

Minority Shareholders' Right to Request the Postponement of General Meetings of Joint Stock Companies in Turkish Law

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One of the most significant outcomes of the majority-based management approach in joint-stock companies is the conflict of interests between the majority and the minority shareholders. According to the Turkish Commercial Code (TCC) “minority” technically refers to those shareholders who own at least ten percent of share capital in closed joint-stock companies and five percent of share capital in publicly held companies. Therefore, “the minority rights” are considered the special rights granted by the law to such shareholders. Amongst minority rights, the right to request the postponement of discussions regarding the financial statements and other relevant agenda items in the general assembly meetings (Art. 420 TCC) is of significant importance in Turkish Company Law. Exercised by a unilateral declaration directed to the chairman of the meeting, this right leads to important consequences, considering the broad scope of its effects beyond the discussions surrounding financial statements. The main function of the right is to provide an additional opportunity to inform the minority shareholders about the financial management of the company and its outcome. On the other hand, due to the method of exercise of the right, it has been opened to discussion in the context of the prohibition of abuse of rights in Turkish legal doctrine. The aim of this paper, following a general overview of the minority shareholder rights in Turkish joint-stock companies, is to exclusively evaluate the minority shareholder’s right to request the postponement of the general assembly meeting and its possible implications regarding the prohibition of abuse of rights

Keywords: Abuse of right; Minority shareholders; Financial statements; Postponement; General meeting

Introduction

Joint-stock companies are governed by majority rule. According to Art.418 of the Turkish Commercial Code (TCC) Nr.6102, the necessary quorum for the convening of the general meeting is the presence of shareholders (or their representatives) corresponding to at least one-quarter of the share capital and the decisions are taken with the majority of the votes present at the meeting unless provided otherwise by law or the articles of association. As a result, decisions taken by the majority based on capital are binding for all shareholders, including those who are not present at the meeting or those who are present but voted against the relevant

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resolution (TCC Art.423). Although company managers are expected to make decisions in line with the company's interests, in reality, they tend to prioritise the interests of the majority who elected them instead of the company's interest and this approach leads to a conflict of interests within the company. However, a system in which only the interests of the majority are protected and the small shareholders are dragged into the conduct of business under the roof of a company shaped only by the desires of the majority cannot be allowed, this situation is incompatible with the rule of good faith and the prohibition of abuse of right (Turkish Civil Code Art.2).¹

Various mechanisms have been provided to limit the abuse of majority power in joint-stock companies and to protect the interests of small shareholders.² Among these, individual shareholder rights and minority rights have special importance in terms of being informed about the management, influencing the management, and supervising the decisions and actions of the managers. Two main issues stand out in the TCC Nr. 6102, which envisages significant improvements in this regard: On the one hand, it is observed that the shareholder rights, of which various deficiencies in terms of scope and use in practice were pointed out are improved with the new TCC (e.g., right to obtain information and special audit), on the other hand, the position of the small shareholders are strengthened by new institutions provided in the new TCC (e.g. right of representation in the BoD, right to apply to the court for the resolution of the company).

The subject of this paper is the right to request the postponement of the discussions on financial statements and relevant issues, which is regulated as a minority shareholder right according to Art.420 of TCC, as well as in the former-abolished- Art.377 of TCC (Nr. 6762). The aforementioned right, which was frequently used and led to many Supreme Court decisions and doctrinal debates in this context, is regulated considering the deficiencies pointed out during the former TCC period. In the study, first of all, a general overview of minority rights will be given briefly, and then Art. 420 TCC will be discussed in detail in the light of other relevant provisions, the doctrine, and the case law.

¹On the other hand, while making arrangements aimed at protecting the interests of small shareholders, the fact that the interests of the majority are just as legitimate as those of the minority should not be ignored, and in this context, the issue should be approached by considering a fair balance of interests between these two interest groups. For detailed information, see Moroğlu (2006).

²Examples of other instruments in this regard are the obligation to act in accordance with the Law and the Articles of Association (Art.445 TCC), the equal treatment principle (Art.357 TCC), the right to receive information (Art.437 TCC), the right to request special audit (Art. 438 TCC), higher quorums (Art. 421 TCC), nullity of the BoD resolutions and general meeting (Art. 391, Art. 447 TCC).

The Concept of “Minority Shareholder” and the Basic Features of Minority Rights

Minority Shareholder

The concept of minority shareholder has two meanings, broad and narrow (technical). In a broad sense, the concept of “minority shareholders” refers to the shareholders who do not have any influence on the will of the company, as opposed to the majority shareholders who have the chance to influence the company management based on their voting power.³ “Minority shareholder in the narrow/technical sense”, on the other hand, is acquired by holding the minimum share required by the law in terms of exercising certain rights. The ratio sought in terms of Turkish law is at least one-tenth of the share capital in non-public companies and one-twentieth in publicly held companies. Technically, minority shareholders are defined as "minority" in the TCC, and the rights granted to these shareholders by the law, which differ from individual rights in terms of their usage and effect, are considered "minority rights".⁴

Minority Shareholder Rights According to TCC

Minority rights are the rights that are exercised by the unilateral declaration of the shareholders holding a certain percentage of share, without the approval of the body to which they are directed, and subject to the control of abuse of right.⁵

Minority rights provided by the TCC are the right to convene the general assembly meeting or to request an item to be included in its agenda (TCC art. 411), the right to request the postponement of the general assembly (TCC art. 420), the right to request the appointment of a special auditor from the court (TTK art. 439), the right to demand the issuance of the share certificates (TCC art. 486/3), the right to prevent the release of the members of the board of directors (BoD) in the establishment and capital increase (TCC art. 559/1), the right to request the resolution of the company with just cause (TCK art.531), and the dismissal of the auditor and the appointment of a new auditor (TTK m.399/6).

The most important feature of minority rights is that once exercised, they can bear legal consequences despite the will of the majority.⁶

Right to Request the Postponement of Discussions on Financial Statement and Relevant Issues

History of the Provision

According to Art. 420 TCC:

³Perakis (2004).

⁴Domaniç (1988); Kısa (2003); Tekinalp, Poroy & Çamoğlu (2014).

⁵Helvacı (1998); Aydın (2001).

⁶Tekinalp (1988).

1. Upon the request of the shareholders holding one-tenth of the share capital and one-twentieth of the share capital of the publicly held companies, the discussion of the financial statements and related matters are postponed by the chairman for one month, without the need for a resolution of the general meeting. The postponement is announced to the shareholders as provided in the first paragraph of Article 414 and published on the website. For the following meeting, the general assembly is to be called under the procedure stipulated in the law.
2. Following the postponement of the first meeting, the minority shareholder's request for postponement for the second time depends on the fact that the relevant parties did not respond regarding the points that are objected to in the financial statements and recorded in the minutes, in accordance with the principles of fairness and accountability.

The right of the minority to request the postponement of the discussions on the financial statements was originally provided in the second paragraph of § 239a German Commercial Code with the 1884 amendment (Handelsgesetzbuch-HGB).⁷ According to this regulation:

“Balance sheet discussions may be postponed by the decision of the majority or at the request of the minority owning ten percent of the capital, provided that there is an objection regarding certain issues in the balance sheet” (§ 239a Abs. 2 HGB).

In the third paragraph of the provision, it is clearly stated that the approval of the balance sheet and the release of the members of the board of directors are interrelated:

“In case the balance sheet is postponed due to the request of the minority, the release of the members of the board of directors will be valid only to the extent of the points of the balance sheet that are not subject to objection”.

Therefore, the origin of the Turkish regulation is § 239a Abs. 2 HGB. This right was later reformulated under §264 in the German Commercial Code of 1897 (HGB-1897). In this regard, the third paragraph, which establishes a compulsory link between the release and the approval of the balance sheets, was abolished due to the criticisms made in the doctrine that it causes injustices in practice. In addition, according to § 264/s HGB-1897, it is provided that the minority can request the postponement of the negotiations for the second time only if the necessary explanation regarding the objected points of the balance sheet has not been made.⁸ Although, the same right was provided in §125/7 of the German Stock Corporation Act (Aktengesetz - AktG) dated 30.1.1937⁹, it was not included in the German Stock Corporation Act of 1967, which entered into force

⁷Makower (1890) at 262.

⁸Esser & Esser (1907) at 185; Knoche (1995).

⁹Gadow, Heinichen, Schmidt, Schmidt & Weipert (1961).

on 1.1.1966 and is still in effect. According to the preamble of AktG-1967:

“[...]The right of the minority to postponement appears to be superfluous since this right no longer serves an objectively justifiable purpose and can easily be misused. The minority right was introduced in 1884 so that the shareholders would receive as much information as possible about accounting and thus avoid inaccurate balance sheets. The right to postpone should therefore indirectly affect the provision of information to the shareholders and compliance with the statutory provisions on accounting. Both reasons have become irrelevant since the shareholder's right to information has been regulated by law since 1937 and the audit since 1931”¹⁰.

In Turkish law, this right was initially provided in Art. 376 of the Commercial Code No. 865 (1926).¹¹ Later, in the Art. 377 of the TCC No. 6762 (1956)¹², the language of the provision was simplified and the postponement period was extended to one month. Although Art. 420 TCC of 2011 has clarified some controversial points, it essentially preserves the principles in the former regulations.

Aim of the Provision

In principle, the financial statements prepared in accordance with the law serve to determine the company's earnings, and as a rule, the decisions taken at the general assembly regarding the approval of the financial statements result in the release of the BoD members and managers (Art. 424 TCC). On the other hand, despite the auditor's reports and the explanations made by the managers, there may be doubtful points in the financial statements submitted to the general assembly, therefore, the minority right is granted in Art. 420 TCC allows the shareholders to be informed about the financial situation and operation of the company and exercise their rights, especially the voting right at the meeting, in the light of this information provided.¹³ Hence, the right to request the postponement of discussions on financial statements and other related matters is an exception to the principle of commitment to the agenda.¹⁴

In addition to Art. 420 TCC, also some provisions related to this right are stipulated in Art. 28/3 and 4 of “*Regulation on the Procedures and Principles of General Assembly Meetings of Joint Stock Companies and Representatives of Ministry of Customs and Trade to be Present at These Meetings*”¹⁵

¹⁰Entwurf eines Aktiengesetz, Deutscher Bundestag 4. Wahlperiode (1962, p.189-190)

¹¹Official Gazette of TR Nr. 406 (28.6.1926).

¹²Official Gazette of TR Nr. 9353 (9.7.1956).

¹³Kayar (1993); Saka (2004).

¹⁴As a rule, subjects to be discussed at general assemblies are limited with the agenda items announced in the invitation for the meeting. This principle, which is expressed as the principle of commitment to the agenda is stated in Art. In 413/2 TCC as: “Items that are not on the agenda cannot be negotiated and resolved in the general assembly. Legal exceptions are reserved.” Also see Teoman (1988); Memişoğlu (2014).

¹⁵Official Gazette of TR Nr. 28481 (28.11.2012).

Scope and Exercise of the Right to Request the Postponement

Personal Scope

In accordance with Art. 420/1 TCC, shareholders who own one-tenth of the share capital in non-public companies and one-twentieth of the share capital in publicly held companies are eligible to exercise this minority right. Since the reference in the exercise of the right is not the number of shareholders, but the number of shares to be determined by the capital, it does not matter whether the holder of this amount is a single shareholder or a summing of several shareholders with fewer shares.¹⁶

It is generally accepted in the doctrine that the exercise of this right cannot be obstructed by increasing the amount of the shares required in the law with the articles of association.¹⁷

On the other hand, whether it is possible to decrease this amount with the articles of association is debatable in the doctrine. Based on this discussion stands the Art. 411, which regulates the minority shareholders' right to convey the general assembly, stating that "with the articles of association, the right to convey can be granted to the shareholders holding a smaller number of shares". According to one view, such an arrangement can be made in the articles of association in terms of all minority rights provided in the TCC.¹⁸ The opposite view considers the provision regarding the call for the general assembly as exceptional, and since the provisions on minority rights in the TCC are not only intended to protect minority shareholders but also to resolve conflicts of interest between the minority and the majority. While protecting the minority, the legitimate and justified interests of the majority, as well as those of the minority, should not be ignored.¹⁹

Before evaluating this debate, the regulation of Art.340, which came into force with the TCC-2011, should also be taken into consideration. According to Art. 340:

*"The articles of association can deviate from the provisions of this Law regarding joint-stock companies only if this is expressly permitted in the Law."*²⁰

In relation to this regulation, it has been stated that it is possible to reduce the share ratios regarding minority rights, provided that there is an express regulation in the TCC. Therefore in terms of minority rights to convey the meeting, it is possible to reduce the share amount, whereas no reduction can be made in terms of other minority rights including the one in Art. 420. Meanwhile, the Turkish

¹⁶Teoman (1988).

¹⁷Yiğit (2005).

¹⁸Domaniç (1988); Helvacı (1998); Tekinalp, Poroy & Çamoğlu (2014).

¹⁹İmregün (1962).

²⁰Within the context of Art.340, it is also controversial in the doctrine whether there should be an expression that clearly allows deviation in the wording of the relevant provision, or whether the meaning obtained by the interpretation of the provision should be taken into account. We agree with the view that it is necessary to take into account the relevant provision with its wording and essence and reach a conclusion (Karasu (2015); Bahtiyar (2014)).

Supreme Court has not decided on the issue to this day.²¹

The main purpose of Art. 340 TCC is to protect the shareholders, especially small shareholders from being harmed as a result of the provisions in the articles of association stipulated with the request of the majority. In this respect, it can be considered that the granting the right to postpone the general assembly to those with lower shares by the articles of association – although there is no such expression allowing this result in Art. 420 – would not contradict the purpose of Art. 340. In fact, more shareholders would benefit from the financial information while exercising their rights. But the well-functioning of the bodies for the operation of companies is also important and it is questionable whether allowing more shareholders to postpone the general meetings will always benefit the company's interest or become a subject of abuse of rights that eventually impede the functioning of the company. In this regard, we believe that *de lege feranda* an express regulation that allows the minority rights to be granted to shareholders with lesser shares by the articles of association should be provided to end this debate and in the meantime comments that expand the personal scope of Art. 420 TCC should be avoided.

Regarding the shares on which a usufruct right has been established, according to the view that we participate, the usufructuary, who exercise the voting right, can also benefit from minority rights that serve the effectiveness of the voting right. So this issue should be evaluated within the scope of the managerial rights. On the other hand, it should be accepted that the shareholder also maintains this minority right.²² According to the contrary view, it should be accepted that the usufructuary, who is not a shareholder, cannot exercise the minority rights, since the determination of the minority status is based on the shareholding, not the voting right.²³

First Request to Postpone the General Assembly Meeting by the Minority Shareholder (Art. 420/1 TCC)

The exercise of this right is to be made by a unilateral request directed to the chairman and it is sufficient for postponing the meeting. There is no need to take a further decision regarding the postponement of the meeting.²⁴ This issue, which was controversial²⁵ due to the lack of clarity in the provision during the abolished TCC, is now explicitly established in Art. 420/1. Another point to be noted at this stage is that the chairman of the meeting, who receives the request for postponement, should only determine whether the shareholder making the request meets the criteria

²¹Nomer (2021).

²²Kendigelen (1994); Aytaç (1982).

²³Can (2014).

²⁴Teoman (1988); Kayar (1993); Saka (2004).

²⁵Domanıç claimed that upon the request by the minority, the discussions on balance sheet and the related issues related should be postponed by the decision of the general assembly. Accordingly this request should be rejected if the justifications are not valid or it is considered as an abuse of right (Domanıç (1988). İmregün and Tekinalp opposed this necessity stating that within the framework of the provision, the minority should ask the postponement in the form of a "demand". Its acceptance of rejection will be subject to voting only if the request is submitted as a "proposal" during the meeting (Tekinalp (1976); İmregün (1962).

of shareholding sought in the provision and he does not have any discretion in accepting or rejecting the request. In other words, if the legal requirements are met, the chairman of the meeting has to decide on postponement.²⁶

The request for the postponement of the meeting is put forward in the general assembly.²⁷ On the other hand, it is suggested that -for practical reasons- this request can be made before the meeting. Accordingly, the shareholders who received the meeting invitation ask for a postponement from the board of directors before the meeting and if the share criteria are met, the BoD can decide on postponement.²⁸ However, the express provision in TCC 420, in our opinion, does not allow such an interpretation, and this kind of practice is against the law. The right in question can only be exercised during the general assembly.

Scope of the Postponed Agenda Items

When the abolished TCC was in effect, determination of the scope of postponement was controversial, since according to Art. 377 the issue that the minority may request to postpone was provided as "negotiation about the approval of the balance sheet"

The reason for this discussion was the decision of the 11th Civil Chamber of the Supreme Court of Appeals in 1986.²⁹ Although it is generally agreed that the scope of the postponement decision based on TCC article 420 does not only consist of financial statements and should be interpreted broadly³⁰, different and opposing views have been put forward about which issues fall within this scope. In this context, TCC m. 420 remains silent. On the other hand, some provisions stipulated in both the TCC and the Regulation facilitate the attempts of interpretation. In the following part which topics on the agenda shall be postponed, are discussed in the light of the related provisions, doctrine, and case law that developed during the former TCC.

Discussions on Financial Statements

The first issue to be postponed under Art. 420 is the discussion on the financial statements. The minority can request a postponement at all general assembly meetings where the financial statements, especially the balance sheet, are being discussed. In this context, the balance sheet may be the annual balance sheet of a continuing company, as well as the opening (Art. 540), intermediate or final balance sheet (Art. 542/1.d) of a company in liquidation.³¹

In general, the basic principles regarding the financial statements of joint-stock companies and the annual report of the board of directors are provided in Art. 514, 515, and 516 TCC. Under Art. 514, the board of directors is obliged to

²⁶Karahan (2012).

²⁷Domaniç (1988).

²⁸Karahan (2012).

²⁹Turkish Supreme Court 11th Civil Circuit, 10.07.1986, Nr. 3798/4357, See Teoman (2012).

³⁰Tekinalp (1976).

³¹Arslanlı (1960).

prepare and present to the general assembly the financial statements, annexes, and annual report for the previous accounting period, the scope of which is determined within the scope of Turkish Accounting Standards (TMS). This task is one of the non-transferable duties of the board of directors (Art. 375 TCC).

What the financial statements are and which items they consist of are listed in the TMS No. 1: "Presentation of Financial Statements". Accordingly, the financial statements are the formalised presentation of the financial position and financial performance of the entity which consists of i) Statement of financial position (balance sheet) at the end of the period, ii) Statement of profit and loss, and other comprehensive income for the period, iii) Statement of changes in equity for the period, iv) Statement of cash flows for the period v) notes, comprising a summary of significant accounting policies and other explanatory notes.³²

Art. 515 of TCC, titled "True and Fair View"³³ regulates the nature of the information about the company included in the financial statements. In this regard, the financial statements should provide information about the assets, liabilities, equity, and operating results in a complete, understandable, comparable, transparent, reliable, honest manner and in accordance with the needs and the nature of the business.

Other Related Subjects – The Criteria of Relevance

As mentioned at the beginning, although only the postponement of the "negotiation on the approval of the balance sheet" was mentioned in the former provision, the doctrine and the Supreme Court have tended to interpret the scope broadly. However, opposing views have been put forward in the doctrine about which issues fall under the scope of postponement, and the Supreme Court has not been able to show consistency in its decisions on the issue.

Various criteria have been put forward in the doctrine in determining which issues in addition to the balance sheet will be postponed during the period of former TCC. An opinion in the doctrine stated that, together with the postponement of the balance sheet discussions, the issues that "results of the approval of the balance sheet" would be also postponed.³⁴

According to *Tekinalp*³⁵, while it is undisputed that the distribution of profits and the release of BoD members are related to the balance sheet, it is unclear whether the election of the members of the board of directors and auditors will be considered related. Therefore, the opinion put forward is insufficient to set a definite criterion. The author argues that the criterion of "items to be affected by the deferral of the balance sheet" would be more appropriate in determining the relevant issues. *Kayar*³⁶ argues that among the items on the agenda, those that will affect the balance sheet discussions and those that will be affected by the balance sheet

³²TMS Paragraph 10.

³³As will be explained under the relevant title, the principle of "True and Fair View" also constitutes the basis criteria to be considered in the decision given upon the second request of postponement made by the minority shareholders.

³⁴Arslanlı (1960); Birsal (1970).

³⁵Tekinalp (1976).

³⁶Kayar (1993).

discussions in the second meeting should be postponed. *Çamoğlu*,³⁷ on the other hand, stated that matters that are directly or indirectly related to the balance sheet discussions should be included in the scope of postponement.

The Supreme Court, with one of its cornerstone decision on the subject, adopted the view that “if the negotiations on the approval of the balance sheet are postponed; it is compulsory to postpone the negotiations of all agenda items that are related to the balance sheet or that may affect the voting of the balance sheet due to their connection.”³⁸ Yet the Court is sometimes sceptical about including the election of board members and auditors in the scope of the regulation. Although Art. 420 TCC seems to adopt the "broad interpretation" tendency of the doctrine and practice, we believe that the different approaches will continue to exist.

Profit Distribution and Dividend Share Proposals of BoD

Under Article 507 of the TCC, each shareholder has the right to participate in the net profit for the period decided to be distributed in accordance with the provisions of the law and the articles of association. Dividends can only be distributed from the net profit for the period and free reserves (Art. 509/2 TCC).

As we have mentioned before, the purpose of financial statements is to declare positive or negative results, in other words, to reveal the amount of profit to be distributed to shareholders. Therefore, since the distribution or non-distribution of the annual net profit for the period requires a general assembly decision based on the approval of the financial statements, Under Art. 420, the postponement of the financial statements also results in the postponement of the negotiations on the distribution of profits.³⁹

According to Art. 511 TCC, dividend shares for the members of BoD, -can be paid from the net profit only after a certain amount is set aside for legal reserves and a dividend of five percent of the paid-in capital is distributed to the shareholders. Since the discussion of the proposal to distribute the profit is related to the financial statements, this issue should also be considered postponed.⁴⁰

Release of BoD Members from Legal Liability

Generally, the accountability and the legal liability of the members of BoD, as well as the managers in joint-stock companies arise from the legal nature of the relationship between the company and these people in question. On the other hand, there are also special provisions in the TCC on the accountability of managers (e.g. Art. 376, 514, 516, 437, etc). In Turkish law, it is accepted that the legal nature of the relationship between the members of the board of directors and the company is a contract of mandate.⁴¹ Code of Obligations (CoB) Art.508, which regulates the mandatary's accountability states: “the mandatary is obliged to give

³⁷Çamoğlu (2003).

³⁸See Turkish Supreme Court 11th Civil Circuit, 14.10.1982, Nr. 3556/3887.

³⁹Birsel, (1971); Yiğit (2005); Domaniç (1988); Tekinalp (1976). See Turkish Supreme Court 11th Civil Circuit, 09.03.1992, Nr. 6300/3338 (Eriş, 2013).

⁴⁰Domaniç (1988).

⁴¹Poroy, Tekinalp & Çamoğlu (2014); Aytaç (1982).

an account of the work he has carried out at the request of the mandator and to give to the mandator what he has received concerning the mandate”. At the same time, the mandatory aims to ensure that he is released from any possible compensation claims that may be directed at him while fulfilling his debt of accountability.⁴² Here, the accountability of the members of the board of directors constitutes the basis of the responsibility mechanism that can be operated against them, and in this context, the release decision taken at the general assembly rules out the responsibility of the managers to the company.⁴³

Accountability for the members of the board of directors is achieved by preparing the financial statements and the annual report and presenting them to the general assembly in an audited manner, and the accounts (financial statements) of the joint-stock company must be discussed in order to talk about a valid release.⁴⁴ Although, as stated in the doctrine⁴⁵, it is possible for the general assembly to release the managers despite rejecting the balance sheet or reject to release despite approving the balance sheet, this still does not eliminate the need for the accounts to be presented and discussed at the general assembly.⁴⁶

The release covers the transactions and subjects presented to the general assembly's knowledge and the subjects that are assumed to be known by the general assembly. Not only the information achieved through the financial statements and explanations made during the general assembly but also the information and documents achieved outside the meeting (especially through the right to information and the appointment of a special auditor) determine the scope of the release.⁴⁷ The release can be made by an explicit decision of the general assembly or by the approval of the financial statements. The latter case is considered the implicit release (the assumption of release).⁴⁸

It is generally accepted in the doctrine and the Supreme Court practice that the decision of release will be postponed under Art. 420.⁴⁹ However, according to the contrary view put forward in the doctrine, the release can be discussed and decided despite the postponement of the balance sheet. Domaniç stated that the release decision may not be made despite the acceptance of the balance sheet or the release is possible despite the rejection of the balance sheet, and argued that there is no release within the scope of postponement.⁵⁰ Çelik though accepts that in terms of implicit release, the postponement is indisputable, he also states that in case there is a separate item on the agenda regarding the release, a positive or negative decision can be taken regarding this item since the approval of the

⁴²Aytaç (1982).

⁴³Çelik (2007); Aytaç (1982).

⁴⁴Art. 424 TCC which states: “Unless provided otherwise, the approval of the accounts will result the release of the BoD” also supports this conclusion. See Aytaç (1982).

⁴⁵Domaniç (1988).

⁴⁶Aytaç (1982).

⁴⁷Aytaç (1982).

⁴⁸Çelik (2007).

⁴⁹Tekinalp (1976); Teoman (1988); Çamoğlu (2003); Also see Turkish Supreme Court 11th Civil Circuit, 23.10.1985, Nr. 5142/5562 and Turkish Supreme Court 11th Civil Circuit, 13.12.1979, Nr. 5667/5701 (Eriş, 2013).

⁵⁰Domaniç (1988).

balance sheet and the decision of release are independent of each other.⁵¹

In our opinion, although the release and the negotiation of the financial statements are independent matters, the connection between them according to Art.424 is indisputable. It is not possible to accept that this provision is only valid for implicit release and that the link between the financial statements and the release is broken in case there is a separate item of release on the agenda, considering the necessity of presenting the accounts to the knowledge of the shareholders for a sound and valid release. If the shareholders becoming the partners of a company for the sole purpose of making a profit are not going to take into account the financial performance of the company when determining whether the managers fulfil their duties duly, what will they take into account? For this reason, whether implicit or explicit, the release should not be decided unless the financial statements are discussed, and therefore, the release should be also postponed as a related matter within the context of Art. 420.

Election of the Members of BoD

During the time when the former TCC (1956) was in effect, the Supreme Court held in its decision in 1986⁵², that the agenda item regarding the election of new managers and auditors does not constitute a "relevant issue" in the context of postponement of the discussions on financial statements. After this date, the Supreme Court has adopted the same approach in its decisions.⁵³ This approach of the Court was essentially based on fact that there were no prerequisites in the law for the re-election of the directors, as in the Art. 374 /4 of TCC 1956 which stated: "directors who are not released cannot be elected as an auditor".

This attitude has been criticised in the doctrine, stating "if the individuals nominated for the Board of Directors have performed the same duty in the previous period, it is not correct to accept their re-election before the balance sheet negotiations are completed". If the contrary is accepted, the minority and other shareholders who are not affiliated with the board of directors will have to re-elect or reject them without having sufficient information about their previous performance, which is inconsistent with the principle that the general assembly decides based on free and independent will.⁵⁴

If this issue is to be evaluated within the framework of the provisions of the new TCC:

⁵¹Çelik (2007).

⁵²Turkish Supreme Court 11th Civil Circuit, 10.7.1986, Nr. 3798/4357.

⁵³See decisions of Turkish Supreme Court 11th Civil Circuit, 5.2.2009, Nr. 6326/1286; 6.5.2011 Nr. 11844/5503; 13.10.2003, Nr. 2885/9174; 16.06.1994, Nr. 7027/5207; 28.09.1992, Nr. 2334/9298 (Eriş, 2013).

⁵⁴Teoman (2012); Kayar (1993); Çamoğlu (2003). For the dissenting opinion stating: "Although the fact of being released is not considered as a pre-condition for re-election, the election of the same individuals to the board while the financial statements are not being discussed does not comply with the purpose of the general assembly and it binds the will of the shareholders. Therefore, the selection item should also be considered in connection with the financial statement negotiations and postponed, otherwise shareholders will have to make decisions without having informed about the performance of the managers in the relevant period." See Turkish Supreme Court 11th Civil Circuit, 6.5.2011, Nr. 11844/5503.

The last paragraph of Art. 413 TCC on the principle of commitment to the agenda stipulates that the dismissal of the members of the board of directors and the election of the new ones are related to the discussion of financial statements. In addition, Art. 364 stipulates that “the members of the board of directors, even if they are appointed by the articles of association, can be dismissed at any time by the decision of the general assembly if there is a relevant item on the agenda or a just cause”. Also according to Art.25/1-c of the Regulation, "regardless of the agenda, the dismissal and the election of new members will be decided upon request and in the presence of just cause, dismissal and election of new members can be put on the agenda by a majority of votes during the meeting".

In the light of these provisions, it can be concluded that the election of the members of the board of directors, whether for the first or second time, is a matter related to the discussion of the financial statements and if a minority requests a postponement in accordance with Art. 420, this matter in question should also be postponed to the next meeting.

Issuance of Securities

For all types of securities that can be issued by the decision of the general assembly in accordance with Art. 504, initially, the financial statements must be discussed and approved. Likewise, since the total amount of debt securities that can be issued cannot exceed the sum of the capital and the reserves included in the balance sheet, the financial statements must be finalised beforehand. Therefore, the agenda item concerning the issuance of securities is to be postponed according to Art. 420 TCC.⁵⁵

Capital Increase

In joint-stock companies, the capital increase can be done through capital subscription (TCC art. 459) or from internal resources (Art. 462 TCC). However, if there are funds in the balance sheet allowed by the legislation to be added to the capital, no increase can be made through capital subscription without converting these funds into capital (Art. 462/3 TCC). Therefore, to determine the accuracy of the company's capital, the reserves in the balance sheet and the valuation funds, the negotiations regarding the financial statements must be completed and accounts must be approved before the capital increase decision. For this reason, the capital increase, whether from external or internal sources, will be postponed within the scope of Art. 420 TCC.⁵⁶

Request to Postpone the Second Meeting by the Minority Shareholder (Art. 420/2 TCC)

Timing of the Second Meeting

Upon the request of the minority, the discussions on financial statements and other related issues are postponed to at least one month later by the decision of the

⁵⁵Çamoğlu (2003).

⁵⁶Yiğit (2005); Domaniç (1988).

chairman. On the other hand, matters which not considered "related" to the financial statements can be discussed and resolved at the first meeting. After the first meeting has been postponed, this postponement and time and the date of the second meeting must be announced to the shareholders and published on the website in accordance with Art. 414.

The one-month period in the law is accepted as a minimum period that is recognised as a vested right in favour of the minority.⁵⁷ This period may be extended due to meeting preparations or for any other reason. In this regard, the fact that the second meeting was held after one month is not a reason for the cancellation of decisions taken during the second meeting.⁵⁸ However, as correctly stated in the doctrine, if the period between two meetings is kept too long that it does not comply with the rule of good faith, an action for annulment based on this issue may be brought against the decisions taken in the second meeting.⁵⁹

The Legal Nature of the Second Meeting and Its Agenda

The second meeting held upon the postponement is not considered as a new general assembly meeting, but the continuation of the first one (Also see Art. 21 of the Regulation).⁶⁰ The established jurisprudence of the Supreme Court is in the same direction.⁶¹ Hence the decisions taken in the first meeting on non-related issues will not be discussed again and in case of the action of annulment is to be brought, dissenting opinions should be recorded in the minutes of the first meeting.⁶²

Since the second meeting is considered as the continuation of the postponed meeting, as a rule, no new items should be added to the agenda of the second meeting, and the agenda should only consist of postponed issues. Otherwise, as for the new items added to the agenda, it will be considered a new meeting.⁶³

Exercise of the Right for the Second Time

The minority shareholder's request for postponement for the second time depends on the fact that the relevant parties did not respond regarding the points that are objected to in the financial statements and recorded in the minutes, in accordance with the principles of fairness and accountability (Art. 420/2 TCC).

It is stated in the doctrine that "principles of fairness and accountability" correspond to good faith in Art. 2 of the Turkish Civil Code.⁶⁴ In our opinion, the "principle of fairness and accountability" in the article which is considered as a criterion for the answers given by the relevant parties in the second meeting, corresponds to the "True and Fair View" provided in Art. 514 TCC. Therefore we

⁵⁷Teoman (1988).

⁵⁸Turkish Supreme Court 11th Civil Circuit, 14.10.1982, Nr. 3556/3887 (Eriş, 2013). For the opposing view see Domaniç (1988).

⁵⁹Yiğit (2005).

⁶⁰Tekinalp (1976); Teoman (1988); For the opposing view see Birsal (1971).

⁶¹Turkish Supreme Court 11th Civil Circuit, 10.7.1986, Nr. 3798/4357.

⁶²Teoman (1988).

⁶³Kayar (1993).

⁶⁴Durgut (2006).

only refer to the explanations we have already made in the relevant section.

In case of a postponement request made by the minority shareholders for the second time, unlike the first meeting, this request is to be put to the vote in the general assembly.⁶⁵ In other words, the postponement is to be decided by the general assembly. The minority requesting a postponement of the second meeting may be different than the minority that exercised this right at the first meeting. However, in this case, the new minority cannot request a postponement without a justification, claiming it is the first time they have used the right in question. They can only request a postponement based on the requirements provided in Art. 420/2.⁶⁶

In the Regulation, it is provided that the second meeting is to be postponed upon the request of the minority due to the fact that relevant parties did not respond in accordance with fairness and accountability (Art.28/4 Regulation). Since it creates the assumption that the second request will also directly result in postponement without any decision, it causes confusion. In our opinion, adopting the wording of the Regulation may cause the meetings to be deferred unnecessarily, hence the relevant provision should be ignored.

Evaluation of the Rights Provided in Art.420 TCC within the Context of Prohibition of Abuse of Rights

General Overview

In general, as a result of the concept embraced by the legislator that "minority shareholders need to be protected" against the majority in joint-stock companies, a regulation specifically for the losses incurred by the majority or the company due to the abuse of the rights granted to minority shareholders is not provided in TCC.⁶⁷ The only provision targeting the minority is Art. 208 TCC, within the context of group companies, stipulates the right to purchase the minority shares by the controlling company and squeeze out, in cases where the minority prevents the company from operating, acts recklessly or against good faith, or causes noticeable distress. Although indirectly, in the context of litigation rights, Art.451 on the annulment of decisions taken against good faith is also worth mentioning.

Apart from these, the absence of a specific provision in the TCC on the subject should not be interpreted as if there is a safe harbour for the minority.⁶⁸ Since TCC is an inseparable part of the Civil Code, the principle of good faith, which every individual has to follow while exercising their rights and fulfilling obligations is also applicable to the exercise of minority rights. However, in the context of TCC article 420/1, it needs to be examined whether it is possible to assert a tort claim due to abuse of right since the first postponement is requested without any justification and any resolution of the general assembly and decided

⁶⁵Tekinalp (1976); Teoman (1988).

⁶⁶Tekinalp (1976).

⁶⁷Moroğlu (2006).

⁶⁸Helvacı (1998).

by the chairman who has no discretion on the subject matter.

Justification Problem

During the time when the former TCC was in effect, in terms of postponing the meeting, one of the most controversial subjects was whether the minority has to put forward any justification when requesting a postponement. According to the dominant view in the doctrine and the caselaw of the Supreme Court, which we also agree with, neither back then nor now it is mandatory to present a justification for the postponement of the meeting.⁶⁹ Tekinalp, who does not agree with the justification requirement, argued that seeking a condition is not provided in Art. 377 (Art. 420 TCC) by way of interpretation would make it difficult for the minority to exercise rights, and this is incompatible with the purpose pursued by stipulating minority rights. According to the author, there is no connection between the provision regarding "required explanation" and the first paragraph of the article. The minority may need to examine the financial statements before or during the general assembly meeting. Therefore, it is necessary to see the provision as an additional opportunity in this regard. Additionally, obliging the minority to provide justifications may lead to the assertion of unfounded justifications.⁷⁰

The Supreme Court also stated that the minority's right to request the postponement of balance sheet discussions is "a right arising from the law and that the use of this right cannot be considered as an abuse of right."⁷¹

The opposing view suggests that since the condition of postponing the second meeting is the absence of a necessary explanation about the objected points of the financial statements, reasons for the postponement must be declared at the first meeting, otherwise, it may constitute abuse of the right. In this regard, if the legislator had not anticipated the need for justification in the first meeting, it would not have imposed a sanction for not responding to the items objected to, at the latter.⁷²

Remedial Solutions De Lege Lata

Since the abuse of minority rights and acting against good faith will not be protected by the law, according to a view in the doctrine, the liability of the minority may arise for the losses incurred by the majority or the company, according to tort provisions.⁷³

In our opinion, both paragraphs of Art. 420 TCC should be considered together, as to whether the exercise of the right to postponement constitutes an abuse of the right. As explained above, the first paragraph of the regulation

⁶⁹Tekinalp (1976); Teoman (1988); Çamoğlu (2003); Durgut (2006); Yiğit (2005); Kayar (1993); Turkish Supreme Court 11th Civil Circuit, 13.10.2003, Nr. 2008/9174 (Eriş, 2013)

⁷⁰Tekinalp (1976).

⁷¹Turkish Supreme Court 11th Civil Circuit, 30.9.1985, Nr. 4342/4912 (Teoman, 1988).

⁷²Birsel (1970); Domanıç (1988).

⁷³Zorluer (2021).

provides that once the request is made by the minority shareholder, the discussion of financial statements and other relevant issues will be postponed directly by the chairman's decision, without any further decision of the general assembly. However, according to the second paragraph, for the meeting to be postponed once again, a justification needs to be put forward by the minority. As can be seen, the legislator is not interested in whether the right is abused or not in terms of the first request, by not seeking any justification and obliging the chairman to postpone if the conditions are met. On the other hand, the legislator awaits for the minority to justify its postponement request for the second time and leaves the appropriateness of the justification to the discretion of the general assembly. In case the second request is rejected at the general assembly, the annulment of this decision may be brought to the court to carry out the review based on good faith.

Also, it is worth mentioning the relationship between the minority's right to request postponement and Art. 208 TCC. As mentioned above, in case the behavior exhibited by the minority constitutes a "just cause", it is possible to squeeze out the minority from the company by the controlling company owning ninety percent of the shares and voting rights. In this context, in case of the existence of a minority requesting a postponement in almost every general assembly of a subsidiary in the group of companies, if the operation of the company is constantly hindered as a result, squeezing out the minority may be considered.

Concluding Remarks and *De Lege Feranda* Solution

Because no justification and any decision of the general assembly is required and the tendency toward the broad interpretation of the scope of the "relevant issues", minority shareholders' right to a postponement of the general assembly meeting can be used as leverage against the majority in practice and thus constitutes a violation of the prohibition of abuse of rights. As mentioned at the beginning of our assessments, the origin of Art. 420 TCC in German Law was regarded as an unnecessary threat of misuse and eventually abolished by the German legislator with the introduction of new mechanisms for the protection of minority shareholders such as information rights and independent auditing of financial statements.

Although the same mechanisms are provided in TCC, not only has the right to request the postponement of the general meeting continued to occupy a space in the legislation to this day, the broad interpretation of the conditions in the law by the doctrine and practice eventually had led to a wider platform for the abuse of rights. Because of the difficulties to implement the tort provisions and specially to determine and prove the loss occurred with an effort of interpreting the conditions in the absence of an explicit provision, *de lege lata* solutions turn out to be insufficient to overcome this problem.

Hence it is suggested *de lege feranda* that the provision of Art.420 should be completely abolished and the exercise of other mechanisms for the minority shareholder protection and reconciliation of the conflicts of interests between majority and minority should be encouraged by the Turkish legislator.

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