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RESEARCH ARTICLE

An Atypical Joint Stock Company under Turkish Law: Basic (Atypical) Principles in the Establishment and Share Issuance of Investment Companies with Variable Capital

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Abstract

Thanks to the instruments offered to investors in capital markets, even owners of small savings have the opportunity to buy and sell these instruments and generate income. However, not all investors will have the same level of knowledge and experience in capital markets. Moreover, in such a diversified environment, investment by experts, i.e. professionals, is desirable for everyone in order to maximise profits. Yet it is inconceivable that small investors would hire professionals to make their investments. Collective investment schemes are institutions that offer capital market instruments to investors in return for which they create a portfolio of investment instruments in various markets and allow professionals to manage the portfolio, thus providing access to basic investment principles, such as professional management and risk allocation, for small investors. Collective investment schemes can be established as a company or fund. The established companies may prefer fixed or variable capital systems. The variable capital system allows investment companies to conduct their activities under the status of joint stock companies. On the other hand, there are many aspects that constitute derogation from the fundamental principles of joint stock companies. As the name suggests, this type of company does not have fixed capital in its articles of association. In these companies, capital is equal to the net asset value of the company and changes as the value of the assets changes. In addition, because of capital volatility, shares do not have a nominal value. Thus, basic principles such as the protection of capital, prohibition of return of capital, and nominal value, intended to be protected in the TCC regulations for joint stock companies, are completely eliminated in companies with variable capital. Although there is no protection of capital in such companies, different mechanisms are expected for protecting investors in portfolio management. In addition, in companies with variable capital, shares are divided into founder and investor shares. Founder shares are issued to the persons who founded the company or, with the permission of the Board in the subsequent issuance of founder shares, to the persons who have subscribed to such shares and grant all shareholding rights to the holders. Investor shares are issued through public offering or other special methods and do not grant any rights to their holders other than profit and liquidation dividends. Thus, a type of share that is completely deprived of various rights that do not exist in the TCC has been established. Moreover, the investor shares can be sold to the company at any time, and the company is obliged to return the net asset value per share to the investor. Thus, the basic principle of the TCC regarding the company's acquisition of its shares is eliminated in such partnerships. In this study, issues regarding the establishment, capital structure, and shares of variable capital partnerships, which differ from the basic principles of joint stock companies, are discussed.

Keywords: Collective investment schemes, investment companies, variable capital, founder's share, investor's share

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I. Introduction

In short, the capital market is a sub-branch of financial markets where the supply of funds and demand for funds come together. According to classical understanding, it refers to markets where medium- and long-term fund flows are provided[1]. Investors, who supply funds, invest their savings by buying and selling capital market instruments, whereas those who supply instruments and those who demand funds meet their resource needs. In other words, the capital market is essentially a market in which fund owners invest to earn profits, while those who offer instruments meet their funding needs. Instruments can be very diverse. Investors can operate by directly buying and selling these instruments, or they can pool their funds and entrust them to specialised managers in order to make the best investment and minimise the risk of loss. Collective investment schemes are capital market institutions that respond to the needs of the second group of investors. To put it more clearly; collective investment schemes are institutions that bring together the funds collected from investors and form a portfolio of different instruments within the framework of the principle of risk allocation, manage the portfolio formed through professional persons, store it with depositories, and thus aim to maximise gains and minimise loss[2]. Investment trusts can be defined as entities that perform these activities within a partnership organisation.

The fact that collective investment schemes act on the principle of risk allocation is directly related to the purpose of their existence. This is because, due to the limited funds available to small investors, it is not possible for the investor to divide the fund and make various investments, and even if he or she incurs a loss on one investment, it is unlikely that they will be able to offset it with another. The "collective" aspect of collective investment schemes refers to the ability to make more independent investment decisions due to the size of the funds offered, the ability to divide the funds among investment instruments, i.e. to distribute the risk, consequently minimising the risk of loss, and the ability of small investors to obtain the same benefits as large investors[3]. On the other hand, it can be criticised that the principle of risk allocation would also minimise the profits of small investors and therefore does not attract them.

1 Ali Paslı, 'Türk Hukukunda Menkul Kıymet Kavramı' in Ömer Teoman and others (eds), *Prof. Dr. Hüseyin Ülgen'e Armağan,* vol 2 (Vedat 2007) 1515.

2 Ünal Tekinalp, *Sermaye Piyasası Hukukunun Esasları* (Ekonomik ve Sosyal Yayınlar 1982) 78-79. For the purpose and basic principles of collective investment schemes, see N. Füsun Nomer Ertan, '6362 Sayılı Sermaye Piyasası Kanunu'nda Kolektif Yatırım Kuruluşları ve Özellikle Değişken Sermayeli Yatırım Ortaklığı' (2013) 71(2) İstanbul Hukuk Mecmuası 131, 131-132.

3 N. Füsun Nomer, *Yatırım Ortaklıkları* (2nd edn, Beta 2003) 5-6. These elements have been presented since the first definition of investment partnerships. The first was the definition given in the establishment of the "Foreign and Colonial Trust" in 1868. In the definition, the purpose of investment partnerships is to reduce the risk of investing in foreign government securities and to provide small investors with the same advantages as large investors. For the definition see Murat Uğur Aksoy, 'Yatırım Ortaklıklarının Temel Kavramları Üzerine' (1974) 20(11) İktisat ve Maliye Dergisi 412, 413. It was also stated that the principle of risk allocation in economic activity first emerged in Rome. In Rome, instead of one capital owner lending to one sailor, multiple capital owners lending to the same sailor and sharing the risk that will occur are also considered within this framework, see Kemal Tahir Gürsoy, *Yatırım Fonları* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 1977) 2.

However, due to risk allocation, it is possible to make more appropriate investments and maximise profits by managing the investment institution by professionals. The balance between risk allocation and profit is tipped in favour of profit because of professional management[4].

The capital market instruments provided to investors in return for the funds they bring in may vary. For example, partnership shares in public joint stock companies are an example of such instruments. By purchasing shares of a publicly traded joint stock company, an investor can both exercise his/her shareholding rights arising from these shares, for example, benefit from end-of-period profits, and gain income in proportion to the increase in value by selling his/her shares later. In investment companies with variable capital, which are the subject of our analysis, the "investor shares" offered to investors have characteristics that are quite different from those of classical joint stock companies. Although these shares are also the shares of the investment company, as will be explained in detail below, they provide the owner with a profit based on the change in the net value of the share and, moreover, impose an obligation on the company to purchase the share. In this study, the establishment and shares issued by investment companies with variable capital, which are exceptions to many basic principles of joint stock companies, will be analysed.

II. Investment Companies in General

Article 3 of the CML defines collective investment schemes as companies and investment funds.

Investment funds are defined in Article 52 under the heading of collective investment schemes in the fourth section of the CML as follows:

> *An investment fund is a property without legal identity, which is established by portfolio management companies within fund rules in conformity with fiduciary ownership principles on the account of savers, with money or other assets collected from savers pursuant to the provisions of this Law in return for fund units to operate the portfolio or portfolios consisting of instruments and rights determined by the Board.*

However, investment companies are regulated under the heading of collective investment schemes under Articles 48 et seq. of the CML. Article 48 defines investment trusts as

> *Investment companies are joint stock corporations with fixed or variable capital established to issue their shares and to manage portfolios comprised of capital market instruments, real estate, venture capital investments, and other assets and rights to be determined by the Board.*

4 For criticisms and evaluations, see Hamdi Yasaman, 'Fransız Yatırım Ortaklıkları ve Yatırım Fonları-Birinci Bölüm' (1973) 20(4) İktisat ve Maliye Dergisi 146, 150.

The scope of operations of investment companies is thus defined by law. These companies are established to operate the portfolio created within the framework permitted by law[5].

As can be seen, investment funds operate by collecting funds in exchange for participation shares and investing these funds in various assets, whereas investment companies operate by issuing company shares and using the funds obtained in this way by creating a portfolio for investment purposes. The most important aspect of the company model *vis-à-vis* the fund model is the legal personality.

From a legal perspective, a legal personality can also pose a risk to investors. This is because the company will be the owner of the assets, including the portfolio; therefore, the company will be legally entitled to dispose of the portfolio as it sees fit[6]. To overcome such drawbacks, measures such as allowing companies to operate only for specific purposes and separately protecting the company's portfolio from its assets have been included[7].

Investment companies with variable capital constitute a sub-group of investment companies that fall under collective investment schemes. The decisive element it has is the capital system of the company. In other words, as stated in the definition, when an investment company is established as a joint stock company, it adopts either a fixed capital system or variable capital system. Investment companies with variable capital are those whose capital remains at any time equal to their net asset value (Article 50/1 of the CML).

To briefly mention here the meaning of capital variability: Within the TCC system, the company's assets are a dynamic concept, whereas capital is inherently a fixed value [8]. Upon start of operations, the company uses its assets in line with its economic purpose, and these assets may decrease or increase because of its activities. The amount calculated by subtracting the company's liabilities from its assets is called the net asset value of the company (Article 50/1 of the CML). In investment companies with variable capital, no fixed capital figure is shown in the association's articles, and the net asset value also represents the capital of the company. Therefore, not only assets but also capital becomes dynamic.

5 It is argued that this is what distinguishes investment companies from other partnerships, see Nomer (n 3) 17. In addition, regarding the different legal structures under which collective investment schemes are formed see Nomer Ertan (n 2) 134-135. For other purposes of investment companies also see Tekin Memiş and Gökçen Turan, *Sermaye Piyasası Hukuku* (5th edn, Seçkin 2020) 168-169.

6 Ünal Tekinalp, 'Yatırım Ortaklıklarının Düzenlenmesinde Temel Alınabilecek İki Model ve Türk Sistemi' (1970) 27(9) İktisat ve Maliye Dergisi 386, 388.

7 Tekinalp, *Esaslar* (n 2) s. 82.

8 With the incorporation of a company, the property rights of the founders on the cash or in-kind capital items brought by them are terminated and these values are included in the assets of the company. Therefore, at the time of incorporation, the company's capital, at least its paid-in capital, and assets are considered equal. These assets may increase or decrease as the company begins operations. While share capital is a fixed figure written in the articles of association, assets represent a variable value. On this issue only see Halil Arslanlı, *Anonim Şirketler – I. Umumi Hükümler* (Fakülteler Matbaası 1960) 92 et seq.

The CML stipulates that investment companies may have fixed or variable capital (Article 48 of the CML) and that investment companies with variable capital are regulated without any distinction between company types (real estate, venture capital, securities)[9]. Article 49/1 of the CML, while listing the conditions for the establishment and operation of investment companies, states that they shall be established in the registered capital system without any distinction, and the provisions regarding variable capital are reserved. Thus, at first glance, it appears that all investment trusts may have variable capital. However, Article 6/2 of the Communiqué on Principles Regarding Real Estate Investment Companies[10] (III-48.1) and Article 5/2 of the Communiqué on Principles Regarding Venture Capital Investment Companies[11] (III-48.3) refer to the fixed capital system by requiring such partnerships to adopt the registered capital system. In this case, it should be noted that the variable capital system is applicable only to securities investment companies.

Because of this determination, explanations will be provided in the following sections within the framework of the relevant legislation. However, before proceeding with these explanations, note that variable capital investment trusts are particularly preferred in the Anglo-Saxon system. Since the law of joint stock companies in the continental European system is not suitable for a variable capital system, investment funds have come to the forefront of this system. However, when operating as a company, variable capital is a necessity rather than an option. In countries where the public is not accustomed to trading on the stock exchange, it is essential for the company to be able to issue shares and offer them to investors at any time to appeal to a wide range of investors and to be able to buy back the shares by paying the price when the investors want to sell them back[12]. As the basic principles of the fixed capital system do not meet these needs, the variable capital system is an important alternative for investment companies.

To briefly touch upon the legislation on variable capital investment companies: Articles 50 and 51 of the CML generally regulate this type of partnership. According to Article 50/6 of the CML, the principles and procedures regarding the activity and management principles of investment companies with variable capital, valuation of assets and rights in their portfolios, safekeeping of their assets, portfolio restrictions, prospectus and publication of prospectus, the issue, sale and redemption of their shares, cessation of redemption, their liquidation and termination shall be determined by the Board.

9 The name of the Company depends mainly on the predominant investment instruments in the portfolio, see Nomer (n 3) 19.

10 Official Journal No. 28660, 28.05.2013.

11 Official Journal No. 28790, 09.10.2013.

12 İbrahim Öngüt, 'Yatırım Şirketleri ve Yatırım Fonları' (1967) 14(2) İktisat ve Maliye Dergisi 55, 63.

On the basis of the aforementioned provision, a communiqué directly regulating investment companies with variable capital has not been issued. The Communiqué Relating to the Principles for Securities Investment Trusts[13] (III-48.5), on the other hand, directly regulates investment companies with variable capital under Article 41 et seq. of Section III. The following examination will be carried out within the framework of the relevant legislation.

III. Investment Companies with Variable Capital

A. Establishment and Capital of the Company

When the regulations on investment companies with variable capital are examined in general, it is seen that there is a company structure that is incompatible with the principles of joint stock company law, which is different in many aspects and even contrary to the principles to be protected by the TCC and does not yet have an example in Turkish law[14]. However, the fact that this is the case does not mean that the variable capital system will not be applied in the future. While investment companies in Türkiye currently operate under a fixed capital system, it is always possible that this system will be abandoned and a variable capital system will be implemented. This is because the variable capital system may serve the objectives of investment trusts much more effectively. On the other hand, it seems unlikely that the variable capital system can be offered as a choice in the law of joint stock companies for companies other than investment. In particular, it should be reconsidered whether the variable capital system is really disadvantageous in terms of the principle of capital preservation.

As stated above, investment companies can be established with fixed or variable capital. Fixed capital refers to whether the company adopts share capital or the authorised capital system. In these systems, capital represents a fixed number on paper, and the number of shares is limited by the capital. Therefore, it is not possible for third parties and shareholders to freely enter and exit the company as shareholders, except for the transfer of shares, without changing the capital. The issuance of new shares or the cancellation of existing shares requires a change in the capital, i.e. the company must increase or decrease its capital. This feature has led to the gradual abandonment of fixed capital in foreign legal systems[15].

13 Official Journal No. 29368, 27.05.2015.

14 Regarding the aspects of investment companies with variable capital that constitute an exception to the basic principles of the TCC and why it is not possible to establish such a company under the TCC, see Nomer Ertan (n 2) 136; Burak Adıgüzel, *Sermaye Piyasası Hukuku* (5th edn, Adalet 2023) 284-285.

15 Hamdi Yasaman, *İsviçre ve Fransız Hukukunda Yatırım Fonları* (1980) 12. Investment companies with variable capital have been relatively controversial in the United States, but have nevertheless attracted attention. For example, an empirical study conducted in the 1950s compared the income of government debt instruments and investment companies with variable capital and compared which one was the better investment instrument; on this issue see George Wilber Moffitt, 'Management Achievement of Open-Ended Investment Companies' (1952) 25(2) The Journal of Busieness of the

In the variable capital system, a company may increase its capital by issuing and selling new shares or decrease its capital by purchasing and redeeming its shares without being bound by the principles of corporate law in terms of capital increase or decrease. Capital may be changed not only through the issuance or redemption of shares but also through an increase or decrease in the value of the company's assets. Therefore, in this type of company, the assets of the company and the value of the shares determined accordingly are of importance, not capital.

Article 41 of the Communiqué stipulates that investment companies with variable capital should be established as joint stock companies to manage portfolios of certain assets and instruments. That is, the subject of the business is portfolio management. The assets and instruments to be included in the company's portfolio are also explained in the same provision[16]. Although it is beyond the scope of this study to explain these assets one by one, it should be noted that the items in question include a wide variety of assets and instruments.

Article 45 of the Communiqué details the conditions for the establishment of investment companies with variable capital. First, the company must be incorporated as a joint stock company (45/1-a). Although it does not have fixed capital as in the TCC system, founders of the variable capital company must have committed to the Board that the company would increase its net asset value to a minimum of TRY 4 million through issue of investor shares within the term and under the principles set forth in the Communiqué (45/1-b). Article 3/1-a of the Communiqué defines this as the minimum net asset value. In addition, Article 45/1-c of the Communiqué states that the initial capital cannot be less than TRY 2 million. According to Article 3/1-ç of the Communiqué, the initial capital is the minimum amount of capital to be paid by the founding shareholders.

The minimum net asset value must be reached within six months of registration. Article 49/10 of the Communiqué refers to Article 529/1-b of the TCC and stipulates that if this condition is not fulfilled, the company will be automatically dissolved. In Art. 529/1-b of the TCC, the legislator has regulated the realisation or impossibility of realisation of the subject of operation regulated in the articles of association of the joint stock company as the reason for termination[17]. It is unclear why the Communiqué refers to this provision. This is because, in a separate provision in the CML, failure to meet the minimum net asset value may result in dissolution without

University of Chicago 71, 72 onw.

16 The provision lists shares of issuers, debt instruments, deposit and participation accounts, precious metals, lease and real estate certificates, foreign investment instruments, etc. among the assets that may be included in the portfolio. On the other hand, by stating "other investment instruments deemed appropriate by the Board", it is also stated that the enumeration is not restrictive - provided that it is subject to the Board's authorization.

17 Regarding Art. 529/1-b of the TCC and the same provision under the former TCC see Halil Arslanlı, *Anonim Şirketler IV. Anonim Şirketin Hesapları V. Anonim Şirketin İnfisahı ve Tasfiyesi* (Fakülteler Matbaası 1961) 169 et seq.; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (4th edn, Vedat 2015) N. 10-91.

the need for reference. Failure to bring or raise capital is not the same as the realisation or impossibility of realisation of the subject of operation. In this context, it is also possible to consider the commitment and payment of the minimum amount by the founders by applying provision 346/2 of the TCC on public offering at incorporation as another solution instead of the dissolution of the company. There is no prohibition against founders from acquiring investor shares.

On the other hand, Article 50/4 of the CML stipulates that the Board must be notified in the event that the value of the founder shares of an investment company with variable capital falls below the minimum amount or the financial situation of the company deteriorates. According to this provision, the board of directors must convene the General Assembly within 30 days to make a decision on how to address the situation. If the required decision cannot be reached, the Board is authorised to take any measure, including the dissolution of the company.

In this case, the following result is achieved: If the minimum net asset value is not reached within six months after incorporation, which is understood to be TRY 4 million pursuant to Article 45/1-b of the Communiqué, the company will automatically be dissolved pursuant to Article 49/10 of the Communiqué. If this condition is met, but the value of the founder shares falls below the minimum amount in another period, the CML Article 50/4 will be applied and the general assembly will convene; if no measures can be taken, the Board will take a decision on the company.

Article 45/3 of the Communiqué states that the maximum amount of capital may also be included if desired. However, even if the maximum capital amount is stipulated in a company that does not have fixed capital and that changes at any time, it may not be possible to determine whether the maximum capital has been exceeded in all cases.

Another important provision regarding incorporation is that founders will be required to meet the qualifications set forth in Article 46 of the Communiqué. Therefore, unlike the TCC system, persons who will establish a company with variable capital must also possess abstract qualities such as financial strength, honesty, and reputation. The Board will assess whether these abstract qualities are present.

Upon fulfilment of the conditions, an application will be made to the Board under Article 47 of the Communiqué, and upon the Board's approval, the company will be registered in the trade registry. Under Article 47/3 of the Communiqué, it is also obligatory that the initial capital (TRY 2 million pursuant to Article 45/1-c of the Communiqué) is paid before the application.

B. Issuance, Characteristics, Transfer, and Redemption of Shares

1. General Structure-Nominal Value-Net Asset Value per Share

The shares of investment companies with variable capital consist of investor shares and founder shares that must be in the name of the holder (Article 50/2 of the CML). These shares have no nominal value (Article 50/2 of the CML, Article 52/1 of the Communiqué). In other words, in the variable capital system, shares differ from the TCC system (Art. 339/1-c, 347) primarily in terms of nominal value.

In TCC regulations, nominal values represent part of capital. Each share has a nominal value, and the sum of the values of all shares gives the share capital. By envisaging the issuance of each share in this way, it is ensured that the status of the share against the capital is determined[18]. The share system and nominal value primarily create a fixed shareholding position, i.e., they prevent the shareholding position from changing regardless of the name of the shareholder[19]. In addition, as in Article 434 of the TCC, the nominal value may determine the participation rate for certain shareholding rights.

In companies with variable capital, there is no such system. This is because the shares do not have a nominal value and the company's capital is determined on the basis of assets, not on a fixed figure in the articles of association and an amount corresponding to the sum of the nominal values of the shares. The absence of a nominal share value is an imperative rather than a choice[20]. Because, in this system, capital also changes in line with changes in assets. Therefore, it is not possible to set fixed nominal values for shares despite constantly changing capital.

For this reason, in companies having variable capital, net asset value is referred to instead of the nominal value of the shares. According to Article 52/2 of the Communiqué; net asset value per share of a variable capital company shall be calculated by adding liquid assets, receivables, and other assets to the company's portfolio value, subtracting total debts therefrom, and dividing the resulting amount by the total number of investors' and founders' shares. This value is taken as the basis for the trading of shares, and it is determined and announced every day (Article 52/3-4 of the Communiqué). As a result, the real value of the shares is determined, and investors can receive this value[21].

18 One of the most fundamental features of a joint stock company is the division of the company's capital into shares and, as a result, the numerical expression of the relationship between the capital and the share with a nominal value. This is because joint stock companies aim to divide capital into shares and enable the free transfer of these shares; they exist for this purpose, and this is where they derive their "joint stock" character. Therefore, nominal value shares become one of the most important elements of a joint stock company. On this issue, see only Feyzan Hayal Şehirali Çelik (İsmail Kırca and Çağlar Manavgat), *Anonim Şirketler Hukuku Cilt 1* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2013) 97-98. However, the notional value system has also been criticised recently, see ibid 99.

19 ibid 100.

20 Nomer Ertan (n 2) 140; Adıgüzel (n 11) 285.

21 Nomer (n 3) 152.

2. Shareholder Rights

Because shares do not have a nominal value, a question arises as to how certain shareholder rights can be exercised. It would be appropriate to make a distinction between founder’s and investor shares: Pursuant to Article 53/2 of the Communiqué; founder shares provide their owners with the rights of dividends, taking share from liquidation, attending general assembly meetings, voting in general assembly meetings, obtaining and inspecting information, requesting a special audit, filing a lawsuit for cancellation of general assembly decisions, and holding minority interests. Each founder’s share grants one right to vote in the general assembly meeting.

Another aspect of variable capital partnership shares that differs from the TCC system is illustrated here. Under Article 434/1 of the TCC, voting rights are determined on the basis of the nominal value of the shares, whereas in companies with variable capital, voting rights are determined as one share-one vote. In fact, this is a natural consequence of the unique features of the variable capital structure. Since the net asset value per share (=net asset value of the company/total number of shares) of each share will be equal, shares of equal value confer equal voting rights.

Article 53/2 of the Communiqué states that minority rights may also be exercised with founding shares. Presumably, the number of shares will also be taken as a basis for minority rights. Given the variability in capital and absence of a nominal value, the only determinant of rights to be exercised is the number of shares.

Regarding the investor shares, Article 50/2 of the CML states that the investor shares shall not be granted administrative rights. In fact, Article 53/3 of the Communiqué explicitly stipulates that an investor shares shall entitle the holder to only receive profit and liquidation dividends. Therefore, investors’ shares benefit their holders through dividends and increased share value[22] and do not allow interference in the running of the company. In the TCC system, although it is possible for certain rights to be frozen or unavailable under certain conditions in joint stock companies, no share is deprived of all rights other than profit and liquidation dividends. This is where the investor shares differ from the TCC system.

In fact, this regulation agrees with the purpose of the investment company. This is because the investor shares are not a partnership but an investment instrument. The acquirers of these shares, as shareholders, may have no interest in the internal workings of the company; they simply follow the increase or decrease in the value of their shares and aim to gain profit by returning their shares to the company at the right moment. The people who hold founder shares are the risk-takers and founders of the company. While they bring in the initial capital, it is not as easy for them to

22 Regarding the rights granted by the shares of investment companies in general and the factors affecting such rights, see Öngüt (n 10) 57.

redeem their shares and exit as it is for holders of the investor shares. Therefore, it is appropriate to leave shareholding rights other than financial rights to the founders.

According to Article 53/4 of the Communiqué, founder shares and investor shares do not have any rights of option for newly issued shares. The right to acquire new shares can be exercised in two situations in joint stock company law: Pre-emptive rights in capital increases from external sources and rights to receive free shares in capital increases from internal sources. Because neither of these conditions applies to partnerships with variable capital, it is natural that the right to acquire new shares does not exist. On the other hand, pursuant to Article 54/3 of the Communiqué, after establishment, the founder shares may be issued for allocation to existing founding shareholders or third parties by a decision of the general assembly of shareholders and with prior consent from the Board.

3. Issuance, Transfer, and Redemption of Founder Shares

Founders' shares, which must be issued in name in companies with variable capital (Art. 50/2 of the CML; Art. 53/1 of the Communiqué), shall be allocated to the founders of the investment company (Art. 54/1 of the Communiqué), and new founders' shares may be issued after establishment with the permission of the Board (Art. 48, 54/3 of the Communiqué). In other words, the founders' shares initially belong to the founders of the company and then to those who subscribe to the newly issued founders' shares with the permission of the Board.

There are various restrictions on the transfer of founder shares. First, if founders' shares are to be transferred before the issuance of investor shares, this transfer will be subject to the Board's authorisation, and the transferees will be subject to the same conditions as the founders, except for having financial power (Communiqué Art. 54/2). Note that the financial power requirement for founders is not required for transferees of founder shares. On the other hand, after the issuance of investor shares, the transfer of founder shares in a ratio that will transfer management control is also subject to the Board's authorisation (Communiqué Art. 54/4). Transferees need not possess financial power. The transfer of founder shares that do not change control is not subject to authorisation but to notification (Communiqué Art. 54/4).

Article 50/2 of the CML and Article 54/7 of the Communiqué stipulate that transfers of founder shares made without authorisation shall not be recorded in the share ledger, and if a record is made, such records shall be null and void. Thus, by departing from the freedom of transfer of shares and the principle that this freedom may be restricted exceptionally under Art. 490 et seq. of the TCC, the transfer of founders' shares in companies with variable capital is fully subject to the Board's authorisation or notification.

The redemption of founder shares is subject to the approval of the other founding shareholders, and the value of founder shares remaining after redemption should not fall below the initial capital (Communiqué Art. 55). In the event that the value of the founder shares falls below the determined amount, certain sanctions are envisaged, ranging from notification to the Board to liquidation of the company (CML Art. 50/4).

4. Issuance, Transfer, and Redemption of Investor Shares

In investment companies with variable capital, the shares constituting the subject matter of the "investment" and essentially determine the differentiated characteristics of the company are the investor shares.

According to Article 49 of the Communiqué, investor shares may be issued through a public offering. In the event of any other issuance, the new shares must be allocated to a specific investor group on a professional or sectoral basis or sold to qualified investors. For the issuance of investor shares, the required documents must be issued, and approval must be obtained by applying to the Board. After approval is obtained, investor shares are offered to investors through predetermined distribution channels, and the money and assets obtained from the issuance of these shares are invested in the assets and transactions specified in the documents (Communiqué Art. 49/7-8).

As previously mentioned, the initial capital of a company with variable capital shall not be less than TRY 2 million, and the net asset value of the company shall be increased to at least TRY 4 million through the issuance of investor shares (Communiqué Art. 45/1-b, c). Article 49/10 of the Communiqué contains a provision for this purpose. According to this provision, the minimum net asset value condition must be met within six months of registration of the articles of association with the trade registry. Otherwise, the company will be deemed dissolved. The issuance of investor shares is essentially an obligation rather than an opportunity for the company to reach its net asset value. Once the minimum net asset value is reached, the issuance of new investor shares becomes an option for the company.

The main peculiarity of investor shares manifests itself in the trading of these shares, particularly in the obligation of the corporation to purchase its shares.

Article 50/3 of the CML is one of the most important provisions for variable capital companies. According to this provision, upon the request of the shareholder, the partnership must purchase and redeem the shares and repay the price. These shares are investor shares (Art. 56/1 of the Communiqué). The price to be paid is the net asset value per share, which will be calculated according to the net asset value (Art. 56/2 of the Communiqué).

According to Article 2/3 of the Communiqué on Buy-Back Shares (II-22.1), investment companies with variable capital are excluded from the scope of the regulation. On the other hand, Article 51 of the CML explicitly states that the provisions of the TCC regarding the acquisition or pledge of its shares shall not apply to companies with variable capital. Thus, in companies with variable capital, one of the fundamental principles of joint stock companies, namely, the prohibition of the company's acquisition of its shares (Art. 379 TCC), is rendered inoperative.

In joint stock companies, the acquisition of its own shares is a highly debated issue[23] that is regulated differently in various legal systems as part of the principle of protecting capital and assets[24]. In fact, Article 382/1-e of the TCC provides an exception for securities companies with respect to restrictions on the acquisition of shares by joint stock companies. There is no definition of what a securities company is. The concept was drafted as "securities investment company" in the Sub-Committee of the Justice Commission based on Second Council Directive 77/91/EEC dated 13.12.1976, but the term "securities company" was included in the draft bill when the negotiations on the draft bill were postponed to the next legislative period and enacted as such[25]. Therefore, within the framework of the view we share, the purpose of the provision is to remove the limitations on these types of partnerships, since it is usual and necessary for investment companies to acquire their own shares[26]. On the other hand, although the exception set forth in Article 382/1-e of the TCC refers to investment companies with fixed capital[27], in our opinion, both fixed and variable capital investment companies fall within the scope of the provision. As a matter of fact, even if a contrary interpretation is made, within the framework of Article 61 of the CML, the provision on the prohibition of acquisition of own shares by joint stock companies shall not apply to companies with variable capital.

23 In general, joint stock companies may acquire their own shares to utilise cash surpluses, convey to the market that there is confidence in the shares of the company and that there is a possibility of profit, increase the price of the shares, to realise dividend distribution without taxation, and remove the minority from the company for a fair price. On this issue see Alihan Aydın, *Anonim Ortaklığın Kendi Paylarını Edinmesi* (Arıkan 2008) 66 et seq.; Andreas Cahn and David C. Donald, *Comperative Company Law* (CUP 2010) 242; Çağlar Manavgat, 'Anonim Ortaklığın Kendi Paylarını Edinmesinde "Menkul Kıymetler Şirketi"nin Anlamı ve İstisnaların Değerlendirilmesi' in Merih Öden and others (eds), *Prof. Dr. Erdal Onar'a Armağan,* vol II (Ankara Üniversitesi 2013) 1141-1143; also see Ahmet Türk, *Anonim Ortaklığın Kendi Paylarını Edinmesi* (Adalet 2016) 79 et seq. In addition, such transactions entail dangers such as the reduction of a company's assets, the ability of managers to remove shareholders who are uncomfortable with them or who pose a threat to their position by purchasing their shares, and the over-inflation of a company's share value. See Cahn and Donald (n 20) 243.

24 Under UK law, companies may issue redeemable shares even if the company is not publicly traded, provided that there is a provision in the articles of association (Companies Act Art. 684). In essence, the company issues a group of shares called "redeemable shares" and can redeem these shares upon request of the shareholders or the company. Regarding this subject, see Alan Dignam and John Lowry, *Company Law* (OUP 2012) 134-136. In the American Law, on the other hand, it is allowed to redeem shares provided that the share capital is not harmed. For example, see Delaware General Corporation Law 160; Cahn and Donald (n 20) 250. For similar structures in other legal systems, see Mads Andenas and Frank Wooldridge, *European Comperative Company Law* (CUP 2009) 233 onw.

25 Grand National Assembly of Turkey Justice Commission Report, no. 1/324, decision no. 10, date 11.01.2008, order no. 96, page 491; Manavgat (n 20) 1139.

26 Manavgat (n 20) 1143 et seq.; Türk (n 20) 259. However, this exception provision has been subject to serious criticism in the doctrine. First, since there is no such company type as a "securities" company in our law, it is unclear whether the provision will apply to investment companies or to all companies whose field of activity is the purchase and sale of securities. For this and similar criticisms, see Aydın (n 20) 326.

27 Aziz Bora Durmaz, *Anonim Ortaklığın Kendi Paylarını İktisabı* (Beta 2024) 195.

The ability to redeem shares through a partnership is important for investors. This is because, while the investor's expectation is a lower risk and a higher probability of gain, the ability to redeem his/her investment at any time and as easily as possible, e.g., without having to trade on the stock exchange, is also an incentive for investing[28]. In countries where the stock market is newly developed and small investors are not accustomed to trading, enabling investors to sell their shares to the company is an important function.

The freedom for investment companies to acquire their own shares is also the result of their practical need. First, investment companies need such opportunities to compete with other investment funds. In the absence of such an opportunity, while in investment funds, the investor can redeem his/her participation share and obtain the return, in a company structure, the shares can be traded at a discounted price on the stock exchange, which will result in both costly and lower-price transactions for investors, leading to the non-preference of the company structure[29]. The ability of a company to buy its share also reduces the difference between the discounted value in the stock market and the actual value of the shares[30]. Thus, the company structure is attractive to investors.

In investment companies with variable capital, investor shares are redeemed upon the request of the shareholder. Shares may be purchased through delivery of shares of investors and full payment in cash of the net asset value per share, and shares may be sold through liquidation of shares of investors upon delivery to the variable capital company in accordance with the principles stipulated in the information documents (Communiqué Art. 56/2). In other words, the net asset value per share will be paid to the shareholder, and the acquired shares will be disposed of. The net asset value per share of a variable capital company shall be calculated by adding liquid assets, receivables, and other assets to the company's portfolio value, subtraction of total debts therefrom, and division of the resulting amount by the total number of investor's and founder shares (Communiqué Art. 52/2).

Therefore, how can shares be paid? This is where the challenge for investment companies arises. The company will either hold cash at all times or meet its cash needs by monetising the assets in the portfolio[31]. In our opinion, holding cash at all times may lead to insufficient investments, whereas liquidating a portion of the portfolio may lead to a failure to realise the expected benefit. For this reason, it would be more appropriate to regulate the conditions of the return and how it will be realised in more detail, in a way to protect both the company and investors.

28 Nomer (n 3) 149-150.

29 Manavgat (n 20) s. 1144; also see Nusret Çetin, Hatice Ebru Töremiş and Zeynep Cantimur, *6362 sayılı Sermaye Piyasası Kanunu'nun Sistematik Analizi* (Yetkin 2014) 106.

30 Manavgat (n 20) 1145-1146; also see Çetin, Töremiş and Cantimur (n 26) 106. For other advantages of the ability to redeem shares see Memiş and Turan (n 5) 168.

31 Nomer (n 3) 154.

C. Provisions Not Applicable

Pursuant to Article 51 of the CML and Article 91/2 of the Communiqué; provisions of the TCC with respect to joint stock corporations regarding the principles of equity capital, minimum amount of capital, minimum content of articles of association, commitments of capital in-kind, nominal value, acceptance of own shares by the corporation as acquisition or in pledge, the procedure of capital raising and reduction, share commitment and its payment, restrictions of share transfer, profit and loss account and profit distribution, reserves and liquidation shall not be applicable for investment companies with variable capital. Meanwhile, it should be noted that, in accordance with our view, it would have been more appropriate to regulate the institution of variable capital companies, which constitutes an exception to these provisions of the TCC that refer to the basic principles of joint stock companies, at the level of a law rather than a Communiqué[32].

IV. Conclusion

Investment companies with variable capital are collective investment schemes established in the form of joint stock companies as regulated by the CML. According to the legislation, only securities investment companies can be established with variable capital.

The characteristic of the variable capital system is that capital increases and decreases depending on the assets of the company, thus abandoning the classical joint stock companies' system of written and fixed capital. Shareholders will be able to enter and exit the company as they wish, and even if there is no change in the shareholders, the capital will increase and decrease with the increase and decrease in the value of the company's assets. The net asset value corresponds to the company's capital. The figure calculated by subtracting liabilities from company assets, i.e., net asset value, is also the company's capital.

For companies with variable capital, exceptions are made to the basic provisions of the TCC regarding the establishment of joint stock companies with the qualifications required for founders, the distinction between initial capital and net asset value, the payment of shares in cash and in advance, and especially the dissolution of the company if the minimum net asset value is not reached within six months after the establishment. Although some of these differences are mandatory due to the nature of the company, in our opinion, it would be beneficial to re-evaluate the regulation introduced, especially in terms of the dissolution of the company.

There are two types of shares in variable capital partnerships: founder and investor shares. Founder shares are granted to the founders of the company, and their subsequent

32 Nomer Ertan (n 2) 142.

issuance, transfer, and redemption are subject to certain conditions, in addition to the Board's approval. Founder shares provide the holder with all shareholding rights.

Investor shares do not have such strict requirements. This is because investor shares can be returned to the company in return for payment of the net asset value per share. Therefore, the type of shares that investors are most interested in are investor shares. These shares entitle the holder only to profits and liquidation dividends.

Although the company has no fixed capital, it cannot be said that it has no capital. Moreover, the legislator has tried to limit the variability of capital by including rules such as minimum initial capital and minimum net asset value. Naturally, some duties and responsibilities fall on a company if it falls below these limits.

Finally, there is a long list of provisions of the TCC that are not applicable to investment trusts with variable capital. The aforementioned points demonstrate how a company with variable capital differs from a classical joint stock company, at least in terms of establishment, capital, and shares. It would be more appropriate to regulate an institution that makes such exceptions to the basic principles of the TCC regarding joint stock companies by law rather than a communiqué.

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