

**BOOK OF THE SEMINAR ON THE
EVALUATION OF THE RESULTS REGARDING
CHAPTER 6 (COMPANY LAW) IN THE PROGRESS
REPORTS OF THE EU ACQUIS
HARMONIZATION PROCESS**

**TUBITAK 3005 PROJECT
PROJECT NO: 123K011 – 2023**

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TÜBİTAK

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Preface

Türkiye signed an association agreement with the European Economic Community in 1963 and started full membership negotiations on 3 October 2005. One of the criteria for Türkiye's membership in the European Union is the adoption and implementation of the *acquis communautaire*. This *acquis* is categorized under 35 chapters, and Chapter 6, a separate chapter on company law, was opened within this scope. In this framework, the Turkish Commercial Code No. 6102 was adopted and entered into force in 2011. Although it is clearly stated that Türkiye is at an advanced level in the field of company law after the legislative studies and implementations, Chapter 6 has not been closed yet.

Within this framework, the TUBITAK 3005 project titled "Evaluation of the Results Regarding Chapter 6 (Company Law) in the Progress Reports of the EU *Acquis* Harmonization Process", which is led by Prof. Dr. Şükrü YILDIZ, a faculty member at Ibn Haldun University Faculty of Law, and contributed by academics from Istanbul Sabahattin Zaim University, Kocaeli University and Anadolu University, aims to contribute to the harmonization process from both an institutional and academic perspective. The seminar organized within the scope of the project was a comprehensive and collective study in which the current deficiencies were discussed despite the progress made, the changes that need to be made in terms of harmonization with the European Union *acquis* were put forward, and the determinations and suggestions of the legislative, executive, and judicial powers and other stakeholders on the subject were examined.

As a result of the discussions held within the scope of the seminar and the different evaluations and perspectives put forward, the present work

has emerged. I believe this work, which is the result of a collective effort that brings together academia, civil society and relevant public institutions, is very precious. I hope that this work will make an essential contribution to the process of harmonization of our country with the European Union acquis, and in this context, I would like to thank Prof. Dr. Şükrü YILDIZ, the project researchers who worked intensively with him and the valuable participants who contributed to the seminar.

Prof. Dr. Ömer ÇINAR
Ibn Haldun University
Dean of the Faculty of Law

Introduction

Dear Readers

We are pleased to present you this seminar book, which represents an important step in Türkiye's EU membership process.

The seminar titled "Evaluation of the Results Regarding Chapter 6 (Company Law) in the Progress Reports of the EU Acquis Harmonization Process", which we, as Ibn Haldun University Faculty of Law, carried out within the scope of TUBITAK 3005 project No. 123K011, aimed to evaluate the important steps taken in the company law chapter in the process of harmonization with the EU acquis.

This project, which we carried out with the contributions of my esteemed colleagues from Kocaeli University, Anadolu University and Istanbul Sabahattin Zaim University, aimed to answer the questions of what efforts have been undertaken for the closure of the chapter, whether the desired harmonization has been achieved, and if not, at which points work needs to be done, by bringing together the perspectives of experts who are directly interested in the subject in academia, public sector and non-governmental organizations.

In line with our objective of ensuring the exchange of ideas, we have sent invitation to

European Union Harmonization Commission of the Grand National Assembly of Türkiye

Republic of Türkiye Ministry of Justice (General Directorate of Foreign Affairs and European Union)

Republic of Türkiye Ministry of Foreign Affairs (Directorate for EU Affairs - Directorate General for EU Affairs)

Republic of Türkiye Ministry of Trade

as being the public authorities which all have been authorized on the subject of our study,

Capital Markets Board

Public Oversight, Accounting and Auditing Standards Authority

Presidency of the Court of Cassation

Justice Academy of Türkiye

as being the public institutions,

Economic Development Foundation

Banking and Commercial Law Research Institute

Union of Chambers and Commodity Exchanges of Türkiye

as being non-governmental organizations,

and our esteemed academician professors who have more than years of experience in this field;

Prof. Dr. Rıza AYHAN

Prof. Dr. Mehmet BAHTİYAR

Prof. Dr. İsmail KAYAR

Prof. Dr. Hayrettin ÇAGLAR

Prof. Dr. Korkut ÖZKORKUT

Prof. Dr. Şafak NARBAY

Prof. Dr. Sıtkı Anlam ALTAY

Prof. Dr. Fülürya YUSUFOĞLU BİLGİN

Prof. Dr. Halit AKER

to participate in the Seminar.

To the invitation made,

Republic of Türkiye Ministry of Justice (General Directorate of Foreign Relations and European Union)

Republic of Türkiye Ministry of Foreign Affairs - (Directorate for EU Affairs - Directorate General for EU Affairs)

Republic of Türkiye Ministry of Trade

Capital Markets Board

Public Oversight, Accounting and Auditing Standards Authority

Economic Development Foundation

with their representatives

and

Prof. Dr. Rıza AYHAN

Prof. Dr. Mehmet BAHTİYAR

Prof. Dr. Hayrettin ÇAGLAR

Prof. Dr. Korkut ÖZKORKUT

Prof. Dr. Şafak NARBAY

Prof. Dr. Sıtkı Anlam ALTAY

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Prof. Dr. Halit AKER

participated in the seminar and added value to the seminar with their ideas and opinions and ensured its successful completion.

The book includes the topics addressed in the seminar as well as the discussions and evaluations made by the participants. In this respect, the book provides important evaluations from various perspectives on Türkiye's current situation in harmonization with the EU acquis and what needs to be done to ensure full harmonization. This study, which aims to contribute to its predecessors, is a guide that enlightens the path to be followed in Türkiye's harmonization with the EU acquis and contains the most up-to-date evaluations. As a matter of fact, such a study is considered to

be valuable in 2023, when Türkiye's EU membership discussions are intensifying. At this point, I would like to thank all the project researchers who contributed, the valuable participants who attended the seminar and shared their valuable knowledge with us, and the Scientific and Technological Research Council of Türkiye for making this study possible.

I hope that this study will provide a comprehensive perspective on Türkiye's EU harmonization process in the field of company law and that it will be read with interest and contribute to the purpose of the project.
25.12.2023

Yours sincerely

Prof. Dr. Şükrü YILDIZ

Ibn Haldun University

Faculty of Law

Head of the Department of Commercial Law

Opening Speech

ŞÜKRÜ YILDIZ: First of all, bon appetit. Our Rector will make an opening speech a little later. Actually, our program consists of two parts. In the morning session, representatives and experts from public institutions will share their views on the subject. The second session will be held in the afternoon. Our academic professors will again share their scientific views on the problem with us. I hope it will be good work and I will leave the floor to Prof. Dr. Atilla Arkan, the Rector of our university.

ATILLA ARKAN: Friends, first of all, thank you very much for accepting our invitation. I would like to thank in advance both the bureaucrats and our lecturers from Kocaeli University, Istanbul Sabahattin Zaim University and Anadolu University for their contributions.

ŞÜKRÜ YILDIZ: We have professors from Başkent University, Ankara University, Ankara Hacı Bayram Veli University, Galatasaray University, Sakarya University, Uludağ University, Yeditepe University.

ATILLA ARKAN: Thank you, Prof. Yıldız. Thank you all. I am glad you are here. Let me briefly talk about Ibn Haldun University. After that, let me talk a little bit about the EU acquis in the context of this project. I am an expert on Medieval Islamic Philosophy. After a short presentation on how it looks from there, I hope I will finish all this in 10 minutes.

Ibn Haldun University is a boutique and international research university established by our trustees in order to strengthen the quality of academia in Türkiye, especially as a social sciences university, to improve the quality of human resources in the field of social sciences.

The meaning of a research university is that approximately 54% of the current students of our university are graduate students who are master's and doctoral students. Again, as a research university, we focus on the missing research areas that our country needs at this point with projects and publications, and we aim to meet these needs in cooperation with you. We work with for d strengthening our institutional infrastructure in line with this focus. Therefore, the intellectual side of the projects is critical in such a university. Prof. Yıldız has shown us with his concrete examples that TUBITAK projects and EU projects can be carried out in the field of law. Your contribution is also significant in this sense.

Now, let me briefly tell the story of the European Union from a long way back. In fact, when we refer to our knowledge of history, the EU story is based on the historical experience of Thirty Years' War, Hundred Years' War, then World War I and World War II. I think the Europeans have managed to do this: They have focused on geography as an island of peace with the question of "how we can solve our problems together with reason and law". As you know, the European Union experience was first of all a coal union. In other words, since the source of the conflict in Europe to a large extent after World War II was energy-based, the basis of the union was the coal union. Therefore, the basic questions were, "How can we solve our problems without fighting?" and "What kind of practice should we develop in this regard?" The second dimension was this: in this series of 30 years of wars, there were actually two dynamics of conflict. One was economic and the other was religious. Of course, we use the term religion, but all friends who are interested in the history of religion know that when we say religion in Europeans, Protestantism, Orthodoxy or Catholicism is what we mean. They perceive this as religion. Their view is different from our perception of religion. Indeed, what corresponds more to the sect in our country corresponds to religion in theirs. Therefore, this is what we call religious conflict: In their world, these are the conflicts between these three central religious understandings. Even today, we see partial effects of this between the European Union and Russia. We also see it in their discourse. I think what EU has done is asking the question: "Can we build a common future by softening the religious understanding, which is particularly rigid and intense,

together with the *acquis* of reason and law?”. And if you remember, they did this gradually. While the European Union was initially established as a coal union, it later turned into the European Economic Community. They realized that this was not enough either. Why? Because, as long as the economic union did not transform into a cultural understanding and mentality, the conflict continued. Therefore, they brought the education pillar of this. For example Erasmus. Then they realized that this was not enough either, so they brought Erasmus Plus. Therefore, in this sense, I always think so, the European Union is an exemplary project for our geography.

In other words, we need to see the issue as a geography-centered one. How can we produce such an understanding in this geography together with the Balkans, the Caucasus and the Middle East, how can we achieve this? Otherwise, in my opinion, wars will continue in our geography. Despite this historical background, the EU’s *acquis* is still very valuable.

First of all, the EU *acquis* undoubtedly includes the areas of religion, culture, history and interpretation between states. We all see this *acquis* in our own fields. Nevertheless, the EU *acquis* is the conflation of humanity. It is conflation that we cannot ignore. We may differ with the EU at certain points. We may have different jurisprudence and interpretations as jurists, but the *corpus* itself is valuable. We cannot ignore this and we have to continue with it. Now, what is the future of the EU? As you know, it is actually about...

ŞÜKRÜ YILDIZ: We applied in 1959 and signed the first agreement in 1963.

ATILLA ARKAN: Yes, about 60 years. In this process, the future of the EU will actually be determined by the political priorities and preferences of European political states together with the balance of power in international relations. The recent fluctuations actually show this. However, such comparative studies are important for the following reason: We can influence these political preferences and priorities with the results we obtain from these studies. In other words, we need to do this with the Europeans:

Europeans need to realize that they have a shared future with Türkiye and that the vision of a prosperous and just world cannot exist without Türkiye. Therefore, we need to be able to show them this intellectual endeavor. When we can show this, it will be much easier for us to become a member of the EU. I hope that this will be the case. Is this the future? My reading of history shows that it is. Indeed, it is very difficult for a Europe that neglects Türkiye to provide stability on its own. The scale at which we see this comes to this: We observe their competition among themselves on a large scale, and Europe is not a global power here. It is a power below the global power. Look at the recent Russia-Ukraine war, it is not Europe that dominates, it is Europe that is dominated. The US is dominating. It is understood that this is due to the competition between the US and China. I do not think that Europeans, at least as far as I can see, will be able to stay in this line for long. Because the cost of the current Russia-Ukraine war is on Europe in terms of energy, exports, and economic consequences. Europeans, they're probably struggling with it and they have to find a way out. Let's see how much it will be.

Now, as you all know, the project that Prof. Yıldız is leading here is related to the EU. The negotiations we will carry out are based on three criteria. After the full membership application, 35 chapters were opened for negotiations. The chapter to be negotiated here is the chapter on company law. The problem areas are how much has our country proceeded in this chapter and where are we within the EU acquis. Of course, our esteemed bureaucrats see and know the problematic points closely. And the contributions of you academicians to the solution of these problems are very important.

Yes, I hope I finished in 10 minutes as promised. I'm glad you guys came. Thank you very much for your contribution. We would like to be partners with you, in the projects you will propose, and as a university, we will provide all kinds of support. In this sense, we have an event office and a corporate communication office. These offices are doing all these organizations. Inshallah, let's sign under good projects and good works together. Let's take our country further. Thank you again for coming. I would have

liked to stay, but I am not very confident about how much I can follow the individual negotiations on the law. Therefore, I will leave you alone.

ŞÜKRÜ YILDIZ: Thank you very much, thank you very much for not leaving us alone, Honorable Rector.

RIZA AYHAN: Esteemed friends, dear friends, I am thrilled to be with you on a beautiful day in September, the beginning of autumn. I would like to thank Prof. Yıldız for bringing us together again. He brought us together with my very dear friends whom we have not met for a very long time, we have only spoken on the phone. I enjoyed it very much, thank you. Welcome and good cheer. I would like to give the floor to my dear brother Prof. Yıldız, who brought us together today, to open the session.

ŞÜKRÜ YILDIZ: I would like to thank you very much, I greet all the participants with respect, I welcome everyone, we are going to have a really important seminar. We want to do a brainstorming. As Rector said a little while ago, we, as a country, both as a nation and as a state, we are willing for the full membership to the EU. We want to become a member of the EU. But there are probably some problems with this membership. In this case, among the chapters opened, there is a chapter on company law, which is the most suitable chapter, to be closed. But it has not been closed. I wonder if the reason why it has not been closed is due to technical problems, i.e. have we not achieved harmonization, or are there other reasons even though we have achieved harmonization?

In the first session, our guests from Ankara, especially from the institutions that are the public law stakeholders of the subject, Ministries, Capital Markets Board, POA, non-governmental organizations, and the representative of the Economic Development Foundation, which has made very valuable contributions to this issue, will give us the answers to these questions in a brainstorming process. We will listen to them.

In the second session, as academics and scientists, we will look at whether we have technical problems, and whether this chapter cannot be closed because of technical issues.

As you know, we had a very short journey to the EU. The European Union was established by six European countries as a coal and steel union within the framework of an agreement signed in Rome in 1957. In 1958, it became a legal entity. Türkiye applied for full membership in 1959, but our application was not accepted. In 1963, our first contractual relationship started with the Ankara Agreement. For Türkiye's integration into the Community, three periods are envisaged: preparatory, transition and final periods. In 1987, Türkiye applied for full membership in the EU. In 1996, we entered the Customs Union. 1999 is another important date for us, Türkiye was declared a candidate country at the Helsinki Summit. On 3 October 2005, accession negotiations to the EU started. Full membership to the EU has actually led to the completion of many issues that needed to be included in our legislation. Although there are rules on competition law in our Constitution, the first competition law in our country was only enacted in 1994 with the application for full membership to the European Union. However, in the USA, the Americans did so in 1881 with a law called the Scherman Act. The EU made the relevant regulations in 1954. We are only making our regulations on competition law 100 years after the USA and 50 years after the EU. Again, in 1995, we imported the very valuable acquis on intellectual property law into our country by decrees having the force of law. In 2005, after these procedures were carried out, in other words, after the opening of the chapters, in 2006, the experts of the EU and our country held screening meetings. Therefore, in these screening meetings, deficiencies we had were identified. Thirty-five chapters are agreed upon.

Chapter 6, which concerns us, is the chapter on company law. It opened in 2008, but we had actually carried out various studies on company law before that. In 1993, the State Planning Organization established a Specialized Commission on Company Law between Türkiye and the EC, and we revealed the state of our law.

As a matter of fact, Türkiye made its first commercial law in 1850 with the "Kanunname-i Ticaret." The origin of "Kanunname-i Ticaret" is the French Commercial Code dated 1807. Then the Commercial Code of 1926 was adopted. This law is not taken from a specific country, but the

influence of European laws, especially Italian and German laws, is in question. When TCC No. 6762 entered into force in 1957, it was stated that it was one of the most important commercial laws in the world. Indeed, it is. There are traces of both Swiss and German law. Therefore, our company law actually already contains legislation of European origin. And with the application for full membership to the EU in 1999, a commission was set up by the Ministry of Justice to formulate a new commercial law. The aim of the commission was to ensure harmonization with the EU acquis on company law. Indeed, a very good law was drafted with its shortcomings. Another feature of this law is that it was adopted on 14 February 2011 with the unanimous vote of all parties, both ruling and opposition, all parties in the Grand National Assembly of Türkiye. In fact, it is worth investigating whether this will happen to any other law and the commercial law such an exception. The reason is this: As a state and nation, we really want to become a full member of the EU. This chapter is being opened, and it is the most suitable chapter to be closed. We will see which criteria are in this chapter a little later. When we look at these criteria, even if they are fulfilled, but the European Union still does not close it. There may be political reasons for not closing the chapter. I am not talking about these thirty-three chapters. For example, there are chapters related to thirty-three chapters that are not opened due to the reservation of the Greek Cypriot part of Cyprus. Again, there are chapters not opened by the EU Commission because we do not recognize the Greek Cypriot Administration. Look, sixteen chapters have been opened. One of them is Chapter 6, which concerns us. According to us, and I am curious if we will get an answer from you, the closing criteria have been fulfilled, we have been stated to be at an advanced level in the progress reports, but still this chapter has yet to be closed. Therefore, we want to know why the chapter has not been closed despite the fact that we have technically fulfilled the criteria required by the EU, or if not, on which issues, and the answers to these questions from the valuable participants from Ankara and Istanbul who attended the seminar as stakeholders. Then, we want to evaluate the companies chapter of our commercial law. There are experts on this subject, especially Prof. Özkorkut. He has done a lot of work on independent audits. He produced valuable outputs. We would like to analyze this issue in the afternoon. For

example, Türkiye has an action plan for 2021-2023. There are issues that need to be changed in the commercial law. What are these, for example, we would like to talk about them. Prof. Ayhan, that's all I have to say.

The opinions expressed in the seminar are the academic and individual views of the speakers and are not binding on the organizations they work for.



Session I

Approach of Public Institutions and Civil Society Organizations to the Problem

Chairman: Prof. Dr. Rıza Ayhan

RIZA AYHAN: Thank you very much. We were listening with pleasure and you could have continued. But we would also like to thank you for leaving time for the friends after you, and for ending your speech after making it so succinctly. But your speech did not end here. You will definitely take the floor with explanations in the future.

Dear friends, we will evaluate the results of the progress reports on the harmonization process with the EU acquis in Chapter 6, namely on company law. I believe that this evaluation will be essential because the timing is also perfect. As you know, September literally means the month of harvest. In terms of its ancient origin and etymology. I am sure that we will reap a good harvest from this seminar. Of course, in order to get this harvest, first of all, we want to look at the situation of public institutions and organizations, what are the issues regarding this 6th chapter from their point of view, what are issues regarding this 6th chapter from their point of view, what their evaluations are and how my esteemed faculty members will intervene in these evaluations. And according to the program I have, I would like to give the floor to our dear brother and friend Ahmet Ulutaş Ahmet is the deputy director general of the Ministry of Justice, Foreign Relations and European Union. His other characteristic is that he is Prof. Narbay's deskmate. Another characteristic is that he is my student. (Laughter) Sir, please, Mr. Ulutaş.



Asst. Prof. Dr. Ahmet Ulutaş

**Ministry of Justice, General Directorate of
Foreign Relations and European Union**

AHMET ULUTAŞ: Honorable Dean, esteemed professors, ladies and gentlemen, I would like to start my speech by thanking the authorities of Ibn Haldun University for kindly inviting us, our esteemed Rector and everyone who contributed to the meeting.

Here, it would be helpful to first mention the developments in our organizational structure with the 2018 Presidential system.

The unit called Directorate General for European Union Affairs was reorganized by merging it with another international unit, the Directorate General for International Law and Foreign Relations, and the name of the Directorate General was changed to Directorate General for Foreign Affairs and European Union Affairs.

The departments that I am responsible for are the departments that the merged Directorate General for European Union Affairs is responsible for. These can be analyzed under two main headings. One is related to Chapter 23 and partly to Chapter 7 within our Directorate General. The other title is to carry out the coordination of harmonization associated with the adoption of the EU acquis within the context of the Ministry, and the other title is to be responsible for the coordination of European Union fund-supported projects in the judicial sector.

As you know, the reform process continues in the form of the sixth the seventh packages. We closely follow these developments in the progress report as Chapter 23 and partially as Chapter 7, as well as legislative amendments.

We closely follow the legislation, the judicial decisions and any other additional measures on the subject and convey them to the European Union delegation under the coordination of the EU Directorate of the Ministry of Foreign Affairs, but this is not our only work.

As an office, we negotiate free trade agreements in partnership with the Ministry of Trade. We also provide support for their harmonization with the intellectual property rights chapter and other Turkish domestic legislation.

You know that there is a visa liberalization dialogue. Of course, the work on the completion of the remaining six criteria continues.

We also have publication activities. I am also coordinating these activities in order to increase the visibility of European Union law further both in the judiciary and the legal community.

I would like to state that I attach great importance to Jean Monnet, which is also a European Union scholarship program, and my professors are of course more than aware of it. This year, 4-5 of our colleagues from our department, who have won the Jean Monnet scholarship program this year, which we will send to European Union member countries in a thematic field of their choice and they have already received their acceptances from their universities. They will enter in September or towards the end of September after their acceptance and start their master's degrees.

One of our colleagues, who has just completed his master's degree in private law in Leiden, the Netherlands, returned to his post with increased experience.

As you know, Decision No. 1/95 is very important.

Türkiye, as you know, without becoming a full member of the EU, has a customs union in one of the four fundamental freedoms that constitute the EU, namely the free movement of goods. There are committees established to resolve legal issues and problems encountered in the execution of this relationship.

Although the Ministry of Foreign Affairs holds the coordinated meetings of these committees, we, as the Ministry, closely follow the Customs Union Partnership Committee together with Brussels, both in terms of notifying legislative changes and providing expert support.

In this sense, of course, the judgments of the Court of Justice of the EU are very important for us.

We have two justice counsellors in Brussels. We also have one justice counsellor at the bilateral level before the Belgian government, which makes the number three. We try to mirror the developments in the field of justice in two ways through our justice counsellors working in our Permanent Representation to the European Union.

When we closely follow the agenda of the European Union, we see that the green agenda, digital justice, and especially the regulation studies on artificial intelligence are significant for us in this sense.

Of course, it is also important to follow the European Union in the field of private law. Especially in the context of the vision reflected in the progress reports and other developments, but it is not limited to this.

Regarding our second task, as I mentioned here, we are trying to coordinate the projects to be presented by the central organization of the Ministry and our higher judicial institutions, the Union of Bar Associations of Türkiye and the Union of Notaries of Türkiye in the judicial sector.

Here, I would like to mention that the IPA 3 process has started. In the IPA 3 (Instrument for Pre-Accession Assistance) process, we have just launched the call for 2024.

Of course, efforts are underway in coordination with both Brussels and our Ministry of Foreign Affairs at the center to eliminate the categorical negative approach of the EU Commission officials towards the judiciary field after the failed coup attempt on 15 July 2016.

We do not see these projects only as a transfer of funds to Türkiye and the use of these funds in the judicial sector and other organizations. In the same way, we always state that we see these projects as important platforms for our European counterparts and Turkish authorities, civil society, universities and public institutions to come together and to understand each other more, to listen to each other, to exchange views on each other's positions and to improve each other. We will continue to do so. In the context of this meeting, I hope that when these issues are discussed again, we will be able to discuss both the updates and the problems in the middle. As I conclude my remarks, I hope that I have not exceeded the time allocated to us and I would like to extend my respects to the esteemed Professor Rıza Ayhan. Thank you very much.

RIZA AYHAN: Thank you very much, thank you.

Now, especially as our friends who work on company law know much more closely, when we work on company law, we always look at German law, we look at Switzerland, we look at France, and we draw our own conclusions. We also see that our laws are not much different from the laws there. But it has been about 15 years and we still have not been able to close the chapter on companies. As the Ministry of Justice, do you have an insight as to the reason why we have not been able to close this chapter? I mean, technically, is there anything you can say that we should have done in company law?

AHMET ULUTAŞ: Dear Sir, here is the following: As the General Directorate, we translate approximately 200.000 files annually. We translate both criminal and civil cases.

We follow up on both the cooperation issues and the European Union issues that fall under the responsibility of our Ministry. In fact, there is a political blockade by the Greek Cypriot Administration of Southern Cyprus and some other circles that do not see Türkiye's full membership of the EU in their interests. However, Türkiye is a country with a whole-hearted will for reform today as it was in the past. If an amendment

to the law is to be made, it will be done and put into effect within the high discretion of the Turkish Grand National Assembly. There is no doubt about this. Thank you.

RIZA AYHAN: Thank you.

AHMET ULUTAŞ: Thank you.

RIZA AYHAN: Thank you. What will the Directorate General for Relations with the European Union of the Ministry of Foreign Affairs say on the same issue? I would like to give the floor to Mr. Hasan Yıldız and Mrs Meltem Gündoğar on this issue.



Meltem Gündođar - Hasan Yıldız

**Ministry of Foreign Affairs, Directorate General
for Relations with The European Union**

MELTEM GÜNDOĐAR: Thank you esteemed professors, representatives of public institutions and organizations. First of all I would like to say hello to everyone. In this period when the relations with the EU are not very good politically, it is very valuable for us to carry out such a study on a technical issue. I have been working at the Directorate for EU Affairs since 2010 and I am responsible for five chapters. It is not so enjoyable to work on each chapter. The chapter on company law is one of the chapters we are good at. Therefore, it is a chapter that I enjoy working on.

We have been working very closely with Mr. Sevim and Mrs. Küçük-güngör in harmony for a long time. They are more familiar with the technical aspects. They know better than me. As the Directorate for EU Affairs, I would like to draw a general framework as an institution responsible for the general coordination of relations with the EU. . I would like to briefly tell you where we are in the chapter, what has been done so far, and why we cannot close the chapter.

RIZA AYHAN: Sir, before our esteemed Mrs. Gündođar starts her presentation, our Dean is going to attend a meeting and has asked for your permission. I would like to say goodbye on your behalf.

ÖMER ÇINAR: Dear Professors, well said, good work.

RIZA AYHAN: Thank you. Yes.

MELTEM GÜNDOĞAR: As Prof. Yıldız also mentioned a little while ago, the screening report process started in 2006. Then an opening criterion was introduced for the chapter. After that was completed, official negotiations started in 2008. At that time, it was possible to open some chapters, but later on, when the pace of opening chapters slowed down in 2009-2010, the idea of giving some momentum to this process emerged in 2012. Let's come together again and work on some chapters under the name of a positive agenda. Especially in the areas where they think they can make progress. One of these chapters was the chapter on company law. At that time, we came together again, work started and and legislative comparison tables were prepared in this context. Tables showing the regulations in our legislation corresponding to each piece of EU in this field were prepared and a long haul was carried out on this basis.

It is also a long-term work. We organized two technical meetings in 2015 and 2016, and at the end of those meetings, it was almost time to talk about closing the chapter. But then, after 2017, the process dragged on a bit. Now, when we look at the closing criteria of the chapter, we say that there are five technical closing criteria. And there is also one political criterion that is the one related to the application of Additional Protocol. But, we are in a very good position in other technical closing criteria,. Therefore, in the progress reports, it is said that we have a very advanced level of harmonization.

The first of these was the enactment of the Turkish Commercial Code and the law on its enforcement and implementation and the related secondary legislation. In 2011, the law was enacted. It was then updated in 2012. We are quite good in this context.

Again, the second criterion is related to the Capital Markets Law. In 2012, the law was updated and work on secondary legislation continued. The third one is related to accounting and auditing. Our legislation in this field is always in line with the EU legislation.

The fourth criterion was the establishment of a public oversight system and a relevant institution. In 2011, we met this criterion with the

establishment of the Public Oversight Authority and as the Commission officially notified us of this it has been met.

The last one is a more horizontal criterion: strengthening administrative capacity. We know that our institutions are working very well in this field, and serious progress has been made especially with the establishment of the MERSIS (Turkish Central Registry System) system. Therefore, we are also quite good at this criterion. Therefore, when we look at it, we seem to have almost completed the closing criteria. As for the legislative comparison tables I mentioned before, we are dealing with the chapter on company law under two headings. Company law and accounting and auditing. The study on legislative comparison tables was carried out under the company law pillar. Tables of Turkish legislation corresponding to a total of eight EU directives were prepared. We are talking about a 1000-page document in total. They were gone over one by one. The first five directives are the ones related to division, merger, company branches, and establishment. Later, as the work dragged on for a while, there were changes in the EU legislation, and these directives are now gathered under Directive 2017/1132. There are also directives on takeover bids and shareholder rights. Concerning these eight directives, it is important to note that almost all of them are in line with the EU Legislation.

But we also have the second pillar, our accounting and auditing legislation. Here we need the support of the Public Oversight Authority. We know the Public Oversight Authority has issued the legislation in line with the EU. But in EU-related issues, it is not enough to do something, we also need to prove it to the EU. Therefore, our Public Oversight Authority should prepare comparison tables in these legislations and show the harmonization of legislation to the EU side. Therefore, even though we are largely harmonized, “there is a need for harmonization with the EU in the field of accounting and auditing” comes before us as a criticism in the progress report. Therefore, I believe that this can also be done.

ŞÜKRÜ YILDIZ: I mean, I would like to say something. We need to make a little more effort and endeavor in terms of accounting, and of course, we need to prove this point to them.

MELTEM GÜNDOĞAR: Absolutely.

ŞAFAK NARBAY: Please indulge my curiosity. Why have we not done these things since the establishment of the Public Oversight and Audit Institution? The organization is working. Yes, we do. You know, we have done things at the point of proving them, but why have we not reported them to the EU as “we have done these things”, to use the sentence you just said? In other words, these are our preparations and concrete arrangements by preparing these comparison tables. Within this framework, we do not have any deficiencies regarding this chapter and these issues. While we have many projects and regulations that we have put into practice, I wonder why we cannot make any progress in closing the chapter on company law.

MELTEM GÜNDOĞAR: Actually, maybe this is a common answer for all chapters. Unfortunately, since the EU process has almost come to a standstill, we cannot provide enough motivation to the institutions. We know that they are working.

ŞAFAK NARBAY: No doubt.

MELTEM GÜNDOĞAR: They are enacting legislation in line with the EU, but we can no longer be a driving force to prepare harmonization tables. Because even if they prepare the tables, perhaps the institutions are no longer motivated thinking that they will not receive positive feedback from the EU. That is why. General answer.

ŞÜKRÜ YILDIZ: And I guess, Prof. Narbay, there had to be a period of work until we got to this stage. I mean, it’s only now that we’ve discovered how they think, right? I mean, we need to prove it. Yes, we have achieved harmonization. We need to say that these are the regulations we have made, and these are the regulations you have made. As they say, the philosophy of language, we need to decipher their language. So what you say is very accurate.

KORKUT ÖZKORKUT: Let’s not forget this point, it’s a critical one. You make a regulation or the material of the regulations is harmonization,

but the essence of the work is to produce information. In other words, it is not enough to say that we have made the regulation. It produces information, and the question is whether you can use this information or make it available. I will try to focus on this in my turn today, because there were some very striking sentences that Mr. Rector said in the morning. This issue is a bit like holding a mirror to ourselves. I think it is not a matter of what others are doing, what they are not doing, or what mistakes they have, but a matter of holding a mirror to ourselves. Therefore, I am one of those who think that if we cannot hold this mirror correctly, we will not have the power to create very powerful effects to change the perspectives of others. Therefore, if you make yourself strong and feel strong, the reflections of power will be visible everywhere. Consequently, I think that the main point is related to the producing the right information and reflecting on this information, especially in the field of commercial law, i.e. company law. Because I think that all progress reports were actually written until 2016, and then the name became the Türkiye report.

MELTEM GÜNDOĞAR: That's the EU's approach.

KORKUT ÖZKORKUT: No, it should be taken into consideration that there is a severe change of the EU's approach, perhaps after the incident in 2016. In other words, their perspective is changing, but not as a country whose perspective is moving in a positive direction. Now, ten more countries are coming to the Union, and after these ten countries, thirty, forty, fifty countries will enter the Union. a question arises as to whether we will enter the European Union after the end of the European Union. I think this should be our main point. It is undoubtedly open to discussion.

ŞÜKRÜ YILDIZ: You have put your finger on a crucial issue, but we should not ignore Mrs. Gündoğar's observations.

KORKUT ÖZKORKUT: I completely agree.

ŞÜKRÜ YILDIZ: You send the work you have done for harmonization, but you don't get a return, so not getting a return is also the reason for this lack of motivation in us.

KORKUT ÖZKORKUT: There are two criteria, one political and one economic. Let's think of it like this: we see a wealthy man walking around saying that he is rich; indeed, he has money, companies, everything, and even power in the world. But no one turns to him and says, "You are rich, you are powerful," nobody respects him, hold his hand, come to him, or even chat with him. Now, greatness, wealth, etc. are different, but why he is not respected needs to be answered. Can I explain? To the extent that you cannot overcome political criteria, no matter how good your economic criteria are, they will only knock on your door if they need you. But until that day, no one will even pass in front of their house. Essentially, we have to consider the modalities of this too.

ŞÜKRÜ YILDIZ: There was an issue that Mr. Ulutaş underlined, for example, the Greek Cypriot Administration. The biggest problem in front of us.

KORKUT ÖZKORKUT: Without any doubt. But now, if you think back to 12 September, we, as Türkiye, enabled them to become a member and suddenly turned them into players on the field. In my opinion, we are the leading cause of this problem. Yes, when you look at it, as can be seen from the question, "Is it them or us who made this political move wrong?", What I mean when I say that we should hold a mirror to ourselves becomes clear automatically. In other words, if you turn someone who is not a player into a player on the field, the responsibility of being able to foresee the possibility of them working against you after a while will not belong to someone else, but directly to you. Is it them or us who cannot foresee this? We need to determine this correctly.

RIZA AYHAN: Let's ask Mrs. Gündoğar to continue where she left off.

ŞÜKRÜ YILDIZ: These speeches were very useful.

RIZA AYHAN: Yes.

ŞÜKRÜ YILDIZ: In other words, Mrs. Gündoğar agrees with your observations.

KORKUT ÖZKORKUT: Since it's in the scope of my study...

ŞAFAK NARBAY: Well, of course, since I did not fully understand whether we could ask a question on the point of procedure or not, I made such a sudden entrance. Sorry.

RIZA AYHAN: Estağfurullah, no problem at all

ŞAFAK NARBAY: It was completely important at that moment to add these. What was said is extremely important for us.

RIZA AYHAN: As it is a seminar, it's normal to add more to what we all said

ŞÜKRÜ YILDIZ: Yes, this is what the seminar means.

RIZA AYHAN: This is not a presentation or a monologue. Yes, here you are Mrs. Gündoğar.

MELTEM GÜNDOĞAR: As a conclusion, I can say the following: When we write down the deficiencies in the progress report, it will not exceed 3-5 items. In fact, there are some issues that can be corrected with a law article or, as in the case of Mrs. Küçükgüngör (CMB), there are some things that we cannot explain to the EU side. There are some things that we are harmonized with, but which they cannot accept and write here as deficiencies. In other words, can correct minor things in the progress report. But as we said, the issue has become a bit politicized. As a result, the closure of this chapter depends a lot on the conjuncture. The conjuncture can change at any moment. Two years ago, who could have said that Ukraine's or Moldova's membership to the EU would be discussed? Therefore, the conjuncture can change at any moment and a situation may arise where we need to close this chapter and accelerate the negotiations as soon as possible. Therefore, we should always keep our hands ready. The issue of harmonization with the accounting and auditing legislation is the easiest thing we can do at the moment. If we show this to the EU as soon as possible and prove that we are compliant, it will be serious progress.

Apart from that, regardless of the negotiation process, our commercial and economic integration with the EU is very high. Our companies operate in the EU or we want to attract foreign investors here. Therefore, we need to play the game according to the rules. In other words, unlike the dimension of closing this chapter to negotiations, we have to do what is happening in the world to prove that we are good. And when we look at the EU, we see that it has adopted an approach that puts green and digital transformation into everything and all policies. Therefore, we cannot lag behind these developments. If we do, our companies will be disadvantaged. Therefore, the EU passed the legislation on digital tools in 2019, which has recently emerged in this field, which is written as a deficiency in the progress report. If we can harmonize with this legislation, I think it will have a positive contribution. Also, a corporate sustainability reporting standard on sustainability has been introduced. This legislation enacted last year. In this area, I think it is very important that we do not fall behind the process by making a financial reporting standard as soon as possible. That's all I have to say for now. I would like to support you if there is anything again.

RIZA AYHAN: Yes, Mr. Hasan Yıldız, you have something to add...

HASAN YILDIZ: First of all, thank you very much for this seminar. I am a newcomer to company law. Therefore, it was a seminar where I learned a lot. Mrs. Gündoğar has already explained everything in detail. So I have nothing to add, thank you I do again.

RIZA AYHAN: I thank you very much.

ŞAFAK NARBAY: Again, with many apologies, out of curiosity, do you have a *deadline* for the completion of your predictions as these deficiencies, a road map, and a definite period for us as a State?

MELTEM GÜNDOĞAR: Well, there are some actions in the national action plan. For example, preparing a comparison table on compliance with the accounting and auditing legislation, which, of course, depends on the working speed and translations of the organization.

ŞAFAK NARBAY: You mentioned low motivation, I mean, I can understand that to some extent, but this is a state policy. I mean, as a result, motivation falls today, tomorrow, etc. Do you foresee a date, or a timetable in which you can say that we have set ourselves the goal of completing these deficiencies by the following date and are working for this?

MELTEM GÜNDOĞAR: As far as I know, there are some actions in the national action plan. Apart from that, there is no precise date, but I know that if there is significant progress in the negotiation process, the institutions will complete it very quickly. Preparations are made immediately in a very short time. It is one of the chapters where we really have no problems. For example, I am also looking at the chapter on competition policy and state aid. It is so difficult to harmonize in this area that I cannot foresee any deadline. Still, if there is a motivation increase in company law, the work can be completed in a very short time.

ŞAFAK NARBAY: Okay, thank you.

RIZA AYHAN: Sir, thank you very much. Actually, that harmonization program also states that it should be completed in 2021.

ŞÜKRÜ YILDIZ: This one in 2023, the other in 2021.

RIZA AYHAN: The Ministry of Trade part also needs to be completed in 2023. What does Kadir Sevim, our esteemed friend from the Ministry of Trade, say about this? What will they finish by the end of 2023? The ninth month is over, there are only three months left.



Kadir Sevim

Ministry of Trade, General Directorate of Domestic Trade

KADİR SEVİM: On behalf of Ministry of Trade and myself, I would like to respectfully greet my esteemed professors and the valuable participants of our public institutions. I would also like to thank Ibn Haldun University for organizing this seminar. The outputs we will obtain as a result of the seminar will contribute to the European Union negotiation process of our country. We, as the stakeholder institution of these studies, have to perform certain duties. These outputs, the evaluations, and the opinions we receive here will certainly be guiding us. I would like to introduce myself before saying what our Ministry has done so far, what it thinks, what are its shortcomings, and what we can do. My name is Kadir Sevim, Prof. Ayhan introduced me... I have been working as a trade expert in the Directorate General of Domestic Trade and Directorate General of Companies Department of our Ministry of Trade for about ten years. I started to work in our Ministry in 2013. Since then, I have been actively involved in the work related to the chapter on company law. Mrs. Gündoğar also mentioned our Directorate for EU Affairs, a working group established to evaluate legislation. As the Ministry of Trade, we are basically responsible for the implementation of the sections of the Turkish Commercial Code on commercial enterprises and commercial companies. Within the framework of the authorization given to us by the law - we have regulations, communiqués and communiqués issued by our Ministry - we fulfil our duties with this body of legislation. We also work on various international platforms from time to time. The World Bank, the World Trade Organization, the OECD, the European Union, and today we are together within the scope of the Company Law Chapter, one of the works related to the European Union.

The chapter on company law has been opened for negotiations by completing the opening criteria. There are five technical closing criteria. We need to complete them in order to close the chapter. If we look at these five closing criteria, the first one is directly related to our Ministry. The EU states that “Türkiye should adopt the Draft Turkish Commercial Code, the Draft Law on the Enforcement and Implementation of the Turkish Commercial Code and other relevant legislation in order to harmonize with the EU acquis.” We adopted the law, the new Turkish Commercial Code was adopted in 2011. In July 2012, the new Turkish Commercial Code entered into force, but, it is not enough just to adopt the law. Here, the European Union is questioning whether there is a law in line with the *acquis communautaire* of the European Union. In the studies carried out within the scope of the positive agenda, we have assessed mainly the harmonization of our legislation with the directives in force at that time. Has the Turkish Commercial Code been prepared in line with the EU acquis?

We made evaluations. When we look at the justification of the Turkish Commercial Code, we see that the European Union accession process is referred to. In the Law’s preamble, there is a section refers to the harmonization efforts with the European Union and Türkiye’s goal of becoming a full member. Subsequently, it is stated which subject is regulated in each directive and which directive provisions are taken into consideration in which part of the draft law. As Mrs. Gündoğar mentioned, a working group was established at that time. This working group had prepared a table for each directive. On one side of the table were the provisions of the European Union, on the other side were the provisions of the legislation that we had identified, and opposite to them were the comments and questions of the EU Commission and our comments and questions. Assessments were made on whether this article fulfills this EU provision or there is a deficiency in this provision. These works continued with a process of mutual correspondence. Until 2016, a closing meeting was held in Brussels in January 2016. We discussed with the commissioners the extent to which we are in compliance with these directives. I took note of these issues on my way here. Let me convey to the esteemed audience the main criticisms directed at us. In fact, these are repeatedly expressed in the Progress Reports.

There was a directive numbered 2009/101 in force at that time, and there was also a directive numbered 89/666 on branches. These were incorporated into Directive 2017/1132, and these provisions were combined in this directive. These are primarily directives on public disclosure provisions. In other words, the provisions that regulate the matters that we will disclose to the public in the establishment and other transactions of a company (disclosure), what we should share with the public regarding the company and the branch, and the matters that we should commercially display. The EU Commission stated that we are in compliance with these provisions in terms of company law. In these directives, there are provisions regarding the registration of financial documents in the trade registry and their disclosure to the public. These regulations envisage the public disclosure of financial documents in all commercial companies. These provisions are included in the directives for both companies and branches. The EU Commission said that we do not have legislative harmonization in this regard. As you know, when the Turkish Commercial Code was first adopted, it was envisaged that the financial statements of all commercial companies would be independently audited, and all of them would open a website and publish their financial documents on this website. Before the Turkish Commercial Code entered into force, these provisions were repealed by Law No. 6335. We no longer see the financial information of companies on their websites. Each company is no longer subject to the obligation to open a website. Therefore, a step back has been taken in terms of sharing financial information with the public.

ŞÜKRÜ YILDIZ: Mr. Sevim, can I ask you something?

KADİR SEVİM: Sure.

ŞÜKRÜ YILDIZ: Is there an obligation in the European Union legislation for all capital companies to be subject to independent external audit? This is my first question. My second question is, is there an obligation in the European Union legislation for all capital companies to open a website and publish their financial information on this website?

KADİR SEVİM: Now, we have not studied accounting and auditing, to be honest. We are the ministry's...

ŞÜKRÜ YILDIZ: Let me tell you, no. Namely, the fact that we have published it on the website... Of course, there are different types of companies, public, more precisely *limited liability company*... In other words, a public company is one thing, and a normal family-type joint stock company is another. Therefore, in the Turkish Commercial Code No. 6102, we also did something that they did not want. For example, no such provision exists in Switzerland, Germany or the European Union law. In other words, 650,000 capital companies are subject to independent external audit... 95 percent of companies in the UK are not subject to independent audit, 97 percent in Germany. Likewise in Switzerland. The European Union cannot say to us, "You accepted this in the law." Right? "You changed it afterwards.", I wish we could say this or we could investigate this.

KADİR SEVİM: Actually, they don't say that, Prof. Yıldız. They do not say that you have abolished it. They say to make it "publicly available" in some way as stated in the Directives. This may be in the form of registration and announcement of these documents in the trade registry, or shared with the public elsewhere. They criticize us that your legislation does not meet this requirement. At that time, we asked the EU Commission officials, "Are we obliged to announce this information to all commercial companies?" They said, "Yes, we attach great importance to this after the economic crisis, especially after the crisis in 2008." "Because another commercial company or a person who will do business with a company may need to see the financial status of that company. You should share these." was their approach. This is the main criticism they brought to us.

We also see it in the Türkiye Report, which they wrote long after the technical meeting in 2016. This is the issue here, if those amendments to the Turkish Commercial Code had not been made, would we have met the requirements of the EU Directives? I don't know how their evaluations would have been; because sometimes we had disagreements even regarding the provisions of the legislation that we thought were compatible. We even had

problems arising from translation. Mrs. Gündoğar and Mrs. Küçükgüngör are here, they know this, too. We had such disagreements at some points. Therefore, I cannot clearly say whether the initial provisions of the Turkish Commercial Code regarding the disclosure of financial information to the public would have been considered compatible with the EU Directives or whether new criticisms would have been introduced. The first issue is the disclosure and public disclosure of financial information in the trade registry both in branches and in “*limited liability companies*”. They emphasize this type of company. At the end of the directives, it is written one by one which types of companies these regulations cover in which country. Since we are not a member, we make our own interpretations as to which company it corresponds to. We consider the types of companies that the concept of “*limited liability company*” heading corresponds to in our country as “joint stock company” and “limited liability company”. We can consider it as a company based on limited liability. According to EU regulations, these companies are required to disclose financial information to the public. This seems to be a deficiency in our legislation.

Apart from this, let me present another criticism made in the Türkiye Report. It is said that there is no harmonization regarding cross-border mergers in Türkiye. This is a directive that regulates the merger of companies subject to the legislation of two member states, that is, it regulates the provisions regarding the merger of a German company and a Spanish company, for example. Since we are not a member of the European Union at the moment, any company coming from the European Union is considered a third-country company for us. Therefore, we have not carried out any harmonization work regarding this directive and we told the Commission that if we become a member of the European Union, that is, if we reach that stage, we will harmonize with this directive within the last year. Since we will be a member of the EU, the company of that country will be a company that corresponds to the regulations here. Currently, it is a third-country company for us. Therefore, we have not worked on this directive. This is the case. Apart from this.....

ŞÜKRÜ YILDIZ: Isn't it the 2021 statute?

KADİR SEVİM: I may have expressed it wrongly...

ŞÜKRÜ YILDIZ: As you know, the by-laws have the following characteristics: they are directly applicable in domestic law. The directive is not like that. In the directive, we harmonize our domestic law with the provisions of the directive. But when they accept us as a member, the by-laws will be directly applied in our law. So there is no need to do such a work for that. It can be applied.

KADİR SEVİM: You are right, but this is expressed as a deficiency. In our meetings, they ask if you have done anything in your legislation on this issue. We hold meetings every two years to discuss the progress of the chapters. There are subcommittees. Certain chapters are discussed under these subcommittees. We also have a subcommittee where we discuss the chapter on company law. Subcommittee No. 2 on Competition and Internal Market. We held its last meeting last year in December 2022. At each meeting, the commission asks us questions about the issues they see as missing. We explain the developments we have made every two years.

ŞAFAK NARBAY: Dear Prof. Ayhan, apologising again...

RIZA AYHAN: Yes, Prof. Narbay.

ŞAFAK NARBAY: Prof. Yıldız, now you are deeply familiar with the issue, I am trying to understand the following from Mr. Sevim's statements. I had a hesitation as if we did not benefit enough from the knowledge of academicians, at least at the point of consultancy in the interviews. Okay, our friends in the bureaucracy fulfill their part in the best way possible in terms of making legislation and in the operation of the process, but I understand that we lack some concrete information about what we are doing.

Namely, I wondered whether there is a need for academic support to explain what we have done well within the framework you have just mentioned, i.e. to convey the primary and secondary regulations on issues such

as the direct independent audit issue or the obligation to open a website and to defend what we have done on the issues that are addressed to us in the chapters and explained as deficiencies. In the process of negotiations with the European Union, the bureaucracy and the Ministry are actively endeavoring to carry out the process, however, at the point of counseling, we also need the support of professors like you, who are experts in the field, to the Commissions.

There seems to be a disconnect in terms of support. It seems to me that there is a lack of intellectual debate, and I apologize for this.

ŞÜKRÜ YILDIZ: Mrs. Küçükgüngör completes that gap arising from the disconnection, what you say is true, but Mrs. Küçükgüngör is an associate professor as well.

ŞAFAK NARBAY: Of course, I have just recognized them.

ŞÜKRÜ YILDIZ: I mean, she is well-qualified. We had the opportunity to communicate with her before, even by the phone call. What you say is undoubtedly very important. For example, like Prof. Özkorkut, like Prof. Altay, like Prof. Yusufoglu Bilgin, like you, like Prof. Çağlar, like Prof. Ayhan... These professors are also in Ankara. Of course, they will provide all kinds of contributions. Right, Prof. Ayhan, if there was such a thing?

RIZA AYHAN: If they (bureaucracy) want, we'll do it.

ŞÜKRÜ YILDIZ: If they want. (Laughter.) Thanks to Mrs. Küçükgüngör, I think they did not feel the need for this deficiency, but it would undoubtedly be very useful.

ŞAFAK NARBAY: I mean, with my apologies, from Mr. Sevim's statements, I mean from your statements. Please don't misunderstand, but I understand from your words as if some things had been done and we couldn't explain them very clearly.

ASLI KÜÇÜKGÜNGÖR: I have prepared a presentation if you wish.

ŞAFAK NARBAY: Well, okay...

ASLI KÜÇÜKGÜNGÖR: Before starting my presentation, I would like to emphasize one point. At the beginning of the harmonization process of the chapter on company law with the European Union, studies were initiated with Prof. Ünal Tekinalp. He personally attended the first meetings. The beginning of our work dates back to the 2000s. In 2006, as a candidate country, our negotiations with the EU Commission started with introductory and detailed screening meetings. Therefore, we have a shortage of participating public institutions, but the participants here have actually been involved in this process continuously. I would like to start.

I am also involved, but I would like to make a point to support you. We already receive help from our professors from time to time as we share the thoughts you mentioned. Prof. Özkorkut, although he does not attend our subcommittee meetings, has been involved in many organizations carried out by the European Union, especially on the audit and accounting side. We are already in contact with him, and you are very right, the participation of our professors is always necessary and will have a very high added value for us, but we are not very sure that the deficiency is due to this. In other words, we are not sure that the lack of results before the EU Commission can be attributed to this.

RIZA AYHAN: Let's continue with Mr. Sevim in order to use our time efficiently.

RIZA AYHAN: Are you here from the Public Oversight Authority, Ladies? Welcome. (Upon the participation of the representatives of the Public Oversight Authority in the hall)

KADİR SEVİM: Sir, I am looking at the criticisms in the latest Türkiye Report Let me explain what they are. It is said to comply with the directives on mergers and divisions. These directives were also incorporated

into the holistic directive in 2017. Two issues are said not to be met by our legislation regarding division transactions. One of them is the second paragraph of Article 151 of the current Directive 2017/1132. This is a somewhat complicated provision at first glance. There were points that we had difficulty in understanding. This is a provision that prevents the company from undertaking its own share in the division transaction. For example, a company is being divided. It gives some of its assets to an existing company, in return for which it will receive shares. If he is a shareholder in that company or has previously acquired his own shares, the directive provision says that he cannot buy shares for them. In other words, it says that you should exclude these in the share exchange. Actually, this is the nature of the business. Even without this provision, the calculation is made in this way in our country. They told us this: You have a provision that meets this regulation regarding the merger. I think it was the second paragraph of Article 153 of the Turkish Commercial Code. This provision meets the regulation in the merger directive; however, you have not included its equivalent in your legislation on divisions. Yes, Article 153/2 of the TCC. This is regulated in the merger process. There are corresponding provisions in the merger directive. There is a similar provision in the division directive, but we were told that there is no equivalent in the TCC. This provision seems to be missing. I think we can eliminate this with a reference or a minor amendment to the law. This regulation will not make a fundamental change in the Turkish Commercial Code. Another issue is that Article 154 of Directive 2017/1132 regulates facilitated division transactions. There is no corresponding regulation in our law. They also state this as a deficiency. We have facilitated mergers, but facilitated divisions are not among the general provisions. This is a deficiency, and no legislative amendment work has been carried out on this issue until today. Apart from these, there is another issue in the merger directive; however, we could not actually agree with the commission on this issue.

ŞAFAK NARBAY: I am taking notes and I will look at it now. Is there a reference to Article 151/2 of the TCC?

KADİR SEVİM: Article 153/2 of the TCC, Prof. Narbay, I just looked again.

RIZA AYHAN: Article 153/2 of the TCC.

KADİR SEVİM: This provision is regulated in merger transactions. They say a parallel arrangement should also be made in the division process. We had reached that point in the correspondence process.

The Directive states that if the rights of the creditors of the company are jeopardized in the merger, the creditors should have the opportunity to apply to a relevant administrative or judicial authority if sufficient collateral is not provided after the registration of the merger. In other words, if the collateral is insufficient, countries should provide the the creditor with an opportunity to remedy this deficiency by applying to an administrative or judicial authority. They told us that your legislation does not meet this. We thought it did. We have the obligation to provide collateral in the Turkish Commercial Code. Again, a liability lawsuit can be filed if this guarantee is not sufficient. Special liability is also regulated in mergers, divisions, and type changes. We told them these, but they did not consider these provisions sufficient. This was also pointed out as a deficiency. They even sent us examples of German and Austrian law on this subject. I remember the regulation there as follows: if the collateral is insufficient, the person can go and put a mortgage on a property or take a pledge. If collateral is not provided, it is possible to obtain a quick solution by applying to an administrative authority.

Apart from this, there are also issues specified in terms of publicly traded companies. Mrs. Küçükgüngör will already present them. I am again looking at the issues related to our Ministry. Finally, a directive was issued in 2019. A directive on the use of online digital tools. This directive is basically an online company establishment, that is, the establishment of a company online by submitting all documents electronically and other registration procedures to be carried out in the trade registry.

The directive regulates the establishment of the companies and carrying out other registration process by submitting online documents to the trade registry. We were always asked about this issue in the subcommittee meetings held after the publication of this directive. I think we are

largely compliant here. Because we have a really good electronic trade registry system, MERSİS, the central trade registry system. In MERSİS, we establish all commercial companies and commercial enterprises electronically. We keep the records of companies electronically. There are 238 different points in Türkiye where these transactions can be made. MERSİS is active in all of our trade registry directorates. Of course, in order to establish a company, we have a signature certification process at the notary public or at the trade registry directorate. The law has changed slightly in terms of company types, but this is the general procedure. The person physically goes and completes this process with us. This issue may seem to create a deficiency here, but we have also brought the establishment of companies with electronic signatures to MERSİS. In other words, the person can immediately sign the company agreement with an electronic signature and register it with the trade registry. There are payments to be made here. There are no fees in the company establishment process. In the Law on Fees, company organizations are exempted from fees. There are some fees charged by chambers of commerce: such as chamber registration fees, newspaper announcement fees, etc. We are also working to move these to the electronic environment. Our goal is to be able to make all payments electronically in all our trade registry directorates within a few years. Therefore, I think we will comply with this directive. In the online registration application, when we look at the Trade Registry Regulation, we see that we always ask for a notarized copy of the document. Such as a notarized copy of the decision of the board of directors or the minutes of the general assembly meeting. It is possible to upload these documents online at MERSİS. The person uploads and submits his petition, but we also want the physical document at the trade registry as required by the legislation. This creates a bit of a deficiency in terms of harmonization with the directive, but I think this is not a problem that cannot be overcome. We can achieve this harmonization when we fully focus on the European Union. When we put forth that will, I think this issue does not require such a big change. These are the criticisms directed at the issues concerning our Ministry.

Let me also say that the closing criterion no. 5 is related to us; it is a criterion related to the development of institutional capacity. In other words,

it is a criterion we will complete and close in cooperation with our other institutions. There, we really care about MERSIS. It is an electronic system that works extremely well. It is a system that exchanges data with 50-odd institutions. For example, we need to record the address of the person. We do not take the address based on a declaration. We automatically take it from the relevant database. When a company is established, we immediately notify the tax office and the Social Security Institution. We share data with many institutions.

This is a system that has been highly appreciated on international platforms. We had conducted a study with the OECD. We explained MERSIS in this study, and they wanted to examine it on-site. We made a study visit to Ankara Trade Registry Directorate with them. They liked it very much, and they said that there is no electronic trade registry system in the world that works integrated with so many institutions and where all transactions can be made. I do not think there is such a solid electronic trade registry system in Germany or France. I think MERSIS is a formation that contributes greatly to our commercial life, and we continue offering digital services in MERSIS. For example, we can electronically provide all documents received from the trade registry.

We issue the electronic document to the person, and the person receives this document from the system without the need to go to the registry office. For example, the announcements to be published in the Trade Registry Gazette used to be sent physically. Now, the text of the announcement is automatically prepared in MERSIS, it goes immediately and announced on the same day, we do this. Most recently, we have made it possible to take circular-type board decisions in joint stock companies and general assembly decisions in limited liability companies with electronic signatures. In other words, it is a system we have developed and use extensively. It is used as a source of verification in many services related to companies in e-government system, in more than 200 services. It is a good database that seriously strengthens our institutional capacity. It is one of the three largest databases in our country. In general terms, I think we are in a good situation. There are some basic deficiencies, especially the announcement of

financial documents is a major deficiency. This is, of course, an issue that requires amendment to the law. In order to complete the issues that require legislative amendments, the agenda of the country needs to be a bit favorable. If legislative amendments are made in order to harmonize with the European Union, we are always ready to contribute.

RIZA AYHAN: Thank you very much. Actually, the Public Oversight Authority is next in line, but they have just arrived. In that respect, I would like to give the floor to the Capital Markets Board. The Public Oversight Authority should take the floor after the Capital Markets Board. Associate Professor Aslı Küçükgüngör and Sanem Üzeler Demirağ, please here you go.



**Assoc. Prof. Dr. Aslı Küçükgüngör -
Sanem Üzeler Demirağ**

Capital Markets Board

ASLI KÜÇÜKGÜNGÖR: Thank you very much. First of all, I would like to start my speech by thanking Prof. Yıldız very much. On behalf of all public institutions, we would like to thank him for giving us the opportunity to discuss our long years of work by bringing together such a good audience. In the process of harmonization studies, we have formed the opinion that creating solutions is always based on communication, explaining ourselves and bringing together the right people within ourselves. Therefore, your effort to create a discussion platform by bringing together experts from within and outside the academy who have been working on this subject for 20 years is very valuable. For this reason, we thank you very much, Prof. Yıldız.

I would like to point out that this work has covered almost our entire professional life for many years, an endeavor spanning many years. Rather than the details of its content, since we are all brainstorming together here, I will endeavor to explain what we have done with a short presentation in order to make everyone aware of this process. Of course, I would like to introduce myself first. My name is Makbule Aslı Küçükgüngör. I graduated in 1996 from Ankara Faculty of Law. I started working at the Capital Markets Board in 1997. In 2003, I completed my master's degree in law at LSE as a Jean Monnet scholar. After my return, we started to work in the European Union unit in line with the conjuncture at that time, and we have been working on these issues ever since. At the same time, the unit has been involved in technical work on harmonization, but it has also always been

involved in such EU studies under the title of projects. Now, I will try to present our harmonization process in terms of the field of duty of the Capital Markets Board.

In general, our initial work started in 2006 after the preparation of the accession partnership document. With the participation of public institutions, our negotiating position our national program were prepared. After this main work, our screening meetings started. The screening meetings were very important for us. The first screening meeting was organized as an “Introductory Screening” with presentations made by the European Commission. The Commission explained the issues related to all chapters in the EU legislation in detail. In the second stage “Detailed Screening” meetings, the Turkish side explained the situation in Turkish law to the Commission officials. The Commission expressed the issues deemed deficient by the Turkish side, and a joint decision was taken to act from this point. In 2006, after these studies, separate studies on each chapter started to be carried out. As my colleagues have mentioned, the chapter on company law is one of our strongest areas. Five closing criteria were set in this chapter. These are basically the inclusion of certain issues in the draft Turkish Commercial Code, which we were already in preparation for at that time, the revision of the Capital Markets Law in line with it and its sub-regulations, and some regulations on accounting and auditing issues.

At this point, our colleagues at the Public Oversight Authority will share their own experiences, but I would like to touch upon an issue that we are having difficulties with the valuable assessment of the Professor. Namely, one of the closing criteria is the establishment of the Public Oversight Authority and the development of its administrative capacity. The Capital Markets Board is relatively new compared to the Ministry of Trade, but both institutions have an established history. After the establishment of the Public Oversight Authority to fulfill this closing benchmark, it has had to fulfill the envisaged tasks quickly. Some of the issues that we, as the Turkish side, criticized and had difficulty in keeping up with the obligations in this regard may be due to the fact that the said institution is new and had to undertake many tasks in a very short period of time. Because even in areas

where we are powerful, we may encounter recurring questions. In areas where we have some deficits or shortcomings, we are constantly addressed with questions directed to us regarding increasing administrative capacity. I think this may be one of the reasons for the prolongation of the process.

Very briefly, I will talk about the directives related to the capital markets law for which we are responsible as the CMB. Since the harmonization studies are related to the issues linked to our commitments made during and after the screening meetings in 2006, we have always used the generic name of the directives in our studies and presentations in order to create a unity of language. Our mission in harmonizing with the directives, if the term is appropriate, has been to achieve a continuously moving target. While we are trying to harmonize, the legislation is constantly changing. Directives were merged by the Commission. As Prof. Yıldız expressed very well, the issue of regulations, which are sub-regulations, is now directly transferred to domestic law. But this was not the case when we first started. Secondary regulation also had to be transposed into domestic law. Before ESMA (European Securities and Markets Authority), there was an institution called CESR (Committee of European Securities Regulators) on the EU side. Therefore, as certain institutions were established by the EU and new regulations were introduced, we endeavored to harmonize our own regulations in Turkish law. As the CMB, we are responsible for five issues in the chapter on company law.

There are basic issues. Without going into technical details, I would like to explain very briefly what was requested in relation to them and what was done in return.

One of our working topics is the Second Council Directive on the establishment of companies, capital protection, and the registered capital system. Another one is on mergers and demergers, of course in terms of public companies. In addition to this, the directive on takeover bids, which evolved into the Shareholders Directive and even the Shareholders Directive II, which diversified and kept us busy with questions, was put into force.

With regard to the second Council Directive, certain commitments have been set forth regarding the formation, protection and replacement of capital. These requirements have been clearly fulfilled. In addition, certain requirements have been set forth regarding the adoption of the registered capital system and the need to regulate its rules in a certain way. In this sense, there have been commitments on authorization for a period of five years, the duties and powers of the board of directors in this regard, how to act when delegating authority to the board of directors at the general assembly meeting, and quorums. Our regulation on this matter is included in the CML (Capital Market Law) and has been fully acquired by regulating the details in the Communiqué on Registered Capital System.

Secondly, mergers and demergers have been an area in which the EU Commission has been very sensitive and has raised a many questions for all kinds of public and private companies. In general, since these transactions are qualified private transactions, the issue of quorum has been mentioned a lot and the requirements related to this issue have been put forward. In addition, a commitment regarding the implementation of a certain procedure in these transactions was also included in the harmonization document and requested from us. In order to fulfill this requirement, merger and demerger transactions have been classified as material transactions. I will explain this part in more detail because our regulation is not limited to this. In order to harmonize with the EU legislation, the consequences of being a material transaction are regulated separately. Likewise, the issue of quorums is regulated in the CML and the Communiqué has been issued in accordance with it.

The shareholders' directive is a directive that the Commission is very sensitive to, and rightly so. In addition to this, considering our mission especially in the field of capital markets in terms of small investors, we were also asked for commitments regarding voting in the general assembly and proxy voting. There are also recommendations on corporate governance. I will explain this issue separately. One of our commitments is to use proxy voting to make arrangements regarding the general assembly meeting. The second was to facilitate the call for a general assembly meeting. In fact, with the developments in technology, we have already enacted regulations

regarding online meetings and some regulations that go beyond what was requested. In order to harmonize, the principles regarding the general assembly have been amended in the law, and a separate article on participation and voting has been introduced. The communiqué on proxy voting and proxy collection was similarly amended.

I would like to speak separately about the communiqué on corporate governance. Since corporate governance is a foreign element for EU member states in continental Europe, member states have preferred principle-based regulation instead of regulating it within their own commercial laws. In terms of our harmonization, instead of regulations at the level of a directive to be taken as a criterion, there are some suggestions diversified on the axis of two recommendations. Corporate governance principles are generally included in the listing rules of the stock exchange by applying the principle expressed as “comply or disclose” or “implement or disclose” within the market. Although there is no obligation to comply with the recommendations, we have made a commitment that our work on this issue should also be carried out, and we have carried out our work on it.

The regulation on share takeover offers is another regulation to be harmonized. The main problem here is that, since we have a market with a company structure that is generally dominated by block shareholding, the companies that are currently closed to the public consist of family-owned companies. Since the sovereignty of the block shareholder is preserved during the public offering of these companies, mostly by selling small shares and preserving the privileged shares, our regulations are basically focused on the mandatory share purchase offer. However, the directive itself is a consensus directive. Since there is no agreement among the member states, most of the articles of the directive can be applied in different ways by granting discretionary and optional rights. Although this is the case, we have received many questions regarding the implementation of the voluntary takeover bid. In fact, it is not the case that we do not have the answers to these questions or that we do not have rules to apply in case of a voluntary takeover bid. Basically, since the voluntary takeover bid is not an issue that we encounter in practice, it is not subject to regulation exclusively. Otherwise,

our law permits this. In our secondary regulation, some defense mechanisms are to be applied by the board of directors, how they will be accountable to the general assembly while applying these defense mechanisms, and how the operation will be carried out.

Our regulations are suitable for harmonization, but we have not made the sub-regulation in the board. Because no such application was received. Therefore, of course, it took some time to explain this. The Commission asked, “So what would happen if it were like this? What would happen if a company came, made a voluntary call, and developed a counter mechanism?” Regarding the mandatory call, since we have already suffered from this, our regulation is very much in line with the EU. We also expressed this to them.

Lastly, I mentioned two recommendations on corporate governance. Corporate governance principles are regulated in our communiqué on this subject by adopting the principle of “comply or explain”. This issue has already been left out in our Turkish Commercial Code to be regulated in the Capital Markets legislation. However, since it is not reasonable to regulate it with coercive rules at the legislative level due to its Anglo-American origin and the fact that it is actually a subject of finance, the Board, let us say the legislator, has preferred to adopt this subject in the form of “*soft law*” where the principle of “comply or explain” is applied, as is the case in the whole of Continental Europe.

It is our ongoing practice to apply international accounting standards and IFRS, which are required to be applied by the EU Commission, in the parts of accounting and auditing that fall under the responsibility of the Capital Markets Board in terms of publicly traded companies. In liaison with the Public Oversight Authority, we have issued our regulation on the parts of this issue that fall within our area of responsibility in terms of publicly traded companies.

Before mentioning the positive agenda work, it may be more appropriate to mention our projects. Within the scope of harmonization, there is a criterion under the heading of increasing administrative capacity for all

institutions. In order to improve this, two European Union projects were realized at the Capital Markets Board. *Twinning* was our first project. Our second and relatively small project is our assistance project under IPA. Our amendment of the law has progressed in a coherent structure. Before the amendment of the Capital Markets Law, 13 main areas were identified. The CMB was twinned with the German Ministry of Finance to work on these 13 areas of financial services and company law, and with this support, Norbert Venzlaff, Resident *Twinning Advisor*, worked with us for two years between 2006 and 2007. Several experts from BAFIN and the German Central Bank for each topic worked with us three or four times in one year for two weeks each and worked on the drafts of each regulation. Within the scope of this project, the first drafts on takeover bids, supervision, and company law (2004/25/EC, 68/151/EEC, 77/91/EEC, 78/855/EEC, 82/891/EEC) were prepared. I would like to point out that the comprehensive amendments introduced to the CML in 2013 are actually the result of this twinning project. In terms of its perspective, it reflects the EU approach exactly, and the principle of dematerialization, the registered capital system, mergers, demergers, calls, and public offerings, which are especially important for the financing of partnerships, have been prepared within the framework envisaged in the European Union directives. This is not our subject, but I would like to mention it as an example. Although membership could not be realized with our current preparations since we have equivalent regulations, we, as the CMB, received an equivalence given to third countries under the name of “ESMA Equivalence” regarding prospectuses. The prospectus directive, unlike the takeover bids directive, has a structure that requires one-to-one compliance. In other words, you are either in the system or you are not. If you are not a member, you do not have the chance of full harmonization. The Directive is designed to harmonize member states with each other. You publish a prospectus. It is valid in all member countries within the EU. Since we have the status of a third country in terms of EU legislation, we do not have the chance to do this even if all our prospectus formats comply with it. As such, we applied to ESMA for the equivalence granted to third countries. As a result of a detailed evaluation process, we are the first country to receive prospectus equivalence, which was previously granted only to Israel. We would like to express this with pride.

Our second comprehensive EU project was for the implementation of a public awareness-raising program on the issues that were missing in the first project, in particular training in the field of accounting and auditing, improving the administrative capacity of the CMB and establishing implementation measures. As I mentioned, our Public Oversight Authority has been established, but there were also duties falling to the CMB in terms of publicly listed companies. The obligations of the CMB in that part were also fulfilled as a result of this study.

The last point I would like to mention is the positive agenda work. This work, which we have been initiating with Mrs. Gündoğar (Directorate for EU Affairs) since 2005-2006 in order to demonstrate that we, as the Turkish side, are fulfilling our obligations, was mainly carried out within the scope of increasing administrative capacity. The positive agenda work is a work that we have spent a lot of effort on. Under the chairmanship of Ms. Lale, the EU was the ministry at that time, we all became a committee together, and everyone started to work in their own departments. As Mr. Sevim (Ministry of Trade) explained, comparative tables were prepared separately for each directive. We have endeavored to mobilize the EU Commission. It was stated that harmonization tables had been prepared, and we requested a physical meeting in order to finalize the missing points. In this way, we held two meetings on 19 March 2015 and 22 January 2016. At the point we have reached, we no longer receive any questions regarding the three directives other than the shareholders directive and the takeover bid, which are the main directives for which we are responsible as the CMB. From our point of view, the questions we received were very minor. We believe that we have fulfilled our commitments regarding the relevant directives. There were very protracted discussions on the other two issues. This subcommittee meets every two years. Every two years, each new expert asks the same questions again and again. This was a very disturbing issue for us. For example, when we first started with the participation of Ünal Tekinalp, the concept of discussion was “What are we discussing, which company are we talking about?”. Already in the directive, in the preamble part, it says that this company corresponds to this in German law, this in English law. We are talking about the company corresponding to a joint

stock company. But we can discuss it privately. This question was asked by the Commission to Prof. Tekinalp when they first started 15 years ago, but we were asked the same question again in 2015. We had a lot of fun there. (Laughter) We explained it again, we put it in writing. We endeavored to explain what we understood from the concepts and to create our own language unity. Afterward, we did not receive many questions in the 2020 and 2022 meetings.

In conclusion, to make an assessment of what we started with and where we are now, I would like to state that our starting point in the screening meetings in 2006 was the will of all our bureaucrats to work together and in coordination in order to become a full member of the European Union. We started with the motivation that we would do this work, and after the comparison tables were prepared in the positive agenda study, we endeavored to explain this.

As the Capital Markets Board, the CML was revised within the framework of this purpose. However, as I have just stated, we are trying to achieve a moving target here. Harmonization studies are being carried out in a process in which it is not clear whether the membership will be realized or not, and if so, when. Therefore, we cannot foresee a harmonization schedule. As such, the legislator may not prefer to regulate issues that do not constitute a priority need (e.g. voluntary takeover bids). This is because regulation requires intensive labor and effort. I would like to point out that the fact that the details of some issues left optional in the directives are not regulated is not because our legislation does not allow it but because we do not need it. Besides this, new issues in need of regulation are emerging and we endeavor to harmonize with them. Again, to give an example of takeover bids, within the scope of harmonization with the directive in this regard, it is necessary to regulate the right to buy and sell in the context of takeover bids. This condition has been fulfilled in the harmonization regulation. However, in our legislation, the right to buy and sell is regulated more broadly by linking it not only to the result of the takeover bid, but also to the concept of “significant transactions”. The way it is regulated in our law was a policy choice. In our law, these rights are regulated in a

way that affects a wider area. Therefore, the right to buy and sell is not only a right to be used to protect the share purchase offer and the parties therein but also a more comprehensive right linked to transactions of a significant nature. Can it be done? Of course it can be done. This is because the directive does not oblige to regulate these rights limited to the takeover bid. Other EU regulations have also started to evolve in that direction. Therefore, especially in our capital market regulations after 2018, since we do not have time to explain the details it would be correct to say we are close to Turkish-Swiss law if asked. In our new regulations, we continue our regulatory efforts by focusing on the issues we need without missing the harmonization with the EU legislation. It's because the chapter is locked at some point. This is the summary of our work from our point of view.

RIZA AYHAN: Thank you very much. Mrs. Demirag, your contributions are also in the capital markets section.

Welcome Prof. Aker. (Addressing Prof. Dr. Halit Aker who joined the hall)

HALİT AKER: Greetings very much, hello.

SANEM ÜZELER DEMİRAG: Thank you, Prof. Ayhan, I also greet our esteemed professors and representatives of our public institutions with respect. I would like to take this opportunity to thank Ibn Haldun University for the invitation. I have been in the meetings with the European Union officials in the subcommittee in the last 2 meetings together with Mrs. Küçükgüngör. But of course, Mrs. Küçükgüngör has been taking part in the process since the beginning and has been carrying out the process. She has a lot of experience and knowledge in this field. I cannot say anything different at this point. Thank you, Professor.

RIZA AYHAN: Thank you very much, thank you. Dear friends, do we have any questions for the Capital Markets?

MEHMET BAHTİYAR: If I may, I would like to ask questions to the last two speakers.

RIZA AYHAN: Our Dear Bahtiyar.

MEHMET BAHTIYAR: Yes, Mehmet Bahtiyar, Yeditepe University. Thank you very much. We really benefit a lot. You have also provided information on some issues that we already know but do not know their backgrounds. It is very useful for us. I would like to make a small contribution and pose a question to Assoc. Prof. Küçükgüngör. I have a feeling that we have a bit of a problem in explaining our work. For example, Mr. Sevim gave very useful information about online establishment and MERSIS. I coincidentally attended a presentation at Ozyegin University last year where they explained to the students how online incorporation was done through MERSIS and I was proud to see how useful it was. My country can do this and they showed the students how to incorporate a company in 15 minutes directly on the screen. The students were very surprised and very happy. This is a very good development. I congratulate you, but we need to explain it more. I provide consultancy services to some companies. I was an independent board member. Believe me, I realized that they were aware of this development upon my narration. I wanted to share this. Secondly, Mrs. Küçükgüngör, my question is also related to this: strengthening administrative capacity is really very important but this has two pillars. I can conclude that both the number of administrative staff needs to be strengthened and the existing administrative capacity needs to be increased, especially through some in-house trainings. Because as professors, we have the following opinion, I think all professors share it. We really have incredible difficulties in our registry practices. And I don't know Mr. Sevim, does that resonate with you? There is a very serious increase in cases of objection to the registry compared to the past. I can see this from my own experience. There is a very serious increase. The reason for this is that each registry, if you will pardon the expression, does as it pleases. If you make the same application to five registries, sometimes five different applications may come out. This means that there is a very serious problem in the implementation of the registry. Now, on the issue of strengthening administrative capacity, Mrs. Kucukgongor's statements are obvious. I understand that we have done more than our part in terms of companies, but I would like to ask you both what we have done for closed companies. What have we done or what do we need to do in terms of closed companies? Thank you very much.

KADİR SEVİM: First of all, I would like to thank you for your comments. I would like to add to your comments on MERSIS. We are actually explaining the situation in MERSIS on every platform. Maybe the deficiency with the European Union may be due to this. We held the last two meetings online due to the pandemic. We connect to the meetings where we conduct chapter negotiations with the European Union from here, and they connect from Brussels. More than one chapter is also discussed in these meetings. Therefore, there is not much time to discuss each chapter in detail. The time allocated for our chapter on company law is 15 minutes. Since it is a chapter with which we are somewhat compatible, it takes 15-20 minutes. But we are already sending a text, a set of information describing the developments we have made every year with the coordination of the Directorate for EU Affairs in order to contribute to these progress reports. In other words, we do not think that there is much deficiency on our side. Maybe the approach there may be a little different. I think we are in a good position here.

You asked what we are doing in terms of closed companies. I am not expressing our shortcomings but what is expected of us. We also agree with some of these. We always submit these to our Ministry after the technical meeting, and we write a report when we go on an overseas assignment. This is our duty. We submit this report after the meeting. Amending the law is a bit more dependent on the conjuncture. For example, we have been writing for years that we would facilitate the establishment of companies in all action plans, we had such an aim. There was a political will to improve the investment environment in our country and to progress in the World Bank Business Environment Report. There was the *Doing Business* Report of the World Bank. Two law amendments were made in 2016 and 2018. We immediately made very radical changes very quickly. We abolished the requirement to pay minimum capital before establishing limited liability companies. In other words, we have recently made an amendment to the Commercial Code regarding bearer share certificates, and this was based on an international study. There is an organization called FATF. *Financial Action Task Force*. This is an organization that works on money laundering and financing of terrorism. You may have seen in the news that we were put on the grey list. Our Minister of Finance was also talking about it. Such a

radical change in the Commercial Code on this issue we did. If such a study is carried out with the European Union agenda, I think that all these deficiencies can be completed quickly.

MEHMET BAHTIYAR: We are seriously hesitant about the abolition of the requirement to pay the minimum capital in limited liability companies. It is really a big problem. And we have a situation that is completely contrary to German law.

ŞÜKRÜ YILDIZ: Yes.

MEHMET BAHTIYAR: Let me express my reservation here.

ŞÜKRÜ YILDIZ: Exactly, I agree with you.

RIZA AYHAN: Prof. Yıldız, let's not force the bureaucracy. (Laughter)

KORKUT ÖZKORKUT: Yes, yes, co-operatives, publicly listed companies, there are so many topics and provisions that we can discuss right now. In fact, when you mention the registry, it comes to my mind. The strict liability arising from the maintenance of the registry. The joint liability of the state and the registries. Now, when you look at it, the reason for most of these lawsuits is what I have started to think: right or wrong is debatable. In cases filed according to the law, the registries primarily take into consideration the motive of not having any cost or burden on the chamber, including attorney fees. Because the current practice differs significantly from the practice in the trade registry when it was previously within the courts under the Ministry of Justice. Now, you see that the chairman of the chamber calls the registry management and asks what these expenses/costs are in relation to the lawsuits filed, and requests them to make an explanation in terms of their own balance sheets due to the nature of the business. Different motives may arise in terms of the existing 238 registers. In this sense, I think that we need to re-discuss these liability provisions, because when you look at it, a control system or a system of compliance with mandatory provisions, which is scrutinized, with the motive of ensuring that the registry does not incur any liability, may lead to delays in the unity

of implementation and at the same time waste time, even if the Ministry is constantly asked for its opinion. Another point is that the opinions of the Ministry should also be discussed. For example, capital. There are so many opinions that I can think of at the moment, such as the opinions on increases, equity, and the utilization of funds. It is seen that most of these opinions go beyond academic perspectives and are formed entirely by reflexes coming from practice. I think that we should discuss these issues within ourselves with realistic approaches.

RIZA AYHAN: This is the beginning, I hope it will continue from now on. Any other questions?

KADİR SEVİM: Regarding the different practices in trade registries. Actually, we are also aware of this, but we have done a lot of work to prevent this. Our Trade Registry Regulation is already known...

KORKUT ÖZKORKUT: Training sessions are ongoing.

KADİR SEVİM: There is a study on the registry academy. In other words, a study is being carried out electronically to present the opinions of the ministries on each article of the law and the implementation in a standardized manner. We also hold meetings with trade registries from time to time, in order to increase their knowledge capacity and implementation capacity. In fact, the last one was chaired by Hocam. We held a trade registry implementation workshop in Ankara. We are also transferring these to the European Union in order to increase corporational capacity. MERSIS is already in force in all trade registry directorates. It shows all transaction steps, how to apply, which document to upload, etc. Of course, there may be different practices in trade registries, but as the Ministry, we always continue our efforts to implement the provisions of the relevant legislation correctly and to increase the capacity of trade registries.

RIZA AYHAN: Dear all, I am thinking of taking a small break. Before that small break, Prof. Yıldız has a small question. A small question for Mrs. Gündoğar. Have we adapted to the 2019 directive, the digital directive? What do you say within the framework of Mr. Sevim's statements?

MELTEM GÜNDOĞAR: No study has been conducted on this issue. Therefore, it is impossible to say clearly whether we are in compliance or not. Since the studies have been kind of suspended since 2017, it is a legislation issued in 2019. There has been no work done regarding which provisions directly correspond to our legislation? To a large extent, we are still compatible, but it still needs to be put forward clearly.

KADİR SEVİM: Yes, as Mrs. Gündoğar said, we did not carry out a one-to-one compliance study. We did not carry out a mutual evaluation process as in the comparison tables regarding this Directive. However, I think that we are generally compatible with this directive and that we can eliminate the deficiencies in a short time. Apart from this, there is also a directive on the integration of business registers. A directive titled *Interconnection of business register*. This directive stipulates that all trade registries in Europe should interact with each other. For example, if a company has a branch in another country, the other registry should be aware of this. Because there have been problems related to this issue before. We are asked at committee meetings whether your trade registry system is ready to be integrated into this system.

We have also organized our trade registry department in a separate structure, in order to further develop MERSIS and provide better service. Our colleagues in that department are also prepared in this regard. If the membership process is finalized, I think we will be able to comply with that directive.

RIZA AYHAN: Yes, thank you very much. I think a ten-minute break will be enough. There are human needs.

RIZA AYHAN: Yes, dear friends, we continue the first session of our seminar. Lastly, we stayed with the Public Oversight, Accounting and Auditing Standards Authority. After welcoming our friends, I would like to give the floor to them. How do they evaluate the results of the progress reports on the EU acquis harmonization process regarding Chapter 6, namely the company law? Please go ahead, ladies.



Şeyda Adak Kızılhan - Hatice Sevde Ocak

**Public Oversight, Accounting and
Auditing Standards Authority**

ŞEYDA ADAK KIZILHAN: Thank you very much. First of all, I greet you all with respect. I am sorry we are a little late. I work as an expert in the accounting standards department of Public Oversight Accounting Standards, I am Şeyda Kızılhan. As you know, the purpose of the establishment of our organization is the EU directive. We were established with Decree Law No. 660, and our aim is to act as a regulatory authority in the field of independent auditing and by regulating auditing and accounting standards. In this context, we have issued the independent audit regulation with the authority granted by Decree Law No. 660. We have already provided the majority of the provisions in the directive that concern us very much, with the independent audit regulation. Authorization of independent auditors, keeping the registry, training obligations, mandatory training regarding their authorization, and exams are all included in the content of the independent audit regulation. In addition, in 2017, we published a communiqué on continuing education and made continuing education compulsory for independent auditors. The accounting and auditing standards we have published are adopted from IFRS standards. Therefore most of our standards are compatible with foreign countries. In this context, we have completed most of the harmonization. We only had a deficiency in secondary regulation, which has been completed as of this year. Mrs. Ocak will explain the arrangements we have made a little later. As I said, we have provided most of the requirements with the Independent Audit Regulation. In the first place, keeping of the registry, the authorization of independent auditors, the conditions for authorization, the training conditions, practical and theoretical training, exams, and so on.

In the same way, we authorize independent audit firms subject to certain conditions and keep their registry, and we take the necessary measures to ensure independence and impartiality both in the Independent Audit Regulation and in the quality management standards, quality control standards and ethical provisions. At the same time, as an institution, we conduct quality assurance reviews on the quality of independent audit. As a result, sanctions are imposed on independent audit institutions and responsible auditors. In this context, we have met the requirements of the directive. Authorization of independent auditors is given to the general assembly with the authority granted by the TCC. We decide whether the authorization of the independent auditors is valid or not based on the resolutions of the general assembly. We then carry out our examinations in the field of independent auditing. We also have a continuous surveillance authorization. These organizations and auditors continue to be subject to supervision. They have to make income declarations. In the case of public interest organizations, the companies auditing them are already separately authorized. We expect these companies to publish a transparency report on the audits they have carried out especially on the issues specified in the content of the company's revenues and so on. We supervise this as well. When the necessities are not fulfilled, the companies become subject to sanctions. Apart from this, as I said, there are standards and secondary regulations in the fields of accounting and auditing that we have published. I will leave the floor to Mrs. Ocak on this subject.

HATİCE SEVDE OCAK: Hello, first of all thank you. Thank you for inviting us and giving us the right to speak here. Now Mrs. Küçükgüngör mentioned it in her presentation. There were five items in the closing criteria. What concerns us here is actually the third and fourth criteria. Here, Şeyda has already mentioned the establishment of the public oversight system and the establishment of the Public Oversight Authority (POA). The third article is on the establishment of secondary legislation and regulations in line with the European Union regulations in the fields of accounting, auditing, and financial reporting. In this context, POA is already being established. The POA is also authorized to publish Turkish Accounting Standards and Turkish Auditing Standards. In fact, our authority here

is already divided into two: accounting and financial reporting - auditing for public interest organizations. In the field of accounting and financial reporting, there were already Turkish Financial Reporting Standards that were fully compliant with the international financial reporting standards already applied for public interest organizations. We were also authorized to publish and update these standards. In addition, a local reporting framework was established by the organization for enterprises that are subject to independent audits in the field of financial reporting but do not apply Turkish Financial Reporting Standards (TFRS). The name of this standard is the Financial Reporting Standard for Large and Medium-Sized Enterprises (BOBİ FRS). This standard has been established in a framework in line with the European Union and international regulations. There was something deficient in our regulations that caused this chapter not to be closed: We did not have a financial reporting framework for enterprises that are not subject to independent audit but are obliged to keep books in accordance with the TCC. Accounting System Implementation General Communiqués (MSUGT) were applied there. In the same way, the Financial Reporting Standard for Small and Micro Enterprises (KÜMİ FRS) was published by our institution in line with the European Union regulations. In fact, this standard had been prepared for 2-3 years, it was waiting, but it was not entering into force. In 2023, this reporting framework was published by our institution and now the frameworks and all standards we have published in the field of accounting and financial reporting have become compatible with the European Union regulations. We also have an Interest-Free Finance Accounting Standards (FFMS) reporting framework for interest-free financial institutions. Here, we translated the international standards in the field of interest-free finance and published them for companies operating in the field of interest-free finance. In the field of auditing, the independent audit assurance auditing, quality management standards, related services audit standards published by the International Auditing and Assurance Auditing Standards Board (IAASB) and the Code of Ethics for Independent Auditors published by the International Ethics Standards Board for Accountants (IESBA), as well as the Interest-Free Finance Auditing Standards published by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) in the field of interest-free

finance have been translated and published in line with international standards and included in our legislation. Therefore, our organization has actually met all the conditions in the third article of this closing criterion. And we have completed our work on this matter. We have no shortcomings here.

RIZA AYHAN: Thank you. My colleagues must have some questions because they asked why this comparison table was not prepared before your arrival. Please go ahead.

ŞAFAK NARBAY: Now, our esteemed colleagues who took the floor before you stated that many studies have been carried out, but we have been a little late in reporting what we have done, especially in accounting and auditing standards, to the European Union authorities. Now, of course, they also explained that, our state policy that revolves around the hot topics of the day. That time, it lost its currency, you know, it cooled down a little after 2016, we understand them, but as a result, there is a goal and we are working towards that goal. When we look at the bureaucracy, we see that very serious work is being done. As scholars, we are more on the side of reasoning and comparing what has been done by the authorities. The Public Oversight Authority is an institution established to ensure the harmonization process with the European Union. In other words, you were established for this purpose, but I wonder in which framework and until when you have targeted the following concrete actions and where you are towards this goal. In the harmonization process with the European Union, that is, according to you, everything that needs to be done as a work has been completed. Here, Prof. Yıldız is asking, “Why is the chapter on companies not closed?” I think that maybe there is an aspect of the question that can be answered by you.

HATİCE SEVDE OCAK: In fact, the directives published in 2006, 2013 and 2014 were related to us. We carried out these studies before we came. You know... Where are we? Have we done it or not? Şeyda also told us. We came here by working on the provisions one by one. In other words, there was only the KÜMİ FRS, which was not published, and with its publication, there are actually no issues left in these texts that we have not done. We have analyzed these.

ŞAFAK NARBAY: I mean in terms of reporting it to our interlocutors, but at the same time, have we been able to create a basis to say to our interlocutors that we have completed these studies and there is nothing missing from our point of view within this framework?

ŞEYDA ADAK KIZILHAN: Actually, we just met with Mrs. Gündoğar, we see most of you for the first time, and we were not very aware of the comparison tables and so on. We also met with people from our organization who attended the meetings before coming here. Our only lack was the deficiency in the secondary regulation on KÜMİ FRS, and since we have completed that this year, our duties are now over. But we were not very aware of the comparison tables etc. Let's say that after this meeting, we will.

HATİCE SEVDE OCAK: Maybe, this can be the case: The establishment of the institution and the main duties of the institution are already in line with international standards. Due to the publication of accounting and auditing standards, we actually have to incorporate all the regulations made by the International Accounting Standards Board and Auditing Standards Board into our legislation within a certain period of time. It is compulsory within the framework of these equivalence agreements we have already made. Therefore, we actually incorporate every change made there into our own legislation within a certain period of time. We already keep ourselves constantly updated, but we have not been able to complete that deficiency on this side.

MELTEM GÜNDOĞAR: Dear Prof. Narbay, we talked during the coffee break, but maybe we had a shortcoming as the Directorate for EU Affairs. In 2016, we were working closely with the POA and we had actually started the process of preparing these comparison tables with the experts at that time. We even sent some legislation to the EU side, but then the in-house experts were changed and they somehow did not transfer the information to others, and we, as the Directorate, did not motivate them again. Therefore, it dragged on for a while. But now we got our contact details over coffee, and we will have a meeting again. We will also prepare the tables related to the legislation and send them to the EU side. We will speed up the work.

ŞAFAK NARBAY: Prof. Yıldız, you have enabled another very auspicious work. I mean, it is not only a scientific activity. Look at it this way, with many apologies, excuse my lack of knowledge on this subject, I don't know the bureaucracy very well. We say that we don't need bureaucracy when we have Ahmet Ulutaş. We ask him everything. Now I took a note to myself after listening to you. I wonder if there is a lack of a top unit that manages and coordinates all these processes. You are the Directorate for EU Affairs. Now, in such a situation, it has become clear that there is a miscommunication, so please do not take it as criticism. I am not criticizing. We are people who endeavor to bring the country to the best points together. If there is a disconnect, we have to eliminate it. As a citizen of the Republic of Türkiye, I would like to thank Professor Yıldız for this opportunity.

RIZA AYHAN: Actually, we also have an Economic Development Foundation. We will give the floor to him a little later, and the main purpose of the Economic Development Foundation is to provide this kind of information, as you know. Is there a mistake in giving or receiving information? We will have the opportunity to determine that after our friend's presentation. I will leave the floor to Mr. Korkut immediately, but Mr. Ulutaş will say something depending on Prof. Narbay.

AHMET ULUTAŞ: Thank you very much, dear Sir, as you know, our EU Directorate has a matrix to which we send updated information before each progress report. That matrix goes to every relevant institution in the context of Chapter 35, including the Ministry of Justice. Legislative amendments, changes in practice, regulations, etc., within the relevant period, including important court decisions, are entered into that matrix, everyone submits their contributions in English, and then the EU, it is transmitted to Brussels by our Presidency. I would like to emphasize that all information transmitted in this field is meticulously prepared by those concerned.

RIZA AYHAN: We have time, please Prof. Özkorkut.

KORKUT ÖZKORKUT: Thank you very much. I would like to ask your permission not to take the floor too much, but to make another observation.

RIZA AYHAN: Your contributions are extremely important to us.

KORKUT ÖZKORKUT: On the issues pointed out by Mr. Ulutaş and raised by our esteemed experts, I actually took out all the progress reports starting from 2011 and even 2010 before the implementation of TCC. What did they say in the chapter on companies? Because I used to read them all the time, I used to take notes every year, and I have discussed what this sentence means with those concerned. Why did we write such a sentence? Of course, when you look at 2015 and 2016, a certain momentum and excitement has been achieved exactly as Mr. Ulutaş said. In these progress reports, you can see that there is a very serious effort specific to the chapter on companies. In fact, in this sense, accounting practices, financial reporting, and Public Oversight Authority officials worked very intensively. When the texts with short explanations of 3-4 paragraphs are read in order, this flow is easily seen. However, I look at the latest one in 2022, the company report starts in March 2022 on independent auditing issues; although the POA published the BOBİ FRS and the latest KÜMİ FRS after the TAS, the report can still say that harmonization with the EU acquis for the financial reporting standards of small and medium-sized enterprises has been waiting for a long time.

MELTEM GÜNDOĞAR: Since it is last year's report, there will be no such criticism in this year's report. We will go a little late.

KORKUT ÖZKORKUT: I do not mean it in that sense. Look, it comes afterward; I do not intend or mean to imply that you prepared it in this way as a process. What I want to draw attention to here lies in the statement that "more work needs to be done in order to harmonize with the EU acquis in the field of accounting and independent auditing." Now, at this point, the picture comes to a different place. In fact, it is so harmonized that, as they have already stated, the reason for the establishment of this Institution is harmonization with the European Union.

In fact, let me be very brief. In 2008, a draft law on public oversight authority came to the Plan and Budget Commission. While the draft was

being discussed in the Plan and Budget Committee and is about to be passed unanimously, at that moment, the government wing and all other parties unanimously said, “Let’s enact this law immediately.” It surprised me. I asked the Presidency for the floor. Because the representatives of the Ministry of Trade and Union of Chambers and Stock Exchanges of Türkiye (TOBB) did not take the floor. I think only one person from the Independent Audit Association mentioned that independent audits were very important and that such a Law was necessary. I also asked for the floor, and what I said was summarised as follows. While there is a Draft Turkish Commercial Code that has been in the works for years and this Draft has not yet been enacted, you will now, on the grounds of harmonization with the European Union, enact this Law without a basic structure and without being settled, just like you will make a car without an engine. So how will this happen? There is a commission, there is a chairman, if you would be so kind as to listen to them (and this draft law is a very important separate issue, especially in terms of harmonization with the EU), this would be very appropriate. If you wish, discuss this, because this Law will only make sense if the TCC is passed in advance. There were different discussions there. But the important thing is my request was accepted. And a meeting was held again at the EU Commission in the Parliament as a Sub-Commission with the participation of Unal Tekinalp, the Chairman of the TCC Science Commission, and they listened to them. In fact, if there had not been such an explanation, that draft, the first version of Decree Law No. 660, would have been enacted as a law in 2008. I am happy to have contributed to this postponement. When such seemingly minor incompatibilities, which may be overlooked but may have major consequences, suddenly arise from our own practices, the possibility of severe consequences may arise. Thank you very much.

RIZA AYHAN: Thank you very much. Here you are Prof. Yıldız.

ŞÜKRÜ YILDIZ: Thank you very much, Professor. Fortunately, our expert friends from the Public Oversight, Accounting and Auditing Standards Institution came. At least they corrected our information. There is a national action plan for accession to the European Union. January

2021-December 2023, prepared by the Directorate for EU Affairs. It envisages two legal regulations. Financial Reporting Communiqué for Small and Micro Enterprises. It says it will be made by the Public Oversight, Accounting and Auditing Standards Authority. The anticipated date is 2021, but as a result, it was made in 2023. Why is this important? We just listened to Mrs. Gündoğar, she delivered a very good presentation and talked about what we need to do for harmonization. One of them was digitalization. She said that we should take into account the provisions of the directive on digitalization. It was explained to Mr. Sevim that we have actually made that harmonization to a great extent. What are we going to do from now on? We will pour out our knowledge on digitalization. We will prove that we are in harmony with the European Union. This is the first one.

The second was the regulation of financial statements. That was a deficiency, in fact, that was also done, and that was also a good thing.

The third one is sustainability, right? Yes, sustainability. Actually, it would be better if we ask the European Union for sustainability. Because the experts they send to us should be from previous experts, that is, experts with whom we have already worked on this issue. When different experts come to every different meeting, we have to explain to them again what we are doing and where we are.

But I guess there was also division and merger. Actually, when we analyze it, we see that division and merger do not pose a big problem. In other words, there are very small problems, that can be solved. As Prof. Narbay said, if the Directorate for EU Affairs coordinates these activities, if it recaptures that enthusiasm, and if those meetings are held again, small problems can be solved. After all, this is a duty and responsibility that has been imposed on us. So we have done it. I felt sorry for myself that there was still a lot of issue for improvement. But now I have put a checkmark in all the closing criteria. Yes, there are things we need to do, but there are also things we have done. If we form such a working group again under your coordination in order to be able to say to the European Union, “Why don’t you let us in? If not, why don’t you at least close this chapter?”, because this is your

(Directorate of EU Affairs) responsibility, I think it will be successful because we have done our part technically in the field of company law. Thank you very much.

RIZA AYHAN: Thank you very much.

KORKUT ÖZKORKUT: I mean, my brain is constantly producing thoughts right now. The Directorate for EU Affairs was a Ministry, yes, it was a Ministry, but the question “Why did we turn a Ministry into a Directorate for EU Affairs within the Ministry of Foreign Affairs?“, I mean, we are discussing a very special chapter such as company law, but I think there will probably be a need to explain why this happened when we explain these things.

ŞÜKRÜ YILDIZ: I completely agree. There are so many correct assessments stated. However, despite all this, we need to show what we have done at the point we have reached by saying that the Public Oversight Authority has done its part and the Ministry of Commerce has done its part, right, Hocam? Of course, it would be very nice if it was the Ministry for EU Affairs, it would be great, but the Directorate will probably do these things. Because they are very experienced. So there is a good team. I am really happy that we came together with such a good team. I thank them all, but we should be able to say that we have technically harmonized. As the EU, they should not be able to say “Why didn’t you establish a ministry?”. As Türkiye, we have done all the harmonization, even within the Directorate. Now the EU should close the chapter even if it does not take us as a member. Now we are working, endeavoring, and wandering around in the same spot.

In 1998, the progress report said: “*a certain level of harmonisation has already been achieved. The main provisions and principles of Turkish legislation in this field are in line with the relevant Community Directives. Turkish rules give sufficient protection to shareholders and creditors. Other provisions such as minimum capital requirements, the kinds of business associations, the corporate organisation, registration requirements and the disclosure of information are also largely consistent with Community legislation. Complete harmonisation would*

not be difficult to achieve.” 1998 report is the first progress report. However, as the expert who prepared the report changes or the chairman changes, we have to start from scratch when conveying the progress we have made. I have just read in the report that it was said that yes, this and that is very good, but there is a deficiency at this point, but in fact we have completed that point. This point is important. Thank you very much.

RIZA AYHAN: Thank you very much, yes. We have the Economic Development Foundation to explain all this. What are they doing?



Batuhan Aktürk Tezel

Economic Development Foundation

BATUHAN AKTÜRK TEZEL: I would like to start by thanking everyone who organized and contributed to the organization of this meeting. It is a very mind-opening and informative session, and I would like to thank you for inviting the Economic Development Foundation. Let me start by introducing myself, I am Batuhan Aktürk Tezel. I am an assistant specialist at the Economic Development Foundation (IKV). The Economic Development Foundation is one of the oldest and well-established non-governmental organizations in our country. With the forward-looking vision of the Istanbul Chamber of Industry and Istanbul Chamber of Commerce, IKV was established in 1965 to monitor the developments in European integration and to convey them to the Turkish business world. We briefly define our Foundation as “Türkiye’s EU expert”.

When we look at the journey of IKV since 1965, we see that there have been parallel developments in Türkiye-EU relations. IKV, which is primarily the voice of the business world, plays an active and strong role in informing the companies and SMEs (small medium enterprises) in our country before and after 1995, when the final phase of the Customs Union, which is closely related to the business world, started. The 1999 Helsinki Summit opened the doors of a new era in Türkiye-EU relations with the declaration of Türkiye as a candidate. After this date, IKV’s role has expanded and its role has not only been to be the voice of the business world, but also to explain the EU process to a wider audience. Since then, IKV, as the expert organization on the EU, continues to convey accurate and reliable information to the public opinion in Türkiye and the EU, and to monitor and share

the developments in the EU and Türkiye-EU relations. On the other hand, perhaps one of the most important indicators that it is one of Türkiye's leading organizations is its representative office which was opened in Brussels in 1984. Today, IKV is an institution whose work on Türkiye-EU relations is closely followed by EU institutions, experts, technocrats and various diplomatic missions in Brussels and whose opinions and statements are taken into consideration.

Another important aspect of IKV in Türkiye-EU relations is its lobbying activities at the right time throughout the process. Both bringing together nearly 200 civil society organizations from different viewpoints in Türkiye to call on the government for EU reforms, and gathering these civil society organizations together with their European counterparts in Brussels to support the opening of negotiations with Türkiye are initiatives that are etched in everyone's memory. Briefly about myself, after graduating from Medipol University, Department of Political Science and International Relations, I did my master's degree in European Politics at Marmara University, and I am currently writing my thesis on European security. My main field of study is security, foreign relations and the EU's Security and Defence Policy. The expert staff at IKV is expected to build up knowledge and expertise on various EU policies. One of the chapters I am responsible for is company law.

I can start by saying the following about the subject. The panelists took the floor before me actually talked about the progress reports and Türkiye's current situation in detail. The progress reports underlined issues such as the current situation regarding company law, what has been done, what has not been done, and what is expected to be done. According to the 2021 Türkiye report, no progress has been made in the field of company law, and it is suggested that harmonization is needed on important issues such as cross-border mergers, domestic mergers, divisions and acquisitions. It is also stated that the use of digital tools and cross-border transactions should be harmonized with the 2019 company law acquis.

Concerning the public disclosure of company documents, it is emphasized that there is no provision requiring the publication of annual accounts in the trade registry for all limited liability companies. The report states that the Ministry of Trade has developed trade registry e-services to include a general assembly module, electronic document and electronic announcement services. However, it is underlined that it is not yet possible to register company documents to the trade registry online or to complete the registration of limited liability companies to the trade registry entirely online. In addition, in the area of corporate governance and shareholders' rights, the report found that Turkey has taken significant measures in the area of significant transactions or Environmental, Social and Governance reporting in the context of listed companies. However, in addition to all these, in both the 2021 and 2022 reports, I think the most important thing to pay attention to is the recognition that Türkiye is at a very advanced level of harmonization with the EU acquis in the field of company law. However, as you have just stated, Prof. Yıldız, why is it that this chapter and other chapters are not closed even though Türkiye being at such an advanced level in company law? Actually, this is the main problem. Now, as we all know, there is a situation in which the Council and the Greek Cypriot Administration of Southern Cyprus block the closure and even the opening of the chapters. And Turkey has actually completed all the criteria especially in five chapters, namely chapters 6-20-21-28 and 32, and in chapters 20 and 21, namely Enterprise and Industrial Policies and Trans European Networks. However, despite this, these chapters cannot be closed temporarily. As stated by the EU in its reports on Türkiye, we are at a very advanced level in these five chapters; company law is one of them.

On the other hand, I would like to touch upon the political dimension of the opening and closing of these chapters and the current perception that is the reason for this. The EU has a perception that Türkiye has deviated from the EU axis, especially in the last ten years. The EU's approach towards us is based on this perception. In fact, there are concrete data on this. Türkiye's alignment with the EU's foreign policy is decreasing every year. From 14 percent in 2021, Türkiye's alignment declined to 7 percent in 2022. However, it should be recalled that in 2010 this rate was

74 percent. There is a dramatic decline and deviation. In addition to all this, there is a statement made by the European Parliament's Rapporteur on Türkiye, Nacho Sanchez Amor, that the process has become dysfunctional. He says that it is now necessary to turn towards alternative forms of relations because this membership process is not progressing. However, these alternatives were also voiced at a time when Türkiye's relations with the EU were experiencing the most intense and positive momentum since 2005 and 2006, when Türkiye and the Turkish public opinion were thinking "we are now entering the EU", and the EU had very important positive views on many issues in terms of Türkiye's membership. Chancellor Merkel was one of the first to express this. In the following period, Sarkozy made very important statements that would undermine Türkiye's EU membership process. In other words, there is actually a very serious political background here, and this political background hovers over the process like a ghost, no matter what we do or how much progress we make in all chapters. Even when all indicators were positive and Türkiye had made a very positive progress in reforms and legislative harmonization, there was a lot of rhetoric that "Türkiye was not in Europe, but in Asia" and that Türkiye could not become a member of the EU.

We are doing a lot of work, including government bureaucracy, diplomacy, civil society and think tanks like IKV, and we are thinking about how to become more harmonized. This is very valuable, but why can't we move forward? Because some things are not resolved in high politics. The Cyprus problem is already one of our main dilemmas. It is worth mentioning that we have actually taken very important initiatives regarding the solution of the Cyprus problem.

In particular, our support for the Annan Plan is the most important indicator of this. However, Greek Cypriot Southern Cyprus rejected it. The biggest factor behind their rejection is the EU itself. One of the most critical mistakes was made regarding the membership of Southern Cyprus. The fact that the guarantee that Southern Cyprus would be included in the Union covering the whole island was given before the referendum caused the South to reject the plan with peace of mind. Because they had already got

what they wanted. Chancellor Schröder later recognized what a severe mistake this had been. But it was too late.

Both the Cyprus problem and Türkiye's recent distancing from the reform process, as well as the change in the priorities of the EU and Türkiye, and the failure to present Türkiye with a more transparent and clearer accession perspective, as in other candidate countries, have led to a situation where the negotiation process has effectively stalled.

Before my master's degree, I was very hopeful about Türkiye's accession to the EU, but later on, especially after specializing in this field and learning the historical background in detail, unfortunately I am not as hopeful as I used to be. Of course, this should not be taken as an analysis that membership will never be realized. Because the phenomenon in question is a very cyclical process. In periods when mutual wills have come together, Türkiye-EU relations have always shown great momentum. However, during periods of divergence and cyclical periods when mutual wills did not come together, unfortunately, important ruptures were experienced, and we are actually experiencing one of these rupture processes right now. However, I hope that a positive process regarding Türkiye-EU relations can be re-entered. Especially in international politics, nothing is 100 percent impossible or 100 percent possible. Of course, for this, the variables within the international system as conjuncture must also develop and form in a way to serve the process. Russia's aggression, the rise of China as an alternative, and the EU's post-Brexit quest to recover and become an actor may be important exit doors for Türkiye. However, if we play our cards a little more accurately, and if we can explain much better, both as civil society, bureaucracy and academics, what the cost of the EU's exclusion of Türkiye might be for the EU in the future, we can make gains in this regard. This is a very challenging process, Türkiye's main and prioritized goal is membership, and it should direct both its domestic and foreign policies in this direction. Because of our harmonization with the entire *acquis*, the reforms we have made and will make are very important and very valuable in raising our citizens' living standards. That is all I have to say; thank you very much for listening.

RIZA AYHAN: Thank you very much. Are there any questions for Mr. Tezel?

ŞAFAK NARBAY: Now you made a statement that Türkiye should play its cards well. I would like you to elaborate on this a bit. I mean, okay, there is a high policy at the point of putting forward that will. I expressed this during the coffee break when I was talking to Mrs. Küçükgüngör. There is also a statement that our President has recently made, which is intended to turn our road map in another direction but we can put this aside for now. Which cards do we have? How can we, as a country, utilize them in order to cover the distance faster in the European Union process? I would like you to concretize this a little bit.

KORKUT ÖZKORKUT: May I also add something? At this point, as our Honorable Rector said, it has also caught my attention a little while ago. The EU is not a global power. In other words, Türkiye's commitment to the EU story, the fact that a fair structure cannot exist without Türkiye, and that you cannot talk about a Europe that neglects Türkiye, he emphasized exactly these points. What you said overlapped with these points so much that aside from the great political will, does Türkiye, as a candidate country, politically, want, demand, desire and even aspire to join the European Union? Or do we politically endeavor to manage a process in which there is such a balance of power, a new world formation, and the European Union is gradually disintegrating; you mentioned Brexit; are we politically trying to manage a process in which it may or may not happen?

BATUHAN AKTÜRK TEZEL: Let me start with the first question: What are Türkiye's cards, and what can happen? In a changing, multipolar, and increasingly chaotic world order, Türkiye has a very important position as one of NATO's dominant military powers. At the same time, Russian aggression could help Türkiye regain its significance during Cold War period. Russia is a very predictable country in terms of aggression. Its goal is simple: to regain the territories it has lost in the past. Russian foreign policy for the last 25 years has been based on this. Russian aggression did not start today, with Ukraine. They annexed Crimea in 2014. Before that, there were

the invasions of Georgia and Chechnya. As I mentioned before, Russia has been defending itself since the collapse of the Soviet Union.

It is a power that is trying to recover and reclaim the geopolitical territories it lost. In other words, it is a country trying to get back on the superpower stage.

How can Türkiye play its cards right in such an environment? One of Türkiye's most important trump cards, especially in the process of rapprochement with the West, was the Cold War and the use of its geopolitical position. Our admission to NATO and our relations with the EU have always proceeded in this direction. Türkiye's being in the West and being one of the Western allies was not discussed during the Cold War. Because Türkiye's being in the West was something that the West wanted and favored very much in the conditions of that period. Today, unfortunately, this is not the case, but this situation may recur. I am one of those who believe that history is not a continuous line and that many phenomena repeat themselves within processes.

In other words, our first trump card is that our country is still a member of NATO and, therefore, one of the Western allies. I would like to underline that we are not just a plain NATO member. We are a very strong and important member in terms of military capabilities and capabilities; in addition, we are a regional power.

Our second trump card is the precious metals that we call critical raw materials, most of which are found in countries outside the West and Europe, such as China and South Africa, and even some of them are found in the Central African region, in countries that are facing coups today. These critical raw materials are actually the critical raw materials that both the EU and the world must have in order to realize green transformation. In other words, you can build wind turbines with them, and you can build electric cars. You can do many things. Türkiye is a very important route for the supply and transit of these critical raw materials to the EU. And critical raw materials such as antimony and boron are actually exist in Türkiye. At this

point, the extent of our trade relations with the EU and the issue of critical raw materials can be two important trump cards in our hands.

Thirdly, although Türkiye has recently been experiencing certain political divergences with the European Union, there is a Western state tradition that dates back to the foundation of the Republic. This was very important both for our positioning during the Cold War and for the process that followed. After 1991-1992, that is, after the end of the Cold War Türkiye has always pursued this goal with the desire to become a Western state and to position itself in the West. This also continued when the AK Party (Justice and Development Party) came to power in 2002. In recent years, especially after the treacherous coup attempt in 2016, Türkiye has rightly embraced a more skeptical view of Europe and the West. I say rightly because I think we have not received the support we expected from our allies on many issues. Therefore, there has always been a kind of Europe-externalization towards Türkiye. And this Europe-externalization is actually reciprocal. That is to say, we are being de-Europeanised by Europe. But are we not skeptical towards Europe? Turkish politics, especially in the last ten years, has been looking at the issue in this way within the mechanism of action-reaction. In recent years, the discourse that all evil comes from the West has increased on many issues, either they are related to Europe or not. There are certain justifiable points in this discourse, but there are also discourses used especially for domestic politics. Unfortunately, the use of this language is also very damaging to relations.

Now I would like to come to the second question. Is the European Union a power? Does Türkiye really want to be included here? Do we really characterize and position ourselves as Europeans or why should we be in this structure? Let me put it this way: Especially after Brexit, the departure of the United Kingdom affected Europe very deeply. Because for the first time, a state has left the EU. This is an important step backwards for European integration, a failure for the EU. But now, after seeing the costs of Brexit and the burden that Brexit actually caused in the United Kingdom, it is worth noting that the European Union is still a very important economic power. Although it has fallen behind in competition with China in

terms of critical raw materials or other strategic raw materials, it should be underlined that it is a very important power, especially in economic terms, and that it is a very important structure in legal terms. Of course, despite its size, the biggest disadvantage of the EU in international politics is the lack of military power. This is one of its most important problems. That is why I go back to the point I made in the first question. In other words, Türkiye's biggest strength, one of the biggest trump cards in its hand is that Europe does not have an army, and Türkiye has a very strong army.

There are actually two states that can protect Europe in the event of Russian aggression or the aggression of any other state. One is the United States of America and the other is Türkiye. This is a very important trump card in Türkiye's hand. Because Germany has not already had an army. France has one of the most important armies in Europe. The French army is half the size of Türkiye's, especially in terms of the number of active personnel.

It should also be noted that a European army to be established through France will not be in the favor of the European Union and especially the USA. Because what France has been trying to do, especially since De Gaulle, is to create a European army under French leadership. In other words, there is an internal conflict and divergence within Europe, especially in terms of security. I think we can make good use of this divergence within Europe.

Let me come to the other part. Do Türkiye and the Turkish public opinion want to become a member of the EU? I can say that 65 percent of the Turkish people still want to be a member of the European Union. They want to be in Europe. This attitude is valid for almost many different segments of the society. We want to benefit from both the economic and social advantages of the European Union; this is clearly seen in the public opinion survey conducted by IKV in recent months. As a state, we have such a tradition and such a goal.

Let me answer the last part of your question. Is the European Union a dying power? I think not; only the world has changed. In other words,

Europe has ceased to be an important center on its own and has become a center within multipolar centers. Therefore, throwing Europe aside and thinking that Europe is over and that we should turn to other centers will not be very good for Türkiye. Türkiye is a country that can be positioned within Europe due to its location and structure, but it can also enter into alternative partnerships. This is a very important structural feature. It should be utilized well. However, these partnerships, i.e. non-EU partnerships, should be at a level that does not prejudice Türkiye's historical relations with the West and the European Union. In other words, our relations with Russia and China should not be at a level that would be an alternative to the EU and our Western allies and create a perception of threat in them. Because this attitude would be a wrong move that would bring very severe costs to Türkiye at the end of the day. Therefore, what we need to do here is to continue to position ourselves as Westerners, just as we have done so far. Our EU candidacy process is our most important goal in this direction, which should not be abandoned or ignored. On the other hand, just like the EU, it is also essential to make trade agreements with China, establish economic ties with China, and to develop relations with other regional powers such as India. That's all I have to say on this subject. Thank you for the questions.

RIZA AYHAN: Excuse me, who else would like to ask a question, Prof. Yıldız?

ŞÜKRÜ YILDIZ: I would like to thank you for your explanations. We especially wanted to make a technical evaluation of Chapter 6. It is already clear that the European Union will not close the chapters politically. No chapter is temporarily closed due to the additional protocol decision of the Council of Europe. It is purely political. Chapter 20 (enterprise and industrial policies) and Chapter 21 (Trans-European networks) are technically suitable for closure, correct? What does it say? In addition, seven closing benchmarks have been met in five chapters, one of which is chapter 6.

Five closing benchmarks were envisaged for the chapter on company law. They stated that one of them was met. But in the morning session, we

realized that we actually met all of them, not just one. Isn't that right, Hocam? I mean, we have met them all. But somehow we could not explain these criteria to our interlocutors. They say, "Yes, you have fulfilled one criterion. Business and industrial policy has met one criterion. Consumer and health protection fulfilled one criterion. Financial control met three criteria." Okay, they do not close our chapter. It does not matter at all, but just like in Chapters 20 and 21, they should technically say "Türkiye deserves to close the chapter on company law". Let them say, "We are not closing it, but it deserved it." Because we have achieved this, we really have. Does the Economic Development Foundation share this view as an organization, what do you say? Have we achieved technical harmonization? The 2022 progress report says, "*Türkiye is well advanced in the area of company law although no progress was made on the 2021 recommendations during the reporting period and they remain valid. In the coming year, Türkiye should in particular:*

- *make progress in alignment with the EU acquis in the company law area, including in the field of shareholder rights and encouragement of long-term shareholder engagement;*
- *adopt the financial reporting standards for small and micro companies to achieve further EU acquis alignment."* and we learned that we are putting this into effect in 2023. What do you think?

BATUHAN AKTÜRK TEZEL: Let me put it this way, what you have just said seems to be a technical comment. Unfortunately, the progress reports put forward by the EU do not mean anything in terms of the progress of the process. What needs to be done is mentioned, but even if we do these things, we cannot close the chapter. Unfortunately, I will come back to the beginning again. There is a political attitude behind this. In other words, it is said that Türkiye is at a very advanced level. But you cannot move forward or you cannot finalize the process. In this context, the EU reports remain political at the end of the day.

IKV explains everything in its contacts with the EU and in Brussels. However, in the problematic areas between Türkiye and the EU, the parties

need to act in a more conciliatory manner and discuss how to move the process forward by uniting around common interests. It is true that there is a blockage in the negotiation process today, but this does not mean that all relations between the two sides are at a standstill. Through various high-level dialogue mechanisms, the parties come together in many areas and discuss developments and problems. We should look for ways to increase cooperation opportunities. As IKV, while emphasizing these issues in our contacts in Brussels, we insist that the EU's approach to Türkiye should be more fair.

RIZA AYHAN: Are there any other questions you would like to ask, friends? We used our time very well. It is eight minutes to 13:00. Therefore, I think that the meeting was productive. As we have a little more time, I have a note to share. Prof. Yıldız also stated this note directly. It is of course a political outcome for us whether or not they accept Türkiye's accession to the European Union. Why did we enter this European Union process? What were the reasons for our request to become a member of the European Union? You have just stated it yourself. When we established the Republic in 1923, we had a goal, we were going to be westernized. We were going to reach the level of contemporary states. For this reason, we made changes in our legislation and administrative organization similar to those in the West. We endeavored to change our education system towards the West and we said that the West represents the level of social life in the current world that is orientated towards justice. That is already the definition of law: a social order orientated towards justice. As a living order. And the rules of law are the rules that will ensure this order. We need to establish the rules of law, that is, the rules that will ensure the social order of life oriented towards justice. The closure of the sixth chapter shows that we have gone one step further in this regard. We may or may not do it, they may not let us into the European Union. But just as the competition law has brought the social life level to a certain point and made great contributions to Türkiye, just as the consumer protection law and the capital markets law have made outstanding contributions to our life in this regard, let us see our shortcomings. Let us overcome our deficiencies regarding the chapter on companies. I also agree with the view that it is purely political whether they take it

or not. We have done it, but we cannot get results, we cannot enter. I think what is important for us is to incorporate the rules that will be fitting to the level of social life into Turkish law and to be able to present and give them to our people. But what happens next? We need to explain what we have done well. Latin Americans have a saying. As you know, it is not the intensity of the water that pierces the marble, but the continuity of the drops. Let us do our duty. After that, the politicians may or may not take us by agreement. If we do our duty, we may have served our people well. For this reason, do not lose motivation. It is extremely important for Turkish people that have motivation. In particular, it is you who need to increase your motivation. Because those of us who are interested in company law and commercial law refer to the EU acquis from time to time. However, it is one of the issues that we should frequently touch upon and emphasize. Thank you all very much.



Session II

Academic Evaluations

Chairman: Prof. Dr. Rıza Ayhan

RIZA AYHAN: Our time is limited for now, because friends who have bought a ticket for the 19.00 flight should depart from here at 17.00. Therefore, we have 150 minutes. We have ten faculty members. We will ask our faculty members to limit their presentations to 10-12 minutes. I would like to give the floor to Prof. Bilgin immediately so that there will be time for both discussion and answering the questions of our friends. Here you go.



Formation Provisions

Prof. Dr. Fülürya Yusufođlu Bilgin - Galatasaray University

FÜLÜR YA YUSUFOĐLU BİLGİN: Thank you, Professor. First of all, I would like to thank Prof. Yıldız. Prof. Yıldız was on my associate professorship jury, and since that day, he has always supported, encouraged and believed in me. I am really grateful to you, Professor. I am grateful to you, I say this in every circle, and I wanted to say it now. Thank you very much for inviting me here and trusting me. I would like to thank Ibn Haldun University for this beautiful organization. I would like to thank our experts from public institutions for the good information they gave us and for enlarging our horizons, and I would like to extend my respect to my esteemed professors.

Now, our presentation with Ms. Badak is on the formation. As our experts have already said, the establishment is actually one of the most smooth areas. We have tried to make detailed examination here, but due to the limited time allocated to us, we have to go through it a little fast.

RIZA AYHAN: Ladies, if you are presenting together, yours will be a little more.

FÜLÜR YA YUSUFOĐLU BİLGİN: We have analyzed the provisions for the establishment of a joint stock company, its nullity, and the validity of the obligations separately.

Article 2: Scope

This section is limited to the establishment of joint stock companies. These companies are listed in Annex 1 of the Directive. In Annex 1, the companies are listed by country. The provisions on incorporation are transposed from Directive 2012/30 EU.

In the Commission's initial proposal for the Second Directive, it was stated that two reasons led it to impose restrictions on joint stock companies. Firstly, they represent the most economically important type of company, and their activities often cross national borders. Secondly, they represent the most legally sophisticated type of company. Therefore, the coordination of joint stock companies is of higher priority. But it is also intended to be a solid basis, *mutatis mutandis*, for the harmonization of other types of companies.

Member States may decide not to apply this Chapter to investment companies with variable capital and co-operatives established as one of the types of companies listed in Annex I. As long as the laws of Member States exercise this option, such companies are required to include the words 'investment company with variable capital' or 'co-operative' in all documents referred to in Article 26. In our law, "investment company with variable capital" is regulated in Articles 50 and 51 of the Capital Markets Law.

The term 'variable capital investment company' within the meaning of this Directive refers only to the following companies

- whose exclusive purpose is to invest its funds in various stocks, shares, land or other assets for the sole purpose of spreading investment risks and benefiting its shareholders from the results of the management of its assets,
- We are a company that has taken its own shares public
- The bylaws stipulate that they may issue, repurchase or resell their shares at any time within the minimum and maximum capital limits.

Article 50 of the Capital Markets Law appears compatible with the provisions of the Directive.

Article 3: Compulsory information to be provided in the statutes or instruments of incorporation

The statutes or the instrument of incorporation of a company shall always give at least the following information:

- a) the type and name of the company; - TCC Art. 339/2-a
- b) the objects of the company; - TCC Art. 339/2-b
- c) where the company has no authorised capital, the amount of the subscribed capital; - TCC Art. 339/2-c
- d) where the company has an authorised capital, the amount thereof and also the amount of the capital subscribed at the time the company is incorporated or is authorised to commence business, and at the time of any change in the authorised capital, without prejudice to Article 14(e);
- e) in so far as they are not legally determined, the rules governing the number of, and the procedure for, appointing members of the bodies responsible for representing the company vis-à-vis third parties, administration, management, supervision or control of the company and the allocation of powers among those bodies.
- f) the duration of the company, except where this is indefinite; -Article 2/i of the TCC

Article 4: Compulsory information to be provided in the statutes or instruments of incorporation or separate documents

The following information at least shall appear in either the statutes or the instrument of incorporation or a separate document published in accordance with the procedure laid down in the laws of each Member State in accordance with Article 16:

- a) the registered office; Art. 339/2-a
- b) the nominal value of the shares subscribed and, at least once a year, the number thereof; Art. 339/2-c of the TCC
- c) the number of shares subscribed without stating the nominal value, where such shares may be issued under national law; - In our law, each share must have a nominal value, it is not possible to issue shares without a nominal value, therefore, the exclusion of this provision from our law is not a deficiency in terms of harmonization,
- d) the special conditions, if any, limiting the transfer of shares; - TCC Art. 339/2-d, TCC Art. 492-493
- e) where there are several classes of shares, the information referred to in points (b), (c) and (d) for each class and the rights attaching to the shares of each class; Art. 339/2-d of the TCC, Art. 478 of the TCC
- f) whether the shares are registered or bearer, where national law provides for both types, and any provisions relating to the conversion of such shares unless the procedure is laid down by law; TCC Art. 339/2-d
- g) the amount of the subscribed capital paid up at the time the company is incorporated or is authorised to commence business; TCC Art. 339/2-c
- h) the nominal value of the shares or, where there is no nominal value, the number of shares issued for a consideration other than in cash, together with the nature of the consideration and the name of the person providing the consideration; Art. 339/2-c TCC
- i) the identity of the natural or legal persons or companies or firms by which or in whose name the statutes or the instrument of incorporation, or where the company was not formed at the same time, the drafts of those documents, have been signed;

- j) the total amount, or at least an estimate, of all the costs payable by the company or chargeable to it by reason of its formation and, where appropriate, before the company is authorised to commence business;
- k) any special advantage granted, at the time the company is formed or up to the time it receives authorisation to commence business, to anyone who has taken part in the formation of the company or in transactions leading to the grant of such authorisation ; Art. 339/2-e TCC

Article 5: Authorisation for commencing business

1. Where the laws of a Member State prescribe that a company may not commence business without authorisation, they shall also make provision for responsibility for liabilities incurred by or on behalf of the company during the period before such authorisation is granted or refused.
2. Paragraph 1 shall not apply to liabilities under contracts concluded by the company conditionally upon its being granted authorisation to commence business.

This article has been in force since Directive 77/91/EEC dated 13 December 1976, was included in the Companies Directive 2012/39/EU, and has remained unchanged in Directive 2017/1132.

The purpose of this article is to protect creditors and to harmonize national laws.

Art. 5/1 - Main rule

A Member State may require an authorization for a company to start its activities. Liability for transactions carried out on behalf of the company in the period before the necessary authorizations are obtained must also be regulated by the Member State concerned.

Obtaining the necessary authorizations before commencing operations is independent of the registration and legalization of the company. Even if a company does not obtain the necessary administrative authorizations, it still acquires legal personality. Therefore, Art. 5 stipulates that the period from the establishment of the company until the time of obtaining the necessary permits must be regulated.

The liability for activities prior to the establishment of the company is regulated in Article 7/2 of the directive (Art. 8 of Directive 2009/101/EC). Necessary arrangements should be made regarding the transactions made after the establishment of the companies subject to authorization, but before the authorization is obtained. In case the company fails to obtain authorization, it is stipulated that the liability arising from the transactions carried out on behalf or account of the company should be regulated.

A situation in which this article existed in the United Kingdom, a former member of the EU. Article 761(1) of the UK Companies Act 2006 specifies which activities of companies are subject to authorization. Article 767 of this law deals with the consequences of transactions carried out without authorization.

As a rule, the incorporation of joint stock companies is not subject to any permission under Turkish Law. However, pursuant to Article 333 of the TCC, the incorporation of the companies specified in the communiqué to be published by the Ministry of Customs and Trade shall be subject to permission.

It is important to add that if a joint stock company, the incorporation of which is not subject to authorization but which must contain the mandatory provisions required by law for registration with the trade registry, fails to acquire legal personality within three months pursuant to Article 345/2 of the TCC, the same rule shall apply.

Another possibility should be examined here. For example, although the establishment of a health services company is not subject to an

administrative permit, the operation of the hospital depends on obtaining a hospital operating licence from the Ministry of Health. In this case, the company's opening of a hospital depends on obtaining the licence.

In order to ensure compliance with this article, it may be determined that the company will be liable for the transactions made or a regulation may be made that the person who performs the relevant transaction on behalf of the company may be held liable. However, it is not necessary to make these arrangements in order to ensure harmonization. The provision is in compliance with EU regulations.

When we look at Articles 125 and 371 of the TCC, we see that the principle of *ultra vires*, which is accepted as a limitation on the capacity to exercise rights, has been eliminated. It is now accepted that the company is liable for all transactions. Pursuant to Art. 371/2 of the TCC, the transactions made by those authorized to represent the company with third parties outside the scope of the company's business are binding on the company. Therefore, we believe that the provisions herein are sufficient.

Art. 5/2 - Exception

Art. 5/2 of the Directive states that Art. 5/1 shall not apply to the liabilities arising from the agreements made subject to the condition of granting the authorization to commence operations. For example, if the authorization to commence operations is not granted, the contract will be invalid as the condition in the contract will not have been fulfilled. The inclusion of this exception also enables the persons who will carry out activities on behalf of the company to take the necessary measures for the company to commence operations.

As recognized by doctrinal authors in the EU, Article 5 does not contain the necessary clarity for direct application.

Article 6: Multiple-member companies

1. Where the laws of a Member State require a company to be formed by more than one member, the fact that all the shares are held by one person or that the number of members has fallen below the legal minimum after incorporation of the company shall not lead to the automatic dissolution of the company.
2. If, in the cases referred to in paragraph 1, the laws of a Member State permit the company to be wound up by order of the court, the judge having jurisdiction shall be able to give the company sufficient time to regularise its position.
3. Where a winding-up order as referred to in paragraph 2 is made, the company shall enter into liquidation.

Pursuant to this provision, if a company is envisaged to be established with more than one shareholder, a decrease in the number of shareholders below the envisaged number will not lead to the automatic termination of the company. A court decision is required for this. However, the company shall be dissolved upon the court's decision.

This provision aims to take the necessary measures for the rescue of companies that do not comply with the conditions regarding the number of shareholders rather than terminating them. In any case, the consequence of the number of shareholders falling below the prescribed number cannot be automatic dissolution. As a matter of fact, it is stated that companies may be dissolved by a dissolution decision issued by the Court.

Under Turkish Law, a company may be established with a single shareholder. Although there is no explicit provision on the number of shareholders in the Banking Law, according to Article 18/4, "transactions leading to a decrease in the number of shareholders below five and share transfers made without authorization shall not be registered in the share ledger". This means that transactions that lead to a decrease in the number of shareholders below five without the authorization of the Banking Board will not

be registered in the share ledger of the company, and therefore, this transfer does not affect the company.

As in the EU Law, one-person companies are also regulated under Turkish Law. Regulations on one-person companies were made at the EU level and the 12th Company Law Directive on Limited Liability Companies with One Shareholder numbered 89/667/EEC entered into force in 1989. Although this Directive has been replaced by Directive 2009/102/EC, the new Directive has not made any fundamental changes in the current situation. Some of the provisions in the Directive and their equivalents in the TCC are as follows,

- Pursuant to Article 2/2 of 2009/102, Member States may make special arrangements in cases where a natural person is the sole shareholder of more than one company, and in cases where a company with a single shareholder or another legal entity is the sole shareholder of a company. There is no such regulation in the TCC, but this regulation has not been transposed into German and English law.
- Pursuant to Article 3 of 2009/102, in the event that a company subsequently becomes a single shareholder as a result of the concentration of all shares in the hands of a single person, it is obligatory to disclose this situation to the public together with the identity of the single shareholder. Articles 338/2 and 574/2 of the TCC are in parallel with Article 3 of the 12th Directive, which stipulates the obligation to disclose to the public in the event that the shares of the company are subsequently concentrated in the hands of a single person.
- The law stipulates that the sole shareholder, while exercising the authority of the general assembly, must take the decisions in writing or record them in a minute book. In Turkish Law, there is also a requirement to put the general assembly resolution in writing.
- According to Art. 5 of 2009/102, contracts between a sole shareholder and a company represented by a sole shareholder must be

recorded in a minute book or made in writing. However, Member States are not obliged to apply this rule to ordinary transactions carried out under ordinary circumstances. Turkish law has adopted a more restrictive article than the aforementioned regulation, and all agreements made by a sole shareholder, whether or not he represents the company, are subject to the requirement of writing (TCC 371/6). It is stated that the requirement of formality shall not be applied to agreements relating to daily, trivial and ordinary transactions according to market conditions.

Article 7: General provisions and joint and several liability

1. The coordination measures prescribed by this Section shall apply to the laws, regulations and administrative provisions of the Member States relating to the types of company listed in Annex II.
2. If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed.

Annex I and Annex II of the Directive identify companies in each Member State in order to avoid ambiguity. The first paragraph of the Article specifies to which companies the provisions of this Chapter apply.

Art. 7/2 regulates the liability arising from the establishment of capital companies in general. The provision regulates the liability arising from an activity carried out on behalf of the company, which does not cover the establishment expenses. As a rule, if a representative acts on behalf of a non-existent person, the non-existent person cannot be held liable.

Although the Directive is based on German and Italian law, it does not require Member States to adopt a similar form of incorporation. The Directive does not regulate the moment of legal incorporation of the company, nor does it regulate the “pre-company” and this period. Similarly, the

liability of the company and its representatives is not regulated in the Directive. Article 7/2 of the Directive regulates the minimum protection for the period before the company becomes a legal entity. The purpose of this provision is to determine the addressee of the transaction made in the period before the company becomes a legal entity. The aim is to ensure that the counterparty of the transaction finds the addressee without any problems. From the moment the company accepts responsibility, the provision will not be applicable. The law of many countries prevents an unincorporated company from becoming a party to a contract but prefers to find a responsible party for the transaction in any case.

Article 7(2) of the Directive provides minimum protection against this risk. If the company claims that it is not bound by a transaction concluded after its incorporation, the counterparty to the transaction will have recourse against to the person acting on behalf of the company. **Persons acting on behalf of the company will be liable only if the company does not accept liability.** In this way, in the event that the company does not accept liability, the other party to the transaction has the right of recourse directly against the persons acting on behalf of the company at the time of incorporation.

Although Article 355/2 of the TCC is not in literal conformity with Article 7/2 of the Directive, it provides broader protection than the protection intended by the Directive. Pursuant to Article 355/2 of the TCC, those who carry out transactions and undertake commitments on behalf of the company prior to registration shall be personally and severally liable for such transactions and commitments. However, only the company shall be liable if the transactions and undertakings are expressly declared to have been made on behalf of the company to be established in the future, and if these undertakings are accepted by the company within a period of three months following the registration of the company in the trade registry. Pursuant to Article 355/2 of the TCC, the company shall be liable for the commitments only if it accepts these commitments within a period of three months following the registration.

In our opinion, Article 355/2 of the TCC does not fully comply with Article 7/2 of the Directive and is more stringent than the provisions of the Directive. Article 355/2 of the TCC requires the company to make a decision within three months. If the company fails to make a decision within 3 months, the liability of the transactors will continue. However, in some cases, some transactions may have been overlooked and the 3-month period may have been missed. According to Turkish Law, when an expense is incurred in the name of the company because a preliminary joint stock company has been established, if the company has gained legal personality, there should be no need for further regulation for acceptance of the transactions. This is because the founders are already shareholders of the newly established company. This provision is taken from the former TCC, and has the effects of the gradual formation that existed under the former TCC. Under the former TCC, there was a concept of founder and concept of shareholder, and therefore, it was meaningful for the company to accept the transactions, but since there is no gradual formation under the new TCC, and since the founders are already shareholders, and since the institution of a preliminary joint stock company has been introduced, no additional approval requirement should be stipulated. The same is undoubtedly valid for the establishment expenses.

When we look at the EU Directive above, according to Article 7/2, there is no provision stipulating that the company must accept the costs within three months. There, it is stated that the company is already responsible for the expenses incurred, but if the reimbursement of the costs are requested from the company, it may object and in this case, the liability of the persons who carried out the transactions may arise. According to the provisions of the Directive, the creditor has the right to recouse directly to the company, and if the company objects to the claim, the founders are held liable in order to ensure that the creditor's right is not delayed. The purpose of this regulation is to prevent the creditors from being victimized due to the transactions prior to the incorporation of the company. When we look at the regulations in the TCC, we see that the creditors have the right to apply to the founders for the transactions prior to the incorporation of the company, and if the company has accepted the undertakings within 3 months following the incorporation of the company, then the company may be

applied to. Art. 355/2 of the TCC is in line with Art. 7/2 of the EU Directive, which stipulates that creditors have the right of recourse against the parties joining in the transactions that the company does not accept the undertakings made. Since a directive stipulates minimum protection and the regulations under Turkish Law have higher protection than the regulations stipulated in the directive, amore comprehensive protection than the protection intended by the Directive is already provided. Therefore, there is no need to amend the article in order to harmonize with the EU Directive. Because, here, harmonization with the Directive has been achieved.

In our opinion, it would be appropriate to amend Art. 355/2 and 3 of the TCC in accordance with the other provisions of the TCC, although not contrary to the EU regulations.

(2) If transactions are carried out on behalf of the company before the company acquires a legal entity and the company does not undertake the commitments arising from these transactions, the persons who carry out these transactions shall be unlimitedly, personally and severally liable, unless otherwise agreed.

(3) After the company acquires a legal entity, the founders may recourse to the company for the establishment expenses (Amendment proposed by Prof. Dr. Abuzer Kendigelen).

Article 10: Preparation and Approval of the Articles of Association and Certificate of Incorporation

The certificate of incorporation, the articles of association and any amendments to these documents shall be drawn up and approved in the required legal form, unless the legislation of the Member State provides for preventive administrative or judicial control provisions at the time of incorporation of the company.

As mentioned above, the Directive does not in fact, uniformize the establishment of the company. Article 10 only states that Member States must have a minimum requirement of supervision and authorization.

Article 11: Conditions for nullity of the company

The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions:

- (a) nullity must be ordered by decision of a court of law;
- (b) nullity may be ordered only on the grounds:
 - (i) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with;
 - (ii) that the objects of the company are unlawful or contrary to public policy;
 - (iii) that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company;
 - (iv) of failure to comply with provisions of national law concerning the minimum amount of capital to be paid up;
 - (v) of the incapacity of all the founder members;
 - (vi) that, contrary to the national law governing the company, the number of founder members is less than two.

Apart from the grounds of nullity referred to in the first paragraph, a company shall not be subject to any cause of non-existence, absolute nullity, relative nullity or declaration of nullity.

Article 11 limits the nullity of the company to the specified reasons. A nullity other than these reasons cannot be claimed.

This article differs slightly from Art. 353 TCC. This is because Article 353/1 of the TCC does not list the grounds for nullity. It is stated that the nullity of the company may only be requested if the *interests of the creditors, shareholders or the public have been significantly jeopardized or violated by*

acting contrary to the provisions of the law in the establishment of the company. Under Turkish law, the grounds for termination of the company are quite ambiguous and broadly drafted. However, in the Directive, these grounds have been reduced to 6 (more grounds were mentioned in the former Directive). Of these grounds, i and iii are formal grounds, ii, iv, v, and vi are substantive grounds.

It would have been appropriate for harmonization to include five of the six conditions of nullity (conditions for dissolution) specified in the Directive in the text of the article 353 rather than six. (i) non-compliance with the formal requirements for incorporation or preventive supervision rules, (ii) the purpose of the company is contrary to the law or public order, (iii) the articles of association do not specify the title, capital and share amount and purpose of the company, (iv) violation of the provisions determining the minimum capital amount and the amount of capital to be paid, (v) all of the founders are incapacitated, may be included in the article. On the other hand, the condition in (vi) that the number of founding members should be less than two is not necessary to be included in the article since it does not comply with our law.

Nevertheless, it should be accepted that the existing provision under Art. 353 TCC covers the provisions of the Directive and does not prevent harmonization.

Under EU law, Member States may not invoke the nullity of a company on grounds other than these grounds. However, they may minimize these grounds. Therefore, in Turkish Law, Article 353 of the TCC should be interpreted in accordance with the provisions of Article 11 of the Directive.

Article 11 is an article on the nullity of the company and when we look at the old directive, it was seen that the nullity of the company could be based on more reasons. However, here, we see that six reasons for the nullity of the company have been written. Two of these reasons are formal conditions and four of them are substantive conditions. The sixth condition actually states that nullity, can also be claimed if the number of founding

members is less than two, contrary to the national law regulating the company. However, as I mentioned before, since there is no such condition in Turkish law, there is no such problem, and Article 11 of the Directive states that the grounds for nullity cannot be excluded from these 6 grounds. When we look at the first paragraph of Article 353, we see that the reasons are stated in a more general way. There is no explicit limitation of five reasons, but we think that this can be applied and interpreted in accordance with the Directive during the implementation.

Article 12: Consequences of nullity

1. The question whether a decision of nullity pronounced by a court of law may be relied on as against third parties shall be governed by Article 16. Where the national law entitles a third party to challenge the decision, he may do so only within six months of public notice of the decision of the court being given.
2. Nullity shall entail the winding-up of the company, as may dissolution.
3. Nullity shall not of itself affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's being wound up.
4. The laws of each Member State may make provision for the consequences of nullity as between members of the company.
5. Holders of shares in the capital of a company shall remain obliged to pay up the capital agreed to be subscribed by them but which has not been paid up, to the extent that commitments entered into with creditors so require.

Article 12 harmonizes the process and effects of the nullity of a company. Its aims to withdraw the company from the market but maintain its obligations to third parties.

A nullity declared by a court judgement entails the liquidation of the company (Article 12 para. 2). The company continues to exist until it is liquidated. The liquidation is carried out in accordance with the provisions of national law.

When we look at the Turkish Law, it is seen that the provisions under Article 353 of the TCC are not contrary to this provision. The different provisions stipulated in TCC are in line with Article 12 of the Directive.



Formation Provisions

Asst. Prof. Dr. Zehra Badak - Kocaeli University

ZEHRA BADAĞ: Thank you very much, Professor. I would also like to briefly thank my esteemed professors, Prof. Yıldız and Ibn Haldun University for providing this opportunity. I am also excited and honored to make a presentation in front of these esteemed professors. Thank you very much.

I'll take it from here.

In fact, when we looked at the general regulations on establishment procedures, another issue that came to our minds was the issue of online establishment, and it was seen that the problems expressed regarding online establishment were mostly related to digitalization. Our findings were already in that direction, and it was shown in the first session that the things seen in some progress reports and expressed as deficiencies are actually met in today's conditions. Article 13 of the EU Directive on the online incorporation of companies requires Member States to ensure that the incorporation of companies can be carried out entirely online, without the need to appear in person before any authority or person or body charged with dealing with any aspect of the online incorporation of companies. In this respect, in our law, especially the issues related to the inability to submit documents digitally are now fulfilled with the ease of electronic signature. With a concise short research, it can be seen that how to use MERSIS and which steps to follow in the establishment of a company are explained very well step by step in the materials shared by MERSIS online. In this sense, it is understood that the user participation requested by the EU has

also been ensured. This infrastructure also allows stakeholders to easily access this system. Although Article 335 of the TCC mentions “in the articles of association where their signatures are notarized or signed in the presence of the trade registry manager or his deputy”, according to TCC art. 1526/3 and Trade Registry Regulation art. 13/5: All transactions required by the law may be performed electronically with a secure electronic signature. Therefore, in this sense, we actually comply with the criteria requested by the directive.

However, as Mr. Sevim underlined in the first session, since we are not in the community at the moment, we are not in a structure that will be integrated with them. Of course, it will be possible to complete this when membership is realized. In this sense, although it has been criticized, both in the third paragraph of Article 1526 of our Law and in the fifth paragraph of Article 13 of the Registry Regulation, we can see that it has already been codified and included in our legislation by allowing it to be done electronically with a secure electronic signature.

Following this, company capital is one of the important topics in the establishment step. This issue is regulated in Articles 45-46 of the Directive. The minimum amount shown here is 25.000 Euro. Of course, our provision amount will be discussed. In other words, what the amount is in our law due to inflation is a matter that we can discuss in our own domestic law, and on the other hand, perhaps it is necessary to think about this, as we evaluated the other day while talking with Prof. Yıldız, Türkiye already has a guarantee to convert its currency to Euro if it becomes a member of the European Union. Therefore, it should not be overlooked that the TL values in the laws will be converted. In other words, in this framework, the debate on compatibility and incompatibility is also somewhat related to membership. In my opinion, it is not very possible to see this as an incompatibility in this sense.

As permitted by the Directive, we also allow the acceptance of capital in cash and in kind. In this respect, the restrictions on what can be non-cash capital for capital companies are already included in our law. According to

Articles 342 and 581 of the TCC, acts of service, personal labor, commercial reputation and unpaid receivables cannot be included as capital in a joint stock company. There is no incompatibility. The article on the fulfilment of the capital obligation, Article 48 of the Directive, also contains provisions on how cash and non-cash capital will be brought and how they will be utilized. The rate required by the Directive is 25%. In this sense, we see that our system is actually in line with the Directive with the requirement that 25% of the capital subscribed in cash must be paid at the time of incorporation of the company (Art. 344 TCC). While the maximum period stipulated in Article 48/2 regarding when the remaining portion shall be paid is in five years, this period is regulated as 24 months in our system; therefore, we see that our system is also compatible with the Directive.

When we look at the valuation in terms of non-cash capital, Article 343 of the TCC requires the valuation of this capital in kind by an expert determination to be made by the court before it is brought to the company as capital. Since Article 49 of the Directive also requires the supervision of an administrative or judicial authority, we actually see it as a one-to-one fulfilment. In addition, there is an exception to reporting, which we do not include (Article 50 of the Directive). However, the exception to reporting is presented as an option even in the Directive. The fact that we do not have this exception cannot be a subject of criticism. Because we do not need it, we are not obliged to do so, and so at some point, it may be necessary to make a comment like this. This was an impression I had already gained from the previous session with Mrs. Küçükgüngör, Mrs. Gündoğar and Mr. Sevim. Yes, there are places in the Directive that we have to take compulsorily, but there are exceptions to this in some cases. In general, there is a basic philosophy in the European Union's First Directive, Second Directive, and then in Directives No. 2017/1132, which replaced them, once we adopt this philosophy, there is actually no criticism they can bring to us. In this sense, I think that the legislator can make some special arrangements in its own legal system by preserving the philosophy of the Directive, especially in this exception. I am of this opinion. I will give an example of this in a moment on the issue of fraud against the law.

Acquisition after establishment amended in the Directive is named as fraud against law in our TCC. In fact, it deals with the asset acquisitions that will be made in amounts corresponding to 10% of the capital within a period of 2 years after the establishment. Article 52 of the Directive states that within a period of at least two years from the date of incorporation of the company, if the company acquires any asset belonging to the founders and worth at least 1/10 of the registered capital, this acquisition should be subject to the evaluation of independent experts and also subject to the approval of the general assembly, and the evaluation should be registered and announced in the trade registry, It has been accepted that this provision shall not apply to acquisitions made in the normal course of business of the company, acquisitions made under the request or supervision of an administrative or judicial authority or stock exchange transactions. On the other hand, Member States are not obliged to limit the application of this provision only to founders and may decide to apply it in the case of the purchase of assets from the shareholder or any third party. Now, here we have in Article 356, we see a general harmonization. The 2-year period and the approval of the general assembly are in full compliance with the Directive in this sense. In addition, the Directive states that the approval of the general assembly is not required for acquisitions other than those included in the activities of the company due to the request of an administrative or judicial authority or for stock exchange transactions. In our law, these limitations, i.e. the cases that do not require the approval of the general assembly, are shown only in two cases. The standard business process, i.e. the activities within the company's field of operation, and acquisitions made through forced execution. However, acquisitions in the stock exchange are excluded from this. In this sense, we see that there is a preference of the legislator that I have just mentioned. The legislator may or may not include this. If we want it to be fully harmonized, we should include acquisitions in the stock exchange as an article of law. However, it can also be discussed during the interpretation of the law. On the other hand, we can also say that this is not necessary or appropriate in our systematization. Again, the consideration exceeding one-tenth of the capital is in line with the Directive. A difference in this sense is that the limitations in the Directive regarding the acquisitions to be made only from the founders are not preserved in

our Directive. In our law, limited acquisitions and leases from third parties are also included. Unlike the other countries included in the European Union, or more precisely, unlike the model law, a transaction within 356 in our system is a leasing transaction. In other words, in our system, not only purchases, but also leases are considered fraud against the law. When we look at whether this is an incompatibility, the wording of Article 52 mentions ‘*acquisition*’ and what is acquired is non-cash capital. There is no definition of non-cash capital in the Directive, and those who have written about the Directive in the doctrine state that this definition is generally left to the legislation of the member states, and that non-cash capital can be applied in whatever way they accept, and since lease agreements can also be accepted in our country, we see that the article is actually quite appropriate.

Very quickly, I would like to briefly mention my other topic, mergers and divisions, which are not on the slide. I will not go in details here in order to summarise quickly.

In general, when we look at the merger and demerger regulations, we see that they are divided into national and international mergers in the Directive. *Cross-border*, i.e. cross-border or national, national ones refer to “*public*” public limited liability companies. The scope seems to be expanded in international ones. However, when the content of this Directive is considered with the philosophy of the directives on mergers and demergers before this merger in 2017, it will actually make not only joint stock companies but also other types of companies uniform in the European Union countries. It is seen that it aims to make regulations that will ensure uniformity both in their national laws and internationally in cross-border transactions. In my opinion, we are one step ahead of them in this respect. Because our merger and demerger regulations do not only cover joint stock companies. But also other companies in terms of demerger capital companies, but in mergers, there are regulations on both capital and private companies. In addition to this, one advantage of the Directive is that it shows the special types of mergers in more detail under a few articles, these are institutions that can be easily incorporated into our legislation, but whether they are necessary can be discussed because we have very detailed regulations.

As far as we can see, a criticism can be made in terms of the Directive. You say that this criticism has not been voiced by the EU in the reports, but of course, since they have not voiced it, I don't know if it is right to say this, but in terms of criticizing ourselves on my own behalf, maybe this could be the case. It is requested that this draft merger agreement and division agreement be shared with third parties either publicly on the website or by registration in the trade registry and the Directive states that if a company has disclosed this draft on its website, which is freely accessible to everyone, there is no need for registration in the trade registry. In our related merger provisions, it is stated that companies may announce this on their websites. Therefore, we fulfill the condition required by the Directive, but we do not mention this in divisions; there is nothing in divisions will announce the drafts on the website. Only it is said that the time, who and where these are presented for observation can be shared and explained on the website. At this point, of course, the amendment made by Law No. 6338 after the Law was adopted seems to have disrupted the integrity of this merger. Because the obligation to have a website were previously for all companies, but now the obligation does not include all companies. This might be a subject of criticism there, but in general, if you ask me, I think there is no incompatibility since it allows third parties to reach third parties free of charge. Indeed, we have detailed regulations on the transition of shareholder rights and the protection of shareholder rights. In this sense, I think we cannot criticize the merger or demerger, but the protection of employees, creditors, and the absence of any regulations on privileged holders which may bring some criticism in that sense.

Besides, we have a difference regarding the quorums. In mergers and demergers, we take the 3 / 4 quorum in Article 151, but when I read here, I guess that this actually comes from here. We have always taken the 3 / 4 quorum because we have always taken it from the German and Swiss Fusionsgesetz in our predecessor laws, but this quorum is different from the quorums sought in mergers and demergers. In this sense, since the dual quorum is already a subject of criticism in our own legislation, an amendment can be made in that sense, but there has been no criticism in this regard.

About partial division, since you said that partial merger and partial division are also brought to us, maybe we tried to draw their attention there, and partial division is not exactly the same as the partial merger in the directive, but there was no criticism. On the other hand, I see the omission of partial division as a legislator preference. Maybe those exceptions in partial division are not wanted to be applied here and for that reason it was not included or for another reason, I will say that it may not have been included. Thank you very much, Prof. Ayhan.

RIZA AYHAN: Thank you very much.

KADİR SEVİM: You are talking about facilitated division, right?

ZEHRA BADAĞ: Right, facilitated division, sorry.

KADİR SEVİM: As you said, some provisions are left optional. If the country has chosen not to regulate it here, it is not an obligation.

ZEHRA BADAĞ: Since we did not take the precedent directly from the Directive, it was taken as a whole, taking into account the regulations in the Fusionsgesetz, that is, the regulations in Swiss law. Therefore, the first criticism to be brought to us here is that we were already doing this when, the merger and division was not here. In this sense, what we will do is very simple. In fact, it is a very minimal amendment to the law, but in general terms, I am of the opinion that we are not at a point that can be called incompatible in terms of establishment, mergers and divisions, and that we are even compatible.

KADİR SEVİM: I think at that point, there may be some points where they say that they are better than us while making such legislative evaluations.

ZEHRA BADAĞ: Thank you very much

RIZA AYHAN: Thank you very much. They did not exceed their time limit. They completed 13-13 in 26 minutes, thank you very much, you have prepared it thoroughly and it is very good. Now, without wasting time, I would like to give the floor to our brother Sitki Anlam Altay from Galatasaray University.



Board Of Directors

Prof. Dr. Sıtkı Anlam Altay - Galatasaray University

SITKI ANLAM ALTAY: Thank you very much. Honorable professors, honorable public administrators, and honorable colleagues, thank you all very much. I would also like to thank you on behalf of our university for this opportunity. I would like to express my gratitude to Professor Yıldız for this opportunity, because I really benefited a lot from this study. I mean, I expected to benefit so much, but I am also very happy to experience this. Because today, especially in the sessions that progressed with the presentations before and afternoon, I saw the following: Türkiye has a very serious accumulation for the closure of the chapter in the negotiations with the European Union in terms of company law. This was a known fact, but it is more important that people who have made great efforts in this field, who have devoted years to this work, have experienced this. Because a very important observation was made in the morning. It was said that there is a famous saying about the European Union, to start like a Turk. We started like Turks, we started like us, and it went on very well. But there is no motivation at the moment. I mean, there certainly is, we can see from the statements of our esteemed public administrators that this motivation continues, but we need greater support. In other words, this needs to be embraced at the social base. The previously existing base should be strengthened. Because, the basic philosophy we have adopted since the foundation of our Republic is always this: As Türkiye, as Turkish society, we are a society that can adapt very quickly. In other words, yes, we ensure this adaptation by making a reception on some issues, but I think my esteemed professors and all participants will agree that we do not just make a reception, especially in the field of private law: It is possible to talk about a nationalized commercial law that has been applied for more than eighty years. We are talking about a structure

that is integrated with its practitioners, academics and judiciary. There is a great accumulation of jurisprudence and we actually have a very important material. A material, a legal problem that is not so abundant in other countries. It is very difficult to encounter such material in other countries as we do in Türkiye. However, the quantity of this material is also very high. Although the quality of the material is deep and we have the human resources to meet it, not enough resources are allocated to it. We see this.

Let us criticize ourselves in every field. I can briefly summarize the meaning of our preparation in terms of harmonization of the company law with the European Union. We have done a lot of work until today. I hope that this will continue in the future. This meeting is one of the very good milestones of this. In other words, our European Union process, as Prof. Yıldız said, it's a process of encounter. And it seems to be an important target point for us. However, in fact, our target is not the European Union itself. Our goal is always to stay on a modern and universal ground. The European Union is one of the reference points for this. Professor Yıldız pointed this out. In fact, the draft Turkish Commercial Code went beyond this and introduced provisions that are not found in the European Union. They also pointed out, and I completely agree, that there was also a problem of realism. There was an strangeness in extending this to all companies, but on the other hand, this is a policy of the law. Each participant here may have a different philosophy and different perspective. It would have been preferable to start somewhere and proceed from a certain cross-section. We can continue to think about this issue together. Very personal ideas can be put forward.

The perspective that the Commission has put forward and reflected in the European Union partnership law in 2020 in terms of company law is built on a total of seven elements in addition to the four elements that were previously available. I hope I will not tire you too much as they are all known factors.

The first is to ensure a functional competition that is subject to regulation, but in which the regulator does not interfere too much and only

intervenes in obstacles. This is already an element of competition policies, as Mrs. Gündoğar pointed out. It can also be related to competition law, but for the proper functioning of company law, healthy competition and elimination of unfair competition are among the main objectives of company law.

Another one also concerns labor law. The world economy is built on joint stock companies. The amount of joint stock companies is small, but we need to look at the quality. In terms of quantity, there are a lot of limited partnerships, we cannot ignore them, and we need a special structure for them. The Turkish Commercial Code has both brought them closer to each other and preserved the personal characteristics of limited partnerships. This is a very positive step, because we have more than a million limited partnerships. We still neglect this. Both in studies and in general practice, the problems of companies are generally addressed by accountants. Accountants are very valuable professionals, I have infinite respect for them, but they are not lawyers, after all. This is a very big problem. In other words, based on the fact that some of the amendments made to the Turkish Commercial Code do not comply with the basic characteristics of the law, I can say that the participation of lawyers is not serious enough.

Improving the environment for employees is also reported an aim of partnership law. And of course, the legal protection of creditors and shareholders.

Fourthly, the functional mobility of capital as well as the movement of persons within the European Union. On the other hand, the EU legislator does not neglect shareholder groups with special rights. From here, there is a transition or a wink to corporate governance. Sustainability is a very popular concept of the last period, and it has started to find its place in our Turkish Commercial Code in terms of financial standards: Sustainability has emerged as a fundamental objective in company law. As Mr. Sevim pointed out, let us immediately concretize the intensive interaction of the European Union countries with each other in terms of commercial law practices and their effects on management. The capital structure, which is directly related to the board of directors, was reserved for Prof. İsmail

Kayar, on the basis of 4 basic standards at the origin of European company law. Therefore, I kept it out of my study, but I will say a few sentences.

There is a legal ground created by Article 376 of our famous Turkish Commercial Code. It is very important because there is a serious loss of equity capital in a significant part of our companies. This is a fact and unfortunately, there is an issue that European lawyers cannot agree on. In this sense, we have experts who are more familiar with the European Union than me. All participants here know very well that we should not see the European Union law as an integrated one. There is an intense debate between the Germans and the French on the dual and single system in the administrative structure. In contrast to the Germans, all members of the European Union are discussing the structuring of the corporate group and its legalization. Again, there are great debates on the participation of labor in management. One of these debates is taking place among groups of lawyers. Commercial lawyers and enforcement and bankruptcy lawyers speak different languages on the issue of capital adequacy, and lawyers of obligations speak different languages on the issue of insolvency. A common ground has still not been found. We have article 376. There is a Communiqué on the Procedures and Principles Regarding the Implementation of Article 376 of the Turkish Commercial Code No. 6102 issued by our Ministry of Trade. It contains very controversial issues. In other words, it gives the opportunity to increase the capital of a bankrupt and insolvent company. The results may be good, it is pleasing, but it contains points worth thinking about.

The second issue is the organizational structure of the company, and the fact that there is still a dual system in the establishment of the company's organizational structure, which is expressed in Article 375. Since the separation of structure, supervision and board of directors used by the Germans, Austrians and the monist system led by the British, which was previously used by the Dutch and now not used by the Dutch, is still in conflict with each other, no single regulation is made in this field.

The protection of minority rights is an indispensable issue that is always thought and discussed. The esteemed Professor Yıldız pointed out the issue

of minority rights. In other words, we have fulfilled the requirements of the chapter on company law, and as valuable experts have emphasized, both of them overlap with each other. We are pursuing a moving target. We are pursuing an ever-changing target, and I am speaking on my own behalf, this is a subjective opinion, we have failed in the implementation of minority rights. The reason for this is actually the issue of supervision, which complements management, and which my esteemed Professors Özkorkut and Narbay will explain. In other words, management is a thesis, and as you know, it has an antithesis. Without this antithesis, this thesis cannot see itself in the mirror. The reason is that we do not have a settled internal audit culture. I am keeping apart those who succeeded in this. It is achieved in public sector. There are those who have achieved this very well in the private sector, but it has not become widespread. In other words, the management does not audit itself. Of course no one can be the judge of themselves, but first and foremost, we must learn to establish a reporting culture. Unfortunately, we still face the following reality in company law. Like a wall, we always make commercial law based on selected truths. The management chooses. It conveys diluted information in the annual report. Yes, the right to information is used. Yes, sir, minority rights are also abused. This is also the case. We are in need of balancing these. It is undoubtedly our valuable practitioners who will balance this. There is a very valuable accumulation of jurisprudence in this regard. The Court of Cassation, regional courts of appeal and local courts are making a very serious effort. In a structure where there are so many intense disputes. But as a result, we see that a significant part of the basic problems in the administration have been solved in the law. Firstly, in terms of management structure, Article 367 in Turkish law allows for a singular structure and a dual structure, that is, an organization approaching a dual structure. Secondly, there are very clear rules on how this structure will be formed. Real and legal person board membership, sir, internal directive of the board of directors. We discuss this a lot. Article 371/7 of the TCC confuses business and partnership, management and representation, but although there are good and bad practice, but there are points that still need to be discussed. In other words, who should discuss this issue? The very valuable stakeholders present here should discuss this issue. In addition, judges, lawyers and members of the financial profession should also discuss this issue. This is the first issue.

Concessions are also structured to support the formation of the management structure. The second issue, equity, was discussed in the context of Article 376. In Turkish law, this issue is addressed and complemented with risk management and independent audit, which will be discussed by the lecturers in a moment. And the law offers us some perspectives and options regarding the organization, especially the internal audit committee. In this sense, we can say that we are lucky. We may find it strange that the regulation is within the provisions of the board of directors, but the acquisition of the company's own shares is regulated in detail in Turkish Law. Article 380 has been introduced. As you know, the prohibition of financial assistance before Article 380 was introduced... The European Union regulation in Directive 2006/68 was changed. However, in the European Union regulation, alternative fields of action were offered to the member states. Article 380 of TCC has not yet been discussed sufficiently. However, we see that many studies have been carried out on this issue.

Then there are the decision-making processes of the board of directors and the issue of electronic board of directors. European company law, as mentioned by esteemed professors, aims to digitalize almost all transactions. We are not at this stage yet. I mean, is it necessary? It can be discussed much, but we still carry out many transactions in writing. We also see the benefits of this, especially in disputes. Unfortunately, we have not yet solved two problems that we cannot deal with. One is unfair competition and the second is fraud. We need to overcome the issue of fraud. This requires effective cooperation between the criminal and judicial judiciary, and we need to train a large number of technical experts to support the judiciary. As academics, I am speaking for myself, we cannot be enough for this job. I mean, we can be of benefit, but people who have sat on the other side of the table and, have done transactions, need to observe those fraudulent transactions. Thank you very much, Prof. Ayhan.

RIZA AYHAN: Thank you very much. Thank you very much. Prof. İsmail Kayar could not attend. He has a legitimate and legal excuse. Prof. Korkut Özkorkut. Here you are, Prof. Özkorkut.

Auditing Standards and Independent Audit

Prof. Dr. Korkut Özkorkut - Ankara University

KORKUT ÖZKORKUT: I would like to thank Professor Yıldız for both starting this project and inviting us. Actually, we missed such meetings; I can see that, but I cannot help but ask the question whether we are at a loss in terms of both time and cost; because when I got “so to speak” involved in this business, it was in 2006, we talked about it.

At that time, there was a request from the Presidency of Union of Chambers of Turkish Independent Accountants and Certified Public Accountants (TÜRMOB) to attend the Justice Commission meetings. I started to attend these meetings both on their behalf and academically. So we have almost completed 17 years. We are still in the process of discussing similar issues. Are we slowing down? Are we not even able to take two steps forward one step back? The subject of independent audit and independent audit standards was assigned to me. Of course, I will try to look at the picture in this context. However, of course, I feel that we cannot separate them from each other. The board of directors, corporate governance, financial reporting and independent auditing, are indispensable pillars. In particular, they constitute the basis of company law, even the law of joint stock companies. Therefore, if we cannot establish a good connection between them, if there is a disconnection between any of them, there will be neither good governance, producing accurate information, or getting results. It had not been discussed before, but Prof. Altay mentioned it. In terms of insolvency when we look at it, in TCC Art. 376 and the rest, it is seen that the topic is handled from the perspective of equity capital, and alternatives such as concordat and bankruptcy are minimized, and when the possibility of

companies resorting to this in terms of the Execution and Bankruptcy Law are considered the question of whether we are producing accurate information or not comes to mind.

Again, we endeavor to be in a position that protects minority shareholders, especially in the face of the frequent filing of company lawsuits before the courts. There is an idea that comes from an approach that has no infrastructure in principle, such as these are in a weak situation like laborers, so let's protect them against the majority of the company, and unfortunately sometimes even reflected in the opinions of the Ministry; if there is a profit, distribute it, let the minority get its money, and then file a lawsuit. But in real terms, it does not matter whether there is profit in the company. Before finding answers to questions such as Can profit be distributed? What is the profit distribution culture in Türkiye and what should it be?, we also see the emergence of the approach of protecting only the oppressed without finding a solution in company law. Especially when I look here, of course, when we talk about profit distribution, the question "which profit?" comes to mind. In my short presentation today, I think I will endeavor to say something on the main distinction of what we can do and what we cannot do. If we look at what we can do, in terms of compliance with the acquis, we have actually established the Authority, we have issued the standards, and they are even being implemented. Everything is being implemented up to the registry, but what are the things we cannot do? I think we should endeavor to find them out.

From this point of view, when it comes to profit distribution, the question of which profit comes to mind, which in turn begs the question of which balance sheet. Because why? Even from the point of view of the Capital Markets Board - and Mrs Aslı thankfully mentioned this and said what we will apply - it is essential that we apply TAS/TFRS, that is, Accounting Standards. Accordingly, if there is a profit in the company, can we distribute it? We say that accounting standards (TAS/TFRS) provide us with more information than the Tax Procedure Law (TPL), since it is based more on valuation criteria. What does this mean? The company, those who manage the company, shareholders, and all stakeholders have more information

and have the opportunity to analyze this information. That is why I tried to express at the beginning that this subject is essentially the product of an endeavor to produce information. Now, at the point we have reached in this information production, you are a public company or even a listed company. Therefore, when we say which balance sheet, if there is a profit in the balance sheet you have prepared according to TAS/IFRS, you should be able to distribute this profit with peace of mind. Is this possible today? No, it is not. And why is that? Basically, in Türkiye, except for banks and financial institutions, all financial statements are prepared in accordance with the Tax Procedure Law. As we have just mentioned, according to the General Communiqués on Accounting System Implementation, you produce information based on approximately 80, 100 valuation approaches, and if there is a profit according to this information, you are obliged to distribute this profit; because the Ministry of Finance has the authority according to the provisions of Article 175 and Repeated Article 257 of the Tax Procedure Law. However, there is more profit in your balance sheet according to TAS/IFRS, i.e. Accounting Standards. What will happen now?

In other words, according to the Tax Procedure Law, there are 10 units of profit, whereas according to the Accounting Standards, there are actually 100 units of profit. The Capital Markets Board cannot make a regulation on this issue and says -in its own profit distribution guide- to distribute what is legal, in brackets- what should be distributed according to the Tax Procedure Law. The fact that this is said by an independent authority in an organization that implements the Capital Markets, is a reason for foreign capital and foreign investors to come here.

This is a serious question mark for a market where public offerings are expected to flourish. In a different example, there is no profit according to the Tax Procedure Law, but there is profit according to Accounting Standards. Zero; this table shows a loss. However, according to Accounting Standards, there is a profit of 100 units. The foreign investor comes to the general assembly and says, "Distribute my profit". What do we do?

In such a case, it is not possible to distribute the company's profit because; what if the Ministry of Finance takes the company under scrutiny? Is it possible otherwise? In other words, it is stated that sometimes there is a possibility due to inventories. According to TPL, there is a profit, but according to Accounting Standards, the company is in loss. Can we distribute this profit? There is no problem in terms of TPL and Ministry of Finance practice, because there is no audit by the Ministry of Finance in this context. However, what does this mean? Actually, mathematically, it would mean that you are returning (a profit that does not exist) from the capital. To the extent that you do not look at it based on real information, that is, as soon as you say that you can easily distribute my profit because it will not be under the supervision of the Ministry of Finance, it means that you actually disrupt the capital structure of the company, even the balance sheet. Now, this brings to mind the question of how information production should be. In this dilemma, unfortunately, we have still not been able to provide the basic principle written in the General Communiqué on Implementation of the Accounting System as the principle of unity of the balance sheet. Of course, when we go into the reasons for this, I think it is necessary to understand the reasons for this well.

Because what did this reflect on? This was also the main reason for the enactment of Law No. 6335. When we look at this, why couldn't the independent administrative authorities such as the CMB and the Banking Regulation and Supervision Board (BRSB) do this, and why can't they still do it well? Even though we are expecting foreign investors. In fact, when the Turkish Commercial Code was drafted, it was also intended to simplify the institutions as much as possible and to prevent conflicts of authority. Apart from the five main objectives of the draft law, these were also set out between the lines. However, these regulations have given birth to new institutions, areas of authority and conflict. When we look at it now, I will be very brief. Currently, under Article 175 and repeated Article 257 of the Tax Procedure Law, the authority of the Ministry of Finance to determine accounting standards under the heading "*freedom to choose the accounting method*" remains. Now, when we look at the emergence of Public Oversight Authorities in the Sarbanes-Oxley Law in 2001 and its spread to the European

Union and the whole world, the fact that this new structure is contrary to the American Constitution was also discussed in the face of the fact that the public oversight authority, which we call PCAOB (Public Company Accounting Oversight Board), is completely independent and impartial in its establishment philosophy.

In this context, since even the President of the United States does not have the authority to dismiss the members of the PCAOB - equipping this structure as a Board that should be independent - was also discussed in terms of the US Constitution. And accordingly, it was seen that the Sarbanes Oxley Law was introduced as a reaction law and regulation. Of course, this was reflected in the European Union Directive, and then, of course, in similar member countries and countries like us. But we have not yet achieved this independence and impartiality. Should these regulations have been so harsh? Although the US Constitutional Court cancelled a few minor points in its decision, it did not find the main regulation to be in violation of the US Constitution. Because this board was appointed by the US Capital Markets Board (SEC / Stock Exchange Commission). In fact, the salaries of SEC members authorized to appoint PCAOB members were lower than the salaries of PCAOB members. This institution was independent and impartial, and the criteria for dismissal were very narrowed. In addition, when the Public Oversight, Accounting and Auditing Standards Authority (POA) was established in our country in terms of authorization, the understanding that we should have all the authorizations and we should use them was also dominant. Now, my friends have also mentioned it a little while ago:

First, we should be authorized to translate and publish the Accounting Standards from the world.

Two, we should be authorized to translate and publish independent auditing standards.

Three, we should also have the authority to authorize, supervise and control independent audit institutions.

Now, of course, when Decree Law No. 660 was issued before the Commercial Code was enacted, we looked at it - there was no relevant or related ministry - which ministry would be this ministry? There were three ministries in the nomination. One was the Ministry of Trade. The other was to be associated with the Ministry of State, which I think was under Mr Babacan, who was then the Deputy Prime Minister. The third possibility was to associate the Agency with the Ministry of Finance, which we all opposed and said that it should not be associated with the Ministry of Finance. The issue came up without any discussion. Immediately by a triple decree, the Agency was associated with the Ministry of Finance. In this case, is the authority of the Ministry of Finance over this administrative authority, which should be independent and impartial, a tutelage relationship? The issue suddenly enters the field of administrative law. And here we are confronted with Law No. 3046. In 2011, I think there was a period of Decree Laws. 80- 100 Decree Laws were issued. At that time, an article 19A was added to Law No. 3046. Regarding the organization of these ministries Law, later, most of its provisions were repealed. It was renamed as the Law on the Financial Rights of Deputy Ministers and Certain Regulations. But article 19A was introduced there. In fact, with Article 19A, first the first sentence and then the second sentence were added. It was regulated in a way that the terms “related”, “associated”, “affiliated” all have the same meaning. I mean, I still say it means the same thing. Therefore, the relevant minister has become authorized to supervise all activities and transactions of the related affiliated board. Therefore, today, all public administrative authorities, or more precisely, all of the institutions that I call independent administrative authorities, such as the most popular CMB, BRSA, and EMSB (Energy Market Supervision Board), have been turned into tutelage institutions for the relevant ministries. Therefore, when the Public Oversight Authority was established, it was of great importance that it fully complied with this requirement of being independent and impartial. In this context, being independent and impartial meant that the Agency would be independent neutral from companies, independent neutral from certain lobbies, and independent neutral from business circles, and independent neutral from politics, so that it would act as an arbitrator and supervise whether the information in a company was produced correctly or not; it would be able

to act appropriately in appointing and supervising people and then, if necessary, in determining whether it would be appropriate to apply administrative measures against them. Now, unfortunately, this fiction was not formed in the desired way from the beginning. The reflection of this led to a major amendment of the TCC with the amendment of Law No. 6335, even a few days before it entered into force.

This amendment was reflected in all provisions related to financial reporting, independent audit and other audits. Therefore, the possibility of issuing a legal provision for the first time, which is actually unique to us - it was even mentioned in a meeting at the Capital Markets Board - has been eliminated in this way. In fact, all member states of the European Union have asked what is this new transaction auditor, and how will it be implemented. Questions such as whether the auditor will provide a separate transaction audit in the specific transaction and whether it will perform a function remained unanswered. While it was being debated whether this would work or not, the issue was reflected in the media and a request was made through a dialogue between the relevant Minister of the time and the President of TOBB, and this regulation was abolished before it could be implemented. Suddenly, it was reported in newspapers, magazines and economic news that Türkiye saved its businesses from an audit burden of five and a half billion dollars. In fact, it was never implemented, so when would it have been a burden?

I would like to say very briefly that when we look at the numbers today, as Prof. Yıldız mentioned before, there are 199,000 joint stock companies - the numbers I received from the Ministry. There are 1,210,000 limited liability companies. Now, independent auditing is especially important for capital as a company. So how many companies are independently audited? Approximately 16,000 companies are independently audited. Are these because they are subject to it or the organization warns them? That is also not clear. I guess that voluntary audit is not included in this number. How many independent auditors do we have? 2001 figures, I saw from the statistics, correct me if I am wrong, there are 15,900 independent accountant financial advisor real person auditors, 3099, that is, about 4,000 certified

public accountant auditors, and in total, there are around 19,000-20,000 people who have audit authorization. But when I look at the registry, there are 17,249 records in the independent audit official registry, in the auditor official registry. I saw the number of auditors undertaking audits, that is, the number of real persons personally carrying out audit activities, in the fifties. There is something strange here, and I will ask you how many are they? In this sense, I am saying that the number of independent audit institutions, especially legal entity independent auditors, is probably around 500-600, maybe even less. Because the 2021 figure is 353, I do not know if the number in the statistics have decreased.

ŞEYDA ADAK KIZILHAN: We have made an arrangement in the regulation. Therefore, the auditor who undertakes an audit has to establish a team. Yes, we foresee an audit to be carried out with an audit team of 5 people, so they generally went for incorporation. That is why the number of auditors undertaking audits is low.

KORKUT ÖZKORKUT: I will come to this. When we look at the real person legal entity auditor, in the Commercial Code....

ŞEYDA ADAK KIZILHAN: There are also the inactive ones, Prof. Özkorkut.

KORKUT ÖZKORKUT: Actually, statistical data are open to evaluation. But what we have done by abolishing the independent audit body is, an important step forward to the independent audit to become a culture, even if only about 2 percent of the companies perform independent audit activities. In this respect, interesting provisions have been introduced regarding the appointment of the auditor, the duties of the auditor, the preparation of the audit report, and especially the responsibility, including opinion letters. These independent audit regulations concern the general assembly, the release of the board of directors, and financial statements. In other words, they are important in terms of information production and management in every subject, and in the end, in terms of independent audit... So, what could we not do? When I came to the question of what we

could not do, we gradually started to ask and discuss the question of whether the audit was performed properly, that is, whether İT was implemented in compliance with the standards

We are doing it relatively with a number of companies for the time being; but is this enough? It should be much more advanced. Why am I saying this? My last words, because Prof. Yıldız also expressed this as a criticism: can all companies be subject to independent audit or be obliged to apply financial reporting? In fact, if you look carefully at the Commercial Code, there was no such expectation in the first draft, but the target. If you look at Article 64, especially the first version of Article 88, since it says “all commercial enterprise operators”, it was actually aimed at achieving this information production from the smallest to the largest, that is, from the real person to accurate financial reporting or information. However, as I said at the beginning, we still maintain the authorization of the Ministry of Finance in these two articles and there is no development in this direction. But what is positive, at least at the last, is we have expressed, “an accounting standard has been established for small and medium or micro-enterprises.” Therefore, commercial enterprises are not excluded from the scope. Therefore, the effect created by the Ministry of Trade in Article 397/5 of the TCC still exists.

In other words, the understanding of letting the unaudited companies at least the joint stock companies to be audited was a search for a regulation six months after that relevant structure. Today, of course, the acceleration of the search for the re-activation of the regulation on independent auditing, which should have entered into force on 1.1.2013 immediately after the enforcement of the Law, has created excitement.

RIZA AYHAN: Thank you very much, Prof. Narbay. Friends

HATİCE SEVDE OCAK: I would like to say something about this issue here. There was something like all companies being subject to audit. However, as you mentioned, when there was a great reaction, certain companies, and businesses above a certain size that met certain conditions were

subjected to independent audit. In fact, these criteria are actually reduced from year to year and the number of enterprises subject to capacity and audit is tried to be increased. We are trying to do this by the Institution. There is also a regulation of the Ministry of Commerce on the audit of joint stock companies that are not subject to independent audit, that is, not subject to independent audit in accordance with those legal limits. Maybe you are also aware of this. There are studies for the audit of enterprises that are not subject to mandatory audit in accordance with the TCC. In other words, it is not a complete independent audit, but there is something that will be more limited or less costly. They are subject to independent audit. We even have an audit standard for this purpose, which is not yet finalized.

There is an “Independent Auditing Standard on Auditing the Financial Statements of Less Complex Entities”. When it is published, it will be published in Türkiye, and we have translations for it. And as I said with the Ministry of Commerce, we also have a standard to be applied for those entities that are not subject to mandatory independent audit, but which the Ministry of Commerce wants to expand the scope. If the Ministry of Commerce accepts and makes it compulsory for these companies by law, or if independent auditing is introduced for them within certain criteria, that scope will actually expand even further.

RIZA AYHAN: Thank you very much, I couldn't check the time for this presentation.

Audit

Prof. Dr. Şafak Narbay - Sakarya University

ŞAFAK NARBAY: Prof. Ayhan, Prof. Özkorkut has the right to use the time allocated to me and I say this with many apologies, because when I asked Prof. Yıldız whether I should work on special auditing, he told me to work on auditing in general, I thought that I would speak on auditing alone. However when I saw Prof. Özkorkut, I thought that if Prof. Özkorkut was here, I would mention the issues that he did not touch upon. Therefore, Prof. Özkorkut did not exceed the time. Since he had already said what I was going to say, we used our time together.

RIZA AYHAN: Okay, But Prof. Narbay might also has a few words to say.

ŞAFAK NARBAY: First of all, I present my greetings and respects with the most heartfelt emotions. Prof. Ayhan, you know, Prof. Bilgin mentioned Prof. Yıldız. Prof. Yıldız has a special place for us. Professor Ayhan's place is more special. He was on my associate professorship jury and I am here as a person who has passed through the teachings of precious Prof. Ayhan. First of all, I would like to thank Prof. Dr. Şükrü Yıldız for bringing us together with our valuable colleagues who are in the kitchen of the work in such a scientific meeting. I would also like to thank the Rectorate of İbn Haldun University for hosting. Indeed, my esteemed Prof. Özkorkut touched on extremely important issues. Our esteemed colleagues from the Public Oversight Authority also touched upon them.

First of all, Article 397/5 of the TCC No. 6102 previously mentioned a regulation to be prepared by the Ministry of Customs and Trade and

issued by the Council of Ministers, but after the amendment, it has been transformed into a regulation to be issued by the Presidency. Therefore, joint stock companies that have been excluded from this independent audit will be removed, possibly next year. As a result of the work you will carry out, that regulation, which will be issued at the end, will now be issued by the President of the Republic.

Again, as stated by the representatives of the Public Oversight Authority, within the framework of our observations, the number of companies subject to independent audit is increased with each change in the criteria.

When we look at the date when the first criterion was envisaged with independent audit, we see that the scope of companies that will be subject to independent audit has been expanded with each new amendment. This is an important observation for us, of course. However, within the framework of Art. 397/5, there are so many joint stock companies, and limited liability companies, and the fact that the independent audit culture has not yet been fully established within this framework is also obvious. Prof. Yıldız, of course, expressed that there is no obligation for small and medium-sized enterprises to be subject to independent audits in Germany, Switzerland or the European Union acquis. This does not mean that these enterprises are or will be exempt from auditing. But let us also make this clear. There is an audit standard, I won't go into details for time restriction. I would like to emphasize that we have made a significant progress in fulfilling the obligations stipulated within this framework. However, it is also clear that the Regulation stipulated in Article 397/5 should be issued as soon as possible, so that the audit standards of small and medium-sized companies should be set forth. Thank you again, Dear Prof. Ayhan.

RIZA AYHAN: I would like to thank our speakers for fulfilling such commitments.

ŞAFAK NARBAY: Our professors have good presentations, we would like to benefit from them as well.

ŞÜKRÜ YILDIZ: We would also expect you to say a few sentences about the audit.

ŞAFAK NARBAY: I hope when I make a presentation, I'm saving it especially for there.

RIZA AYHAN: Sir, thank you very much. Please, Prof. Bahtiyar.



Amendment To The Articles Of Association

Prof. Dr. Mehmet Bahtiyar - Yeditepe University

MEHMET BAHTIYAR: Thank you, sir. First of all, thank you very much. I felt like a student. Prof. Ayhan was on my associate professorship jury. Then I would like to thank my dear brother, my friend from my PhD program, Şükrü Yıldız for organizing this productive meeting and for bringing us together with you, dear colleagues and public representatives. I hope this meeting will be beneficial for our country. I really learnt a lot on my own behalf, it was very well expressed. I am sure that this will be a milestone and I hope that it will contribute, even if modestly, to the work to be carried out in the future and to the EU journey of our country.

Dear friends, of course, I would like to repeat my thanks to the public representatives. You have really brought up issues, some of which we know and some of which we do not know. We also had the opportunity to learn the background of the issues we know from you. It was very productive, and I would like to thank you especially, for taking the trouble to come. Now my topic is the amendment of the articles of association. My colleague Dursun Bey will speak on the same subject. But I think he will focus on the capital in kind, I will focus on the amendment of the articles of association. As you can appreciate, my topic includes the transition to the registered capital system, which is my doctoral thesis topic. There are capital increases and capital decreases. Of course, in connection with these, there are also very important issues such as pre-emptive rights, in which Prof. Yıldız is an expert. But let me start with a general observation. What is pleasing is that the studies carried out on these issues that I have examined or included in my field are largely in line with the EU legislation. And

at this point, I have seen that at least we have not received any heavy criticism or recommendation. I am very happy for all of us including the public and my state.

What is EU legislation, what is Turkish legislation? Normally, if we had more time, I would like to prepare and present such a presentation by comparing them. Thanks to Ms. Badak, she helped me in that regard. She sent me the tables she had, but since the time was very limited, instead of making such comparisons, I dealt with the conclusions or determinations that could be made as a result of all these comparisons. I would like to make a presentation regarding these and finish the presentation in 7-8 minutes at most.

It was explained once in the morning session. Especially before Directive 2017/1132, there were five directives on company law, but with this last directive, those first five directives were mixed. It consists of repetitions, but its basic logic and spirit was preserved. Of course, the directive is dated 2017, but considering the dates when the preparatory work for our current Commercial Code started and looking at its general justification, we see that our law was prepared in line with the provisions of the 2nd Directive dated 1976 on company law, and we see that those first directives are referred to. But we have no loss here. Because the Directive dated 2017 also includes the second Directive dated 1976, and although it entered into force later, we have largely fulfilled the requirements of the Directive dated 2017. This is a pleasing development for our country. Therefore, I congratulate the success of my representative friends. When we look at it now, we have harmonized well at this point. Despite this, can some minor improvements be made as revisions, although not very substantive? These can be done, but I am pleased to note that they do not constitute an obstacle to our country's journey to the EU in terms of the part I have examined. There are very valuable studies on this subject before me. I would like to mention two of them in particular. There is a study on harmonization with the EU acquis prepared at the Istanbul University Faculty of Law under the chairmanship of Professor Tekinalp, who made the greatest effort in the preparation of the new law. As you know, it was published as an extensive book. Later on, an updated version of that book was published

under the leadership of my colleague Arslan Kaya. I had read certain parts of it before, but when I had the opportunity to repeat it once again for this study, I had the conviction to share these observations with you. As I said, small revisions may be made, but even if we do not make them, I see that we do not have a problem regarding the subject I have examined. Now, maybe four small revisions can be made, but I have identified two points that I see as theoretically and practically problematic. I have determined that these should be resolved by law or through jurisprudence. I will end my presentation by listing a total of five or six determinations immediately.

Firstly, Article 68 of the Directive stipulates that if there is more than one privileged share category group in the company, each group should vote separately, but Article 454 of our Commercial Code does not make a distinction at this point. It seems as if the privileged shareholders may convene a meeting all together.

It is criticized and said that it should be done separately, but this is the doctrine's view. Perhaps a small revision may be needed at this point.

Secondly, in the fourth paragraph of our Article 454, there is a special provision stipulating that if a certain percentage of privileged shareholders attend the general assembly meeting where the amendment of the articles of association is resolved and say yes to a certain percentage, there is no need for a special meeting of privileged shareholders. But this special regulation exists only in our Law. There is no regulation on this issue in the Directive. However, no criticism has been received regarding this. Perhaps a small revision can be proposed here.

The third point is that the provisions of the Commercial Code, which stipulate that the regulations on capital increases made pursuant to mergers and demergers should not apply to capital increases in kind, seem to be incompatible with the Directive. Especially when I make a small comparison with Article 70 of the Directive and its third paragraph, such a determination emerges, which he determinations made before me at the second meeting at Istanbul University.

A fourth point, again, there was no criticism on this point, but when we compare, this difference emerges: Article 71 of the EU Directive permits capital increases without full subscription, but unfortunately there is no authorization provision in our legislation that permits capital increases without full subscription. Perhaps a clarification can be provided here as well.

ŞÜKRÜ YILDIZ: As you know, there are countries in the European Union law that can issue shares without nominal value. Therefore, they probably made such a regulation by taking these laws into consideration. Actually, I thought that there was no need for us to make such a regulation.

MEHMET BAHTİYAR: Of course, it is already being discussed. Yes, there are those who say there is a need and those who say there is not. For example, when we analyze Cem Soykan's book on capital increases, all of these discussions are there. As I said, it depends a bit on the policy of the legislator. It is not essential, but can be considered. According to one opinion, at least in the light of Prof. Yıldız's correction, this is the case. Now, these four points are what I can say under the title of minor revision. If Prof. Ayhan will allow me, I would like to add two more points that I think are theoretically problematic, which cause serious problems in practice, and which cause us a lot of trouble in terms of the protection of shareholders' rights.

There is an additional issue that I think will cause pain. Perhaps I can humbly make two suggestions in this regard, and perhaps it may attract the attention of the legislator, our valuable bureaucrat friends working on this issue, and public representatives and may be useful for them.

One of them is that in Article 452, you know that we have set a limit to the amendment of the articles of association. We have stated that indispensable and vested rights are reserved. However, in the Swiss law, which is our source law to a great extent, there are no more vested rights. We have preserved this and added the category of inalienable rights. However, the boundary between the two is unclear. I think that the ambiguity of this border may cause severe headaches both in terms of when shareholders' rights are indispensable and when they are deemed to be vested, and what

sanctions will be applied in case of violation. I have humbly detected this in the files before me. This is one.

There is a second point, dear colleagues. We have also seen it in the presentations of esteemed public representatives in the morning. We see that the EU directives attach great importance to quorums in order to protect the rights of shareholders and to take certain decisions in the bodies. However, we need clarification regarding quorums: Our quorum articles are different from that of the source country, nor do they fully comply with the German regulations, nor do they fully comply with the EU regulations. It is a bit of a mixed situation. For this reason, the quorums seem to be unsystematic and confusing in terms of the way they are regulated, and despite the existence of such detailed quorum regulations, there are still problems with quorums. I think there are two main problems, two sub-problems, and I think these will create problems. Firstly, quorums can be aggravated. How far are Articles 418 and 421? Can we aggravate them until unanimity? When we aggravate up to unanimity, would we or would we not paralyse the decision-making ability of that body? I recommend that we think about it. We have to solve this question either by law or jurisprudence. Theoretically, it is a subject that has created serious debates. This is one of the issues that our late Professors Domanic and İmregün, and later Ömer Teoman, drew much attention to.

Secondly, if we have aggravated the quorums in the law with the articles of association, which account will be applied when we want to change this quorum in the articles of association? It is an incredible application problem. I am sure that my colleagues who act as expert witnesses and our professors who provide counselling in expert files I faced with this problem at least ten times. Either by law or as in Switzerland, limited liability companies as in the case of joint stock companies, we also have a regulation, although there is a mistake in the translation, but maybe we should think about solving these problems by law in terms of joint stock companies. Or at least we need to stabilise these problems with case law. Thank you Prof. Ayhan, that's all I have to say.

RIZA AYHAN: Thank you very much, we were listening with pleasure. Yes, Dr. Saat, where he left off.



Amendment To The Articles Of Association

Asst. Prof. Dr. Dursun Saat - Anadolu University

DURSUN SAAT: Dear professors, esteemed representatives of public institutions, I greet you all with respect. Prof. Dr. Yıldız is my doctoral thesis advisor. I can never repay his efforts on me. I am also grateful to him for giving me the chance to take part in such a project, and I say, "I am glad you are here, Professor." What I will try to express in the presence of so many doyen professors will always be a little incomplete. I beg your forgiveness for my mistakes in advance.

Undoubtedly, in joint stock companies where the shareholders are not held liable for the debts of the company, the only guarantee of the creditors, shareholders and even the company itself is the capital. As an extension of this, we can state that the basic idea behind the legislator's imposition of strict formal procedures for the contribution in-kind that are considered to be brought as capital is to prevent the partnership, shareholders and creditors from incurring losses by valuing the contribution in-kind above the actual fair value.

As stated in the general justification of our Law No. 6102, the legislative body has adopted the philosophy of harmonizing with the European Union regulations with the provisions it has referred to As you have stated from the very beginning in many topics, it has achieved this.

However, as a result of the study I have conducted, we have determined that some of the regulations regarding the capital in kind in the TCC systematic differ from the European Union directives and legislation and that our legislation includes a more advanced and more protective regime

than the EU regulations. In this context, in our study, firstly, the Turkish translations of the relevant parts of the European Union Directive No. 1132 dated 2017, and then the harmonization and incompatibilities of the corresponding provisions in Turkish law will be tried to be expressed.

I. Translation of the Directive Provisions

When we look at our directive,

European Parliament and Council of 14 June 2017 Directive 2017/1132 (Eu)

Title One General Provisions, Establishment and Operation of Capital Companies

Section Four Capital and Capital Changes

Part One *Capital Elements (Requirements)*

Article 46 Assets

Committed capital may consist only of assets that can be economically valued. However, a commitment to do business or provide services may not form part of these assets.

This article determines what we can bring in as capital in the span of amonth. While the directive states that the subscribed capital may only consist of assets that can be economically valued, the same directive also stipulates that the commitment to do business or provide services may not form part of these assets.

We continue again. The second part, especially the appraisal of the value of contribution in-kind is the part that meets our Article 343; let's see how it is regulated together. The first three paragraphs here are important, and I would like to read them. It says,

Part Two

Assurances on Legal Capital

Article 49

Experts' report on consideration other than in cash

1. *A report on any consideration other than in cash shall be drawn up before the company is incorporated or is authorized to commence business, by one or more independent experts appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State.*

2. *The experts' report referred to in paragraph 1 shall contain at least a description of each of the assets comprising the consideration as well as of the methods of valuation used and shall state whether the values arrived at by the application of those methods correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par and, where appropriate, to the premium on the shares to be issued for them.*

3. *The experts' report shall be published in the manner laid down by the laws of each Member State, in accordance with Article 16.*

In this report, it is stated that a valuation method should be determined, and as a result of this valuation method, a nominal value should be reached and the amount of the share corresponding to this value should be determined. Again, the third paragraph states that this report shall be published in accordance with Article 16, i.e. Article 16 of the Directive, in the manner specified in the laws of each Member State. Article 49 briefly mentions appraisal and states how the appraisal shall be made and how the report shall be prepared.

Article 50 regulates the exemption from the requirement of an expert report.

Derogation from the requirement for an experts' report

1. Member States may decide not to apply Article 49(1), (2) and (3) where, upon a decision of the administrative or management body, transferable securities as defined in point 44 of Article 4(1) of Directive 2014/65/EU of the European Parliament and of the Council (33) or money-market instruments as defined in point 17 of Article 4(1) of that Directive are contributed as consideration other than in cash, and those securities or money-market instruments are valued at the weighted average price at which they have been traded on one or more regulated markets as defined in point 21 of Article 4(1) of that Directive during a sufficient period, to be determined by national law, preceding the effective date of the contribution of the respective consideration other than in cash.

However, where that price has been affected by exceptional circumstances that would significantly change the value of the asset at the effective date of its contribution, including situations where the market for such transferable securities or money-market instruments has become illiquid, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body.

For the purposes of such revaluation, Article 49(1), (2) and (3) shall apply.

2. Member States may decide not to apply Article 49(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1 of this Article, are contributed as consideration other than in cash

which have already been subject to a fair value opinion by a recognized independent expert and where the following conditions are fulfilled:

- (a) the fair value is determined for a date not more than six months before the effective date of the asset contribution; and*
- (b) the valuation has been performed in accordance with generally accepted valuation standards and principles in the Member State which are applicable to the kind of assets to be contributed.*

In the case of new qualifying circumstances that would significantly change the fair value of the asset at the effective date of its contribution, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body.

For the purposes of the revaluation referred to in the second subparagraph, Article 49(1), (2) and (3) shall apply.

In the absence of such a revaluation, one or more shareholders holding an aggregate percentage of at least 5 % of the company's subscribed capital on the date the decision on the increase in the capital is taken, may demand a valuation by an independent expert, in which case Article 49(1), (2) and (3) shall apply.

Such shareholder(s) may submit a demand up until the effective date of the asset contribution, provided that, at the date of the demand, the shareholder(s) in question still hold(s) an aggregate percentage of at least 5 % of the company's subscribed capital, as it was on the date the decision on the increase in the capital was taken.

3. Member States may decide not to apply Article 49(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1 of this Article, are contributed as consideration other than in cash the fair value of which is derived from the value of an individual asset from the statutory accounts of the previous financial year provided that the statutory accounts have been subject to an audit in accordance with Directive 2006/43/EC.

The second to fifth subparagraphs of paragraph 2 of this Article shall apply mutatis mutandis.

In fact, it is stated that, upon the decision of the administrative and management body, it may be decided not to apply the provisions of the first, second and third paragraphs of Article 49, which I have just read, i.e. the valuation, if the capital market instruments referred to in the relevant articles of Directive 2014 are offered as a consideration other than cash.

Let me move quickly, I will elaborate on these in more detail a little later. Article 51 is

Article 51

Consideration other than in cash without an experts' report

1. Where consideration other than in cash as referred to in Article 50, is provided without an experts' report, as referred to in Article 49(1), (2) and (3), in addition to the requirements set out in point (h) of Article 4 and within one month of the effective date of the asset contribution, a declaration containing the following shall be published:

- (a) a description of the consideration other than in cash at issue;*
- (b) its value, the source of this valuation and, where appropriate, the method of valuation;*
a statement whether the value arrived at corresponds at least to the number, to the nominal value or, where there is no nominal value,
- (c) the accountable par and, where appropriate, to the premium on the shares to be issued for such consideration; and*
- (d) a statement that no new qualifying circumstances with regard to the original valuation have occurred.*

The publication of the declaration shall be effected in the manner laid down by the laws of each Member State in accordance with Article 16.

2. *Where consideration other than in cash is proposed to be provided without an experts' report, as referred to in Article 49(1), (2) and (3), in relation to an increase in the capital proposed to be made under Article 68(2), an announcement containing the date when the decision on the increase was taken and the information listed in paragraph 1 of this Article shall be published, in the manner laid down by the laws of each Member State in accordance with Article 16, before the contribution of the asset as consideration other than in cash is to become effective. In that event, the declaration pursuant to paragraph 1 of this Article shall be limited to the statement that no new qualifying circumstances have occurred since the aforementioned announcement was published.*

3. *Each Member State shall provide for adequate safeguards ensuring compliance with the procedure set out in Article 50 and in this Article where a contribution for a consideration other than in cash is provided without an experts' report as referred to in Article 49(1), (2) and (3).*

As can be seen, the provision specifies the procedure to be followed if a contribution in-kind is introduced as capital without an expert report. In fact, Article 49, Article 50 and Article 51 of the Directive regulate how a contribution in-kind can be brought as capital and how it can be exempted from the expert report.

II. Provisions of TCC No. 6102

Turkish Commercial Code Second Book Company Law

Part Four

Joint Stock Companies

Part One

General Provisions, Establishment and Basic Principles

VI - Capital in kind

1. Elements of assets that may be capitalised in kind

Article 342

(1) Assets, including intellectual property rights and virtual media, on which there are no limited rights in rem, attachment and injunction, which can be valued and transferred in cash, may be capitalised in kind. Acts of service, personal labor, commercial reputation and outstanding receivables cannot be capital.

(2) Article 128 is reserved.

Article 342 of the second book of the company law of the Turkish Commercial Code, which corresponds to the provisions of the Directive, lists the elements of assets that may be contributed as capital in kind. Article 342 of the TCC, which corresponds to Article 46 of the Directive, states that “*intellectual property rights that can be valued and transferred in cash, which are not subject to any limited real right, attachment or injunction, and assets, including virtual media, may be contributed as capital in kind.*” The TCC does not accept service performances, personal labor, commercial reputation and unmatured receivables as capital.

Article 343 also mentions a valuation method.

2. Valuation

Article 343-

(1) The capital in kind contributed and the enterprises and real property to be taken over during the establishment shall be valued by the experts appointed by the commercial court of first instance in the place where the head office of the company will be located. In the valuation report, it shall be explained that the valuation method applied is the most fair and appropriate choice for everyone in terms of the characteristics of the concrete case; the reality, validity and compliance with Article 342 of the receivables contributed as capital, their collectability and their full value; the amount of shares to be allocated for each asset

contributed in kind and their Turkish Lira equivalent shall be explained with satisfactory justifications and in accordance with the requirements of the principle of accountability. Founders and stakeholders may object to this report. The expert decision approved by the court is final.

III. Evaluation

1. Our first assessment will be on the harmonization and differences between the regulation introduced under Article 46 of the Directive and the legislation stipulated under Article 342 of the TCC. At the outset, it should be noted that the TCC, unlike the EU Directive, has chosen to narrowly define the scope of the defects that may be brought to capital companies.

The Directive recognizes that the subscribed capital may only consist of assets that can be economically valued. Therefore, according to the Directive, the existence of an economic value of the bearer is the sole condition for it to be accepted as capital. According to § 27 of the German Stock Corporation Act (AktG), which is the analogue of Article 342 of the TCC, contributions in kind or acquisitions in kind can only be assets whose economic value can be determined; obligations to provide services cannot be contributions in kind or acquisitions in kind.

However, pursuant to Article 342 of the TCC, in order for an asset to be included as capital in kind

- i. **there should not be any limited real right, lien or injunction on them**
- ii. **be realizable in cash and**
- iii. **must be transferable**

As can be seen, the TCC, in a different and more protective manner than the EU and the original law, not only restricts the values that may be brought to the joint stock company as reserves, but also attributes certain

characteristics to these reserves, such as not being subject to attachment, not being subject to an injunction, etc. In the doctrine, one of our professors also named this form the Turkish method.

In addition, although the TCC has stated that personal labor and services cannot be accepted as capital in accordance with the provisions of the Directive, it has also narrowed down the scope of receivables that are not included in the Directive and stated that only due receivables can be brought as capital in kind.

It should be noted that, in addition to these differences, the Turkish Commercial Code, in accordance with both the German law and the provisions of the Directive, has also determined that commercial labor and personal reputation cannot be brought as capital in parallel with the provisions of the Directive.

2. The procedure for the valuation of the cash deposits to be recognized as capital should also be evaluated within the framework of the EU Directive and the provisions of the TCC.

According to Article 49 of the EU Directive, if a value other than cash is to be recognized as capital,

- i. It must be prepared by one or more independent experts appointed or approved by an administrative or judicial authority before the company is established or authorized to operate,
- ii. This report should include, at a minimum, a description of each of the assets comprising the consideration and the valuation methods used, and a calculation of the nominal value and the amount of the share to which it corresponds,
- iii. Furthermore, this report must be published in accordance with Article 16 of the directive, as laid down in the law of each Member State.

According to Article 343 of the TCC, which is titled as “Valuation of the shares”;

- The value of the capital in kind and the enterprises and real property to be taken over during the establishment shall be appraised by the experts appointed by the commercial court of first instance in the place where the company headquarters will be located,
- In the valuation report, the valuation method applied should be the most fair and appropriate choice for everyone in terms of the characteristics of the concrete case;
- **The authenticity, validity and compliance with Article 342 of the receivables recognized as capital, their collectability and their full value;**
- The amount of the share that should be allocated for each asset put in kind and its Turkish Lira equivalent,
- **It is stipulated that the founders and stakeholders may object to this report and the expert decision approved by the Court shall be final.**
- **There is no regulation regarding the publication of the valuation report.**

For example, if we want to appraise a bear, the provisions of the Directive refer to an independent expert appointed by an administrative or judicial authority before the company is established or authorized to operate, whereas, in our country, only the Commercial Courts of First Instance can appoint the expert. The Directive recognizes that they may also be appointed by an administrative authority.

Again, the directive states that the report should include the valuation method, the normal value should be calculated, and the amount of the share should be determined in parallel with our regulation and this report should be published. When we look at the regulation in our country, firstly, it is a legal obligation for the Commercial Court of First Instance, where the company headquarters is located, to appoint this expert. Secondly, similarly, in this valuation report, it should be stated that the valuation method has been selected in a fair and appropriate manner according to the characteristics of the concrete case.

This report should determine the authenticity, validity and certifiability of the receivables capitalized as a difference capital. However, we do not have any regulations regarding this in the directive.

Again, unlike the Directive, it is accepted that the founders and stakeholders may object to this report, and it is stipulated that the decision of the expert report approved by the court shall be final.

On the other hand, we do not have a positive regulation regarding the publication of this valuation report.

3. Another point is that, although the Directive permits the abandonment of the valuation procedure in the presence of certain conditions, the TCC (except for merger and demerger transactions) has accepted the strict application of this principle unlike the EU Directive.

Indeed, Article 50/1 of the Directive explicitly states that Member States may, upon a decision of the administrative or governing body, decide not to apply the valuation rule in cases where transferable securities or money market instruments such as treasury bills, commercial paper, certificates of deposit or money market instruments as defined in Directive 2014/65/EU of the European Parliament and of the Council are brought as capital.

According to this regulation, the value of these bears is determined by the weighted average price on one or more markets on which they are traded within the time interval determined by national law.

However, in the preamble to the TCC, the Commission stated that *“In September 2001, the European Commission established a group of leading European professors of commercial law (the Group) and asked the Group to prepare an action plan on company law that not only shapes the future of European company law, but also directs it, taking into account in particular the objective of increasing the competitiveness of EU companies”*.

The recommendation of the Supreme Board of Experts that expert valuation may be dispensed with in terms of capital in kind was deliberately not preferred by the High Council of Experts on the grounds that “*Some studies questioning the function and benefit of the principle of capital preservation in the context of the principle of limited liability and reaching negative conclusions have not been taken into consideration and the principle has been adhered to, since they are still in the evaluation and scrutiny stage and options to replace the principle have not been proposed.*”

In summary, the commission that drafted our new law clearly stated that they strictly adhered to the principle of capital protection and did not follow the recommendations herein.

However, in some cases, the valuation procedure may be relaxed under the TCC. For example, this is the case for mergers, divisions and conversion of type. In this context, for example, regarding mergers:

a) Capital increase

ARTICLE 142- (1) In a merger by acquisition, the acquiring company shall be obliged to increase its capital at the level necessary for the protection of the rights of the shareholders of the transferred company.

*(2) In a merger, the **provisions relating to capital in kind and the provisions relating to the public offering of new shares in public joint stock companies shall not apply, except for the provisions relating to the registration of the Capital Markets Board.***

b) New formation

*ARTICLE 143- (1) In a merger by way of new incorporation, the articles of this Law and the Cooperatives Law dated 24/4/1969 and numbered 1163, other than the **provisions relating to capital in kind and the provisions relating to the minimum number of shareholders, shall apply to the incorporation of the new company.***

4. Another regulation in Article 51 of the Directive, which has no equivalent in Turkish Law, is related to contribution in-kind brought as capital without obtaining an expert report. What will happen if a bearer is brought as capital without obtaining an expert report?

In the aforementioned regulation, in the case of the provision of consideration other than cash (treasury bills, commercial papers, etc.) referred to in Article 50 without an expert report, in addition to the requirements referred to in point (h) of Article 4 (shareholder, number of shares, nominal value) **and within one month** from the effective date of the asset contribution, **a statement shall be published** containing the following

- (a) a description of the non-cash consideration in question;
- (b) value, the source of this valuation and, where appropriate, the method of valuation;
- (c) a statement of the nominal value reached and the number of shares allocated; and
- (d) a statement that no new circumstances have arisen in relation to the original valuation. The publication of the declaration shall be carried out in the manner provided for by the laws of each Member State, also in accordance with Article 16.

Article 51/3 of the Directive finally provides that each Member State shall provide adequate safeguards to ensure compliance with the procedure laid down in Article 50 and this Article where capital in kind is provided without an expert report in the manner referred to.

Finally, I would like to state that when the European Union Directive regulations on capital in kind and the TCC regulations are evaluated as a whole, the regime adopted in Turkish Law contains quite strict differences from the European Union regulations, and I would like to state that this regime has a much more protective structure with a unique method. Thank you for your patience, and if there are any questions, I may take them.

ŞÜKRÜ YILDIZ: Now Dr. Saat, both Prof. Altay and Prof. Özkorkut mentioned something a little while ago. They said that we should take into account the philosophy of the European Union directives when solving the problem before us. Now, when the articles of our Turkish Commercial Code that you have examined are taken into consideration within the framework of the philosophy of the European Union, has harmonization been achieved or not? There are different provisions. Now, has harmonization been achieved between our law and the European Union directives on the issues you have described? Has it not been achieved?

DURŞUN SAAT: Prof. Yıldız, there is a harmonization within the framework of general logic. But when we go into detail...

ŞÜKRÜ YILDIZ: Let's leave the details aside. We need to look at the philosophy here. What does it say? What does the commission that drafted our law say in its justification? Yes, there is such a recommendation, but we have envisaged such a method to protect both the capital and shareholders in our country. This method is slightly different from the European Union directive, stricter, and more protective, but has harmonization been achieved or not? Is the interest to be protected or not?

DURŞUN SAAT: Prof. Yıldız, we have more, not less.

ŞÜKRÜ YILDIZ: Our European stakeholders have never mentioned this issue. Therefore, we have tightened the provisions in this regard and introduced more secure provisions. Yes.

The European Union offered us the opportunity to make a more liberal regulation, but we said "No, let's introduce a stricter regulation". As a result, there is harmonization.

DURŞUN SAAT: I can state that we have a much more protectionist structure than the EU regulations and that much harmonization has been achieved in this context.

RIZA AYHAN: Thank you.

KADİR SEVİM: Our ministry also has an opinion on the issue of capital in kind without an expert report. If the shareholder's receivable is given in cash and due, then we have said that it can be added as capital in kind without an expert report, without a report accepted by the court. This is how it is implemented. I think that the other provisions are more protectionist, as you say. In other words, certain rules have been introduced at a minimum level in the European Union directive. In our country, we apply this in a more protective manner, more systematically.

ZEHRA BADAĞ: And isn't the lack of reciprocity related to the fact that those values cannot be brought to us as capital in kind? Therefore, the answer to what happens if these are brought is not included in the Law because it is unnecessary but that is also controversial. In other words, the ministry has such an opinion, but it is also one of the issues that are discussed in the doctrine.

But at the point we have reached, I think we cannot called incompatible. Since I took the floor, I would like to add a very small thing. We have always discussed auditing in the merger and demerger issue related to my field. Auditing is important at every stage in every sense. One of the criticisms about auditing was that the auditing procedure in mergers and demergers was not included since we now have a transaction auditor. In order to protect the rights of creditors and shareholders, it would be appropriate to include an audit procedure, i.e. the audit of the merger agreement and other division agreements, such as "whether the shares are correctly proportioned, how these share transfers will be". That again seems to be a deficiency, but our general framework does not change. Thank you very much.

RIZA AYHAN: Thank you very much, Prof. Aker.

HALİT AKER: I would like to add one point. Mr. Sevim, you have just mentioned. About adding the receivables of the partners from the company to the capital with the independent accountant financial advisor/

certified public accountant report without the expert appointed by the court. This is already against the law. Of course, there is also an article in this directive. I cannot remember the number right now, it is also against the law. I would like to draw your attention to it, it would be good if it is looked at again. In other words, with the signature of the Ministry's General Director of Domestic Trade or deputy general manager, I think, in a session with Prof. Narbay, there is a law congress of Aristo Publishing House, I think I presented a related paper there. The fact that the Ministry allows the capitalization of the receivables from the partners and the company with this certified public accountant report causes unfairness in practice. We need to remove it. In other words, it would be good to have an expert report by the court. Also, this is already against the directive. As our professor stated, there are very heavy rules on capital in kind. Thank you, Professor.

RIZA AYHAN: Thank you very much for your reminders, that is the purpose. Our friends find the truth better by chatting in this way. The sun of truth is born from the confrontation of ideas. Prof. Yıldız, here you go.



Capital Increase and Pre-Emptive Rights

Prof. Dr. Şükrü Yıldız - İbn Haldun University

ŞÜKRÜ YILDIZ: Prof. Ayhan, Mehmet Bahtiyar has already touched upon the capital increase in the amendment of the articles of association in a very good way, thank you. Firstly, another directive was added to the 2017 directive in 2019. This directive is called “Restructuring and Bankruptcy Directive”. This 2019 Restructuring Directive is in fact an attempt by the European Union to somehow incorporate into the European Union law the restructuring regulations in Chapter 11 of the US Bankruptcy Code of 1978 (*Chapter 11*) and the restructuring regulations set forth in the report prepared by Sir Kenneth Cork in English law and published in 1982 and included in the Insolvency Act of 1986 (1986 Insolvency Act). The interesting part of the matter is that the regulation on restructuring was added to our Execution and Bankruptcy Law with the title of “Restructuring of Capital Companies and Cooperatives through Settlement” with the amendment made in 2004. The provisions on the subject are included between Articles 309/m and 309/ü of the Turkish Execution and Bankruptcy Law (EBL). These provisions have existed in the EBL since 2004 but have never been used.

In other words, restructuring through reconciliation is included in the EBL, but has never been implemented. A little while ago, Professor Altay made a very good observation. His observation was this: “We cannot establish a connection between the enforcement and bankruptcy law and commercial law.”

Indeed, the TCC previously had Article 377 of the TCC, which had the subtitle of Postponement of Bankruptcy, following Article 376 of the

TCC. This title and the content of the article were amended by Law No. 701 in 2018 and transformed into concordatum. Unfortunately, the provisions on “Restructuring through Reconciliation”, which we introduced to our law in 2004 and regulated in Article 309/m et seq. of the EBL, were not referred to in the original or amended version of the TCC No. 6102. Although these rules are included in our law, they have never been applied. I will also ask Mrs. Gündoğar to look into this matter.

MELTEM GÜNDOĞAR: Prof. Yıldız, I am not sure if this is the subject of the chapter on company law? Sometimes things like this happen. For example, *transparency* can also be linked to company law. But in the screening process, we handled it under Chapter 9. Therefore, it is still being discussed there.

ŞÜKRÜ YILDIZ: The Restructuring and Bankruptcy Directive has been added to the Directive No. 2017. Take a look again, we will look at it again, too. These are my first words, Prof. Ayhan.

The second thing I would like to say is about the pre-emptive rights. When the TCC No. 6102 was prepared, one of our objectives was to harmonize with the European Union Law. However, we have taken many articles from Swiss Law. We say that the Swiss have harmonized their law with the European Union Law. Therefore, let us take it from there. For example, we have taken this merger and demerger directive called *Fusionengesetz* from Switzerland. I wish we had taken it directly from the European Union Directive. There was a special provision on priority right in Article 29 of the EU dated 1976 and numbered 2. Article 72 of the 2017 Directive repeats the same special provision on priority right. Article 72 of the 2017 Directive clearly states that the priority right cannot be restricted by the articles of association. It is a very clear provision. However, there is no such provision in our Commercial Code. In other words, we have taken what is written in Article 652b of the Swiss Code of Obligations. But I wish we had taken the provision in the Directive.

Nevertheless, is there no harmonization? We cannot say that. Harmonization still exists. In the preamble of Article 461 of the TCC, it is stated that it will no longer be possible to limit the pre-emptive right by the articles of association. However, there is no such statement in the text. On the other hand, it would also be appropriate to harmonize Article 478 and 502 of the TCC with Article 461 of the TCC.

We have also introduced the provision that the pre-emptive right may be limited to 60% (sixty percent) of the capital at the general assembly meeting where the capital increase decision is taken. When we look at Article 83 of Directive 2017/1132, we see a dual situation. This article opens a horizon for the Member States: In the first case, it stipulates that “pre-emptive rights may be restricted by a quorum of at least two-thirds of the votes represented, of the votes attached to securities or of the votes of the capital represented”. Two-third means 67 percent of the capital. In the TCC it is %60.

However, in the second case, the Directive stipulates that “in the legislation of the Member States, a simple majority of the votes referred to in the first paragraph shall also be sufficient if at least half of the share capital is represented”. Therefore, the second paragraph of Article 83 already recognizes that our rule regarding the limitation of the pre-emptive right (right to acquire new shares) in the general assembly is in compliance with the provisions of the Directive.

There is no inconsistency between the 461 quorums on the right to acquire new shares and the quorums adopted by the 2017 Directive.

Thirdly, Article 591 of the TCC clearly stipulates that the pre-emptive right in limited liability companies may be limited by the articles of association. Is this contrary to the Directive? No, it is not contrary, because Article 72 of the 2017 Directive is applicable only to joint stock companies, but not to limited liability companies. In the book “Van Hulle, K., “AB’nin Şirketler Hukuku Müktesebatı ve Türkiye’nin Uyumı”, İktisadi Kalkınma Vakfı Yayınları 17, İstanbul, March 2003”, published by the Economic

Development Foundation in 2003, it is rightly determined that the member states generally apply the rule in Article 29 on pre-emptive rights to limited liability companies, but not applying it would not constitute a deficiency. Therefore, the rule under Article 591 of the TCC, which provides that the pre-emptive right of limited liability companies shall be abolished by the articles of association, does not pose a problem in terms of harmonization. These are my explanations on pre-emptive rights. Thank you, sir.

RIZA AYHAN: Here you go, Prof. Çağlar.

Reduction Of Capital

Prof. Dr. Hayrettin Çağlar -
Ankara Hacı Bayram Veli University

HAYRETTİN ÇAĞLAR: I would like to thank Professor Yıldız for organizing this event and inviting us, and for giving me a completely harmonized topic. I have nothing else to harmonize. Thanks to my colleagues, they have harmonized this part quite a lot in the past.

I had written this subject as an associate professorship thesis in 2010, together with Prof. Bahtiyar, who was also a member of my jury. For this reason, He gave me this assignment, saying that you need to remember this subject again. However, when I looked at it, I saw that in the amendment made on the night of 24 June 2012, that is, in the amendment announced on 30 June, it was said with reference to here that the developments in the European Union directive in 2012 were also reflected, and they took it here with a few minor changes. The basis of this regulation is actually the Directive of 77 in our first preparation. Later, this directive was updated in 2012, and in the directive numbered 1132, which we have just mentioned in 2017, the reduction of capital is regulated in 11 articles. However, in our Commercial Code, there are a total of 3 articles on the subject. In other words, they have regulated it in great detail. However, we have solved it in fewer articles by interspersing it in some other places. The reason is that in the Swiss Code of Obligations, this issue is regulated in four articles between Articles 732-735. Prof. Yıldız said before that we are both trying to harmonize with the European Union and at the same time we are taking the regulations from Swiss Law. As such, some things do not coincide. In addition, if we are going to go over Switzerland, then maybe it is not on the agenda of this meeting of the sun of truth rises from the open and clear clash of ideas, but it

may be necessary to make a separate study on the Swiss regulations that entered into force on 01.01.2023. Because the new system introduced there under the name *Kapitalband* is what we call a “limited flexible capital system”, which makes it possible to increase or decrease the capital with a board of directors’ decision. This, of course, enables the company to take action very quickly. This is not in the European Union regulations. It is a change brought by Switzerland based on its own needs. I think that if we can introduce this, we may be able to facilitate the reduction procedure, which requires a long procedure in our country. If the board of directors can increase the capital, we can authorize it to reduce the capital. But of course, this will be something separate from the harmonization studies.

In German law, the issue of reduction of capital is regulated in 19 articles, which are more detailed than ours. Also, there is a special concern in terms of reduction and protection of the creditor. Let me also say that, apart from this text, the capital in Turkish law is already low, that is, there is a capital of 10.000 TL in a limited liability company. What are we going to reduce? Or there is a capital of 50.000 TL in a joint stock company. In this respect, in our harmonization studies, Sir is not in my position, but where we need to harmonize is the provision in the European Union type joint stock companies regulation dated 2001, which refers to the member states and states that the company capital cannot be less than 25,000 Euros. We need to correct this as soon as possible. Maybe then, what I am going to tell you may have a meaning.

Regarding the relevant regulations in the EU Directive, Article 73 states that the call procedure, quorum, purpose and method of the reduction must be indicated in the decision. In our text, this is regulated in paragraphs one and three of Article 473. The issue regarding the announcement of the general assembly resolution is also included in our text, and there is no problem.

The next article refers to different share groups, especially Article 454, which is regulated as privileged shares. If there is such a situation, it says that each share group must also be approved separately, which we already have in relation to contract amendments.

In Article 75, the protection of creditors is regulated in the second paragraph of Article 473; there is no harmonization problem. Regarding the protection of creditors, we have made detailed provisions on the call procedure, which is even more detailed than the one there, by saying that it must be announced at least three times with an interval of one week, and so on. There is no problem in this respect. In addition, if there is a reduction to cover the losses of the company, then there is no need for this ceremony. It says that capital reduction can be made in a simplified manner. In this respect, it is harmonized, and in the next one, it is regulated that the minimum limit cannot be lowered. We have exactly the same provision. Therefore, we can say it is compatible.

We do not have Article 78, but this is only an opportunity for member states if they have such a regulation, and since we do not have a regulation on this, there is no obligation, and there is a mandatory regulation on the redemption and compulsory redemption of company shares. In Article 475, we have included which measures will be applied, and it seems to be compatible.

The acquisition of the company's own shares by the company is a very sensitive issue for the European Union. This is also very much mentioned in German law. They have even made provisions on this issue in the reduction of capital. In cases where the company acquires its own shares if it cannot dispose of these shares within a certain period, it must redeem them. This issue has been regulated in a separate article. This is also compatible. In our country, of course, it is not regulated here, it is regulated further back. This issue has been addressed in the acquisition of the company's shares.

Article 81, we are back to different share groups. We have already stated that before.

Article 82 contains the conditions for the company to acquire its own shares, and it says the same thing over and over again.

As a matter of fact, Article 83 is not only about the reduction, but also about the quorum for the general assembly to take decisions in other cases. This is the issue that Professor Yıldız has just mentioned, and here we have a heavier quorum. It refers to Article 421/3 regarding the reduction of the capital, and mentions the 75% majority of the capital. Since this is a contract amendment, it is not possible to use privileges, so I say that there is compatibility with this form. Thank you, Professor, that's all I have to say.

RIZA AYHAN: You have made a very systematic presentation. Thank you.

HALİT AKER: May I make an addition to Prof. Çağlar's explanations?

RIZA AYHAN: You already have the floor.

HALİT AKER: As I told my professor, the Directive really could not stop itself from making regulations on the acquisition of the company's own shares. In other words, let me close all possibilities, there are articles, paragraphs, sentences, etc., so there is a lot of detail. It far exceeds the article in our law on the acquisition of the company's own shares. Maybe it would be understandable in publicly traded companies. But such detailed provisions, even for closed companies, are incomprehensible. I can think that someone has taken a special interest in this, as if there is no harmonization there, and we remain simple accordingly. In other words, I think our law is a bit simplistic in the acquisition of the company's own shares.

HAYRETTİN ÇAĞLAR: It is also necessary to see if there is a need for it.

HALİT AKER: Of course, that is a separate issue, but maybe there is a problem in terms of wording.

ŞÜKRÜ YILDIZ: Has harmony been achieved or not?

HALİT AKER: It was not my specific topic, but as far as I know, the EU Directive is quite detailed.

ŞÜKRÜ YILDIZ: Harmonized.

HALİT AKER: They have made a very detailed arrangement.

ŞÜKRÜ YILDIZ: But harmonization has been achieved because we have a special provision on this issue. There is a very simple and good special provision. The acquisition of the company's own shares cannot exceed 10 percent. If it comes in another way, it will be disposed of.

HALİT AKER: I mean, of course, the interests to be protected are protected in both. As you said, our law and the directive took different paths. A question arises as to whether it is necessary to go the same way to achieve the same goal. It doesn't. So maybe we can interpret what you said in that way.

RIZA AYHAN: Thank you very much. Halit Aker, what do you have to say about the termination?



Termination

Prof. Dr. Halit Aker - Uludağ University

HALİT AKER: Thank you. I would like to thank Ibn Haldun University for inviting us to this beautiful study. I would also like to thank the valuable representatives of the bureaucracy for their explanations since they are in the kitchen of the business. I would also like to thank my esteemed professors for their presentations before me. Prof. Yıldız appreciated the subject of the termination of the company for me. In general, I adhered to 2017/1132. Here, when we look at Annex 3 of the directive, it is seen that the mentioned directives have been repealed. When we read the sixth chapters of the EU progress reports for 2019, 2020, 2021, 2022, there is actually no special statement, positive or negative, regarding the termination, liquidation. This is not mentioned much.

However, since the company continues to be subject to the general principles even in the event of termination and liquidation, I did not stick to Article 529 in a narrow sense. I tried to touch upon its slightly different aspects. If we compare it like this, our Professor Bilgin also mentioned it, even though it does not seem to be directly my topic - since the termination and liquidation may come to the agenda at the end of the work - I found it right to include it here again.

It is requested to limit the termination and nullity of companies. It is stated that this should only be done by a court decision, and at the same time, it is stated here that third parties should be given a certain period of time from the announcement and notification of this decision. As seen in Article 11, there must be a court decision. Professor Bilgin also wrote the articles and subparagraphs. It says that it can be given limited to the events

written in clauses one to six, and in cases other than this, it is stated that the absolute or relative nullity of the company cannot be decided. When we look at our Commercial Code, it is already stated in Article 353/1 that it cannot be decided on the nullity or absence of the company, but in our case, it says that it is decided to terminate it in a material sense, perhaps equivalent to this. As is known, termination is not effective retroactively, but it is effective prospectively, but this is also restricted to certain cases in Art. 210 and Art. 353. Since it is not directly related to the subject matter, I have separated them into cases related to the substantive law and cases related to the substantive law. I think it corresponds to these again, albeit relatively. From our legislation, the issue is whether third parties can object to this termination decision. There is no explanation regarding this in our Commercial Code. This constitutes a difference.

Perhaps this can be underlined. Is there a great need? That can also be discussed. Again, there are regulations in Article 12 on the legal consequences of absence/abandonment. There is actually similar content on the previous slide. There must be a court decision. In the Directive, if the right of objection is granted to third parties, this should be limited to a maximum of 6 months from the announcement of the court decision. As I have just mentioned, the right of third parties to object is not explicitly mentioned in the law. If the court decides that the company is null and void, it is stated that this company will enter into liquidation. When we look at our Art. 532/1 and Art. 637, we see that they are of a matching nature.

Afterwards, in the third paragraph of the article, it is clearly stated that the decision on the non-existence of the company does not make any changes in the debts undertaken by the company and the debts undertaken against the company. In our law, there is no explanation that the debts of the company do not disappear as a result of the dissolution, that the company's receivables do not disappear, and that this is not a reason that terminates the debt. Such a difference may be mentioned.

Again, in the fifth subparagraph, it is stated that when the company enters into liquidation in this way, the liquidators may claim the capital

receivables that have not yet been paid in an amount sufficient to cover the company's receivables. Article 542/1/a is an issue that has an equivalent in our country. In the event of a judgement of nullity, the fourth paragraph states that the regulation of the relations between the company and the shareholders and between the shareholders themselves is left to the member states. In our country, there is no explicit regulation on this issue, i.e. if the court decides to dissolve the company, the following should be done, such a method should be applied, but this problem is already solved based on other articles. In the sixth article, it is regulated in the sixth article that the decrease in the number of shareholders below the minimum number or the acquisition of all shares by a single shareholder in multi-shareholder companies should not be a reason for termination. Since we have now switched to a single shareholder system in both limited liability companies and joint stock companies, this has no effect on us.

While preparing this slide, I naturally did not take banks and insurance companies into consideration. Maybe it may have an indirect effect on them. There may be aspects that can be discussed, and aspects that can be considered. When we look at the second paragraph, for example, there must be two or more partners and again all the shares are in the hands of a single shareholder. It says that this should not be a reason for the termination of the company. The company should be given a period of time to rectify it. Only then should the court decide on the termination of the company. Paragraphs 6/2 and 6/3 of Article 6/2 and Article 6/3 of the Directive No. 2017/1131 are the matters that are equivalent to Article 531, Article 636/2, and Article 533/1 of the TCC, so there is no problem.

Again, there are legal consequences of capital loss. It is stated that in case of severe loss of capital, the general assembly should be called for a meeting, and the general assembly should decide on the termination of the company or other measures. This corresponds to our Article 376/2. When we look at the Directive in general, my dear professors, it is possible to determine that the issues related to termination and liquidation are always associated with transparency. In other words, it has given great importance to this, and has always imposed an obligation to disclose the reasons for the

termination of the company. When we look at Article 14 of the Directive, in other words, it can be said that there is a philosophy of informing in a binding manner and as thoroughly and accurately as possible, so that everyone can make their own decisions and determine their own receivables. In other words, I have such an impression. The scope of the disclosure of information regarding the company includes the extension of the term of the company, the dissolution of the company, or rather the termination of the company, and the court's decision on the non-existence of the company. Again, the appointment and election of the liquidators, their identities, and their authorizations are also included. In short, let me express it as a disclosure-transparency obligation. Again, it says that these are also included in this scope. At the same time, it is stated that the termination of the liquidation and the consequent deletion of the company from the registry must be announced sA can be seen on the side, these are already standard articles of the TCC. In other words, there is no problem of harmonization with the issues in our old law.

Again, Article 20 of the Directive states that such registrations, and announcements made to the trade registry shall be carried out on a network. In other words, it means that the registry transactions are carried out electronically and the registries are connected to each other electronically. This practice already has its counterpart in Article 24/3 of the TCC. It has probably been this way for many years. Again, the MERSIS application shows that we meet the requirements of Article 20 of the Directive in this sense.

Again, there are too many detailed regulations in the Directive, especially regarding branches. This draws attention. Of course, both the nationality, i.e. the branches of a company with its head office in a certain member state in the same country, and there are also regulations regarding the branches of companies with headquarters in other member states. A study on branches may be necessary.

Again, the second paragraph of Article 20 of the Directive regarding the inclusion of the records of the branches in this central network, i.e. 34/1, which states that the electronic registry system should also be applied to

the branches, is also mentioned here for Türkiye. So we have no problem here. As I said, the details can be looked at in terms of branches. Again, if we continue with publicity and transparency, there is a provision here that the company's letters, documents, commercial documents, let's say order documents, etc., and other types of papers should be written explaining that it is in the process of liquidation, and that the company's website should also contain explanations that the company is in liquidation. Of course, as we know, the website is mandatory only for companies subject to external audit. Other companies generally use their websites for advertising purposes. Here, we do not have such an obligation in our country for companies that are not subject to external audit because the company itself has entered into liquidation. However, Article 39/2 of the TCC, Art. 1524 and Art. 533/2 meet the requirements of Article 26 of this Directive. There is a harmonization. Here, the scope of the obligation to disclose is somehow limited again. In particular, a limitation has been introduced in terms of the protection of third parties. Again, it is ensured that third parties have access to information about the company through these announcements, especially about who is authorized to represent and bind the company, and who is authorized. It is stated that this information must be provided in the announcements made regarding the company. It is also stated that the persons authorized to represent and bind the company should be disclosed in the information and documents of the company. This justification is mentioned there. Since the liquidators are also authorized to represent the company, who they are, as a rule, there is a double signature authority, i.e. an obligation, for the liquidators. Since these are issues that are already required to be announced in our country, we see that they are included in the justification and harmonized.

It is stated in the justification that the announcements regarding the company should be accessible not only physically, i.e. on paper, but also electronically. In Ground 10, let's say that the trade registry gazette should be published and accessible both physically and electronically. Again, the information in the announcement should also be included in the company's commercial documents, letters, invoices, receipts, etc. Likewise, these must also be announced on the company's website. In other words, here in Türkiye, as is currently known the Trade Registry Gazette is only published

electronically. We no longer have paper. There is such a difference. Maybe this will be abolished in the European Union in terms of environmental protection and sustainability, I don't know. I mean, maybe they will harmonize with us in this sense. Again, about the web page, publicly traded companies already have a Public Disclosure Platform (PDP). I think that we meet the requirements of this in terms of the site that must be established in accordance with Article 1524 of our Commercial Code, the services reserved for the information society, and the obligation to have a separate disclosure area.

As you have just mentioned, there is transparency regarding the branch. Accordingly, the termination of the head office or the liquidation of the branch is listed among the issues that must be disclosed. We have this in detail in Article 125 of the Trade Registry Regulation. In other words, even if it is not in the law, we still provide this requirement through the regulation. By the way, maybe I will say it later, but while we are negotiating with Brussels on harmonization, it is useful to make explanations not only through the law, but also through the registry regulation. This is also a really important issue, especially in terms of transparency. Again, an issue that is not in the law, that is, it can be discussed whether there is a need for much regulation. Since it is the legal successor of the company that was terminated due to merger and demerger, the branches of the terminated company do not need to be deleted from the registry. In other words, the divided company has branches, but when the company is divided, it is divided by acquisition or new establishment, but it already has a legal successor. Especially in a full division or partial division. Neither in our law nor in the registry regulation is there a special regulation on how the branch will be affected by the division and merger. However, as you said in the directive, they have written something special in the directive that it is not obligatory to delete the branch in cases where there is a legal successor of the divided and merged company in the division and merger.

There is an issue understood from Reason No. 74, such as the announcement made on the company's website replacing the announcement in the Trade Registry Gazette. When we look at our Article 1524, it is

understood that matters not subject to registration and announcement in the trade registry shall also be announced on the website. We see that this is also equivalent and appropriate. Regarding the integration of the Turkish Trade Registry into the EU central trade registry network, if I am not mistaken, Mr. Sevim also mentioned this. He says “*wünschenswert*” rather than an obligation, i.e. it would be good to have it. We can express it as desirable for third countries to be integrated into the EU-wide central trade registry. Again, while doing research, this *e-justice* is mentioned. I looked at it, and I put the website’s address there.

There are some detailed regulations on trade. In other words, we may be able to integrate into this system over time, it is a separate issue. When we look at the provisions of the Trade Registry Regulation to be associated with the EU Directive, Article 22 of the Trade Registry Regulation stipulates that the liquidation officers can perform transactions such as registration and announcement in the trade registry in their capacity as related parties. It is an article that is, how shall we say, compatible with the Directive. Again, Article 23 of the Trade Registry Regulation stipulates that the changes in the registered facts are also subject to registration and announcement. If I am not mistaken, Article 39 of this law is exactly the same. In particular, issues related to the termination of the company and liquidation regulate the issues to be registered, as they require certain transactions to be carried out in the registry. As you know, we solve our problem through these articles.

Again, there are articles 86-89 of the Registry Regulation on termination, liquidation, return from liquidation and termination procedures regarding additional liquidation in joint stock companies. The directive does not contain provisions on revocation from liquidation and additional liquidation, but when we look at the provisions in the regulation and our relevant commercial code, we have a situation that meets the provisions of the directive more strictly.

In terms of limited liability companies, Article 104 of the Regulation refers to Article 86 and Article 89. I have already mentioned Article 125,

namely the article on branches, and here again, there is a harmonization between the Directive and our Turkish law in terms of branches.

In conclusion, considering the provisions of the TCC and the Registry Regulation regarding the termination of capital companies, it is possible to say that the requirements of EU Directive 2017/1132 have been fulfilled. I mean, are there any points that can be improved? Increasing transparency, scope, accessibility to content, and being able to see the entire trade registry gazette, for example, the trademark bulletin is published in full on the internet, but I can't go to our registry gazette, for example, today 21 September 2023 and see it. I don't know why this is the case. We could see it when it was in the physical environment. When we switched to electronic media, I can't see the gazette today. However, I need to know the registration number of the company or the first letter of the title so that I can see it. At the meeting in Ankara, the following requests were received from the registry directorates: For example, there are 4-5 versions of today's newspaper, but as in the Official Gazette, there should be one copy of the newspaper in the morning and one copy in the afternoon. This problem can be solved in this way. I don't want to misuse it, but I honestly can't figure out why it cannot be accessed. This is a recurring problem in practice. It may be suggested to make improvements by identifying the issues that cannot be appropriately resolved by the TCC or Trade Registry Regulation regulations. Thank you.

General Evaluation

Prof. Dr. Rıza Ayhan - Başkent University

RIZA AYHAN: Thank you very much. You have handled the issue by using your time well. Yes, dear friends, of course time is fast. We'll take a photo. I'll be right back.

I have 2 minutes, if I may. Prof. Bahtiyar, like Prof. Yıldız, I told one of my assistant friends when he was young, "There is a problem, with someone's family, about someone's company, we will look into it, we will write something." I told him, he wrote it, then he went to the authorized public office and came back, but he was foaming with rage and said, "Sir, it can't be done." "Why?" I said, "It has to be like this." He said. I called him, "Look, the legislation is like this, the explanations are like this. What we want is right, but the person who will make the decision is the person in that office. Go and do as he says." It was an extremely important decision.

Now, I am of the opinion that our Turkish Commercial Code, especially the part related to company law, is not deficient from other company law regulations in the European Union legal system. If I were to criticize it, I would criticize it much more than this, that is, with the expression in the regulations, but in essence, I think that we do not have a deficiency in terms of the interest to be protected. This may cause some problems to arise from the practice, especially by the judges or the public administration, especially by the registry offices.

Our law is exceptionally good, or rather, I am not saying it is good, because, in my opinion, Law No. 6762 was better. I mean, our old law was better. Additions could have been made. Our law is in accordance with the

directives, but it is of great benefit to make arrangements following with what they say, and to negotiate with our esteemed friends while doing so. From this point of view, I would like to thank Prof. Yıldız very much. I saw friends I had not seen for a long time. I had the opportunity to meet friends whom I have known until today due to their distinguished works. We met and got acquainted with friends in public administration. We want to continue these meetings. We have a symposium in February and we invite this team. Let us have the opportunity to keep in touch with each other.

I would like to thank you all for your presence and Prof. Yıldız for his invitation, thank you very much.

ŞÜKRÜ YILDIZ: Prof. Ayhan, I would like to thank you first and foremost. You came and did not leave us alone in the midst of all your work and liabilities. You have contributed to us with your knowledge, experience and humanity. I would also like to thank our colleagues and friends from Ankara, our public representatives from Ankara, and our colleagues from Sakarya, Bursa and Istanbul. I am glad that you are here, it was a very nice meeting. I think it was a great contribution to our knowledge on the topic, it was good.







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**BOOK OF THE SEMINAR ON THE EVALUATION OF THE RESULTS REGARDING
CHAPTER 6 (COMPANY LAW) IN THE PROGRESS REPORTS OF THE EU ACQUIS
HARMONIZATION PROCESS**

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Within the scope of the TUBITAK 3005 project titled " Evaluation of the Results Regarding Chapter 6 (Company Law) in the Progress Reports of the EU Acquis Harmonization Process ", which was carried out under the leadership of Prof. Dr. Şükrü Yıldız, a faculty member of Ibn Haldun University Faculty of Law, Department of Commercial Law, with the contributions of academicians from Istanbul Sabahattin Zaim University, Kocaeli University and Anadolu University, Ibn Haldun University hosted a seminar titled EVALUATION OF THE RESULTS REGARDING CHAPTER 6 (COMPANY LAW) IN THE PROGRESS REPORTS OF THE EU ACQUIS HARMONIZATION PROCESS. In this book, the opinions and suggestions claimed in the seminar are brought together and presented to our esteemed readers.

In the seminar, the issues of the level reached in Chapter 6, which is one of the chapters opened for Türkiye's full membership to the European Union, and why it could not be closed if it is at an advanced level as stated in the Türkiye reports which are prepared by European Commission, were discussed by public institutions, non-governmental organizations and academicians who are experts in the subject. In addition, suggestions on what should be done technically by our country for the closure of the chapter were evaluated.



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