



Significant Power of the Preferred Shareholders over the Management: Right to be Represented on the Board of Directors

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From Turkish corporate law point of view, privilege refers to a privileged right attached to a share regardless of identity or qualifications of the shareholder. A privileged share provides priority and advantages to its holder on certain shareholder benefits such as dividend amount, liquidation share, vote number in general assembly meetings etc.. In joint-stock companies, privileges are granted to shares during the incorporation phase of the company with mutual intent of the founders or afterwards by way of amendment of the articles of association of the company thorough general assembly resolution.

Besides the privilege concept which requires granting of the right to each share on individual basis, Article 360 of the Turkish Commercial Code No. 6102 (“TCC”) has also introduced another superior right concept, which enables certain shareholder groups to be represented on the board of directors, in line with the need of practice and settled precedents of the Court of Cassation. In this concept, the right in question is granted to the customized shareholder groups rather than the shares. Hence, it is considered as a novelty and exception to the general privilege mechanism in Turkish corporate law.

As regard to constitution of a shareholder group having the right to be represented on the board of directors, Article 360 of the TCC addresses three components which are (i) shareholders that constitutes certain share groups, (ii) certain share groups and (iii) minority shareholders. In each case, the shareholder group must be distinguishable from other shareholders holding ordinary shares. For this purpose, the shareholder group could be generated by way of qualifying the shareholders with distinctive features (*e.g.* requirement to have a specific profession), setting aside and grouping the shares (*e.g.* A group shares, B group shares) and/or providing a clear definition regarding the minority shareholder status. It is also important to note that such qualifications, groups and/or definition must be included in articles of association of the joint-stock company for validity and binding purposes.

In addition to constitution of a shareholder group as explained above, it must be also structured and stated in the articles of association of the company that how the shareholder group can exercise their right to be represented on the board of directors. To that end, the articles of association must clearly

indicate that (a) board of directors shall be elected among the members of the shareholder group and/or (b) board of directors shall be elected among the candidates to be nominated by the shareholder group. Articles of association may also provide further details as to determination of the candidates or nomination procedure to regulate the internal relationship within the shareholder group.

Similar to the general privilege mechanism, the right to be represented on the board of directors is also granted to a shareholder group during the incorporation phase or thereafter by amending the articles of association. Once relevant provisions as to constitution of the shareholder group and exercising method of the right are duly included in the articles of association and these provisions are registered with the trade registry, they become legally binding over the general assembly of shareholders, which is the exclusively competent organ to elect board of directors in a joint-stock company. This means that if articles of association of a joint-stock company grants the right to be represented on the board of directors to a shareholder group, the general assembly can no longer freely determine members of the board of directors, and it shall comply with these provisions.

It is also necessary to emphasize that in the cases where a shareholder involved in a shareholder group transfers their shares to a third party, such person might not benefit from the right of to be represented on the board of directors in some cases unless such person bears necessary qualifications described in the articles of association. For instance, if the right of to be represented on the board of directors has been granted to a shareholder group consisting of the shareholders who are factory owners in a specific sector and region, the transferee unable to satisfy such qualifications cannot be involved in the group and benefit from the right. Having said that if the shareholder group has been generated based on certain share groups (*e.g.* A group shares, B group shares) or minority shareholding prerequisite, merely acquisition of the shares in question might be sufficient the transferee to have the right to be represented in the board of directors.

In joint-stock companies, as board of directors is the management organ of the company, the right to be represented in the board of directors enables the right holders to manage and control the company directly or indirectly. Therefore, being holder of this right as a shareholder group has great importance and significant impact and power over the company. In practice, this right is mostly granted to the shareholders of companies having the joint-venture company structures, as the shareholders of these companies usually represent the different sides and interests.

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