



## **Dismissal of Board Members in Turkey**

**Authors:** Gönenç Gürkaynak, Nazlı Nil Yukaruç and Defne Kahveci of ELIG Gürkaynak Attorneys-at-Law

### **I. Introduction**

Dismissal of the board members of a joint stock company is regulated under the Turkish Commercial Code numbered 6102 (“TCC”). According to Article 408/2 of the TCC, general assembly of shareholders is granted with the sole power to appoint and dismiss board members. The scope and implementation of such power is defined under Article 364 of the TCC. Pursuant to such article, board members can be dismissed through including an item in the agenda of the general assembly meeting of shareholders for dismissal or with just cause even if the dismissal is not in the agenda of the general assembly meeting of shareholders.

While the former Turkish Commercial Code numbered 6762 contained provisions regarding dismissal, it did not grant board members the right to claim damages and caused ambiguity in implementation of the dismissal rules. Article 364 of the TCC tried to clear such ambiguity by providing different options for dismissal and granted indemnification rights to the dismissed board members.

### **II. Dismissal of Board Members Through General Assembly of Shareholders Resolution**

Article 364 of the TCC provides two options for the dismissal of board members: (i) including an item in the meeting agenda regarding dismissal, and (ii) dismissing with “just cause” even if no such item is provided in the agenda for discussion.

Before explaining Article 364 of the TCC, it is important to describe the general rules which will be applicable to the general assembly of shareholders meetings. Firstly, in order to discuss dismissal of a board member and to have a valid general assembly resolution, meeting and decision quorums of a general assembly meeting should be met. In this respect, unless a heavier quorum has been provided in the articles of association of a joint stock company, general assembly will convene with the shareholders representing at least 25% of the share capital and the resolution will be taken by a simple majority as per Article 418 of the TCC.

Secondly, the agenda will have a binding effect for the general assembly resolution. Article 413/2 of the TCC states that only the items specified in the agenda can be discussed during the general assembly meeting. In other words, the general assembly will not be able to resolve on a matter unless such an item is included in the agenda. However, the TCC provides several

exceptions to such rule. For instance, Article 364/1 of the TCC requires an item relating to dismissal of a board member to be included in the agenda; but also allows dismissal if there is a just cause without including any item in the agenda.

Another example can be inferred from interpreting Article 416 and Article 364 of the TCC together. In principle, an item can be included in the agenda if all shareholders are present and agree to do so when the general assembly has convened without invitation as per Article 416 of the TCC. Likewise, if there is just cause as per Article 364 of the TCC it would not be necessary to include an item in the agenda for dismissal since the general assembly can dismiss the board members without including any item in the agenda in such case.<sup>1</sup>

Lastly, Article 360 of the TCC grants certain share groups and minorities the right to be represented in the board of directors, provided that it is stated in the articles of association. If such right is granted, general assembly's right to dismiss the board members is restricted; meaning that "the general assembly will be able to dismiss the board members representing such shareholders only if there is just cause".<sup>2</sup>

#### *a. Procedure if the Dismissal is included in the Agenda*

Article 364/1 of the TCC stipulates that board members can be dismissed if there is an item related to dismissal in the agenda; a specific wording is not required. Article 413/3 of the TCC gives an example to an agenda item which can be related to dismissal. According to such article, discussion of year-end financial tables is related to dismissal of board members. In another words, the general assembly will be able to dismiss a board member if there is an item in the agenda regarding discussions of the year-end financial tables.

11<sup>th</sup> Civil Chamber of Court of Appeals (the "**Court**") with its decision dated December 12, 2016 with merit no. 2016/2098 and decision no. 2016/9484, further emphasized the relationship between the discussion of year-end financial tables and dismissal of board members. In the case, the agenda contained discussion of the year-end financial tables but the shareholders decided to postpone the discussions. Nevertheless, the majority shareholders voted for dismissal of some board members. The minority shareholders filed a lawsuit arguing that it is not possible to dismiss board members when the discussions of financial documents have been postponed. The Court concurred with the minority shareholders and stated that discussions of financial tables are related to dismissal of board members and thus, the general assembly cannot resolve on dismissal when discussions about financial documents have been postponed. There is no consensus between the scholars and the Turkish courts with respect to the requirement of just cause when there is an item in the agenda regarding dismissal. For example, some scholars argue that if discussion of year-end financial tables is included in the

<sup>1</sup> Pulaşlı, Hasan, Şirketler Hukuku Şerhi, 3rd ed., Book I, January 2018, pg.944

<sup>2</sup> Pulaşlı, Hasan, Şirketler Hukuku Şerhi, 3rd ed., Book II, January 2018, pg.1249-1250

agenda and the shareholders are not pleased with the results of the financial tables, such reason itself will be sufficient to dismiss a board member.<sup>3</sup> On the other hand, others argue that it is not necessary to have a just cause since the wording of Article 413/3 of the TCC is clear, and once discussion of year-end financial tables is in the agenda it is possible to dismiss a board member.<sup>4</sup>

***b. Procedure if there is a Just Cause***

The second option is to dismiss the board members based on just cause. While Article 364 of the TCC does not provide a definition of just cause, its preamble sets some examples. According to the preamble of Article 364 of the TCC, corruption, inadequacy, violation of duty of loyalty, inability to perform duties due to being a board member in multiple companies, discord, and abuse of power could be deemed as just cause. In addition, the preamble notes that dismissing a board member who is beneficial to the company solely for political reasons may not be deemed as just cause.

Furthermore, the Court gives an example to just cause in its decision dated 30.10.2017 with merit no. 2015/14781 and decision no. 2017/5821, stating that ongoing disputes between a joint stock company and a real person representative of a legal entity board member constitutes just cause since the board member and the company is unable to work harmoniously due to such disputes.

***c. Effect of Dismissal of the Board Members***

While there are many different legal opinions with respect to the legal nature of the relationship between a joint stock company and a board member, the Court tends to rule that the relationship is governed by a mandate contract.<sup>5</sup> According to Article 512 of the Turkish Code of Obligations numbered 6098 (“TCO”), which regulates the mandate contracts, a mandate contract can be terminated with the unilateral declaration of either party. In this respect, general assembly resolution regarding dismissal of a board member can be considered as the unilateral declaration of a party.

In terms of the internal affairs of a joint stock company, dismissal will become effective “once the general assembly’s dismissal declaration is received by the relevant board member.”<sup>6</sup> In case the board member is present in the general assembly meeting, the board member will “immediately receive the dismissal declaration and become informed on the

---

<sup>3</sup> Pulaşlı, Hasan, Şirketler Hukuku Şerhi, 3rd ed., Book I, January 2018, pg.942

<sup>4</sup> Kırca, İsmail/Şehirali Çelik, Feyzan Hayal/Manavgat, Çağlar: Anonim Şirketler Hukuku Book I, Ankara, 2013, pg.460

<sup>5</sup> Yargıtay 11.H.D. , 9.1.2017, E.2015/12189, K.2017/120

<sup>6</sup> Erdem, Nuri, Anonim Ortaklık Genel Kurul Toplantılarında Gündeme Bağlılık İlkesi Çerçevesinde Yönetim Kurulu Üyesinin Azli, İstanbul Hukuk Mecmuası, 76/2, 2018, 503-528, 524

matter.”<sup>7</sup> If the board member is not present at the general assembly meeting, “with the interpretation of Article 514 of the TCO, it is possible to say that dismissal will become effective once the board member is informed.”<sup>8</sup>

The TCC does not contain any provision about the steps to be taken following the general assembly resolution or its effect to the third parties. On the other hand, Article 373 of the TCC stipulates that board of directors is obliged to submit the board of directors resolution indicating the authorized signatories of the joint stock company to the trade registry for its registration and announcement. In addition, any change in matters that have been registered with the trade registry has to be registered as per Article 31 of the TCC. Based on the foregoing provisions, it can be inferred that “the board of directors has to register the dismissal of a board member for such resolution to bind third parties.”<sup>9</sup>

Once the dismissal decision enters into force in accordance with the foregoing, the board member will no longer have any rights (e.g. salary and attendance fee) and obligations. As a result, the board member “will have to terminate his/her activities in the company immediately.”<sup>10</sup>

#### *d. Rights of the Dismissed Board Members*

Board members’ rights can arise when (i) there is an item in the agenda regarding dismissal but there is no just cause, (ii) there is just cause but no item in the agenda regarding dismissal, and (iii) there is neither an item in the agenda nor just cause. In principle, the dismissed board member request cancellation of the general assembly resolution and/or ask indemnification of the damages.

- i. When there is an item in the agenda regarding dismissal but there is no just cause:** Under this option, it is likely that the board member’s claim for cancellation of the general assembly resolution will be rejected by the courts if it is based on lack of just cause. The reasoning behind this derives from Article 364 of the TCC, which grants the general assembly the absolute power to decide on dismissal of board members and allows dismissal even without a just cause. Nevertheless, the board member can request cancellation of the general assembly resolution based on the grounds that the meeting and decision quorums are not satisfied. Also, the board member can claim indemnification of his/her damages.

---

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Karaege, Özge, Anonim Şirketlerde Genel Kurulun Yönetim Kurulu Üyelerini Görevden Alma (Azil) Yetkisi (TTK m. 364), Ankara Barosu Dergisi, 2014/1, pg.104

<sup>10</sup> Erdem, Nuri, Anonim Ortaklık Genel Kurul Toplantılarında Gündeme Bağlılık İlkesi Çerçevesinde Yönetim Kurulu Üyesinin Azli, İstanbul Hukuk Mecmuası, 76/2, 2018, 503-528, 524

- ii. **When there is just cause but no item in the agenda regarding dismissal:** Under this option, it is unlikely that cancellation of the general assembly resolution will have a positive outcome if it is based on the fact that the agenda does not contain any item since Article 364 allows dismissal with just cause. Still, the board member can claim that the dismissal was unjust and ask for damages. In such case, the courts will look at the facts of each case to determine if there was an unjust dismissal decision.
- iii. **When there is neither an item in the agenda nor just cause:** Under this option, the board member can request cancellation of the general assembly resolution and claim damages, since the general assembly decision is not based on any options provided by Article 364 of the TCC.

The Court in its decisions dated January 09, 2017 with merit no. 2015/12189 and decision no. 2017/120, and dated November 30, 2017 with merit no. 2016/3773 and decision no. 2017/6778, stated that the damages incurred by a board member should be calculated in accordance with the provisions related to mandate contracts. The Court then referred to Article 512 of the TCO, stating that the party who has terminated the contract in an improper time (i.e. unjust termination) will be responsible for the damages and the board member can claim wages until the end of his/her term as a board member.

### **III. Conclusion**

In conclusion, the general assembly has broad powers to dismiss the board members and the scope of such power is defined under Article 364 of the TCC. With Article 364 of the TCC, the shareholders, through a general assembly resolution, can use their right to dismiss board members by including an item in the agenda or with just cause. In return, the same article granted board members the right to claim damages under certain circumstances to provide assurance to the board members, especially for the instances where the dismissal is not based on just cause.

Article contact: Gönenç Gürkaynak, Esq.

Email: [gonenc.gurkaynak@elig.com](mailto:gonenc.gurkaynak@elig.com)

*(First published by Mondaq on December 6, 2019)*