A Comparative Analysis of Directors' Conflict of Interest Duties Under the Companies Act 2006 and the Turkish Law on Board Members' Conflicts of Interest With the Company*

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Abstract

This article provides a comparative analysis of the fiduciary duties and liability regimes of board members under Turkish and English company law, focusing specifically on conflict of interest regulations and standards of care. Both jurisdictions impose rigorous duties on directors to prioritize the company's interests above personal or third-party gains. However, they diverge significantly in legal frameworks, enforcement mechanisms, and corporate governance culture. Under the Turkish Commercial Code, board members owe a duty of loyalty and care, requiring that transactions involving directors be conducted at arm's length and without preferential treatment. Liability is fault-based, emphasizing intentional or negligent breaches, and transactions made without explicit general assembly approval are null and void. Turkish law also enforces strict prohibitions and criminal sanctions against borrowing from the company by non-shareholding directors and their relatives, maintaining stringent safeguards against

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self-dealing. In contrast, the United Kingdom's Companies Act 2006 explicitly codifies directors' duties to avoid conflicts of interest, including requirements to disclose relevant interests and prohibitions on accepting benefits from third parties. UK law permits directors to authorize conflicts if allowed by the company's constitution but imposes harsh penalties for non-compliance, including personal liability, fines, reputational damage, and possible disqualification. Shareholders in the UK play a pivotal role in oversight, empowered to approve significant transactions and pursue derivative claims against directors who breach duties. The comparison illustrates that Turkish law prioritizes procedural rigor and criminal deterrence, whereas English law emphasizes transparency, shareholder oversight, and conditional flexibility in conflict management. Both systems underscore good faith, loyalty, and due diligence as foundational to corporate governance but face practical challenges concerning flexibility and emerging governance issues. Ultimately, despite shared fiduciary foundations, the Turkish and UK frameworks differ in liability scope and enforcement, reflecting evolving approaches to director accountability in global corporate law.

Keywords: *Fiduciary Duties, Conflict of Interest, Board Member Liability, Turkish Commercial Code, Companies Act 2006, Corporate Governance.*

2006 Tarihli Şirketler Kanunu İle Türk Hukukunda Yönetim Kurulu Üyelerinin Şirketle Menfaat Çatışması Durumundaki Yükümlülüklerinin Karşılaştırmalı Analizi

Öz

Bu makale, Türk ve İngiliz şirket hukukundaki yönetim kurulu üyelerinin müfidiyet yükümlülükleri ve sorumluluk rejimlerini menfaat çatışmaları ve özen standartları bağlamında karşılaştırmaktadır. Her iki hukuk sistemi, yöneticilerin şirket menfaatlerini kişisel ve üçüncü şahıs çıkarlarının önünde tutmasını zorunlu kılarken, hukuki yapı, yaptırım mekanizmaları ve kurumsal yönetim kültüründe farklılıklar göstermektedir. Türk Ticaret Kanunu'na göre, yönetim kurulu üyeleri şirkete karşı sadakat ve özen yükümlülüğüne sahiptir; işlemler bağımsız ve eşit şartlarda yapılmalı, kusura dayalı sorumluluk esas alınmaktadır. Genel kurul onayı olmaksızın yapılan işlemler geçersiz sayılır ve özellikle şirketten borçlanma hususunda sıkı yasaklar ile cezai yaptırımlar uygulanmaktadır. Öte yandan, İngiltere'de 2006 Companies Act, menfaat çatışmalarını önleme ve şeffaflık kuralları açıkça düzenlemekte; mahkeme içtihatları ile bu kurallar sıkı şekilde uygulanmaktadır. Yöneticiler çatışmaları şirketin onayıyla yönetebilir ancak uyumsuzluk halinde ağır hukuki ve mali yaptırımlarla karşılaşabilirler. Paydaşlar, özellikle İngiltere'de yöneticilerin faaliyetlerini denetlemede önemli rol oynar. Karşılaştırma, her iki sistemin şirket menfaatlerini korurken, Türk hukukunun daha katı prosedür ve cezai mekanizmalarla, İngiliz hukukunun ise şeffaflık ve paydaş denetimini ön plana çıkaran esnek bir yapıyla farklılaştığını ortaya koymaktadır. Ancak her iki sistemde de uygulamada esneklik, yeni sorunların çözümü ve kurumsal kültürün geliştirilmesi ihtiyacı mevcuttur. Sonuç olarak, iki hukuk düzeni müfidiyet temellerini

paylaşmakla birlikte, sorumluluk ve yaptırım açısından farklılıklar barındırmakta, bu da küresel şirket hukukunda yönetici hesap verebilirliğinin gelişimini göstermektedir.

Anahtar Kelimeler: Yönetim Kurulu, Menfaat Çatışması, Güven Yükümlülüğü, Türk Ticaret Kanunu, Companies Act 2006, Kurumsal Yönetim.

Extended Summary

This article examines and compares the fiduciary duties and liability frameworks of board members under Turkish and English company law, focusing on conflict of interest rules and standards of care. Both jurisdictions impose stringent duties to ensure directors prioritize the company's interests above personal or third-party considerations, yet they differ notably in their legal structures, enforcement mechanisms, and corporate governance culture.

Under Article 369 of the Turkish Commercial Code (TCC) No. 6102, board members owe a duty of care and loyalty to the company, requiring good faith conduct and avoidance of conflicts of interest. Transactions involving directors must be conducted at arm's length and without preferential treatment. Liability for directors in Turkey is fault-based under Article 553(1) TCC, meaning damages must arise from intentional or negligent breaches. The Code of Obligations No. 6098 applies analogously, emphasizing tort principles and requiring objective standards of reasonableness for breach assessments. This represents a shift from the previous absolute joint liability under the repealed Code No. 6762, moving toward proportionate liability according to individual fault as per Article 557(1).

Significantly, Turkish law prohibits board members from engaging in transactions or incurring debts on behalf of the company without explicit general assembly approval (Art. 395, TCC). Violations render such transactions null and void, although directors cannot invoke invalidity defensively. Non-shareholding directors and their relatives face strict bans on borrowing company funds, with criminal sanctions for breaches (Arts. 395, 562). While intra-group guarantees are permissible under regulated conditions, Turkish law thus maintains rigorous safeguards against self-dealing.

Board member liability can be mitigated or extinguished through discharge (İbra), settlement, or statutes of limitation, contingent on the absence of fault. The statute of limitations varies between two- and five-year periods depending on circumstances (Art. 560). Furthermore, the doctrine of contributory fault under Article 52 of the Code of Obligations permits courts to adjust liability where shareholders or creditors share causative responsibility. Notably, adherence to general assembly decisions, even

if adverse to the company, may shield directors from personal liability if procedures are properly followed.

In contrast, the UK Companies Act 2006 codifies director duties with explicit emphasis on avoiding conflicts of interest. Section 175 mandates directors to avoid any direct or indirect situation where personal interests conflict or may conflict with those of the company. Section 176 prohibits directors from accepting benefits from third parties connected to their position, and Section 177 requires disclosure of interests in company transactions. These provisions delineate situational and transactional conflicts, imposing strict transparency and accountability. Unlike Turkish law, UK law allows directors to authorize conflicts if permitted by the company's constitution, though public companies face stricter restrictions.

UK case law, including *Regal (Hastings) Ltd. v. Gulliver* (1942) and *Bhullar v. Bhullar* (2003), reinforces the strict enforcement of these duties, holding directors liable for failing to disclose or for exploiting corporate opportunities for personal gain. The courts emphasize full disclosure and shareholder approval as essential mitigators of conflicts. Failure to comply risks personal liability, financial penalties, reputational damage, and potential disqualification under the Company Directors Disqualification Act 1986, which can bar directors for up to fifteen years.

Shareholders in the UK play a pivotal role in monitoring compliance, empowered to approve significant transactions and to bring derivative claims against defaulting directors. While private companies enjoy more flexible governance, dominant shareholders' influence may risk governance failures. Transparency is further encouraged through disclosures in annual reports and independent audit committees.

The comparative analysis reveals that both legal systems aim to balance robust protection of company interests with fair accountability of directors. Turkish law's fault-based, proportionate liability system and strict prohibitions on self-dealing emphasize procedural rigor and criminal deterrence. The UK's codified conflict of interest rules and judicial precedents promote transparency and shareholder oversight, allowing conditional empowerment of directors in managing conflicts. Both systems underscore the centrality of good faith, loyalty, and due diligence in corporate governance.

Nonetheless, practical challenges remain. Turkish law's criminal sanctions and strict prohibitions may inhibit entrepreneurial flexibility, while the UK's more discretionary conflict authorizations could invite governance risks in less regulated private companies. Both jurisdictions would benefit from clearer statutory guidance addressing emerging issues, such as treatment of former directors and third-party benefits. Effective corporate governance requires ongoing legislative refinement, director training, and cultural commitment to transparency.

In sum, the Turkish and UK frameworks share common fiduciary foundations yet diverge in liability scope, enforcement mechanisms, and governance culture. Their complementary strengths highlight the evolving nature of director accountability in global corporate law.

Introduction

The duties imposed on directors under the Companies Act 2006 are grounded in the principle that directors are accountable to the corporate entity of the company. Another key actor in companies, the shareholders, also play an indispensable role in monitoring whether directors fulfill their duties. Moreover, through derivative actions brought in the company's interest, shareholders contribute significantly to the prevention of unlawful conduct (Companies Act 2006, sec. 260).[1]

The conflict of interest duty imposed on directors aims to prevent directors from engaging in transactions that conflict or may conflict with the company's interests for personal gain, as well as from secretly profiting (Companies Act 2006, sec. 176). A breach of the conflict of interest duty often also constitutes a breach of the duty to exercise powers for a proper

1 As established in the landmark case Salomon v Salomon & Co Ltd [1897] AC 22, once a company is duly incorporated, it must be regarded as a separate legal entity distinct from its founders and shareholders, possessing rights and liabilities in its own name. Accordingly, in cases where the company suffers harm, the proper plaintiff is ordinarily the company itself. However, in certain circumstances, directors controlling the company may engage in fraudulent conduct to conceal matters from minority shareholders. To address such abuses, minority shareholders have been granted the right to initiate derivative actions—lawsuits brought on behalf of the company to seek remedies for wrongs committed against it (see Tang, "Shareholder Remedies: Demise of the Derivative Claim?", *UCLJLJ* 1, no.1 (2012): 178).

purpose (Companies Act 2006, sec. 171) and the duty to promote the success of the company (Companies Act 2006, sec. 172).[2] Governance duties and conflict of interest duties are not mutually exclusive categories.

Traditionally[3], courts in both the UK and other jurisdictions have disapproved of situations where a fiduciary's interests conflict with those of the person to whom they owe duties. Such conflicts are treated as matters of equity and are actively addressed to prevent any abuse of trust.[4] Section 175 of the Companies Act 2006, which codifies these longstanding principles, provides:

> (1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (2) This applies in particular to the exploitation of any property, information, or opportunity, and it is immaterial whether the company could take advantage of the property, information, or opportunity (Companies Act 2006, sec. 175).

As fiduciaries, directors can avoid liability arising from a breach of their fiduciary duties by obtaining the fully informed consent of shareholders.[5] Such consent may be given through prior approval or subsequent ratification by the shareholders (Companies Act 2006, sec. 180). Disclosure, therefore, is a crucial step toward securing informed consent.

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2 Director duties are cumulative in nature. Section 179 of the Companies Act 2006 explicitly states that more than one general duty may apply in any given case.

3 For an older case precedent illustrating the principles of directors' duties, see Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461; see also Alan Dignam and John Lowry, "Directors' Duties," in Company Law, 12th ed. (Oxford: Oxford University Press, 2022), Law Trove, accessed June 23, 2025, https://doi.org/10.1093/he/9780192865359.003.0014, 300.

4 In Bray v. Ford [1896] AC 44 (HL), Lord Herschell stated that a person in a fiduciary position is not entitled to make a profit unless expressly permitted and must not place themselves in a position where their duties and personal interests conflict. This principle was further elaborated in Bristol & West Building Society v. Mothew [1998] Ch 1.

5 For a detailed discussion on avoiding breaches of duty by conflicted directors, see Rosemary Teele Langford and Ian M. Ramsay, "Conflicted Directors: What Is Required to Avoid a Breach of Duty?" (2021) 108–127, 110; see also Brenda Hannigan, Company Law, 7th ed. (Oxford: Oxford University Press, 2014), 253.

It is common for company constitutions to include provisions that attenuate the duty to avoid conflicts. These provisions often stipulate that the director's disclosure obligations apply only to the other directors and not to the shareholders (Companies Act 2006, sec. 177).

I. What is a Conflict of Interest?

As noted in our previous general explanations, section 175 of the Companies Act 2006 enacts a prohibition on conflicts of interest. This provision requires a director to avoid situations where they have, or could have, a direct or indirect interest that conflicts or may conflict with the interests of the company (Companies Act 2006, sec. 175).

In determining the existence of a conflict of interest, the test is based on how a reasonable person would interpret the current situation and whether it is likely to give rise to a conflict.[6] This test is effectively incorporated as an exception in section 175(4)(a) "if the alleged conflict is reasonably regarded as not likely to result in a conflict of interest, then a breach of the duty under section 175 is not considered to have occurred (Companies Act 2006, sec. 175(4))."

Section 175 does not apply to situations where a director has an interest in a transaction with the company. Such situations are addressed under section 177, which requires the director to declare the nature and extent of their interest in the transaction with the company (Companies Act 2006, sec. 177).[7]

Section 175 is also likely to be relevant in situations where a director's duties to the company conflict with their duties to another company or individual. In theory, there is no rule preventing a director from holding directorships in multiple companies, even if those companies are engaged in the same trade, whether competitively or not. Disclosure and consent are

6 For an analysis of the legal control of directors' conflicts of interest in the UK, particularly concerning non-executive directors post-Higgs Report, see Richard C. Nolan, "The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report," *Theoretical Inquiries in Law* 6, no. 2 (2005): 413-462, https://doi.org/10.2202/1565-3404.1112.

7 Andrew Keay, "The Authorising of Directors' Conflicts of Interest: Getting a Balance" *J Corp L* Stud 12 (2012): 129, 133.

key in managing such conflicts, and if a director holding two directorships fails to secure informed consent from both companies in situations where there is a potential interest conflict, the director will be in breach of the obligation of undivided loyalty (Companies Act 2006, sec. 175).[8]

A director with a conflict of interest or a conflict of duties may be subject to different requirements. These requirements may include the disclosure of the conflict, disclosure of further information relevant to the particular transaction, and taking positive action to protect the company's interests, which may include the director preventing the transaction from proceeding (Companies Act 2006, sec. 175). A director who is in a conflict of interest situation should be aware of what legal steps they need to take to resolve this situation. The views expressed by Owen J in Fitzsimmons v. R (1997) 15 ACLC 666 are instructive on this matter. Owen J's views can be summarized as follows: A director who confronts a possible conflict must assess their own situation.[9] The director must disclose the conflict at a directors' meeting. The director may refrain from voting on the matter or may excuse themselves from the meeting.[10] In some cases, the director may be required to suggest a course of action to limit potential damages.

In some cases, the disclosure of the interest, together with the informed consent of the relevant director, has been sufficient to absolve the director from breach of duty.[11] To explain the conflict of interest without using abstract terms, it is useful to refer to a case example. In Regal (Hastings) Ltd v. Gulliver [1967] 2 AC 134, the Hastings company decided to

8 See Bristol and West BS v. Mothew [1998] Ch 1.

9 For a judicial perspective on directors' fiduciary duties and conflicts of interest, see CMS Dolphin Ltd v Simonet [2001] EWHC Ch 415, where Lawrence Collins J underscored that directors are held to a stringent standard of integrity and must actively fulfill their duties of honesty and stewardship. The judgment clarifies that fiduciaries encountering conflicts of interest are obliged either to address them openly or to resign, rather than simply avoiding direct breaches.

10 Avoiding voting does not always relieve a director of liability. For a related case, see Darvall v. North Sydney Brick and Tile Co Ltd (1989) 16 NSWLR 260.

11 In Centofanti v. Eekimitor Pty Ltd (1995) 15 ACSR 629, 642, the appellant, with the approval of the other directors, attempted to rescue the company. The court ruled that the director had not breached his duties. In its judgment, the court stated that the director was required to inform the board of the nature of his interest, but that detailed disclosure was not necessary. The provision in the company's constitution also referred only to the requirement to give notice, not to provide a detailed explanation.

form a subsidiary, Hastings Amalgamated Cinemas Ltd, in order to acquire the leases of two cinemas. One of the founders of the subsidiary was Hastings, but in order to secure the necessary capital for the company, the existing board of directors took shares in the newly formed subsidiary. The leases for the new cinemas were then executed in favor of Amalgamated. Later, the shares of Regal and Amalgamated were sold to a third party. After the sale, the directors made a significant profit from their shares in Amalgamated. Subsequently, a new board was appointed at Regal. This new board brought a case against the former directors on behalf of Regal, seeking to recover the profits made from the sale of shares in Amalgamated. The House of Lords dismissed the defense of the former directors, who claimed they had acquired the shares for the benefit of the company, and deemed it irrelevant. The Lords proceeded to calculate the profits made from the sale of the shares.

Section 170(2) of the Companies Act 2006 clearly states that even if a person ceases to be a director, they will remain subject to the obligations under section 175 "with respect to the use of any property, information, or opportunity of which they became aware during their tenure as a director." The concept of "opportunity" should not be understood as a proprietary right.[12] It is unrealistic to say that an opportunity belongs to someone, as it cannot be assigned, transferred, charged, or bequeathed by will.[13] There are two types of cases involving directors who leave a company and use opportunities for their own benefit. The first is where the director deliberately resigns, and the second is where the director is forcibly removed from office.[14]

In Canadian Aero Service Ltd v. O'Malley (1973) 40 DLR (3d) 371, the court held that directors who actively participated in contract

12 Although Guth v. Loft Inc. (1939) 5 A.2d 503 is a case decided in the United States, it provides valuable insight into the concept that a corporate opportunity is not necessarily a tangible asset. The use of corporate resources—such as a company-owned factory or the efforts of an employee—by a director for personal gain can also constitute a corporate opportunity.

13 See FHR European Ventures v. Mankarious [2013] EWCA Civ 17.

14 The point we are trying to emphasize here is that a director who has been forcibly removed from the company remains under the obligation not to have conflicts of interest with the company.

negotiations on behalf of the company and then resigned to form a new company and acquire the contract on behalf of the new company were liable to account to their former company for the profits made.[15]

This was a diversion of a maturing business opportunity that the company was actively pursuing. As can be seen, the resignation was intentionally motivated by the desire to obtain a personal benefit. In cases where directors are forced out of the company, courts have slightly relaxed the stringent interpretation. Based on the principle outlined in London and Mashonaland Exploration Co Ltd v. New Mashonaland Exploration Co Ltd [1891] WN 165, it has been held that there is no rigid rule preventing a director from engaging in the business of a company competing with another company of which he is also a director.[16]

Tighter applications of the rule have been seen in Philip Towers v. Premier Waste Management Ltd [2011] EWCA Civ 923 (CA) and Bhullar v. Bhullar [2003] 2 BCLC 241 (CA). In Bhullar, two directors of a small company, during a period when the company was not currently developing any further land, purchased a piece of land that the company would otherwise have been interested in for the purpose of developing it for themselves, without informing the company that the land was available for purchase. As Jonathan Parker LJ noted in the dissenting judgment in Boardman v. Phipps [1967] 2 AC 46 (HL), applying the principle that "reasonable people who see a sensible possibility of a conflict of interest could see this," he found the directors liable for breach of duty.

It was confirmed in Penny-feathers Ltd v. Pennyfeathers Property Co Ltd [2013] EWHC 3530 (Ch) that the fact the company, in other words the corporate entity, could not have exploited the misappropriated opportunity itself does not constitute a defense against claims of breach of section 175.

15 For a similar case, see Industrial Development Consultants Ltd v Cooley (1972) 1 WLR 443.

16 See Plus Group Ltd v. Pyke [2002] 2 BCLC 201 (CA).

II. Authorization by Shareholders and Authorization by Independent Directors

Prior to codification, directors under conflict of interest were required to disclose the matter at a general meeting and obtain approval. However, particularly in public companies, convening a general meeting can be difficult and costly.[17] Now, the procedure for handling such situations can be determined by including provisions in the company's articles, as established by the shareholders.[18]

Section 180(4)(a) and (b) of the Companies Act 2006 preserves this situation and provides as follows:(a) have effect subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done (or omitted) by the directors, or any of them, that would otherwise be a breach of duty, and (b) where the company's articles contain provisions for dealing with conflicts of interest, are not infringed by anything done (or omitted) by the directors, or any of them, in accordance with those provisions.

Section 175 grants the board of directors the authority to authorize conflicts of interest. The conditions for authorization under section 175(5) differ for private companies and public companies. For private companies, the power of directors to authorize conflicts of interest under section 175(5) is automatically available for companies registered on or after 1 October 2008, provided there is no provision in the articles (constitution) that invalidates such authorization (section 175(5)(a)). For companies incorporated before 1 October 2008, shareholder approval is required for the application of section 175(5).

The board of a public company may authorize conflicts of interest under section 175(5) only if the company's articles contain a provision enabling the directors to do so. Section 175(6) governs the conditions for effective director authorization. Any requirement concerning the quorum at the

17 Thomson Reuters, Directors' Duties (Practical Law, accessed June 22, 2025), https://uk.practicallaw.thomsonreuters.com/2-1002059?transitionType=Default&contextData=(sc.Default).

18 The defense of shareholder consent was successful in Sharma v Sharma [2013] EWCA Civ 1287.

meeting where the matter is considered must be met without counting the director in question or any other interested directors. Additionally, the matter must be agreed upon without their votes or, if their votes are not counted, the matter must still be agreed upon. When deciding whether to authorize a conflict, a director must, of course, act in accordance with all of the duties they owe to the company. For example, a director will breach section 172 if they vote to authorize a conflict despite not considering, in good faith, that the authorization would most likely promote the success of the company. This provision was introduced to ensure directors act honestly and make informed decisions that genuinely promote the company's success. Its advantage is preventing conflicts of interest and bad faith decisions, while its disadvantage may be limiting directors' freedom to take commercial risks.

III. Duty Not to Accept Benefits From Third Parties

Section 176: Duty Not to Accept Benefits from Third Parties (1) A director of a company must not accept a benefit from a third party conferred by reason of:(a) his being a director, or(b) his doing (or not doing) anything as a director. (2) A "third party" means a person other than the company, an associated body corporate, or a person acting on behalf of the company or an associated body corporate.

Under section 176, the company is protected against a director acting in their own interest or in the interest of any person other than the company. The director must not accept benefits from third parties conferred by reason of their position as a director or due to doing or not doing something as a director. The term "benefit" here includes bribes, secret commissions, and any kind of benefit, whether financial or non-financial. In *Premier Waste Management Ltd v Towers* [2012] 1 BCLC 67, a director borrowed machinery for personal use from one of the company's customers, and the total benefit to the director amounted to approximately £5,000. The company subsequently filed a lawsuit, and the director lost the case. The benefit conferred by the third party was found to be because of the director's position under section 176, as the third party provided the benefit on the presumption that it was due to the director's role.[19]

19 See FHR European Ventures LLP v Cedar Capital Partners Co Ltd [2014] UKSC 45.

In section 176, unlike section 175, there is no mention of board approval. However, if such a provision exists in the articles of association under section 180(4)(b), approval of third-party benefits is required, and only then can a director avoid liability. Finally, it should be noted that section 170(2)(b) specifically provides that a person who ceases to be a director remains subject to this duty "in relation to things done or omitted by him before he ceased to be a director."

IV. Directors Contracting With Their Companies

Directors and shadow directors who enter into contracts with their companies or have an interest in contracts entered into by their companies are required to declare their interests in both proposed transactions (s. 177) and existing company contracts (s. 182). In the case of proposed transactions, the company has the discretion to decide whether to proceed despite the conflict of interest, whereas in the case of existing transactions, the company's options are more limited. The remedy under section 182 is a fine for the director, and the validity of any contract entered into by the company is not affected by this provision.

V. Shareholder Authorization For Certain Transactions

The conflict of interest between the director's personal interest and his duty to the company is particularly acute in the following cases, such that it is appropriate to seek shareholder approval: substantial property transactions (ss. 190–196); loans, quasi-loans, and other credit transactions (ss. 197–214); long-term service agreements (s. 188); payments for loss of office (s. 215).

Under Section 190 of the Companies Act 2006, if a director acquires or disposes of a substantial non-cash asset from or to the company, shareholder approval must be obtained in advance. The law specifies the monetary value at which an asset is considered substantial.

Under Sections 197–214 of the Companies Act 2006, a company cannot lend money to its director or provide security for loans taken by the director without prior shareholder approval. The same applies if the company provides a guarantee or security in relation to loans obtained from third

parties. For public companies (and private companies affiliated with public companies), shareholder approval is also required for loans and financial transactions involving persons connected to the director. Shareholder approval must be obtained through a general meeting resolution. However, no approval is required if the total value of the transaction and related transactions does not exceed £10,000, or if an advance of up to £50,000 is provided to the director to finance company business.

VI. Evaluation of the Matter in the Context of Turkish Law

A. Conflict Between the Interests of Members of the Board of Directors and the Interests of the Company

The duty of care and loyalty, as regulated under Article 369 of the Turkish Commercial Code No. 6102, governs the conduct of members of the board of directors. This provision imposes an obligation upon board members to observe and protect the company's interests in accordance with the principles of honesty and good faith.[20] As explained in the rationale of the provision, a director must not place personal interests, nor the interests of the controlling shareholder, other shareholders, or individuals and legal entities affiliated with them, or the interests of third parties, above the interests of the company.

The legislature, in continuing the rationale, sets forth the expected conduct of the board of directors in the event of a conflict between the interests of the company and those of others. Specifically, the rationale provides that in situations where such a conflict exists, the board of directors must take the necessary precautions and act on the basis of an arm's length

20 Şaban Kayıhan, Şirketler Hukuku, rev. 7th ed. (Ankara: Seçkin Yayıncılık, 2024), 220–21; İlayda Yılmaz, "Anonim Şirket Yönetim Kurulu Üyeleri Aleyhine Açılacak Hukuki Sorumluluk Davası," Master's thesis, Marmara University, Social Sciences Institute, Department of Private Law, Istanbul, 2024, 10; B. Tatlı, "Anonim Şirketlerde Yönetim Kurulu Üyelerinin ve Yöneticilerin Rekabet İhlallerinden Dolayı Şirketler Hukuku Temelinde Hukuki Sorumlukları," Selçuk Üniversitesi Hukuk Fakültesi Dergisi 29, no. 4 (2021): 2679–2727, 2696; Murat Yusuf Akın and Muhammed Sulu, "Yönetim Kurulu Üyelerinin Menfaati ile Şirket Menfaatinin Çatışması Bağlamında Sorumluluk," Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 25, no. 1 (June 2019): 169–84, https://doi.org/10.33433/maruhad.583680, 171.

transaction.[21] This means that, without showing preferential treatment to the controlling shareholder or related parties, the board must negotiate under competitive conditions, prioritizing the interests of the company.

Moreover, the provision imposes a broad duty of loyalty upon the board member, which extends beyond the obligation to comply with the prohibition on competition.[22] It also mandates adherence to the prohibition of insider trading[23] and the rules that govern self-dealing transactions. It is thus evident that the clear and justified intention of the legislature is to ensure that, in cases involving a conflict of interest, the interests of the company are given precedence.

B. Fault-Based Liability of Members of the Board of Directors

In a liability lawsuit, for members of the board of directors to be held legally accountable due to the breach of their duties, it must first be determined whether a legal obligation exists.[24] Since the relationship between

21 At this point, it should be noted that the nature of the due diligence required of directors is grounded, as indicated in the Turkish Commercial Code's legislative rationale, in the necessity for directors to make decisions in accordance with corporate governance principles under the "business judgment rule." See Turkish Commercial Code legislative rationale, art. 369; Cafer Eminoğlu, "Anonim Şirkette Özen Ve Bağlılık Yükümlülüğünün Kişi Bakımından Kapsamına İlişkin Bazı Değerlendirmeler," *Ankara Barosu Dergisi*, no. 80, no. 1 (2021): 77–105, 85; Büşra Kula, Anonim Şirket Özelinde Pay Sahibinin Yönetim Kurulu Üyelerinin Sorumluluğundan Kaynaklı Zararları Talep Edebilme Hakkı, Master's thesis, Ankara Yıldırım Beyazıt University, Social Sciences Institute, Department of Private Law, Ankara, 2024, 32.

22 As provided in Article 396(1) of the Turkish Commercial Code No. 6102, company directors are prohibited from engaging, either personally or through a representative, in any business activity that falls within the scope of the company's operations without prior authorization from the general assembly. Moreover, they are not permitted to become unlimited liability partners in another company operating in the same field (Turkish Commercial Code [Law No. 6102], art. 396(1)).

23 As stipulated in Article 396(1) of the Turkish Commercial Code, company directors are prohibited from engaging, either personally or through a representative, in any business that falls within the company's scope of activities without obtaining prior authorization from the general assembly. Furthermore, they may not join another company operating in the same field as an unlimited liability partner. Insider trading involves the purchase or sale of securities based on material, non-public information (Arzu Ozsozgun, Emel Ozarslan, and Halil Emre Akbas, "Insider Trading from the Perspectives of Two Ethical Theories: Utilitarianism and Kant's Approach," *International Journal of Business and Management Studies* 2, no. 1 [June 2010]: 2).

24 Emrah Biçimli, *Anonim Şirketlerde Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu, Master's thesis, Dicle University*, Social Sciences Institute, Department of Private Law, Commercial Law Division, Diyarbakır, 2023, 36.

the company and its board members is contractual[25] in nature, the elements of liability must be assessed in accordance with the general provisions of the Turkish Code of Obligations No. 6098. However, because a specific provision exists—namely Article 553 of the Turkish Commercial Code No. 6102—this article must also be taken into consideration.

Pursuant to Article 553(1) of the Turkish Commercial Code No. 6102, the liability of board members is based on fault. Accordingly, the liability of members arises only where there is fault, as prescribed by law. The relevant provision does not explicitly distinguish between intent and negligence in defining fault. However, according to the rationale of the article, damages resulting from faulty conduct—whether arising from intent or negligence—fall within the scope of liability.[26] As a consequence of fault-based liability, unless board members can prove that they acted without fault in actions and transactions carried out on behalf of the company, their liability persists.

According to Article 114(2) of the Turkish Code of Obligations No. 6098, the provisions relating to tort liability shall apply by analogy in cases of contractual breach. Therefore, the required elements for establishing this type of liability should be assessed in the same manner as for tort liability. In this regard, Article 49(1) of the Turkish Code of Obligations No. 6098, which regulates liability arising from torts, must be examined. This article provides that any person who unlawfully and at fault causes harm to another shall be obligated to remedy such harm. From this definition, it is understood that the essential elements necessary to establish tort liability—and, by analogy, liability for breach of contract—are the same.

25 According to those supporting this view, the election of a person as a board member by the general assembly constitutes an offer (invitation to treat), while the elected member's positive acceptance forms the acceptance. Consequently, these offer and acceptance declarations create a contractual relationship between the parties. See Oğuz İmregün, Anonim Ortaklıklar, 4th ed. (Istanbul: Yasa Yayınları, 1989), 242; Necla Akdağ Güney, Anonim Şirket Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu, expanded and updated 2nd ed. (Istanbul: Vedat Kitapçılık, 2010), 100.

26 H. Pulaşlı, *"Türk Ticaret Kanunu Tasarısına Göre Anonim Şirketlerde Yöneticilerin Hukukî Sorumluluğu,"* in Prof. Dr. Alin Naim İNAN'a Armağan (Ankara: Seçkin Kitapevi, 2009), 573; B. Tatlı, "Anonim Şirketlerde Yönetim Kurulu Üyelerinin Ve Yöneticilerin Rekabet İhlallerinden Dolayı Şirketler Hukuku Temelinde Hukuki Sorumlulukları," *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 29, no. 4 (2021): 2679–2727, 2696–2699.

It must be noted, however, that harm to the interests of the company does not automatically give rise to the liability of a board member. While managing the company, a member may act with a degree of risk, and these risks may not always yield the desired results. What is crucial in this context is whether the member caused the harm by breaching the duty of care and loyalty.[27]

When determining the degree of fault, the prevailing view in legal doctrine and the jurisprudence of the Court of Cassation adopts an objective standard.[28] Under this view, whether a person has exercised due care is assessed based on how an "average and reasonable person" would act under similar circumstances. The exercise of diligence and care is evaluated separately for each case, and the standard of conduct expected of a prudent person in comparable conditions serves as the benchmark. Under the objective fault principle, the same conduct is expected from everyone under the same circumstances.[29]

The use of the term "with fault" in Article 553 of the Turkish Commercial Code No. 6102 has led to some ambiguity regarding the burden of proof. In cases involving "liability arising from a contractual or contract-like legal relationship," the general framework of the Turkish Code of Obligations No. 6098 applies. Accordingly, in obligations arising from a contract, the defendant is presumed to be at fault and must prove absence of fault in order to be exonerated. Consequently, although Article 553(1) of the Turkish Commercial Code No. 6102 does not expressly contain a presumption of fault, the defendant board member, who is deemed to be at fault, bears the burden of proving their faultlessness.[30]

27 Barnas Kantarci,*Anonim Şirketlerde Yönetim Kurulunun Hukuki Sorumluluğu*, Master's thesis, Dicle University, Graduate School of Social Sciences, Department of Private Law, Diyarbakır, 2021, 65.

28 Hasan Pulaşlı, "Türk Ticaret Kanunu Tasarısına Göre Anonim Şirketlerde Yöneticilerin Hukukî Sorumluluğu," *BATİDER* 2009, Vol. XXV, No. 1, 27–63, 34; Necla Akdağ Güney, Anonim Şirket Yönetim Kurulu, 2nd ed. (Istanbul, 2016), 313–319.

29 Supreme Court of Turkey, General Assembly of Civil Chambers, dated December 11, 2002, decision no. 2002/4-993, E. 2002/1052, accessed via Sinerji Legislation Database, May 19, 2025. According to this decision, bank managers, as professional bank executives, must have a thorough understanding of the country's economic structure while managing the bank's assets, exercising diligence and knowledge beyond ordinary standards, and engaging only in activities with minimal or no risk.

30 Akın and Sulu, *"Yönetim Kurulu Üyelerinin Menfaati ile Şirket Menfaatinin Çatışması Bağlamında Sorumluluk"*, 173; Abuzer Kendigelen, *Yeni Türk Ticaret Kanunu, Değişiklikler, Yenilikler ve İlk Tespitler*, 3rd ed. (Istanbul, 2016), 459–60.

On the other hand, in cases involving "tort liability," the general principles of the Turkish Code of Obligations No. 6098 remain applicable, and the plaintiff is required to prove that the defendant acted with fault.[31]

C. Joint Liability With Differentiated Contribution in the Responsibilities of Board Members

One of the crucial aspects in determining the extent of liability in lawsuits concerning damages suffered by a company as a result of acts contrary to the company's interest is the principle of joint liability with differentiated contribution.

Under the abrogated Turkish Commercial Code (TCC) No. 6762, the principle of absolute joint liability was adopted with respect to the liability of board members of joint-stock companies. Article 336(1) of the former TCC stipulated that members of the board of directors were jointly and severally liable for damages caused by their intentional acts or negligence in failing to fulfill their duties assigned under the law or the company's articles of association. According to this provision, each board member was liable for the full amount of the damage to the company and its creditors, regardless of the degree of individual fault, while retaining the right to seek recourse from the other members in proportion to their respective fault in the internal relationship.[32] This represented a regime of absolute (or full) joint liability.[33]

Joint and several liability[34] arises when multiple individuals collectively cause harm and are obliged to compensate the entire loss. In cases of full joint liability, each liable party may be held accountable by the creditor(s) for the entire amount of damage. Upon partial or full satisfaction

31 Akın and Sulu, *"Yönetim Kurulu Üyelerinin Menfaati ile Şirket Menfaatinin Çatışması Bağlamında Sorumluluk"*, 172.

32 Levent Uysal, "6762 Sayılı Türk Ticaret Kanunu ve Türk Ticaret Kanunu Tasarısı Kapsamında Anonim Şirketlerde Yönetim Kurulu ve Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu—II," *Türkiye Barolar Birliği Dergisi* 81 (2009): 1–34, 5–6.

33 Muhammet Yavuz Küçüker, *Anonim Şirket Yönetim Kurulu Üyelerinin Türk Ticaret Kanununa Göre Hukuki Sorumluluk Şartları*, Master's thesis, Department of Private Law, Ankara Yıldırım Beyazıt University, Graduate School of Social Sciences, Ankara, 2023, 52.

34 Joint liability is regulated under Articles 61 and 62 of the Turkish Code of Obligations (TCO).

of the obligation by one or more of the debtors, the other obligors are discharged proportionally to the amount paid. Creditors may choose to pursue any of the liable parties without limitation.

With the enactment of the Turkish Commercial Code No. 6102, the principle of differentiated joint liability was introduced into Turkish law, inspired by Article 759 of the Swiss Code of Obligations as revised in the 1991 reform.[35] As is well established in legal doctrine, no one should be held liable for damage they did not cause. Differentiated joint liability reflects the application of this general legal principle within the framework of corporate liability in joint-stock companies. This concept permits the evaluation of the degree of fault—previously considered only in internal relations—to be taken into account also in external relations. Consequently, each member of the board of directors may assert individual defenses based on the degree of fault even against third parties, and will only be liable for that portion of the damage that can be attributed to them based on their fault and the specific circumstances of the case.[36]

Under this system, a board member who is liable for damage jointly caused with others will not be personally responsible for the entire loss vis-à-vis third parties, but only for the part for which he or she is individually at fault.[37] Indeed, Article 557(1) of the TCC stipulates: "If more than one person is liable for the same damage, each shall be jointly and severally liable with the others only to the extent that the damage can be personally attributed to them based on their fault and the circumstances."

D. Authorized Parties to Initiate Liability Proceedings

In joint-stock companies, if members of the board of directors fail—either through intentional misconduct or negligence—to fulfill their legal or contractual duties arising from the law or the articles of association, and such failure causes harm to the company, its creditors, or shareholders, legal

35 Akın and Sulu, *Yönetim Kurulu Üyelerinin Menfaati ile Şirket Menfaatinin Çatışması Bağlamında Sorumluluk,* 174.

36 Mustafa Yasir Aktepe, *Anonim Şirketlerde Yönetim Kurulu Üyelerinin Hukuki Sorumluluğuna Etki Eden Haller* (Istanbul: On İki Levha Yayıncılık, 2024), 61.

37 Ender Dedeağaç and Oğuzhan Sapan, *Ananoim Şirketlerde Yönetim Kurulu Ve Sorumluluğu* (Ankara: Ankara Barosu Yayınları, 2013), 69–72.

action may be brought against the relevant board members.[38] This legal action is classified as a liability lawsuit, and its legal foundation is set forth in Article 553 of the Turkish Commercial Code No. 6102 (Turkish Commercial Code).

Pursuant to Article 555(1) of the Turkish Commercial Code, the right to file a liability action for compensation of damages suffered by the company is granted both to the company itself[39] and to each individual shareholder. Naturally, other members of the board of directors may also initiate such proceedings on behalf of the company.[40] However, in practice, circumstances may arise in which the company refrains from bringing an action—either due to negligence or because certain board members exert significant control over the company, thereby discouraging legal action. For this reason, the right to file such lawsuits has also been conferred upon shareholders.[41]

38 Barnas Kantarci, *Anonim Şirketlerde Yönetim Kurulunun Hukuki Sorumluluğu*, Master's thesis, Dicle University, Graduate School of Social Sciences, Department of Private Law, Diyarbakır, 2021,72.

39 Necla Akdağ Güney, *Anonim Şirketlerde Yönetim Kurulu*, 2nd ed. (Istanbul, 2016), 330.

40 If a lawsuit is to be filed against the incumbent board members, there must be no conflict of interest among the directors representing the company in the litigation. Pursuant to Article 426/1-b-3 of the Turkish Civil Code No. 4721, in the event of a conflict of interest, a custodian (representative) shall be appointed to represent the company. If no resolution regarding the appointment of such a custodian has been adopted by the general assembly, any shareholder may request the court to appoint a custodian. Ersin Çamoğlu, *Anonim Şirketlerde Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu*, 3rd ed. (Istanbul: 2010), 122; İlayda Yılmaz, *"Anonim Şirket Yönetim Kurulu Üyeleri Aleyhine Açılacak Hukuki Sorumluluk Davası,"* Master's thesis, Marmara University, Social Sciences Institute, Department of Private Law, Istanbul, 2024, 46.

41 In its decision dated May 30, 2024, numbered 2023/1202 E. and 2024/4540 K., the 11th Civil Chamber of the Court of Cassation held that "According to the decision of the Regional Court of Appeal referenced above by date and number, it was alleged that the defendant directors' mismanagement caused loss to the company and thereby also to the plaintiff shareholder, indicating that the damage in question constitutes indirect harm to the plaintiff. In light of this, the Court of First Instance correctly concluded that the claim could only be brought on the condition that any awarded compensation be granted in favor of the non-litigant company. Since the plaintiff sought compensation to be paid directly to themselves, the court properly dismissed the case. Accordingly, the plaintiff's attorney's appeal was substantively rejected. Upon review, the Supreme Court found that the contested decision was procedurally and legally sound based on the parties' reciprocal allegations and defenses, evidentiary materials, applicable legal provisions, the characterization of the legal relationship, conditions of the lawsuit, and rules of procedure and evidence, as well as

While Article 309 of the repealed Turkish Commercial Code No. 6762 had granted creditors the right to initiate liability actions[42], the current Turkish Commercial Code does not provide such a general right. Instead, Article 556 stipulates that creditors may seek compensation to be paid to the company only in the event of the company's bankruptcy.

A liability lawsuit may be initiated not only as a direct action for damages incurred by the company, but also as a recourse action for reimbursement of wrongful payments made by the company to third parties. Additionally, such a lawsuit may take the form of an annulment action[43] based

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the reasoning stated in the decision. The grounds presented in the plaintiff's petition did not warrant reversal of the ruling. "Thus, it was affirmed that in derivative liability actions filed by shareholders against the board of directors for indirect damages suffered by shareholders, compensation must be adjudicated in favor of the company rather than directly to the shareholders themselves.(Source: https://karararama.yargitay.gov.tr , Accessed June 19, 2025)

42 In its ruling dated October 23, 2018, numbered 2016/13409 E. and 2018/6594 K., the 11th Civil Chamber of the Court of Cassation stated: "As previously explained, injured creditors also have the right to bring claims against the director. This is because the director's conduct that reduces or impairs the company's assets in violation of legal provisions and the articles of association causes indirect harm to the creditors. In other words, the direct harm suffered by the company results in indirect harm to the creditors. Therefore, in a claim brought by a creditor for indirect damages, any awarded compensation may be requested to be granted not to the creditor personally but to the company. In the specific dispute, it is alleged that due to the culpable actions of the defendant directors, the receivable could not be collected from the non-litigant company, causing loss to the plaintiff company. Accordingly, the damage in question constitutes indirect harm to the plaintiff. In light of this, the court should have ruled that the claim, filed under Article 309 of the repealed Code No. 6762, can only be brought on the condition that any awarded compensation be adjudicated in favor of the non-litigant company. Since the plaintiff sought payment of the compensation directly to itself, the claim should have been dismissed. The court's acceptance of the claim, based on an erroneous evaluation and insufficient reasoning, was incorrect and warranted reversal." (Source: https://karararama.yargitay.gov.tr, Accessed May 19, 2025)

43 Pursuant to Article 371 of the Turkish Commercial Code (TCC), the board member(s) authorized to represent the company may perform all kinds of acts and legal transactions within the company's purpose or business scope on behalf of the company and use the company's title for such purposes. Should a board member undertake a transaction outside the company's purpose or business scope, such transaction falls within the company's legal capacity but exceeds the board member's authority to represent the company. The company suffering loss due to such unauthorized transaction may seek recourse against the representative who performed the transaction. According to Article 371(2) TCC, if the company proves that the third party knew or ought to have known that the transaction was outside the business scope,

on the prohibition of transactions with the company as regulated under Article 395 of the Turkish Commercial Code, in order to invalidate a transaction conducted in violation of this provision.

Under Article 341 of the repealed Turkish Commercial Code No. 6762 , initiating a liability lawsuit on behalf of the company was subject to certain procedural conditions. Either the general assembly had to adopt a resolution to file a claim against the members of the board of directors, or, if it resolved not to bring an action, shareholders representing at least one-tenth of the share capital could initiate the lawsuit, provided they did so within one month from the date of the general assembly's resolution or the date of their request. In contrast, the current Turkish Commercial Code does not require a general assembly resolution in order for a liability lawsuit to be filed against the board of directors on behalf of the company.[44]

In cases where the board of directors is composed of a single member, a conflict of interest may arise, preventing the legal representative from acting to protect the company's interests. In such cases, a representative trustee is appointed to the company under Article 426(3) of the Turkish Civil Code No. 4721 (Turkish Civil Code), in order to initiate the liability lawsuit.[45] The appointed trustee represents the single-director joint-stock company in the lawsuit with the objective of restoring the company's interests.

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the company will not be bound by the transaction. Ayşe Selcen Kutgi Taşan,"Anonim Şirketlerde Temsil Yetkisinin Yönetim Kurulu Tarafından Kullanılması," Master's thesis, Istanbul Commerce University Social Sciences Institute, Istanbul, 2019, 112; İlayda Yılmaz, Anonim Şirket Yönetim Kurulu Üyeleri Aleyhine Açılacak Hukuki Sorumluluk Davası, Master's thesis, Marmara University, Social Sciences Institute, Department of Private Law, Istanbul, 2024, 40–41.

44 Murat Yusuf Akın and Muhammed Sulu, "Yönetim Kurulu Üyelerinin Menfaati ile Şirket Menfaatinin Çatışması Bağlamında Sorumluluk," *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 25, no. 1 (June 2019): 169–84, https://doi.org/10.33433/maruhad.583680, 175

45 Reha Poroy, Ünal Tekinalp, and Ersin Çamoğlu, *Ortaklıklar Hukuku I* (Istanbul: Beta, 2014), 396.

E. Violation of the Obligation to Comply With the Prohibition on Transactions and Indebtedness With the Partnership

Members of the board of directors are also subject to the obligation to comply with the prohibition on conducting transactions and incurring debts with the partnership. A member of the board of directors may not enter into any transaction with the company on their own behalf or on behalf of others. This prohibition may be lifted by a resolution of the general assembly. If the prohibition is not observed, the transaction shall be considered null and void *ab initio* and the partnership may assert the invalidity of the transaction itself; however, the board of directors cannot invoke this invalidity.[46] Provisions of the Banking Law remain reserved. (Article 395, paragraphs 1 and 4 of the Turkish Commercial Code, Law No. 6102). The conduct of the board member in this regard may also give rise to liability for damages pursuant to Article 553 of the Turkish Commercial Code, Law No. 6102. Members of the board who do not hold shares, as well as their relatives enumerated in Article 393 who are non-shareholders, are prohibited from borrowing cash from the company. The company shall not provide suretyship, guarantees, or collateral, nor assume liabilities or take over debts for these persons.[47] Otherwise, pursuant to Article 395, paragraph 2 of the Turkish Commercial Code, Law No. 6102, creditors of the company may pursue these persons directly for the amount borrowed by the company, to the extent of the company's obligations. Persons who borrow from the company contrary to Article 395, paragraph 2, shall be subject to a judicial fine of no less than three hundred days (Article 562, paragraph 5, subparagraph c of the Turkish Commercial Code, Law No. 6102). Pursuant to Article 395, paragraph 3 of the Turkish Commercial Code, Law No. 6102, companies that are part of a corporate group may, subject to reservation of Article 202, act as guarantors and provide surety for each other.[48]

46 Şaban Kayıhan, *Şirketler Hukuku*, 7th rev. ed. (Ankara: Seçkin Yayıncılık, 2024), 221–222.

47 Ozan Can, "Şirkete Borçlanma Yasağının İhlâli, Şirket Alacaklılarına Anonim Şirketten Bilgi Alma Hakkı Bahşeder mi?" *İnönü Üniversitesi Hukuk Fakültesi Dergisi* (İnÜHFD) 8, no. 2 (2017): 480.

48 Kayıhan, *Şirketler Hukuku*,222.

VII. Circumstances Excluding the Liability of Members of the Board of Directors

A. General Provisions

In certain cases, persons subject to liability may be exempted from responsibility. The principal grounds for such exemption include settlement, release, and the statute of limitations. Additionally, it may be asserted that no damage has occurred, that there is no causal link between the act committed and the damage incurred, or that unlawfulness has not materialized.

Furthermore, if the plaintiff fails to prove the fault of the liable party, no liability arises for the responsible individuals. In order for a member of the board of directors to be held liable for damages caused to the company's interests, it is necessary that the member be held accountable in the first instance. This requires that the board member's fault result in harm to the company's interests. In the concrete case, a board member who has acted in accordance with the objective standard of care and the duty of loyalty cannot be held liable. Even if damage exists in such circumstances, fault is absent. The liability of members of the board of directors is fault-based liability. For example, a member of the board who either does not attend a board meeting at which a decision detrimental to the company's interests is made—due to a justified excuse—or attends but votes against the decision, should not be held liable for the damage. This principle also aligns with the differentiated joint and several liability doctrine recognized in Article 557 of the Turkish Commercial Code, Law No. 6102.

Another defense that may preclude liability arising from the breach of company interests by a board member is the statute of limitations defense set forth in Article 560 of the Turkish Commercial Code, Law No. 6102. Article 560 provides that for extended limitation periods, the "criminal statute of limitations" in criminal law shall apply. As explicitly indicated by the provision, three types of limitation periods are envisaged in liability claims: a short limitation period of two years from the date the plaintiff became aware of both the damage and the liable party; a long limitation period of five years from the date of the act causing the damage; and the criminal statute of limitations, which applies to the damage claims where the harmful

act is punishable under the Turkish Penal Code, Law No. 5237, and the criminal law provides a longer limitation period.[49] The commencement of the two-year limitation period is the moment when both the damage and the liable party are known together. The knowledge of only one of these is insufficient to start the two-year period.[50] For each liable party causing the same damage, the limitation period begins from the date each is known by the injured parties.

Liability may also be reduced or extinguished by the defense that the company, its shareholders, and creditors have jointly contributed to the damage alongside the liable parties. The legal basis for this defense is found in Article 52 of the Turkish Code of Obligations, Law No. 6098. Pursuant to this provision, if there is concurrent fault or participation in the act causing the damage, the court may, depending on the circumstances, decide to reduce or extinguish the compensation. However, since the compensation of damages to the company is always necessary, the burden of indemnity shall primarily fall upon the party principally at fault. According to Article 52, paragraph 2 of the Turkish Code of Obligations, if the liable party would become destitute upon payment of compensation, and if the damage was caused by slight fault and justice requires, the court may reduce the amount of compensation. This rule is also applicable during the management and representation by the company's board of directors. If the conditions for the application of Article 52 of the Turkish Code of Obligations exist in the specific case, the court may mitigate or extinguish the indemnity obligation of the board member.[51]

For instance, the immediate implementation of a general assembly decision that is clearly contrary to the interests of the company constitutes a breach of the duty of care and loyalty of the board members. In this respect, following a general assembly decision detrimental to the company's interests, the board of directors should seek instructions from the general

49 Reha Poroy, Ünal Tekinalp, and Ersin Çamoğlu, Ortaklıklar Hukuku I (Istanbul: Beta, 2014), 402–405.

50 Ersin Çamoğlu, Anonim Ortaklık Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu (Kamu Borçlarından Sorumluluk ile), 3rd rev. and expanded ed. (Istanbul: Vedat Kitapçılık, 2010), 260.

51 Murat Yusuf Akın and Muhammed Sulu, Yönetim Kurulu Üyelerinin Menfaati ile Şirket Menfaatinin Çatışması Bağlamında Sorumluluk, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmalı Dergisi 25, no. 1 (2019): 169–184, 176.

assembly. If the general assembly persists in its prior decision despite a warning, the board's execution of that decision shall relieve the board of liability.[52] However, it must be remembered that the board of directors must file an annulment action against the general assembly decision that is contrary to the company's interests.

It is also appropriate to briefly mention liability insurance here. Pursuant to Article 361 of the Turkish Commercial Code, Law No. 6102, liability insurance is envisaged for damages that may be caused to the company by the culpable acts of board members; if the insurance exceeds twenty-five percent of the company's capital, it shall be announced by the Capital Markets Board and published in the stock exchange bulletin for publicly traded companies. This insurance does not eliminate the legal liability of board members but serves to secure the company's interests by mitigating the risk of payment upon damage. This insurance, governed by detailed provisions under Articles 1473[53] and following of the Turkish Commercial Code, has been adopted in German and Swiss law and represents a preliminary "incentive" step in Turkish law.

B. Discharge (İbra)

1. General Overview

The term "discharge" (İbra), originating from Arabic, means "exoneration" or "clearance." A discharge decision taken by the general assembly—the authorized organ of the legal entity—constitutes a resolution whereby the acts performed by the board of directors, who are accountable to the company, are formally deemed compliant with laws and regulations. In the law of obligations, discharge is effectuated through a contractual agreement, thus requiring the creditor's consent to waive the debt, which is subject to the debtor's acceptance.[54]

52 Reha Poroy, Ünal Tekinalp, and Ersin Çamoğlu, *Ortaklıklar Hukuku I* (Istanbul: Beta, 2014), 394.

53 According to Article 1473, paragraph 1 of the Turkish Commercial Code, liability insurance obliges the insurer—unless otherwise agreed in the contract—to indemnify the injured party up to the limit specified in the policy for any liability of the insured arising from an event occurring within the insurance period, even if the resulting damage manifests subsequently.

54 Mustafa Aksu, "Türk Borçlar Kanununun Getirdiği Yeniliklerden İbra," *Yaşar Üniversitesi Dergisi* 8, no. Special Issue (June 2013): 106.

The decision to discharge the board members from liability by the company constitutes an irrevocable duty and authority of the general assembly pursuant to Article 408, paragraph 1, subsection (b) of the Turkish Commercial Code, Law No. 6102. As a unilateral declaration of intent by the general assembly, the discharge decision has a transformative effect. Rights creating new legal consequences, once exercised, produce a new legal status and expire, thereby rendering them irrevocable. Indeed, the Code explicitly states that the discharge decision cannot be revoked by a general assembly resolution, except for annulment actions against general assembly decisions, a rule which—albeit arguably superfluous—serves to reaffirm this principle (Article 558, paragraph 1, Turkish Commercial Code).[55]

Practically, the issuance of a discharge decision means that the company may no longer initiate liability claims against the board members. Furthermore, under Article 558, paragraph 2, the company, shareholders who voted in favor of the discharge, and those who knowingly acquired shares after the discharge decision lose their right to bring liability actions regarding matters covered by the discharge. Conversely, shareholders who either fail to attend the general assembly meeting where the discharge decision is adopted with a valid excuse or abstain from voting maintain their right to litigate. Moreover, a shareholder who transferred their shares after voting against the discharge cannot alter this outcome. A majority decision discharging the board, known to a new shareholder, extinguishes the latter's right to bring suit.

The repealed Commercial Code, Law No. 6762, contained no provisions regarding whether shareholders could bring liability claims against discharged board members. However, doctrine has generally accepted, based on Article 758 of the Swiss Code of Obligations and the principle of good faith under Article 2 of the Turkish Civil Code, Law No. 4721, that shareholders who vote in favor of discharge lack the right to bring suit. The current Turkish Commercial Code explicitly codifies this position. The same provision further stipulates that shareholders who voted against the discharge must initiate claims within six months from the date

55 Akın and Sulu, *Yönetim Kurulu Üyelerinin Menfaati ile Şirket Menfaatinin Çatışması Bağlamında Sorumluluk,* 177.

of discharge[56]; otherwise, their right lapses. This forfeiture period applies solely to company shareholders and does not extend to creditors, who retain the right to bring liability claims within statutory limitation periods.

It must be noted, however, that if a shareholder's will was impaired during voting for any reason, the validity of their vote in favor of discharge may be annulled, thereby preserving their right to bring a liability claim. In this context, if material facts are intentionally concealed from shareholders and later come to light, this constitutes fraud grounds to annul the shareholder's discharge vote and, under Article 445 of the Turkish Commercial Code, to revoke the general assembly's discharge decision concerning board members. Nonetheless, even when such non-binding votes are disregarded, if the decision threshold for discharge is still met, the discharge remains valid. Furthermore, the phrase "...with respect to the disclosed material facts encompassed by the discharge..." in Article 558, paragraph 2—which, despite some textual ambiguity, parallels the provision in Article 758 of the Swiss Code of Obligations—limits discharge to matters disclosed and known by the general assembly. In other words, board members are not considered discharged for facts that were not presented to or known by the general assembly.

Discharge may be express or implied. According to Article 424 of the Turkish Commercial Code, the general assembly's approval of the company's balance sheet constitutes an implied discharge unless a contrary reservation is recorded.[57] Discharge affects board members, executives, and auditors. However, if significant matters are omitted or inadequately presented in the balance sheet, or if deliberate action has concealed the company's true financial status, such approval shall not result in discharge. Notably, although the initial title of the provision was "Discharge," the subcommittee amended it to "Decision on Approval of the Balance Sheet." Unlike the former Turkish Commercial Code, express discharge has become a

56 Özlem Karaman Coşgun and Hanife Doğrusöz Koşut, "TTK Articles 549–561," Şirketler Hukuku Şerhi, *Türk Ticaret Kanunu Md.*452–563, ed. Prof. Dr. Kemal Şenocak, vol. 3 (Ankara, 2023), 3922–25.

57 Büşra Kula, *Anonim Şirket Özelinde Pay Sahibinin Yönetim Kurulu Üyelerinin Sorumluluğundan Kaynaklı Zararları Talep Edebilme Hakkı (Dolayısıyla Zararın Tazmini Davası)*, Master's thesis, Ankara Yıldırım Beyazıt University, Social Sciences Institute, Department of Private Law, Ankara, 2024, 60.

mandatory agenda item of the ordinary general assembly pursuant to Article 409 of the Turkish Commercial Code. Accordingly, the discharge form described in Article 424 constitutes implied discharge.

Since no special majority is prescribed for the adoption of discharge decisions, such resolutions require a simple majority. Pursuant to Article 436, paragraph 2, of the Turkish Commercial Code, company board members and persons authorized to sign on behalf of management do not possess voting rights in decisions concerning the discharge of board members. If disqualified persons vote and their votes materially affect the adoption of the discharge decision, the decision may be challenged and annulled. However, if their votes do not affect the decision's outcome, the general assembly resolution on discharge remains valid. Moreover, disqualified persons may not exercise voting rights either personally or as proxies for other shareholders in matters concerning their own discharge.

2. Discharge Lawsuit

Members of the board of directors may request to be discharged in order to exonerate themselves, free themselves from liability, and restore trust in the contractual relationship with the company. Although the decision on discharge is one of the mandatory agenda items and non-delegable authorities of the ordinary general assembly, it may be postponed, delayed, or even omitted. In such circumstances, the board members may file a discharge lawsuit, requesting the court to substitute for the general assembly and render a decision on their discharge. This action is characterized as a negative declaratory lawsuit. The absence of a legal remedy for the discharge procedure would leave the right unprotected and could lead to arbitrariness and abuse of rights.

Alternatively, instead of filing a discharge lawsuit, board members may pursue an annulment action against the general assembly's decision. While such an action may result in the annulment of the general assembly resolution, the court will not issue a discharge decision itself.[58]

58 In its judgment numbered 2023/5361 E., 2024/9065 K., dated December 16, 2024, the 11th Civil Chamber of the Court of Cassation addressed a case in which the plaintiff's attorney challenged the resolutions numbered 6 and 7 adopted at the ordinary general assembly meeting of the defendant company held on May 14, 2018. Accord-

Furthermore, it is accepted that board members may bring a discharge lawsuit following the dismissal of a liability claim against them. Such liability claims may be rejected either on the grounds that no damage was caused to the company or due to failure of proof. Due to the connection between discharge lawsuits and liability claims, they shall be consolidated procedurally pursuant to Article 166 of the Turkish Code of Civil Procedure No. 6100. However, if it becomes clear that no liability claim has been filed, the discharge lawsuit brought to ascertain the validity of the withheld discharge decision may be heard and adjudicated by the court.[59]

In a discharge lawsuit where the legal entity of the joint-stock company is named as the defendant, the burden of proof lies with the plaintiff board member initiating the action. The joint-stock company, as the defendant, is represented by a court-appointed trustee acting in lieu of the board of directors. Accordingly, the plaintiff board member (or the board

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ing to the plaintiff's representative, the resolution under agenda item 6 decided not to grant discharge (ibra) to the plaintiff and resolved to file a liability action against them. The plaintiff alleged that the resolutions numbered 6 and 7 were contrary to the law, the articles of association, the principle of good faith, the principle of equal treatment, and that resolution 7 was also in violation of the articles of association, thereby seeking annulment of these resolutions. However, although the resolution purported to open a liability action against the plaintiff, no such action was actually brought. The Court of Cassation held that the plaintiff has a legitimate interest in requesting the annulment of resolution 6, and therefore reversed the decision of the Regional Court of Appeal. It was observed that, despite the plaintiff's desire to be granted discharge, the general assembly did not grant such discharge. Consequently, the court emphasized that, in order to relieve board members from ongoing stress, filing a discharge (ibra) lawsuit constitutes a more effective remedy than an annulment action.

59 "According to the established jurisprudence of our Chamber, for a board member to have standing to file an action seeking the annulment of a general assembly resolution that denies their discharge, a reasonable period must have elapsed since the date of that resolution without a liability lawsuit being initiated against them. Otherwise, if a liability action has been filed, the director lacks legal interest in requesting the annulment of the non-discharge decision. This is because the validity of the non-discharge resolution will be substantively examined and assessed within the context of the existing liability lawsuit, based on its specific grounds. However, in the present case, during the general assembly meeting held on June 28, 2011, alongside the decision not to grant discharge to the plaintiff, it was also resolved that no liability action would be brought against the plaintiff. Consequently, with respect to the concrete dispute at hand, the plaintiff, as a board member, possesses legal interest in initiating this action." This reasoning is reflected in the decision of the 11th Civil Chamber of the Court of Cassation, case number 2013/18125 E., 2014/19043 K., dated December 4, 2014. (Accessed June 15, 2025, https://kararara ma.yargitay.gov.tr/)

collectively) bears the burden of proving that they exercised due diligence in managing the company. Nonetheless, it is unreasonable to require proof that the board member exercised due care in every act throughout the entire term of office. It suffices to prove that the board member exercised the degree of diligence that would justify discharge concerning the transactions carried out during the relevant period.

Ultimately, it should be emphasized that although the discharge lawsuit is not expressly regulated by statute, it is an important remedy that protects the legitimate interests of board members and maintains the balance of interests within the company.

3. Settlement Agreement

Settlement is a contract concluded before the court during ongoing litigation by which the parties partially or fully resolve their dispute. As a result of a settlement agreement, any legal liability of the board members towards the company, whether existing or potential, is terminated. In return, where the company's interests are harmed by the settlement, monetary compensation may be stipulated. Unlike discharge, a settlement agreement is a bilateral contractual obligation under the law of obligations.

An examination of the provisions of the Turkish Commercial Code reveals that there is no requirement for a general assembly resolution either for waiver or settlement in liability claims.

The company's general assembly authorizes the members of the board, other than the board member who will enter into the settlement agreement, to execute the contract on behalf of the company. If the board consists of a single member, it is our opinion that a court-appointed trustee is necessary in such cases. Generally, the settlement agreement concluded with the relevant board member binds the entire company. However, shareholders who vote against the general assembly resolution authorizing the settlement agreement should be entitled to bring liability claims for their direct damages. Conversely, if shareholders personally sign the settlement agreement alongside the company, they should be considered bound by the agreement and thereby precluded from initiating lawsuits. Otherwise, such a position would violate the principle of good faith set forth in Article 2 of the Turkish Civil Code.

Additionally, it should be noted that settlement agreements are valid only with respect to disputes over which the parties may freely dispose. In this regard, as noted above concerning discharge, considering that the company has a distinct legal personality and interest separate from its shareholders, the question of whether shareholders have the right to waive claims for company damages merits serious discussion.

VIII. A Brief Comparıson of Two Legal Systems

The fundamental differences between the two legal systems include the fact that under English law, directors can be held liable even after they have left the company, whereas Turkish law limits liability to the balance sheet period. Furthermore, the concept of deriving benefits contrary to the interests of the company is defined more broadly under English law compared to Turkish law. However, in my opinion, there are no significant differences between English law, which is based on case law, and Turkish law. Both legal systems include provisions that require shareholder approval and aim to protect the interests of the majority of the company. Granting shareholders the right to approve directors' actions is a common feature. The absence of the institution of a discharge lawsuit in English law is distinctive. The fact that directors cannot bring lawsuits claiming they are not liable or seeking discharge has, in my view, strengthened the corporate governance criteria under English law.

Although we have not examined it under a separate heading, there are differences between the two legal systems regarding the non-compete obligation regulated in Article 396/1 of the Turkish Commercial Code (TCC). Under English law, a director may simultaneously serve as a board member of two different companies. It is not significant whether the director is a limited or unlimited liability partner in the company where they serve as a manager.

Conclusion

The comparative analysis of Turkish and English company law reveals both convergence and divergence in fiduciary duties and liability regimes of directors. Both jurisdictions impose rigorous obligations requiring directors to prioritize the company's interests above personal gains, underscoring the universal principles of good faith, loyalty, and due diligence in corporate governance. However, their approaches to liability and enforcement differ substantially.

Turkish law adopts a fault-based liability model, emphasizing proportionate responsibility and strict prohibitions on self-dealing, backed by criminal sanctions and rigorous procedural safeguards such as mandatory general assembly approvals. The availability of discharge (ibra) mechanisms further distinguishes the Turkish framework, providing directors with an opportunity to mitigate liability contingent on shareholder approval.

Conversely, English law codifies director duties under the Companies Act 2006 with a strong focus on transparency, conflict avoidance, and shareholder oversight. Unlike Turkish law, English directors cannot seek formal discharge through lawsuits, reinforcing accountability through continuous judicial scrutiny and the potential for personal sanctions, including disqualification. The English regime also accommodates conditional authorization of conflicts of interest, particularly within private companies, balancing flexibility with governance risks.

Despite these differences, both systems empower shareholders to oversee directors' conduct and enforce company interests, reflecting shared foundational values. Practical challenges persist, notably in harmonizing entrepreneurial agility with robust governance. Turkish law's stringent criminal penalties may stifle flexibility, while English law's discretionary conflict authorizations necessitate vigilant oversight.

Ultimately, the Turkish and English legal frameworks offer complementary models that together illuminate the evolving landscape of director accountability globally, underscoring the need for ongoing legislative refinement, director education, and a cultural commitment to transparent governance.

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