de facto* use via judicial opinion in principle, received a legal basis and started to be legally implemented. However, it is bound to be stated in the articles of association.

To that end, if articulated in the articles of association, the members of the BoD may be elected among the minority shareholders, and the minority may be entitled to nominate a candidate to the board. It is mandatory to elect a candidate who belongs to the minority and nominated by the general assembly provided that no rightful objection is made. In the case where the minority is entitled to be represented in the board, its representative is elected by the general assembly (Sümer, 1991:11). The stocks will be regarded privileged after receiving the right to be represented this way, which is an exception to the principle of stock-related privilege.

Specific groups of shareholders and the shareholders who constitute a group according to their characteristics and qualifications are also entitled to this right along with minority shareholders. This type of a right to be represented cannot exceed half of the number of the members of the board in publicly held companies except for the independent members of the BoD.

3.2. The Right to Bring a Lawsuit for the Dismissal of the Auditor

TCC Art.399 enables the minority as well as the BoD to bring a lawsuit for the dismissal of the auditor. Upon the minority's application, the commercial court may decide on dismissal after the auditor and the parties testify. However, it is mandatory to have evidence of a rightful motive regarding the auditors' personality which necessitates a dismissal, and to have suspicion of the auditor for especially impartial treatment. The commercial court, which relieves the acting auditor, is required to assign another auditor. The lawsuit for the dismissal of the auditor and the appointment of a new one may occur in the following three weeks of the announcement of the auditor's election.

Several prerequisites were stated in the TCC in order for the minority to bring this type of a lawsuit. The right of the minority to bring a lawsuit depends on the fact that he/she has voted against the elected auditor, and minuted his or her objection. In addition, the minority shareholder has to be entitled the shareholder of the company for at least three months prior to the general assembly meeting during which the auditor's election was held. (TCC, Art. 399/5). What is paid attention to is not the power to vote but the capital (Pulaşlı, 2015:1249), hence, the privileges in the right to vote will not be taken into consideration.

3.3. The Right of Convocation of the General Assembly and Inclusion of a Subject to the Agenda

The principle of compliance with the agenda is accepted in TCC (Art. 413/2). Consequently, no subject off the agenda may neither be discussed nor concluded. The agenda is determined by the party who has summoned the ordinary or extraordinary general assembly (TCC, Art. 413/1). As a result, the authority, by law, belongs to the BoD who is authorized to convoke the general assembly.

For joint-stock companies, TCC made significant exceptions to the principle of compliance with the agenda, which prevents the effective exercise of minority rights. With this scope, it is possible for minority shareholders to have a subject discussed and concluded by demanding both the convocation of the general assembly and the inclusion of a subject to the agenda. In the former TCC, the principle of compliance with the agenda, which used to be a serious hurdle for the minority shareholders, was smoothly modified, thus became a significant factor in providing a balance among shareholders.

The authority of convocation of the general assembly in a meeting belongs to the BoD (TCC Art. 410/1), but in the cases when meetings of the BoD are discontinued, when the possibility of quorum is low or non-existent, a single shareholder may convoke with a court order. However, this exceptional right given to a single shareholder is related to the inability of a meeting. Therefore, minority shareholders were also entitled to convoke the general assembly. This right, which had also been included in the former TCC with very little possibility to be exercised, became functional owing to the new TCC.

According to TCC, Art. 411/1, minority shareholders may require the BoD to convoke the general assembly or to include a subject to the agenda if the general assembly has already been called for. This request, which has to be made in a written form, has to include the necessitating reasons and the agenda. In the stated regulation, minority is defined as the shareholder(s) who hold at least 10%, or in publicly held companies 5% of the capital. However, as stated above, the fact that these ratios may be lowered was openly regulated. The request for inclusion of a subject to the agenda has to be delivered to the BoD prior to the date of the payment of the notice fee related to the announcement of the call. Both the convocation and the inclusion of a subject to the agenda requests need to be notarized.

The BoD's acceptance or rejection of the request (or when the board is considered to have rejected) made by the shareholder is subject to various legal consequences. If the convocation request is accepted, general assembly meets in maximum forty-five days. In the former TCC, the BoD's convocation of the general assembly would take several months despite the acceptance of the request, which made it difficult for the regulation to be exercised. With the intent of the acquisition of the expected benefits, the new code put a time limit (TCC Draft, Art. 411:199). This period of time will start following the date when the decision is made.

In the case that the BoD accepts the request but not convocate the general assembly within the time limit, the right to convocate passes on to those who made the request, namely, to the minority shareholders. In this situation, the minority does not need to appeal to the court. In the case that the minority will convocate the general assembly, it is one of the duties of the BoD to provide assistance in the operation of the convocation (Çamoğlu, 2014:484).

On the other hand, in the case that the BoD does not include the subject requested by the minority to the agenda, the minority may ensure a decision to include his request to the agenda by appealing to the court (Çamoğlu, 2014:502). In the case that the court order is neglected, the legal and the criminal responsibilities of the BoD will emerge.

The fact that the BoD directly or indirectly refuses the request does not prevent the exercise of this right. In the case when the request of convocation of the general assembly and the inclusion of a subject to the agenda by the shareholders is rejected or when this request is not affirmed in seven days, on the appeal of the same shareholders, the commercial court of first instance in the city where the company is located makes the decision to convoke the general assembly. If the judge finds the convocation necessary, he or she will assign a trustee in order to convoke the general assembly in accordance with the laws and set the agenda. Judicial remedy is not possible when the final decision is made by the court (TCC, Art. 412).

TCC enables joint-stock companies to have a general assembly meeting without convocation when all of the shareholders or their representatives are present (TCC, Art. 416/1). However, a consensus is required to include a subject to the agenda. In these circumstances, naturally, minority shareholders are not entitled to include a subject to the agenda in a general assembly without convocation. A clause stated in the articles of the association will be overruled since, as not being an ordinary procedure, it requires a consensus to hold a general assembly without convocation and to set the agenda.

3.4. The Right of Adjournment of the Deliberations Concerning the Financial Tables

Upon the request of the minority, the deliberations concerning the financial tables and the related subjects may be adjourned for a month by the chairperson (TCC, Art. 420/1). The general assembly does not need to reach a conclusion for that, and the discretion of the chairperson is out of question. The set time limit is the minimum, and the deliberations may be adjourned to a longer period of time. Without the consent of the minority, it is against the law to adjourn the deliberations to a shorter period of time (Pulaşlı, 2015:1561). The adjournment of the deliberations concerning the financial tables will result in the adjournment of all the subjects (Birsel, 1970:640). An adjournment of a general assembly is only possible to be re-adjourned if the objected and minuted points in the financial tables have not been responded by those in charge according to the principle of accountability.

3.5. The Right to Demand the Appointment of a Special Auditor

With the new TCC, an independent audit system is adopted in joint-stock companies. Another method of audit in joint-stock companies is special audit. To demand the appointment of a

special auditor is the base of minority shareholders. This system, which was not operational due to the disputes over its necessity in the former TCC, became functional with the new TCC.

Each shareholder of a joint-stock company is entitled to the right to demand the appointment of a special auditor. In this context, each shareholder may require the general assembly to clarify specific incidences via special auditing even if it is not on the agenda in the cases when it is necessary to exercise his or her shareholding rights and if he or she has previously made use of his or her right to demand information and inspection. If the request is affirmed, the special auditor will either be appointed by the company or by the court upon the appeal of the shareholder.

Here, a minority right emerges in the case that his or her demand is rejected. Therefore, minority shareholders may appeal to the court to appoint a special auditor in the case of a possibility of the rejection of their demand to appoint a special auditor. (TCC, Art. 439/1). In that circumstance, a special auditor will be appointed provided that the appealing party convincingly puts forward that the acts of the founders or the partners of the company damage the company or the shareholders by disobeying the code or the articles of association.

In the justification of the regulation for the minority right to demand the appointment of a special auditor, the report written by the special auditor will lead to a liability case in the court and the adjournment of deliberations on the financial tables if necessary were reasoned (TCC Draft, General Preamble (1/324):31) because if the special auditing mechanism does not function, the expected benefit from the minority rights will not be realized.

A request having been made at the general assembly and the minority's appeal to the court related to this are the initial steps needed in order a special auditor to be appointed because the aforementioned minority right emerges when his or her demand is rejected. On the other hand, only the minority is entitled to the right to appeal to the court while any shareholder may demand a special auditor.

For the regulation to demand the appointment of a special auditor, along with the shareholder(s) who hold at least 10%, or in publicly held companies 5% of the capital, the shareholders whose shares have the nominal value of minimum TL1.000.000 (approximately €300.000) are also entitled to exercise these minority rights.

3.6. Discharge Concerning the Incorporation and Capital Increase

The new TCC entitles minorities to the right to prevent the abolishment through compromise and release of the responsibilities of the founders, the members of the BoD and the auditors emerging from the foundation of the company and capital increase (Art. 559/1). The aforementioned responsibilities cannot be abolished through compromise and release within four years since the company register. When this period of time is over, compromise and release gain validity with the approval of the general assembly. However, if the minority shareholders object to the abolishment of the compromise and release when the binding time period is over, it is impossible for compromise and release to be approved. This right has significance since it allows for a liability lawsuit against the BoD. As exercised to prevent a decision by voting against it, it is defined as one of the negative minority rights.

3.7. The Right to Demand Termination with Justified Reasons

The right to demand termination with justified reasons in joint-stock companies was not included in the former TCC. According to this clause, which was inspired by the Switzerland's obligations law, in the emergence of a justified reasons, the minority shareholders may appeal to the commercial court of first instance in the city where the

company is located and demand the termination of the company (TCC, Art. 531/1). Doctrinally, exercising such a right has rightfully been specified as the most effective means against a majority which is reckless, ill-intended and/or unable to operate the company (Tekinalp, 2014:618).

A definition of justified reason is quite challenging; thus, outlining the basics of this concept is more reasonable than providing a definition (Sümer, 2010:173). In this respect, justified reasons are the happenings which make the relationship unbearable and which need to be evaluated in accordance with the principle of accountability (Tekinalp, 1974:322-324). It is in the judge's discretional power to decide whether the reasons may be justified or not.

Upon the request of termination, the court may decide that plaintiff shareholders are paid the amount of the net value of their shares for the closest date to court's decision and squeezed out of the company or it may find and appropriate and agreeable resolution. The court has a large discretional power to identify what other resolutions may be according to the dynamics of each case. The right to appeal to the court for a termination is the most powerful right a minority is entitled to (Sümer, 2010:178). However, the fact that the court may decide on squeezing out from the company or on another resolution is to prevent the exercise of this right in an ill-intended manner or arbitrarily. Moreover, several doctrinal remarks have been made that a new legal regulation, which requires warranty, is needed in order to prevent any potential abuse of this right and the restitution of any collateral damage (Moroğlu, 2005:163).

3.8. Other Minority Rights

The minority rights are not limited to those mentioned above. According to TCC, Art.486/3, in closed joint-stock companies, the minority has the right to demand registered share certificates in print. Upon this request, registered share certificates are printed and distributed to every shareholder. However, it is not mandatory for this type of companies to print registered share certificates. The right to demand registered share certificates in print is one of the improvements in the new TCC.

In addition to its legal rights, the minority plays a significant role in the operation of the company by the impeding the realization of the ratio when qualified majority is sought. Furthermore, the minority may also hinder decision making when consensus is required. For instance, as the relocation of the head office of the company to another country requires an alteration in the articles of association, it is impossible to make a decision unless consented by the minority (Poroy, Tekinalp & Çamoğlu, 2014:579). Indeed, this is one of the negative rights of the minority.

In addition to the rights in the TTC, several other minority rights exist in the Capital Market Law with respect to publicly held joint-stock companies. An example is the licence to present draft resolution in accordance with the agenda items along with the right to inclusion of a subject to the agenda of the general assembly. However, the minority rights in the capital market law will not be discussed in this paper as the topic of interest is the new TCC. On the other hand, as mentioned above, minorities may be entitled to extra rights in the articles of association in addition to those in the new TCC.

With the purpose of curving and rationalizing the principle of majority in joint-stock companies, several individual rights were also provided to each shareholder in addition to minority rights. It must be noted that the right to demand information (TCC, Art. 437), the right to demand the dismissal of the liquidator through court appeal (TCC, Art. 537/2) are among the rights that each shareholder in a minority may individually exercise since each minority shareholder is entitled to exercise individual shareholding rights.

While exercising the minority rights, similar to other legal rights, it is important to act according to the principle of honesty since the legal order does not protect the ill-intent

exercise of a right. At this point, there arise the issue whether the adjournment of minority decision may or may not be demanded, which is a hot topic within the doctrine. According to the viewpoint that we also agree on, it is, however, impossible to bring a lawsuit against the minority decisions due to lack of legal regulations for that matter (İmregün, 1989:153; Poroy, Tekinalp & Çamoğlu, 2014:532).

4. Squeezing Out

When the minority rights are concerned, another issue that needs discussing is the squeezing out, which came into use in the TCC no. 6102. Squeezing out is an implementation that has long existed for other company structures, but it is new to joint-stock companies.

In the former code, the exercise of minority rights resulted in occasional congestion in the operation of the company. In this context, when there is a conflict of interests between the majority and the minority shareholders, the majority shareholders are enabled to continue the company operations by buying out the shares of the minority shareholders. As a precaution to the exercise of minority rights against the company's interest, this right proposes a rational remedy that is appropriate to the balance of interest with respect to the operation of the company.

The first circumstance of squeezing out appears when the termination of the company with justified reasons is demanded (TCC, Art. 531/1) as mentioned above. Apart from this, squeezing out emerges when stipulation of a payment is made in return for parting from the company during merger. According to this, when companies are being merged, minority shareholders may be squeezed out after receiving partnership buyout during the merging. If the merger contract estimates a partnership buyout, the partners who have the right to vote must be consented if the transferring company is a private company. If it is an equity company, it must receive 90% of those who are entitled to vote (TCC, Art. 151/5).

Another circumstance of squeezing out is possible for the controlling shareholder of the enterprise system to buy out the shares of the minority in order to continue the operations of a company. Accordingly, the controlling company may be entitled to buy out the shares of the minority provided that it possesses minimum 90% of the shares and the rights to vote equity company (TCC, Art. 208/1). However, the exercise of this right is bound to the condition that the minority prevents the operation of the company, behaves against the principle of honesty, acts recklessly or causes distress. In the case of this squeezing out, net values of the shares will be taken into account. The minority to be squeezed out may appeal to the court to be bought out by being paid its stock market value. If it is unlikely or the stock market value is not equitable, it may demand a buyout for its objective value or a generally acceptable value.

According to the law's preamble, the purpose of the mentioned regulation is to terminate the hindering and distressing acts of the shareholders who are against the decision (mostly for personal reasons) made by 90% of the capital and votes of a company, and to provide a peaceful environment in the company (TCC Draft, Art. 208:143). The right to squeeze out does not violate to the constitutional right of property as the depletion of the related shares (Manavgat, 2015:95). As a matter of fact, the Supreme Court of Germany has found the article in the code related to squeezing out accord with the constitution (Pulaşlı, 2003:651).

5. Conclusion

In joint-stock companies, the principle of majority dominates the operations. However, this principle is curved with the minority rights as its utmost exercise will result in serious

inconveniences. From a general point of view, it is possible to assert that, on one hand, the minority rights have been reinforced and on the other they have acquired a more functional and realistic dimension with the new TCC.

With the recent regulations, minority shareholders were entitled new rights while the existing rights were reviewed to be more operational. However, the precautions have been taken to prevent any congestion in the operations of the companies while these rights are exercised. What need to be considered in the operation of a joint-stock company are the interests of neither the majority nor the minority but the mutual benefits of all the shareholders, which mean the company's own interests. Within this frame, the minority right system in TTC is a warrant to provide a balance of interest not only for the minority shareholders but also for the majority shareholders, as well.

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