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TABLE OF CONTENTS

RESEARCH ARTICLES

Editorial

Annales de la Faculté de Droit d'Istanbul (Annales), published since 1951, is the only law journal in Türkiye that publishes original articles in English, French and German. Annales, which has found a place on the shelves of well-known law faculties around the world, is published both in print and online, and provides early access (online first or advance access) to articles on its official website. Indeed, Annales has started to be indexed in ERIH PLUS, DOAJ and SCOPUS indexes as of 2022 by meeting the necessary qualitative and quantitative criteria, owing to the stable efforts made in recent years. As a result of this intense interest and stability shown especially in recent years, Annales will be published twice a year starting in 2023. The publication period has been determined as March-September. Two fundamental points were important in this change: i) the aim of meeting the intense demand from authors and readers in the field of law and to bring academic studies to readers as up-to-date as possible ii) the goal of improving the index area where our journal is indexed, and therefore its readability/visibility. The removal of the term "Annales" from the name of our journal in order to achieve these objectives is not preferred. Because the term "Annales", which has become a brand, reflects the accumulation and recognition of half-century-old history. In fact, it is seen that this term appears in the name of many scientific journals worldwide that publish more than one issue per year in natural sciences and social sciences, including law.

We express our gratitude to all authors who entrusted their valuable works to us and enriched our content, and to the referees who played a decisive role in the review process, for their support that contributed to increasing interest in our journal, and we wish the publication of two issues per year to be beneficial to the legal community.

Éditorial

Publiées depuis 1951, les Annales de la Faculté de Droit d'Istanbul (Annales) sont l'unique revue de droit en Turquie à publier des articles originaux en français, en anglais et en allemand. Les Annales, qui ont trouvé leur place sur les libraires des facultés de droit dans le monde entier, sont publiées en ligne ainsi qu'en version imprimée et offrent la possibilité d'accéder aux articles en avant-première (premier accès en ligne ou accès anticipé) à partir du site web officiel. En fait, grâce au travail constant réalisé en particulier ces dernières années, les Annales ont commencé à être indexés dans les index ERIH PLUS, DOAJ et SCOPUS en fournissant les critères qualitatifs et quantitatifs nécessaires dès 2022. En raison de ce vif intérêt et de cette stabilité, en particulier ces dernières années, les Annales seront publiées deux fois par an à partir de 2023. La période de publication a été fixée à mars-septembre. Deux points principaux étaient importants dans ce changement : i) répondre à la demande intense des auteurs et des lecteurs dans le domaine du droit et mettre les études académiques à la disposition des lecteurs de la manière la plus actuelle possible, ii) améliorer l'indexation de notre revue et donc son lectorat/reconnaissance. Afin d'atteindre ces objectifs, il n'est pas préférable de supprimer le mot "Annales" du nom de notre revue, puisque l'expression "Annales", qui est devenue une marque, reflète l'accumulation et la reconnaissance de son histoire qui a laissé un demi-siècle derrière elle. En effet, on constate que de nombreuses revues scientifiques dans le domaine des sciences sociales et des sciences, y compris le droit, publient plus d'un numéro par an tandis qu'elles possèdent le mot "Annales" dans leur titre.

Nous tenons à exprimer notre gratitude à tous les auteurs qui ont enrichi le contenu en nous confiant leurs précieux travaux, renforçant ainsi l'appréciation accordée à notre revue, et à nos pair examinateurs qui jouent un rôle décisif dans le processus d'évaluation des articles soumises pour leur soutien. Nous souhaitons que les numéros semestriels des Annales soient bénéfiques à la communauté juridique.

Mitteilung der Redaktion

Die Annales de la Faculté de Droit d'Istanbul (Annales) erscheinen seit 1951 und sind die einzige juristische Zeitschrift in der Türkei, wo Originalartikel in englischer, französischer und deutscher Sprache veröffentlicht werden. Die Annales, die ihren Platz in den Bibliotheken renommierter juristischer Fakultäten auf der ganzen Welt finden, werden sowohl online als auch in gedruckter Form herausgegeben und bieten die Möglichkeit, die Artikel auf ihrer offiziellen Website vorab einzusehen (online first oder advance access). Tatsächlich konnten die Annales – nach der Erfüllung der erforderlichen qualitativen und quantitativen Kriterien infolge der kontinuierlichen Arbeit der letzten Jahre – ab 2022 in die Indices ERIH PLUS, DOAJ und SCOPUS aufgenommen werden. Besonders angesichts des großen Interesses und ihrer Stabilität in den letzten Jahren werden die Annales ab 2023 zweimal pro Jahr erscheinen. Es wurde beschlossen, die Zeitschrift im März und September zu veröffentlichen. Zwei wesentliche Aspekte waren bei dieser Änderung von Bedeutung: i) die intensive Nachfrage von Autoren und Lesern in der Rechtswissenschaft zu erfüllen und den Lesern akademische Studien möglichst aktuell zu bieten ii) in weitere Indices aufgenommen zu werden und dadurch eine breitere Leserschaft zu gewinnen. Um diese Ziele zu erreichen, hat man es bevorzugt, „Annales" aus dem Namen unserer Zeitschrift nicht zu entfernen. Denn die Bezeichnung „Annales", die inzwischen zu einer Marke geworden ist, spiegelt den Reichtum und die Bekanntheit ihrer Geschichte wider, die ein halbes Jahrhundert hinter sich gelassen hat. Tatsächlich ist sie im Titel vieler wissenschaftlicher Zeitschriften der Sozial- und Naturwissenschaften, einschließlich der Rechtswissenschaften, zu finden, die mehr als einmal pro Jahr veröffentlicht werden.

Wir möchten uns bei allen Autoren, die unsere Zeitschrift mit ihren wertvollen Arbeiten bereichert und dadurch das Vertrauen in unsere Zeitschrift gestärkt haben, sowie bei unseren Gutachtern für ihre Beiträge bedanken. Es ist unser Wunsch, dass die (von nun an) zweimal jährlich erscheinende Zeitschrift für die Rechtswissenschaftler von Nutzen sein mag.

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Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Evaluation of the Turkish Constitutional Court's Decisions Regarding Transsexuals' Individual Applications Following the Rejection of Their Name Change Requests*

İmge Hazal Yılmaz Tekin**

Abstract

A person's name distinguishes them from others and makes them unique. Due to its importance, the principle of the invariance of the name has been accepted as a rule in the Turkish Civil Code No. 4721 (TCC). However, a person can request the change of a name that they do not identify with from the court, only on the basis of valid reasons, pursuant to TCC art. 27. One of these valid reasons, which is frequently encountered in judicial decisions, is that the person is known by another name in their social life. Despite the fact that they are based on such a valid reason, which is generally accepted in the decisions included in this study, some name change requests of transsexuals were rejected by local courts as the issue was associated with gender reassignment, and the applicant then made individual applications to the Constitutional Court. Regarding these applications, the Constitutional Court decided that the right to respect for private life had been violated. The aim of this study is to examine the name change in light of these two recent decisions of the Constitutional Court.

Keywords

Valid Reason, Name Change, Transsexual, Decisions of the Turkish Constitutional Court

* This study is an expanded version of the paper presented at the International Mediterranean Law Congress on July 5, 2022.

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Introduction

The name of a person is a part of their personality and it can be protected by the general provisions of TCC art. 23-25[1]. However, the legislators did not consider this sufficient and also included the person's right to their name. In this context, "Protection of the Name" in art. 26 of TCC[2] and "Change of the Name" in art. 27 of TCC[3] were regulated.

Although the principle of invariance of the name has been accepted as a rule in Turkish law, according to art. 27 of TCC, a change of name can be requested from the judge in the presence of valid reasons. Therefore, the conditions for changing the name are a claim by litigation, finding valid reasons and a court decision. The judge will evaluate whether there is a valid reason or not in the concrete case.

In this study, the change of name is examined on the basis of the individual application decisions of two transgenders to the Constitutional Court. These individuals applied to the Constitutional Court because their requests for a name change based on the reason "the person is known by another name in their social life," which is generally accepted in the decisions of the Supreme Court, were rejected by the lower courts[4].

1 *"B. Protection of personality*
I. Against renunciation and excessive restriction
Article 23- No one can renounce her/his rights and capacity to act, even partially.
No one may renounce their freedom or limit them unlawfully or unethically.
It is possible to receive, vaccinate and transport biological materials of human origin upon written consent. However, the person who is under the obligation to give a biological substance cannot be asked to fulfill her/his obligation; material and moral compensation cannot be claimed.
II. Principle
1 Against Attack
Article 24- A person whose personal right is attacked unlawfully may request protection from the judge against those who attack it.
Any attack on personal rights is unlawful, unless it is justified by the consent of the person whose personal right is violated, for a superior private or public benefit, or for the use of the authority given by the law.
2. Lawsuits
Article 25- The plaintiff may request from the judge to prevent the danger of attack, to put an end to the ongoing attack, and to determine the illegality of the attack whose effects continue even though it has ended.
Along with these, the claimant may also request the notification or publication of the correction or decision to third parties.
The claimant's right to claim for pecuniary and non-pecuniary damages and that the earnings obtained due to unlawful attack be given to her/him in accordance with the provisions of acting without power of attorney is reserved.
The non-pecuniary damage request cannot be transferred unless accepted by the other party; it does not pass to the heirs unless it is claimed by the legator.
The plaintiff may file a lawsuit in the court of her/his own domicile or the domicile of the defendant for the protection of her/his personality rights."

2 *"III. The right to the name*
1. Protection of the name
Article 26- The person whose name is controversial can sue for the determination of her/his right. The person whose name is used unfairly must be terminated; if the wrongful user is at fault, she/he may also request the compensation of her/his material damage and the payment of moral compensation if the nature of the injustice she/he has suffered requires it."

3 *"2. Changing the name*
Article 27- Changing the name can only be requested from the judge based on valid reasons.
The name change is registered and announced in the registry.
Personal status does not change by changing the name.
The person who has been harmed by the change of name can sue for the annulment of the decision to change within one year, starting from the day she/he learned about it."

4 In the Constitutional Court decisions evaluated in this study, it was concluded that the right to respect for private life under the Constitution was violated. However, since this study deals with the issue in terms of civil law and name change, evaluations regarding public law, especially constitutional law, have been deliberately excluded from the scope of the study.

I. Decisions of the Constitutional Court

A. Decision Dated 27 January 2021, No. 2018/34343

The applicant, who was born in 1985, filed a lawsuit against the Bergama Registration Office on 11 December 2017 at the Bergama 1st Civil Court of First Instance to change their[5] name to S.Ö. In their petition, they justified their request by stating that they had been using the name S.Ö., which was suitable for their sexual orientation, for more than ten years, and that they were known by this name in their social environment. They also stated that they felt like a woman and lived accordingly but could not have sex reassignment surgery due to financial difficulties, and stated that their name being T. in the register caused confusion. The court requested an investigation on the subject, and as a result, it was determined that the applicant was known by the name S. in the social environment where they lived. However, the court decided to reject the case, stating that in order for the applicant, who is a male according to the register, to use a female name, they must first file a gender reassignment claim (TCC art. 40[6]) and wait for the outcome of this case.

The applicant appealed to the Court of Appeals by repeating their claims, but their appeal was also rejected on the merits. When rejecting the case on the merits, the Court of Appeals emphasized that civil rights cases are related to public order, that the acceptance of the applicant's request may cause confusion in the public order, and that it is not legally possible to change the name of a male to S., and stated that the decision was in accordance with the procedure and the law. The Court of Appeals also stated that the fact that the applicant, who was a male in the register, adopted a female identity and was known as S.Ö. in their social environment did not constitute a valid reason for changing the name. After the final decision was communicated to them, the applicant stated that they were known as S.Ö. in their social environment, that they had difficulties in their business and social life due to the difference between the name in the official records and the name by which they were known, that the requirement for gender reassignment surgery as a condition for a name change was unlawful, and that their request had been rejected on arbitrary grounds. They also stated that the regulation on which the courts are based is not about the name, but about the gender, and that they suffered moral damages due to the decisions given. They made an individual application to the Constitutional Court alleging that the

5 In order not to use gender-related pronouns, "they" are used in the article.

6 *"2. Gender reassignment*
Article 40- Anyone who wishes to change their gender may apply in person and request permission from the court to change their gender. However, in order for the permission to be granted, the applicant must be over the age of eighteen and not married; in addition, she/he is transgender and must document the necessity of gender reassignment in terms of mental health (...) with an official health board report to be obtained from a training and research hospital.
In case it is confirmed by the official health board report that a gender reassignment surgery has been performed in accordance with the purpose and medical methods, depending on the permission given, the court decides to make the necessary correction in the registry."

prohibition of discrimination[7], the right to respect for private life[8], and the right to a fair trial had been violated.

The Constitutional Court decided that the applicant's claim that their right to respect for private life had been violated was acceptable and examined the matter on the merits[9]. In this examination, the obligations of the state within the scope of the right to respect for private life, the importance of the name, the obligations of the state regarding the name change, the effect of the interpretation of the courts of instance on the right to change the name, and whether a fair balance had been established between the public interest and the private benefit were evaluated. As a result, it was unanimously decided that the right to respect for private life was violated and a copy of the decision was sent to the Bergama 1st Civil Court of First Instance for a retrial in order to eliminate the consequences of the damage[10].

B. Decision Dated 17 June 2021, No. 2019/42944[11]

H.K. filed a name change lawsuit[12] against the Ankara Registration Office on 11 September 2017, claiming that they were male according to the register, but they defined themself as a transexual, continued their social life in this way, and were known as D. in their social environment. During the proceedings at the 12th Civil Court of First Instance in Ankara, the applicant also stated that they had not yet had a sex reassignment surgery but were planning it, and repeated their reasons for requesting a name change. The representative of the Registration Office who was present in the case declared that the Court had discretion regarding the request. The court, in the reasoning of the decision, TCC art. 40, stated that the name D. was always used by women and that the applicant had declared that they had not undergone

7 The prohibition of discrimination and the principle of equality are intertwined concepts. The principle of equality requires that those with equal status be treated equally and those with different status be treated differently. Failure to comply with this principle without an objective reason would constitute discrimination. Accordingly, discrimination can be expressed as treating people in the same situation differently without an objective and reasonable reason. Both the Constitution and the European Convention on Human Rights prohibit discrimination. For the term prohibition of discrimination, see Bakım S, 'Avrupa İnsan Hakları Mahkemesi (Aihm) Kararları Çerçevesinde Cinsiyet Ayrımcılığı' (2016) 22/3, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 3192-3193, Kudret HA, 'Avrupa İnsan Hakları Mahkemesi ve Türk Anayasa Mahkemesi Kararları Işığında Yasaklanan Ayrımcılık Temeli Olarak Cinsel Yönelim' (2020) 26/2, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 1081 ff. Discrimination on the basis of gender and sexual orientation is also frequently encountered. For evaluations of the European Court of Human Rights' decisions on discrimination based on sexual orientation, see Kudret (7) 1094 ff.

8 This right is also protected under Article 8 of the European Convention on Human Rights. For European Court of Human Rights decisions on the subject, see. Stjerna v. Finland, No: 18131/91, 25/11/1994 § 39; Kemal Taşkın and Others v. Turkey, No: 30206/04..., 2/2/2010, § 48, Güzel Erdagöz v. Turkey, No: 37483/02, 21/10/2008, §§ 44-46.

9 Although the applicant claimed that the prohibition of discrimination was also violated, the Constitutional Court examined the issue mostly in terms of the right to respect for private life and did not make an examination in terms of the prohibition of discrimination.

10 It should be added that Engin Yıldırım, a member of the Constitutional Court, agreed with this conclusion with the additional justification that the right to equal treatment in Article 10 of the Constitution was also violated.

11 This decision was taken by the General Assembly of the Constitutional Court.

12 It should be noted that in the decision the case is described as a name correction case, but when the whole decision is examined, it is understood that the aim is to change the name.

gender reassignment surgery even though they had come to the hearing in women's clothes. Moreover, in the decision, it was stated that although the applicant wanted to take a female name, the applicant had not yet had a gender reassignment surgery, and the applicant did not have a fully determined opinion on this matter. The court stated that a change being made in line with the request could cause misperceptions in society, and such a situation would cause problems both for the applicant and for other people. After the rejection of the claim, the applicant appealed to the Court of Appeal, claiming that contrary to what was stated in the Court's decision, as per TCC art. 40, the correction of gender information in the register after sex reassignment surgery is regulated, that the relevant provision could not be applied in a request for a name change, and that the fact that the gender reassignment surgery had not yet been performed did not constitute an obstacle in terms of changing the name. In this application, they also claimed that the name D. was a name used by both women and men, that they were known by the name D. in their social surroundings, and that the decision of the Court was unlawful. However, the applicant's application was rejected on the grounds of the local court's decision being in line with procedural and substantive terms, and the applicant's claims regarding the reasoning of the name change were not, at this stage, considered valid reasons.

After the applicant was notified of the final decision, in their individual application to the Constitutional Court they claimed that they were known by the name D. in their social environment, that the difference in the name by which they were known in the official records caused difficulties in their education and professional life, that it was unlawful to seek gender reassignment surgery for a name change as a condition, and that their request for a name change had been rejected on arbitrary grounds. They also stated that the regulation on which the court decisions are based upon is not related to the concept of name, but rather gender, that they had suffered moral damages due to the decisions given, and that their right to a fair trial and respect for private life had been violated[13].

The Constitutional Court decided that the applicant's claim that their right to respect for private life had been violated was acceptable and examined the matter on the merits. In this examination, the obligations of the state within the scope of the right to respect for private life, the importance of the name, the obligations of the state regarding the name change, the effect of the interpretation of the courts of instance on the right to change the name, and whether a fair balance had been established between the public interest and the private benefit were evaluated. As a result, it was accepted by a majority of the votes that the right to respect for private life had been violated[14]. The decision also mandated that a copy of the decision be

13 The applicant also requested that their name be concealed in public documents, and this request was accepted by the Constitutional Court.

14 It should be added that Engin Yıldırım, a member of the Constitutional Court, agreed with this conclusion, with the

sent to the Ankara 12th Civil Court of First Instance for a retrial, in order to eliminate the consequences of the violation.

C. Common Grounds of the Decisions

Both decisions of the Constitutional Court regarding individual applications are related to the fact that there is a violation of rights due to the rejection of the name change requests of individuals with different genders and sexual orientations in the register, and who are known by the names they have adopted accordingly. It can be stated that the evaluations and the final decisions of the Constitutional Court are generally the same in terms of both decisions. On the other hand, although in both decisions violation of the right to respect for private life was accepted, the decision dated 27 January 2021 (application number 2018/34343) was given unanimously whilst the decision dated 17 June 2021 (application number 2019/42944) was given by a majority of votes due to two members' dissenting votes.

II. Name Change in Turkish Law

A. Name

The name is the word or words that each person has that distinguishes them from other people and introduces themself[15]. However, the name also denotes one's ties to a particular family, in other words, one's ties to one's family[16]. It is obligatory for each natural person to have a first and last name[17]. Therefore, in terms of natural persons,

additional justification that the right to equal treatment in Article 10 of the Constitution was also violated. Members Recai Akyel and Selahaddin Menteş stated that the evaluations made by the courts were not inaccurate, since the courts referred to Article 40 of the TCC on the grounds brought forth by the applicant both in their petition and at their statement in the hearing about their sexual orientation and gender reassignment surgery, and that the applicant's request was not an ordinary name change, but a gender difference. They did not agree with the majority decision that the right to respect for private life was violated, stating that it was appropriate for the courts to interpret TCC art. 27 and art. 40 together, since there was a request for a name change based on the allegation.

15 Franz Jürgen Säcker, 'BGB § 12 I–XII' (Ed. Claudia Schubert) Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 1, Allgemeiner Teil §§1-240 (C. H. Beck, 2021) BGB § 12, para 1; Bilge Öztan, *Kişiler Hukuku, Gerçek Kişiler* (Yetkin 2021) 400; Arif Barış Özbilen, 'Mahkeme Kararına Dayanmayan Ad ve Soyadı Değişiklikleri (Nüfus Hizmetleri Kanunu Geçici Madde 8 Hükmüne Bir Bakış)' (2019) 40 TBB Dergisi 194; İhsan Erdoğan and Dilşad Keskin, *Türk Medeni Hukuku (Başlangıç Hükümleri-Kişiler Hukuku)* (Gazi 2019) 307; Jale G. Akipek, Turgut Akıntürk and Derya Ateş Karaman, *Türk Medeni Hukuku Başlangıç Hükümleri, Kişiler Hukuku* (Beta 2013) 418; Helvacı on the other hand, stated that while defining the name, it was an "identification sign." See. Serap Helvacı, *Gerçek Kişiler* (Legal 2021) 175. Similarly, see Hayrünnisa Özdemir, 'Türk ve İsviçre Medenî Hukukunda Ad Üzerindeki Hak ve Korunması' (2008) 57/3 AÜHFD 563 and Ahmet Cemal Ruhi and Canan Ruhi, *Nüfus Davaları* (Seçkin 2017) 447; It should be noted that the name is not only valid for natural persons but also for legal persons. However, since natural persons are important in terms of our subject, legal persons were not mentioned when giving the explanations.

16 Öztan (n 15) 400; Mehmet Ayan and Nurşen Ayan, *Kişiler hukuku* (Seçkin 2016) 141.

17 Helvacı (n 15) 176; Öztan (n 15) 400; Andrea Büchler, 'Art. 30' (Ed. Jolanta Kren Kostkiewicz, Stephan Wolf, Marc Amstutz, Roland Fankhauser) ZGB Kommentar Schweizerisches Zivilgesetzbuch, OFK - Orell Füssli Kommentar (Swisslex 2021) N. 1; Rona Serozan, *Medeni Hukuk, Genel Bölüm/ Kişiler Hukuku* (Vedat 2013) 481; Akipek, Akıntürk And Ateş Karaman (n 15) 419; İhsan Erdoğan, 'Şahsiyeti İncitici Soyadı Meselesi' (1998) 6/1 Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 705; Özbilen (n 15) 194; Özdemir (n 15) 566; Zafer Zeytin and Ömer Ergün, *Türk Medeni Hukuku* (Seçkin 2020) 97.

the name consists of the first name and surname[18]. Broadly speaking, the scope of the name includes a pseudonym, or nickname, but their use is not obligatory[19]. However, it should be noted that although their use is not mandatory, they also benefit from the protection regulated under TCC art. 26[20].

B. Change of Name

The principle of invariance of the name has been accepted as a rule in TCC[21]. However, this does not mean that the name cannot be changed under any circumstances, and as such, name change is regulated under paragraph 1 of Article 27 of the TCC on changing the name. As per this provision, *"The change of name can only be requested from the judge based on valid reasons."*[22] Thus, changing the name arbitrarily is not allowed, due to the quality of distinguishing the person from other people and making them special, and as a rule, the person keeps their name from birth to death[23].

Despite the acceptance of the principle of invariance of the name, in some cases, it is the duty of the state to provide this opportunity and it is within the scope of the protection of personality. Regarding the change of a person's name, Supreme Court considers name and surname to be integral element of personality. It also states that a person is known and recognized by their name, that a name and surname have meaning when they are adopted by the carrier, and that a person who does not adopt their name and whose name is not identified with their personality has the most natural right to change their name. [24]

It is possible to say that three conditions are sought in TCC art. 27 in order to change the name, which is so important for the person and is a part of their personality. The first of these is request. Namely, a person who wants to change their name must claim and sue according to article 27 of the TCC[25]. In other words, changing the name can

18 Öztan (n 15) 400; Ruhi and Ruhi (n 15) 447.

19 Öztan (n 15) 400; For name variants, see Helvacı (n 15) 176-178, Öztan (n 15) 400-406.

20 Helvacı (n 15) 178; Öztan (n 15) 400; Serozan (n 17) 483; Özdemir (n 15) 567; Ayan and Ayan (n 16) 141; Erdoğan and Keskin (n 15) 307.

21 Büchler (n 17) N. 2; Ergun Özsunay, *Gerçek Kişilerin Hukuki Durumu* (Sulhi Garan Matbaası 1977) 205; Öztan (n 15) 429; Helvacı (n 15) 186; Mustafa Dural and Tufan Öğüz, *Türk Özel Hukuku, Cilt II, Kişiler Hukuku* (Filiz 2006) 168; Erdoğan (n 17) 708; Ruhi and Ruhi (n 15) 448.

22 In Swiss law, it is stated that the name change is possible if it is found in "*actenswerte Gründe.*" See Büchler (n 17) N. 2; In German law, it stated that the name change is possible if it is found in "*wichtiger Grund.*" See Säcker (n 15) para. 211, 225.

23 Öztan (n 155) 429; Akipek, Akıntürk And Ateş Karaman (n 15) 429; Erdoğan and Keskin (n 15) 315.

24 Supreme Court 8. CD, 2017/6499, 2017/11305, 21.09.2017; Supreme Court 8. CD, 2017/6911, 2018/1819, 08.02.2018; On the importance of identifying with one's name for transgender individuals and the problems created by name difference, see also Sarah Steadman, ''That Name is Dead To Me': Reforming Name Change Laws To Protect Transgender And Nonbinary Youth' (2021) 55/1 University of Michigan Journal of Law Reform 3 ff.

25 It should be emphasized here that changing the name and correcting it are different, because in the lawsuit regarding the correction of the name, the request is to correct a typo in the registry, in other words, a mistake in the registry. In changing the name, there is no mistake in the name written in the registry, rather a change in the name is requested and at the same time it must be based on a valid reason. See. Öztan (n 15) 430, Helvacı (n 15) 186, Büchler (n 17) N. 1 and Akipek, Akıntürk And Ateş Karaman (n 15) 431. On the contrary, see Säcker (n 15) para. 204.

only be requested through a lawsuit[26]. As changing the name is a relative personality right, a person with the mental capacity but limited capacity to act may also sue for a change of name[27]. It should be noted that the names that can be requested to be changed are the first name and surname,[28] because these are the names registered in the civil registry. For example, since nicknames are not registered in the registry, it is not possible to appeal to a judge to change them[29]. The second condition for changing the name is the existence of a valid reason. The valid reasons are not specifically regulated under the TCC. The judge evaluates whether there is a valid reason for changing the name, taking into consideration the specifies of the case[30]. The third condition is the court's decision. In other words, the name change must be based on a court decision[31]. Therefore, it is necessary for the person who wants to change their name to make a request to the court, the request must be based on a valid reason, and a court decision should be acquired to change the name.

C. Valid Reasons for Change of Name

Although an appeal to the court and the decision of the court are necessary for changing the name, the condition that the person making the request must put forward and that will affect the process is the existence of a valid reason. However, as stated before, article 27 of the TCC does not regulate the valid reasons for changing the name. The judge has discretion in this matter (TCC art. 4)[32], so much so that there is no objective valid reason for changing the name, and the judge will determine whether the request to change the name is based on a valid reason, depending on the concrete case. In the decisions of the Supreme Court, this situation is stated as *"Which cases constitute a valid reason will be determined by the court according to the specific circumstances of each case. While making this determination, it is necessary to take into account the special reasons to be presented to the court by the*

26 Helvacı (n 15) 187; Dural and Öğüz (n 21) 169; Erdoğan (n 17) 708; Özbilen (n 15) 195; Süleyman Yılmaz and Abdulkerim Yıldırım, *Medeni Hukuk-I (Başlangıç Hükümleri- Kişiler Hukuku- Aile Hukuku)* (Seçkin 2021) 143; Zeytin and Ergün (n 17) 98.

27 Öztan (n 15) 429; Büchler (n 17) N. 6; Helvacı (n 15) 189-190; Serozan (n 17) 483; Erdoğan (n 17) 709; Erdoğan and Keskin (n 15) 315-316; against Dural and Öğüz (n 21) 170.

28 Özsunay (n 21) 206; Öztan (n 15) 430; Dural and Öğüz (n 21) 168; Erdoğan and Keskin (n 15) 317; Ruhi and Ruhi (n 15) 450.

29 Özsunay (n 21) 206; Öztan (n 15) 430; Dural and Öğüz (n 21) 168; Erdoğan and Keskin (n 15) 317; Ruhi and Ruhi (n 15) 450.

30 Öztan (n 15) 431; Büchler (n 17) N. 4; Helvacı (n 15) 188; Özbilen (n 15) 195; Ruhi and Ruhi (n 15) 450; Yılmaz and Yıldırım (n 26) 143; Gamze Turan Başara, 'Türk Medeni Kanunu'nun 40'ıncı Maddesi Kapsamında Cinsiyet Değişikliği ve Hukukî Sonuçları' (2012) 103 TBB Dergisi 258.

31 Özsunay (n 21) 206; Öztan (n 15) 434; Özbilen (n 15) 195; Ayan and Ayan (n 16) 149; Changing the name is a non-contentious jurisdiction according to Code of Civil Procedure (CCP) art. 382/2-2, and in a non-contentious judicial case pursuant to CCP art. 383, unless there is a contrary regulation, the magistrate's court is in charge. Furthermore, see Supreme Court 17. CD, 2013/18692, 2013/17538, 11.12.2013; Supreme Court 17. CD, 2013/18691, 2013/17540, 11.12.2013; On the other hand, according to Article 36 of the Civil Registry Services Act, the competent court is the civil court of first instance, see. Supreme Court ACC, 2013/18-464, 2013/1698, 25.12.2013; Supreme Court 20. HD, 2019/192, 2019/1386, 04.03.2019.

32 Öztan (n 15) 431; Helvacı (n 15) 188; Büchler (n 17) N. 4.

person requesting the change, rather than the objective conditions"[33]. Therefore, in the face of a request to change a name, the judge should evaluate whether there is a benefit that requires leaving the principle of invariance of the name in the concrete case and decide to change the name when they have come to the conclusion that such a benefit exists[34].

In determining the existence of a valid reason, the judge should take into account the applicant's family relations, commercial or professional activities, social status, or personality[35]. Although valid reasons are not specifically regulated under the TCC, some states are given as examples of valid reason in the doctrine. These examples are based on the evaluations and judicial decisions.

The first examples given for valid reasons are that it can be shown that the name has a ridiculous or bad meaning that can humiliate the person or cause ridicule by others[36]. As another example of a valid reason, it can be shown that the person is thought to be related to people who are notorious in society due to their surname, or that a member of their family does not want to bear the same surname because they have committed a serious crime[37]. In addition to these, the fact that the person has changed their religion[38] or changed their citizenship[39] can also be considered a valid reason for the request to change their name[40].

The fact that the person is known by another name in their social life is also sufficient for the acceptance of the valid reason for the name change request. [41]. Because the name is not only important for the person themself, but also for society, it is important both for themself and for society that the name of the person in the civil

33 Supreme Court 8. CD, 2017/6499, 2017/11305, 21.09.2017; Supreme Court 8. CD, 2017/6911, 2018/1819, 08.02.2018; For the same view, see Büchler (n 17) N. 3.

34 Büchler (n 17) N. 4; Helvacı (n 15) 188.

35 Öztan (n 15) 431; Akipek, Akıntürk And Ateş Karaman (n 15) 430; Ruhi and Ruhi (n 15) 450; Supreme Court 8. CD, 2017/6499, 2017/11305, 21.09.2017; Supreme Court 8. CD, 2017/6911, 2018/1819, 08.02.2018.

36 Özsunay (n 21) 207; Öztan (n 15) 431; Säcker (n 15) para. 215; Dural and Öğüz (n 21) 168; Serozan (n 17) 483; Özbilen (n 15) 196; Ayan and Ayan (n 16) 146; For instances in name change requests, where courts examine the existing name for being obscene, ridiculous, or ridiculed, see. Supreme Court 8. CD, 2017/7950, 2018/11588, 25.04.2018; Supreme Court 8. CD, 2017/7435, 2018/11219, 12.04.2018; Erzurum Regional Courts of Appeal, 5. CD, 2018/1223, 2019/46, 11.01.2019; Samsun Regional Courts of Appeal, 1. CD, 2016/46, 2016/42, 21.12.2016.

37 Özsunay (n 21) 207; Öztan (n 15) 431.

38 *"...the plaintiff changed his religion by preferring the Christian religion at his request and this matter was recorded in the register with the administrative registration correction on 29.1.2007. The name he carries as K1 is the name of one of the holy months of Islam. In addition to changing his religion, the plaintiff's wish to use the name that he believes reflects his own religion and cultural structure should be considered a justifiable reason."* Supreme Court 18. CD, 2007/7881, 2007/8649, 22.10.2007.

39 For examples of the Supreme Court decision in which it was accepted that the requests of individuals to change their names from those they had before they acquired citizenship, as a result of the difficulties they experienced due to the name taken during the transition to citizenship of the Republic of Turkey, were accepted as justified, and that these names were composed of Turkish letters, see. Supreme Court 18. CD, 2014/18217, 2015/7150, 30.04.2015; Supreme Court 18. CD, 2011/4285, 2011/6939, 09.06.2011; Supreme Court 18. CD, 2011/7449, 2011/9051, 20.09.2011.

40 Öztan (n 15) 431, 434; Dural and Öğüz (n 21) 169; Özbilen (n 15) 196.

41 Büchler (n 17) N. 5; Helvacı (n 15) 188; Özbilen (n 15) 196; Ayan and Ayan (n 16) 146; Ruhi and Ruhi (n 15) 451; For a different assessment, see Säcker (n 15) para. 217

registry and the name they are known by are the same. When the jurisprudence on changing the name is examined, many examples are encountered where the person is known in society and requests taking the name by which they are known, and this is accepted as a valid reason and it is decided that the name can be changed[42].

Another example that can be given as a valid reason for changing the name is gender change[43], because the name that a person acquires at birth is usually determined according to their assigned gender[44]. The person who has changed their gender can request that their name be changed to a name that is more common for people of that gender in society, if they wish[45]. It should be emphasized that the request to change the name is up to the person whose gender has been changed, and there is no automatic change of the name in case of a gender change[46].

III. Evaluation and Conclusion

When the decisions of the Constitutional Court are examined, it is seen that TCC art. 40 on gender reassignment and TCC art. 27 on the change of name are evaluated together in the cases subject to the decision. While the conditions for gender reassignment are regulated in TCC art. 40/1, it is regulated in TCC art. 40/2 that the court will decide to make the necessary correction in the registry. However, it is clear that the correction in the registry here is about the change of gender, not the change of the name. A change of gender does not necessarily make it necessary to change the name. In other words, a person who has changed their gender can request a name change if they wish, and in such a case, gender change is considered a valid reason for changing the name in accordance with TCC art. 27. However, there is no other relationship between TCC art. 27 and TCC art. 40. That is, one of these provisions is not a prerequisite for the other. Therefore, we would like to state that we do not agree with the interpretation by the courts of instance that one of these provisions is almost a prerequisite for the other, and that for the request for a change of name pursuant to TCC art. 27, a gender change request must first be made pursuant to TCC art. 40 and the name can be changed after the gender change.

Another issue that should be emphasized is that the situation of "being known by another name in the social life of the person," which is frequently encountered in the decisions of the Supreme Court and accepted as a valid reason, has not been accepted

42 Supreme Court 8. CD, 2017/6911, 2018/1819, 08.02.2018; Supreme Court 18. CD, 2009/14650, 2010/4217, 22.03.2010; Supreme Court 18. CD, 2006/3544, 2006/4251, 23.05.2006; Supreme Court 18. CD, 2010/8125, 2010/12554, 05.10.2010; Supreme Court 18. CD, 2008/5627, 2008/7945, 03.07.2008.

43 Öztan (n 15) 434; Kudret Güven, 'Cinsel Kimlik Üzerinde Hak Kavramı ve Korunması: Transseksüellik ve İnterseksüellik' (2015) 1/1 Başkent Üniversitesi Hukuk Fakültesi Dergisi 171-172; Michael R. Will and Bilge Öztan 'Hukukun Sebebiyet Verdiği Bir Acı- Transseksüellerin Hukuku Durumu' (1993) 43/1 AÜHFD 451; Turan Başara (n 30) 258.

44 Steadman (n 24) 3.

45 Öztan (n 15) 434.

46 Güven (n 43) 172; After a gender change, if the name is not used by those of that gender, the change should be mandatory, see. Will and Öztan (n 43) 450-451.

as a valid reason in concrete cases, because, it is clear that it is in the interest of both the person and society that the name of the person known in their social life is the same as the name in the official records. However, due to the sexual orientation of individuals, the courts of instance made an almost opposite assessment and stated that taking the names by which they are known in society may create inconveniences for both society and the individual.

It should also be added that although it was emphasized in the decisions of the courts of instance that the applicants could not take a female name due to their male gender in the civil registry, especially in the case subject to the decision dated 17 June 2021 and application number 2019/42944, the person's name is used by both women and men. The reason why their request was rejected, despite their willingness to take name and showing the rightful reason why they are known by this name in society, cannot be understood. Considering the statement seen in the dissenting vote of one of the Constitutional Court's decisions, that these name change requests are not ordinary name change requests, unfortunately, the thought comes to mind that the applicants are being discriminated against by the courts, because it is clear that people in the same situation are treated differently without any objective and reasonable reason.

For all these reasons, we would like to state that we agree with the decisions of the Constitutional Court that a person's right to respect for private life has been violated, and that the additional reasoning of one of the members of the Constitutional Court that the right to equal treatment under Article 10 of the Constitution has also been violated is appropriate.

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RESEARCH ARTICLE

Can the Chairman of Managing Directors at a Limited Liability Company Convene the Members' Meeting?

Esra Cenkci*

Abstract

The convocation of members' meetings is regulated explicitly in article 617 of TCC. Accordingly, the managing directors convene the members' meetings (TCC 617/1). Provisions regarding the corporations on the convocation also apply to limited liability companies by analogy (TCC 617/3). Therefore, if there is more than one director, the convocation decision is made in accordance with the decision-making principles of the board (TCC 624/3).

On the other hand, according to article 624/2 of TCC, "The chairman or sole managing director is also authorized to make all explanations and announcements, unless a decision is taken in a different direction at the members' meeting or a different regulation is foreseen in the articles of incorporation, as in the case of convocation and the conduct of members' meeting."

The present study discusses whether the chairman is entitled by article 624/2 of TCC to make a convocation decision. If not, what are the scope and the nature of power given to the chairman by this provision? Moreover, it is also discussed whether the chairman can be entitled to decide on convocation with the articles of incorporation in the context of the delegation of power and the principles of mandatory provisions.

Keywords

Limited Liability Company, Members' meeting, Managing directors, Chairman, Power to Convene

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I. Determination of the Problem

The managing directors of limited liability companies convene the members' meeting (TCC[1] 617/1). Preparation for a members' meeting and execution of its resolutions are the non-transferable and inalienable powers of managing directors (TCC 625/1(g)). According to the 3rd paragraph of article 617 titled "Convocation" of TCC, the provisions of the corporation regarding the convocation for a general meeting are also applied to the limited liability company by analogy. In a corporation, the board of managing directors convenes the members' meeting even if its time has expired (TCC 410/1). Accordingly, if there is more than one director, the decision to convene the members' meeting in a limited liability company should be made by the managing directors in the form of a board decision. According to article 624/3 of TCC, in the presence of more than one director, they will decide by the majority. In case of equality, the chairman's vote will be deemed to be cast a vote. However, a different regulation may be stipulated in the incorporation articles regarding the managing directors' decision-making. It is understood that in the presence of more than one director, they will decide as a board.

On the other hand, article 624/2 of TCC contains the following regulation: "The chairman or sole managing director is also authorized to make all explanations and announcements, unless a decision is taken in a different direction at the members' meeting or a different regulation is foreseen in the articles of incorporation, as in the case of convocation and the conduct of members' meeting." These provisions made about whether the power to convene the members' meeting in a limited liability company belongs exclusively to the chairman, whether this power is given to the chairman as additional power to the board of managing directors, or whether the power given to the chairman by article 624/2 TCC is another power rather than the power to convene. Therefore, this study discusses the scope and nature of the power given to the chairman by article 624/2 of TCC.

II. Persons Entitled to Convene the Members' Meeting

Provisions determining the persons entitled to convene the members' meeting are mandatory[2]. Decisions made at the members' meeting upon convocation by an unentitled person or body are invalid[3].

The convocation is regulated explicitly in article 617 of TCC. Accordingly, the managing directors convene the members' meeting (TCC 617/1). In addition,

1 Turkish Commercial Code, Code Number: 6102, Acceptance Date: 13.1.2011, Official Gazette 14.2.2011/27846.

2 Murat Fatih Ülkü, 'Anonim Ortaklıklarda Genel Kurulun Toplantıya Çağrılması (Daveti)' in *Prof. Dr. Hayri Domaniç'e 80. Yaş Günü Armağanı, C. I* (Beta 2001) 575, 588.

3 Erdoğan Moroğlu, *Anonim Ortaklıkta Genel Kurul Kararlarının Hükümsüzlüğü* (9th edn, On İki Levha 2020) (a) 89; Direnç Akbay, *Türk Ticaret Kanunu Tasarısı'na Göre Limited Ortaklık Genel Kurulunun Toplanma ve Karar Alma Esasları* (Vedat 2010) 66; Ülkü (n 2) 588; Erdoğan Moroğlu, 'Anonim Ortaklıkta Genel Kurulun Daveti Merasimine Aykırılığın Yaptırımı ve Yargıtay 11. Hukuk Dairesi Uygulaması' in Erdoğan Moroğlu (ed), *Makaleler* (On İki Levha 2010) 549, 549 ff.

provisions on corporations concerning the convocation, minority members' right to convene and propose, agendas, proposals, universal meetings, preparatory measures, minutes, and unentitled participation are also applicable to the limited liability companies by analogy (TCC 617/3).

Under the provisions above, the first entitled person to convene the members' meeting is the managing director (TCC 617/1, 3, 410/1). This power is used by managing directors as a board (TCC 617/3, 410/1). Preparation for the members' meeting and execution of its decisions are non-transferable and inalienable powers of managing directors (TCC 625/1(g)). If the board consists of a sole director, the power to convene is compulsorily used by this person; on the contrary, if it consists of more than one person, the board makes the convocation decision in accordance with the decision-making principles of a board. Decisions are made by the majority in the presence of more than one director (TCC 624/3). In that case, in the presence of more than one director, the decisions made at the members' meeting upon a convocation made by one of the managing directors without a board decision are invalid[4].

The other person entitled to convene the members' meeting is the minority members who own one-tenth of the capital (TCC 617/3, 411). The minority members may request that managing directors convene by stating necessary reasons and agendas. Managing directors who accept the convocation request of the minority should convene the members' meeting within forty-five days at the most. Otherwise, the convocation is made directly by the requestor minority (TCC 411). Suppose the managing directors do not accept the request of minority members or do not respond positively within seven working days. In that case, the minority members may request the court to convene the members' meeting. If the court deems it necessary, it appoints a trustee to convene (TCC 412). If the company is in the liquidation phase, liquidators can convene the members' meeting to decide on the liquidation works (TCC 617/3, 643, 535/2). A sole company member is also entitled to convene (TCC 617/3, 410/2). Nevertheless, a sole company member can use this power indirectly, namely with the permission of the court[5]. Moreover, in the event of liquidation through bankruptcy, the bankruptcy administration, and in cases where a management trustee is appointed, the trustee is entitled to convene the members' meeting[6].

4 Eleventh Civil Department of the Supreme Court of Appeals, 11756/8994, 21.11.2016 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı, *Yargıtay 11. Hukuk Dairesinin Türk Ticaret Kanununa İlişkin Kararları 2015-2016* (On İki Levha 2018) 430]; Eleventh Civil Department of the Supreme Court of Appeals, 15527/2736, 9.5.2017 < www.sinerjimevzuat.com.tr > accessed 17.5.2022.

5 Ersin Çamoğlu, *Limited Ortaklıklar Hukukunun Temel İlkeleri* (Vedat 2020) N 248; Esra Hamamcıoğlu, *Aile Tipi Limited Şirketlerde Şirket Sözleşmesi* (Yetkin 2022) 347; Oruç Hami Şener, *Yargıtay Kararları Işığında Limited Ortaklıklar Hukuku* (Seçkin 2017) 535, 670-671; Eleventh Civil Department of the Supreme Court of Appeals, 3944/11066, 26.10.2015; Eleventh Civil Department of the Supreme Court of Appeals, 14685/203, 13.1.2015 [See for the desicions: Gönen Eriş, *Ticari İşletme ve Şirketler, C.III* (3rd edn, Seçkin 2017) 3036]; Eleventh Civil Department of the Supreme Court of Appeals, 15527/2736, 9.5.2017 < www.sinerjimevzuat.com.tr > accessed 17.5.2022.

6 Mehmet Bahtiyar and Esra Hamamcıoğlu, *Yeni TTK'ye Göre Anonim Ortaklık Genel Kurul Toplantıları* (Beta 2014) 47; Hamamcığlu (n 5) 351.

III. Managing Directors and the Chairman

There is either a sole or more than one managing director. The managing board executes the administration and representation of the limited liability company as in the corporation. When there is more than one person on a board, it is necessary to have some rules for its functioning. It is stipulated that a chairman should be elected both in the corporation and limited liability company to organize the transactions necessary for the board's functioning (TCC 366/1, 624/1). On the other hand, other powers are also given to the chairman by law. For example, the chairman is the company's spokesperson, as a rule[7], and can make all explanations and announcements on the company's behalf (TCC 624/2). In certain instances, the chairman's vote has been valued more than that of other managing directors. According to article 624/3 of TCC, which does not exist in TCC numbered 6762, if there is more than one managing director and there is equality in voting, the chairman's vote is deemed casting a vote. It should be pointed out that the purpose of this rule is not to put the chairman in a position above the other managing directors. The aim is to keep the company in a working position by preventing blockages in the management body[7]. Although the chairman's vote, as a rule, is of equal influence and value with the other members of the body, a choice was made to protect the company's interest, and the chairman's vote was given priority only in case of equality of votes. The chairman is in a *primus inter pares* position, as he manages the managing directors in principle and can determine the company's decisions exceptionally.

After the decision quorum of the managing directors is determined and a casting vote is given to the chairman in article 624/3 of TCC, it regulating otherwise is also allowed by the articles of incorporation relating to the decision-making of managing directors. For example, the chairman's casting a vote may be revoked[8], a meeting quorum for the board may be determined, or the decision quorum may be changed to "unanimously" by the articles of incorporation in this respect. On the other hand, this regulation does not allow for the demerger of work or the delegation of authority between managing directors. Therefore, it cannot be regulated in the articles of incorporation that the chairman can decide on certain issues, such as the convocation of members' meetings.

IV. The Chairman and the Convocation of the Members' Meeting

A. The Meaning of Article 624/2 of TCC

TCC 624/2 causes a problem regarding whether a chairman has the power to convene the members' meeting. It should be pointed out that there was no provision for the organization of managing directors in TCC numbered 6762. It seemed

7 Justification, TCC 624; Rıza Ayhan, Hayrettin Çağlar and Mehmet Özdamar, *Şirketler Hukuku Genel Esaslar* (4th edn, Yetkin 2022) fn 477.

8 Çamoğlu (n 5) N 337; Mustafa İsmail Kaya, 'Limited Şirkette Müdürler Kurulunun Oluşumu ve İşleyişi' (2014) 22(1) SÜHFD 61, 63.

sufficient to state that the managing directors would convene the members' meeting regarding their power to convene given them by article 538/1, which regulates the convocation of members' meetings. How to convene when there is more than one director was controversial in doctrine. One view argues that the board of managing directors is entitled to convene the members' meeting as a rule. If there is more than one managing director, they should make the convocation decision together. Although the law did not regulate a decision-making quorum for the managing directors, the wording of article 540/1 of TCC numbered 6762 and the fact that the limited liability company is a proprietorship requires that administrative decisions ought to be made unanimously[9]. According to another view, which evaluates the power to convene within the scope of power to represent, if there is more than one managing director, each of whom is entitled to represent the company, they are also entitled to convene the members' meeting. However, managing directors should act together or at least inform others about the meeting date and agenda to eliminate the inconveniences of holding meetings with the same or different agendas on different dates and in different places. If there is more than one convocation with the same agenda, it is argued that the first of these should be considered valid[10].

Article 617/1 of TCC number 6102, which stipulates that the managing directors convene the members' meeting, is the same as article 538/1 of TCC numbered 6762. On the other hand, article 624 of TCC, numbered 6102 and titled "There is more than one managing director," has no equivalent in TCC, numbered 6762. It stipulates that one of the managing directors appointed as chairman and the sole managing director is entitled to convene, conduct the members' meeting, and make all explanations and announcements. This provision suggests that the legislator acted to end the debate made in the period of TCC numbered 6762 by appointing an entitled for the convocation with article 624/2[11].

To examine the source law, managing directors convene the members' meeting. If necessary, an auditor and a liquidator also have the power to convene according to article 805/1 of the Swiss Civil Code[12] (SCC). The provisions of the corporation regarding convocation, convocation and suggestion right of the member, agenda, suggestions, universal meeting, preparatory measures, minutes, representation of the member, and unentitled participation are applied by analogy to the limited liability company (SCC 805/5). The preparation of the members' meeting and the execution of its decisions (*die Vorbereitung der Gesellschafterversammlung sowie die Ausführung ihrer Beschlüsse*) are non-transferable and inalienable duties of managing directors

9 Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar ve Kooperatif Hukuku* (10th edn, Arıkan 2005) N 1716, 1719a.

10 Halil Arslanlı and Hayri Domaniç, *Türk Ticaret Kanunu Şerhi, C. III: Sermayesi Paya Bölünmüş Komandit Şirketler (TTK M.475-484), Limited Şirketler (TTK m. 503-556)* (Temel 1989) 503-504.

11 Indeed, in this direction see: Hasan Pulaşlı, *Şirketler Hukuku Şerhi, C. II* (2nd edn, Adalet 2015) 2296.

12 Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations).

(SCC 810/2(6)). In article 810/3 of SCC, which corresponds[13] to article 624/2 of TCC, the duties of the chairman are regulated as to convene and to conduct the members' meeting (*die Einberufung und Leitung der Gesellschafterversammlung*) (1), to make announcements to company members (2), and to ensure that necessary records are entered in the trade registry (3).

In practice, there are judicial decisions that accept that article 624/2 of TCC entitles the chairman to convene the members' meeting. The Eleventh Civil Department of the Supreme Court of Appeals indicated in its decision dated 4.3.2021 and numbered 3157/2041 that, "…since the plaintiff is the chairman of the board of managing directors, he is exclusively entitled to convene both the board of managing directors and the members' meeting …"[14]. Also, the Fourth Civil Department of Trabzon Regional Courts of Appeals decided in the decision dated 10.11.2020 and numbered 920/991 that, "The plaintiff's attorney indicated as the reason for the nullity that the entitled body did not decide on the convocation of members' meeting. Article 617 of TCC states that the managing directors will convene the members' meeting. However, in article 624 of TCC, the provision of …is included... pursuant to this provision, the director, who is the chairman, is entitled to make all explanations and announcements unless a decision is made to the contrary at the members' meeting or a different regulation is determined in the articles of incorporation, as in the case of convocation and conduct of members' meeting. Within the scope of the file and from the minutes of the members' meeting dated 11.3.2015, it is understood that the company director Ö.Y was authorized as a chairman of the board. Accordingly, and considering that the decision taken regarding the convocation of the members' meeting, which is the subject of the lawsuit, was taken by this person as the chairman of the board of managing directors, the objections of the plaintiffs' attorney regarding this aspect were not considered appropriate"[15].

There are also views in doctrine stating that the chairman can make a convocation decision. According to one of them alleged in the source law, even though the managing directors have the non-transferable and inalienable power to convene the members' meeting, as a rule, this power belongs to the chairman, not to all managing directors as a collective body, due to article 810/3(1) of SCC (TCC 624/2)[16]. In Turkish doctrine, *Hamamcıoğlu* asserts that the expression "preparation for members meeting" that takes place as a non-transferable and inalienable power

13 Abuzer Kendigelen, *Yeni Türk Ticaret Kanunu (Değişiklikler, Yenilikler, İlk Tespitler)* (2nd edn, On İki Levha 2012) 540; Abuzer Kendigelen, in Abuzer Kendigelen and İsmail Kırca, *Şirketler Hukuku C.III: Sermayesi Paylara Bölünmüş, [Paylı] Komandit Şirket ile Limited Şirket* (On İki Levha 2022) (b) N 250.

14 < www.sinerjimevzuat.com.tr > accessed 1.3.2022.

15 The decision has not been published.

16 Rino Siffert, Marc Pascal Fischer and Martin Petrin, in Baker & McKenzie (eds), *Gmbh-Recht, Revidiertes Recht der Gesellschaft mit beschränkter Haftung (Art.772-827 OR)* (Stämpfli 2008) Art 805 N 3. On the same page, see: Mustafa Çeker, in Sami Karahan (ed), *Şirketler Hukuku* (1st edn, Mimoza 2012) 797.

of managing directors in article 625/1(g) of TCC is ambiguous. Therefore, it cannot be obviously said that it requires a board decision to convene the members' meeting within the scope of this article. Hence, regarding the wording of articles 624/2 and 625/1(g) of TCC, a chairman can take a convocation decision exclusively, but the board must execute the preparation process. Accordingly, this acceptance is more suitable in point of the functioning of the company in that it prevents the cases opened against the decision of the members' meeting on the grounds of the invalidity of the decision[17].

Another view argues that as the provision of TCC 624/2 is a particular regulation, the duties regulated there, including the convocation, can be carried out by the chairman after the decision is made; however, a board decision is required in all other matters[18].

The third view, which does not express the chairman among those entitled to convene the members' meeting, considers the provision from a different angle under the provision of TCC 624/2. The chairman's power is to convene the "board of managing directors" for a meeting and to conduct the board meetings[19].

Since it contained the elements specific to proprietorship and capital companies, the limited liability company was a mixed type in the period of TCC, numbered 6762. It has almost assumed the identity of a small corporation with the aim of TCC numbered 6102, bringing it closer to being a capital company[20]. It is also regulated with an explicit provision that the limited liability company is a capital company (TCC 124/2). The marks of this Law approach can be seen in the provisions that bring similar regulations to the corporation and refer to regulations related to the corporation in many subjects. In this context, management affairs in a limited liability company are carried out by the managing directors as a board as in the corporation (TCC 367/2, 390; 624/1,3), and an inclusive reference is made to the corporation regarding the representation and the convocation in limited liability companies (TCC 617/3, 629/1). Therefore, looking at the provision of TCC 624/2 from the perspective of TCC numbered 6762 on limited liability companies and managing directors will not lead us to the right conclusion. The aforementioned provisions should be interpreted within the discipline of Law numbered 6102. In this respect:

17 Hamamcıoğlu (n 5) 346, 347.

18 Ender Dedeağaç, *Uygulamalı Limited Şirketler Hukuku* (Seçkin 2020) 107-108.

19 Çamoğlu (n 5) N 245-248, 336; Ersin Çamoğlu, in Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku II* (14th edn, Vedat 2019) N 1712b-1712d, 1723.

20 General Juristiction of TCC, p.144; Çamoğlu (n 5) N 5; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (5th edn, Vedat 2020) N 18-01; Murat Alışkan, *Limited Şirket (Tarihçe, Niteliği)* (Legal 2013) 219. The provisions of TCC regarding limited liability companies differ from the source law in this respect. Although the small corporation model was discussed during the limited liability company reform that entered into force in Switzerland in 2008, it was not put into practice there [Alışkan (n 21) 219].

a. On the one hand, it is stipulated that the power to convene belongs to the managing directors as a board (TCC 617/1). On the other hand, article 410/2 of TCC, which gives the power to convene to the sole shareholder in the event of a blockage in the board of directors due to the reference to the provisions regarding corporations (TCC 617/3), will also be applied to the limited liability companies. In the face of such a situation, what purpose would it serve to accept that article 624/2 also grants the chairman the power to convene?

b. Accepting that the chairman has such power directly will result in eliminating the power to convene the board of managing directors *de facto*, positioning the chairman above the board of managing directors, and also causing a conflict of power between the chairman and the board regarding the convocation. In this case, is it appropriate in terms of law-making technique to grant the power to convene directly both to the board itself and to the chairman independently of each other?

c. The preparation of the members' meeting and execution of its decisions are the non-transferable and inalienable duties and powers of the managing directors (TCC 625/1(g)). Hence, the managing directors are responsible for the damages arising from non-compliance with the duration, the form, and the content of the convocation (TCC 644/1(a), 553). Can it be considered that power belongs to the chairman in a matter where the responsibility belongs to the board? Does the legislator impose responsibility on a subject other than the person whom he has entitled?

Provision wording and its systematics strengthen the idea that the chairman has not determined the power to convene. Indeed, as the convocation is regulated under a particular title in article 617 of TCC, it cannot be said that an entitled convocation has been appointed with article 624 of TCC. Article 624 of TCC regulates how they become organized and make their decisions when there is more than one managing director. Although the provision states that the managing director, the chairman, is entitled to convene the members' meeting, the door is left open that this power may be a process for the execution of a convocation decision. As a matter of fact, when categorized together with the other issues in the second paragraph of the provision, such as conducting members' meetings and making explanations and announcements, it is understood that the power here is an executive power rather than a founding/establishing power.

In addition, the preparation of the members' meeting and the execution of its decisions are the non-transferable and inalienable powers of managing directors (TCC 625/1(g), SCC 810/2(6)). The convocation is a preparatory process for the members'

meeting[21]. Due to the aforementioned legal nature of the convocation, the chairman cannot decide to convene the members' meeting. In order for the chairman to convene the members' meeting, a convocation decision must have been made by the managing directors (TCC 624/3) before, and the chairman must fulfill the requirements of this decision[22]. Preparing and sending the convocation letters and writing the necessary correspondence for the announcement are the duties and powers of the chairman in the context of the convocation.

According to article 617/4 of the TCC, members' meetings may make decisions with the written approval of all company members of a suggestion related to an agenda item of a member. For a decision to be valid, the suggestion shall be submitted for the approval of all members, and none of them shall request a physical meeting. Based on this provision, it can be said that insomuch as any company member can start the decision-making process of members' meetings, it should also be possible to accept the convocation power of the chairman. If the chairman is a company member, there is no doubt he can use this opportunity. Company members can apply for this simplified process because of their membership title. However, this article does not ensure they conclude the period with decision-making, in that all other members need to approve this decision-making form. This form requires the consensus of all company members, and we cannot say that article 617/4 of TCC grants any of the members the convocation power. As stated above, a company member can only use the power to convene by a court decision (TCC 617/3, 410/2). Therefore, it cannot be asserted that a chairman is entitled to make a decision instead of all company members and that article 617/4 is not an appropriate base to accept the convocation power of the chairman.

There is no regulation similar to TCC 624 in German law. In German law, the director (*Geschäftsführer*) and the management body are entitled to convene the members' meeting at a limited liability company (Gesetz betreffend die Gesellschaften mit beschränkter Haftung §49(1)). However, the dominant view in the doctrine is that when there is more than one managing director, each is entitled to convene

21 Akbay (n 3) 38; Şükrü Yıldız, *Türk Ticaret Kanunu Tasarısına Göre Limited Şirketler Hukuku* (Arıkan 2007) 258; Siffert, Fischer and Petrin (n 17) Art 805 N 3; Urs Gasser, Christian Eggenberger and Richard Staeuber, in Jolanda Kren Kostkiewicz, Stephen Wolf, Marc Amstutz and Roland Frankhauser (eds), *OR Kommentar Schweizerisches Obligationenrecht* (3rd edn, Orell Füssli 2016) Art 805 N 1.

22 Kendigelen [n 14 (b)] N 116; Roland Truffer and Dieter Dubs, in Heinrich Honsell, Nedim Peter Vogt and Rolf Watter (eds), *Basler Kommentar Obligationenrecht II: Art. 530-964 OR, Art. 1-6 SchlT AG, Art. 1-11 ÜBest GmbH* (Helbing Lichtenhahn 2012) Art 805 N 3; Brigitta Kratz, in Vito Roberto and Hans Rudolf Trüeb (eds), *GmbH, Genossenschaft, Handelsregister und Wertpapiere – Bucheffectengesetz Art. 772-1186 OR und BEG* (3rd edn, Schulthess 2016) Art 810 N 13a; Gasser, Eggenberger and Staeuber (n 22) Art 805 N 1; Şener (n 5) 533; Oruç Hami Şener, *Teorik ve Uygulamalı Ortaklıklar Hukuku* (3rd edn, Seçkin 2017) 732. On the same page see: Fatih Bilgili and Ertan Demirkapı, Şirketler Hukuku Dersleri (7th edn, Dora 2020) 436; Hakan Çebi, *Limited Şirketler Hukuku* (Adalet 2019) 82; Ünal Tekinalp, *Yeni Anonim ve Limited Ortaklıklar Hukuku İle Tek Kişi Ortaklığının Esasları* (2nd edn, Vedat 2011) N 22-32; Ali Haydar Yıldırım, *Türk Ticaret Kanunu Tasarısı'na Göre Limited Ortaklık Müdürünün Hukuki Durumu* (Güncel 2008) 125; Akbay (n 3) 39-40; Yıldız (n 22) 211. Same view for corporations, see: Peter Forstmoser, Arthur Meier-Hayoz and Peter Nobel, *Schweizerisches Aktienrecht* (Stämpfli 1996) § 23 N 19 fn 10; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (4th edn, İstanbul 2015) N 22-23, 22-32 compare with: Tekinalp (n 21) N 22-43, 22-43a.

the members' meetings independently from the others[23]. This view stems from the fact that since the convocation is not a measure of the realization of the company's purpose, it cannot be accepted as a management or representation process; therefore, each director has the power to convene regardless of management and representation authority[24]. As a result, for example, each managing director, equipped with the power to represent together, can convene the members' meeting. Likewise, even the managing director, who is in the position of the *de facto* organ, in case of illegality in the appointment process, can convene the members' meeting validly[25].

In Turkish law, it is impossible to agree with the view that is dominantly asserted in German law, which doesn't accept the convocation as either a management nor a representation process. As is known, managing directors are entitled to make decisions and execute them on all matters related to the management that are not left to the members' meeting by law or by the articles of incorporation (TCC 623/3). The concept of direction in a broad sense includes both management and representation in a narrow sense. Management is to make decisions about all kinds of business and processes necessary for the realization of the field of operation of the company. Representation means making legal transactions against company members and third parties on behalf of the company. Convocation is an indirectly necessary process for the realization of the field of operation of the company. With the decisions made at the members' meeting upon a convocation, the institutional requirements necessary for the realization of the operation field are ultimately fulfilled. Making a convocation decision is a management process in this respect. Since a board decision shall be made on management-related issues, as regulated in article 624/3 of TCC, when there is more than one director, the convocation decision should also be made in accordance with this article. The execution of the convocation decision is to convene the company members on behalf of the company, which is related to representation authority. In matters related to representing a limited liability company, the provisions concerning corporations are applied by analogy. Accordingly, unless otherwise stipulated in the articles of incorporation or if there is more than one managing director, the power to represent belongs to the managing directors, to be used with two signatures (TCC 629/1, 370/1). Nevertheless, the execution of the power to convene was left to the chairman with a special provision (TCC 624/2).

23 Ulrich Noack, in Ulrich Noack, Wolfgang Servatius and Ulrich Haas (eds), *GmbH-Gesetz*, (23rd edn, C H Beck 2022) § 49 Rn 3; Martin C Schmidt and Jörg Nachtwey, in Ulrich Prinz and Norbert Winkeljohann (eds), *Beck'sche Handbuch der GmbH* (6th edn, C H Beck 2021) § 4 Rn 2; Christian Wentrup, in Alexander Gebele and Steffen Scholz (eds), *Beck'sches Formularbuch Bürgerliches, Handels- und Wirtschaftsrecht* (14th edn, C H Beck 2022) § 29 Anm 1.

24 Noack (n 22) § 49 Rn 2-3; Rolf Otto Seeling and Martin Zwickel, 'Typische Fehlerquellen bei der Vorbereitung und Durchführung der Gesellschafterversammlung einer GmbH' (2009) DStR 1097, 1098.

25 Seeling and Zwickel (n 23) 1097-1098; BayObLG, Beschluß vom 2. 7. 1999 - 3Z BR 298/99 (LG München I), [1999] NZG 1063, 1064 Anm 3.

B. Whether the Power to Decide on the Convocation Can Be Left to the Chairman with a Regulation Placed in the Articles of Incorporation

1. Evaluation in the Context of the Delegation of Power

The articles of incorporation regulate the management and representation of a company. They may be given to one or more company members holding the title of managing director or to all company members or third parties. At least one company member shall have the right to manage and the power to represent the company (TCC 623/1). Managing directors are entitled to make and execute these decisions on all matters related to the management that is not left to members' meetings by law or by the articles of incorporation (TCC 623/3). The duties and powers that are prohibited from being transferred even by the articles of incorporation are regulated in the provision of TCC 625/1. One of them is preparing the members' meeting and the execution of the decisions made at the meeting (TCC 625/1(g)). In this respect, since the convocation is also a preparatory process[26], it is impossible to delegate the power to make the convocation decision to the chairman through the delegation of the power[27].

2. Evaluation in the Context of the Principle of Mandatory Provisions

According to the principle of mandatory provisions, articles of incorporation can only deviate from the provisions of TCC regarding limited liability companies if it is explicitly permitted in law (TCC 579, 340). A view states that when determining whether the deviation is allowed or not, under the expression "explicitly" in the provision, the wording of the provision should be taken as a basis, avoiding the conclusions to be reached through interpretation[28]. The other view, which conforms with the explanations in the justification of the provision, is that the wording of the provision should not be contented within this regard. However, the essence of the provision should also be considered. If deemed appropriate to deviate from the provision of law considering the principle of equity and the balance of interests, a regulation different from the provision of law can be placed in the articles of incorporation[29].

26 See above fn. 22.

27 In terms of corporations including parallel regulation (TCC 367, 375/1(f)), see along the same lines: Ninth Civil Department of Adana Regional Courts of Appeals, 848/1011, 23.11.2020 (The decision has not been published). See for the view that the power to convene in corporations may be left to the persons to whom the powers are delegated (TCC 367, 370) with the articles of incorporation; however, this does not remove or limit the power to convene of those who have this authority legally. Moroğlu [n 3 (a)] 94.

28 Feyzan Şehirali Çelik, İsmail Kırca and Çağlar Manavgat, *Anonim Şirketler Hukuku, C. I (Temel Kavram ve İlkeler, Kuruluş, Yönetim Kurulu)* (BTHAE 2013) 157 ff.; Mehmet Bahtiyar, 'Türk Ticaret Kanunu Tasarısı'nın Dili İle Bazı Hükümlerinin Değerlendirilmesi' (2005) (61) TBB Dergisi 47, 70 ff.; Cem Veziroğlu, *Anonim Ortaklıklar Hukukunda Esas Sözleşme Özgürlüğü ve Sınırları* (On İki Levha 2021) 383, 384.

29 Jurisdiction, TCC 340; Rauf Karasu, *Anonim Şirketlerde Emredici Hükümler İlkesi* (2nd edn, Yetkin 2015) 50 ff.; Şener (n 5) 67; İsmail Özgün Karaahmetoğlu, *Anonim Şirket Esas Sözleşmesinin Yorumlanması* (Adalet 2021) 185.

Provisions that bind when placed in the articles of incorporation are also regulated in law. The company members are allowed to make arrangements following their own structures, especially in the internal relations of a limited liability company (TCC 577). One of them is the "provisions that give a special right to convene the members' meeting" (TCC 577/1(h)). It should be discussed whether the chairman can be entitled to make convocation decisions with the articles of incorporation based on this provision.

The source law includes a different provision. According to article 776a/2(3) of SCC, a regulation different from the legal provisions may be placed in the articles of incorporation regarding "the convocation of members' meeting" (*der Einberufung der Gesellschafterversammlung*). In doctrine, it is accepted that this provision allows for amending the "convocation procedure," which is regulated by non-mandatory provisions in law (SCC 805/2,3). In this context, for example, the duration of the convocation may be shortened to ten days, or a period longer than twenty days may be determined for this. It can be shown in which cases the members' meeting may be convened for an extraordinary meeting[30], and the minority member ratio (10 %) may be reduced. The duration of the ordinary meeting (six months) may be shortened[31]. *A contrario* of this, it is understood that provision 776a/2(3) of SCC does not cover article 805/1 of SCC. Consequently, per article 805/1 of SCC, which has a mandatory character, the power to convene the members' meeting belongs to the managing directors and cannot be left to the chairman with the articles of incorporation.

Regarding the scope of article 577/1(h) of TCC, a view in Turkish doctrine asserts that an indirect or limited right to convene the members' meeting is granted to the company members pursuant to TCC 617/3 (TCC 410/2, 411-412). This right can be converted into the right to convene directly pursuant to article 577/1(h) of TCC. However, it can only be linked to the company member, not to the share[32]. The other view states that through the articles of incorporation, an individual right in the form of the convocation of members' meetings can be granted to one or more company members or minority members with less than one-tenth of capital. There is a preferred preferential when the right is granted to a capital contribution. When granted to the member's personality, it disappears with the end of the membership title[33]. Another view is that this right can only be granted to capital contributions[34].

30 Siffert, Fischer and Petrin (n 17) Art 776a N 31; Hans Rudolf Trüeb, in Vito Roberto, Hans Rudolf Trüeb (eds), *GmbH, Genossenschaft, Handelsregister und Wertpapiere – Bucheffektengesetz Art. 772-1186 OR und BEG* (3rd edn, Schulthess 2016) Art 776a N 30; Frank Schenker, in Heinrich Honsell, Nedim Peter Vogt and Rolf Watter (eds), *Basler Kommentar Obligationenrecht II: Art. 530-964 OR, Art. 1-6 SchlT AG, Art. 1-11 ÜBest GmbH* (Helbing Lichtenhahn 2012) Art 776a N 25.

31 Trüeb (n 31) Art 776a N 31.

32 Kendigelen [n 14 (b)] N 116; Şener (n 5) 62-63, 546.

33 Akbay (n 3) 64; Çebi (n 23) 84; Bilgili and Demirkapı (n 23) 437; Hamamcıoğlu (n 5) 351-353; Yıldız (n 22) 214.

34 Tekinalp (n 21) N 19-13.

Although the expression "special right" in TCC 577 is not mentioned elsewhere in the provisions regulating corporations and limited liability companies, it is used in demerger regulations and the justification relating to regulations about mergers and conversion. According to article 167 /1(d) of TCC, a demerger contract and a demerger schedule shall include the rights allocated by the transferee company to the owners of dividend shares, non-voting shares, and special rights. The special rights are mentioned in the justification of article 183/2 and 3 as follow[35]: "This term, which is not defined in the source law, is interpreted broadly, and its scope includes voting preferred shares, rights to binding offer that is among the minority's rights (such as to suspend negotiations on the balance sheet), representation of share categories and share groups regulated in SCC 709, interests provided to founders and other persons, rights to purchase and conversion in a conditional capital increase. The term 'special rights' is used in law to emphasize the same scope." In fact, article 183 of TCC regulates only the non-voting shares, preferred shares, and dividend shares, namely the rights linked to shares. Nevertheless, the justification also remarks on rights linked to the personality of members under the concept of "special rights."[36] Therefore, it can be said that this expression may contain rights to linked shares and personality or both of them. Hereby, it is impossible to determine the scope of article 577/1(h) of TCC based on the concept.

Approaching the expression "special rights," regardless of the essential characteristics of capital companies and also of the provisions regulating the convocation, leads to confronting results with the logic of law. In addition, the purpose of the provision shall be considered when determining the scope of permissible deviation in the articles of incorporation[37]. In this respect, it cannot be said, based on the wording of the provision that does not impose any restrictions on this issue, that the "special right" to convene the members' meeting can also be granted to the personality of company members. On the contrary, it would be more suitable to say that this right is a right that does not depend on the personality of a company member. Subsequently, it is not explicitly stated that this right can be granted "to certain or determinable members" as regards the right of veto in article 577/1(e) of TCC[38].

35 "For the term of special rights in the provision, it should be looked at the justification given in the second and third paragraphs of the article 183. As stated there, special rights have a broad meaning and include preferred shares, but cannot be assigned to preferred shares" (Justification, TCC 140/4). It shall be considered that the expression of special right is not stated in article 140 of TCC. Only the "preferred rights that are linked to shares" are mentioned in this article.

36 For more information about the meaning of the term "special rights", see: Hülya Coştan, 'Türk Ticaret Kanunu Tasarısı Hükümlerine Göre Birleşme, Bölünme ve Tür Değiştirmede Özel Hak Sahiplerinin Korunması' BATİDER (2008) 24(3) 403, 414 ff.

37 Karaahmetoğlu (n 27) 187; Veziroğlu (n 29) 384.

38 See the view that the right of veto can only be granted to the personality of members: Akbay (n 3) 175; Altan Fahri Gülerci, 'Limited Şirketlerde Ortaklara Veto Hakkı Tanınması' LHD (2020) 18(211) 3051, 3061; Çebi (n 23) 61; Hamamcıoğlu (n 5) 326; İsmail Kırca, in Abuzer Kendigelen and İsmail Kırca, *Şirketler Hukuku C.III: Sermayesi Paylara Bölünmüş, [Paylı] Komandit Şirket ile Limited Şirket* (On İki Levha 2022) N 153, 663, 667; Şener (n 5) 56, 58; Eleventh Civil Department of the Supreme Court of Appeals, 2011-15478/2491, 13.2.2013 < www.sinerjimevzuat.com.tr > accessed 27.11.2022. See the view stating that right of veto and right to casting votes can be granted to certain share groups: Tekinalp (n 21) N 19-13. For the view asserting that the right of veto and the right to cast votes can be granted to the personality of members and also because of the expression "determinable members" in the article, these rights can be granted on a share basis, see: Bilgili and Demirkapı (n 23) 422.

The capital company character of the limited liability company (TCC 124/2) requires its members to be granted the rights on a share basis, not on a personality basis. However, this does not mean that a limited liability cannot contain any personal element; this is possible when the law regulates it explicitly. As a matter of fact, this principle is considered when regulating the membership rights in a limited liability company[39]. Therefore, the acceptance of the right to convene can be granted to the members' personalities according to TCC 577/1(h), contrary to the basic structure of limited liability companies.

"Special right" evokes the expression "superior right," used to define privilege in the provision of TCC 478, where the preferred share is regulated[40]. For a share to be deemed preferred, that share must be different from the others by providing more rights or priority[41]. The difference here makes it superior, preferred, and special. In addition, a privilege can only be granted to a share, not a personality[42]. For this reason, it is stipulated in the provision of TCC 577/1(h) that the capital contribution can be preferred to convene the members' meeting. This privilege differentiates the capital contribution from the others by giving its owner the right to convene the members' meeting directly.

The fact that the creation of a preferred capital contribution is optional makes it necessary to regulate this issue in article 577 of TCC. After the provision of TCC 576/1(c), which stipulates that the privileges shall be included in the articles of incorporation, the reason for making a separate regulation with 577/1(h) is to indicate that the particular or unique right may be in the matter of the convocation of the members' meeting. It should be pointed out that while the provision of TCC 577 was held, it was not taken into account whether there was a recurrence of the issues regulated with this article. With the introduction of the principle of mandatory provisions, the concern of arranging the issues that can be determined in the articles of incorporation has been neatly prioritized[43].

As such, it should be accepted that the provision of TCC 577/1(h) allows the creation of the privilege regarding the convocation of members' meetings. Therefore, the right to convene the members' meeting directly may not belong to each company member but only to the member holding the preferred capital

39 e.g. TCC 591, 608, 614, 618, 622.

40 The word "special" is defined in the dictionary as "(1) pertaining to or relating only to a person, a thing, particular (2) having a feature that distinguishes it from similar ones, (3) private, personal, concerning a person, (4) owned by the individual, not the state, private, unofficial, (5) remarkable, (6) having a distinctive character, (7) different from what is always seen, from the usual" (Türk Dil Kurumu Genel Türkçe Sözlük, sozluk.gov.tr).

41 Esra Uysal, *Anonim Ortaklıklarda İmtiyazlı Paylar* (2nd edn, On İki Levha 2018) 47-48. Compare with: Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku I* (15th edn, Vedat 2021) N 784.

42 Bilge Aytuğar, *Anonim Şirketlerde Oy Hakkında İmtiyaz* (On İki Levha 2019) 135; Uysal (42) 50 ff.

43 Indeed, see: TCC 577/1(b) and 595, TCC 577/1(c) and 603, TCC 577/1(ı) and 608/2; TCC 577/1(l) and 639 etc.

contribution. Since the privilege cannot be granted to the share group[44], it cannot be stated that the rate of the minority members (10%) who have the right to convene can be reduced based on this provision. Whether or not the minority rate can be reduced is related to the term of the minority itself, and so is the subject of a different discussion. Finally, the chairman can acquire this power not because of his title of chairman but because of his title of company member with a preferred capital contribution to the convocation[45].

Conclusion

Mandatory provisions regulate the power to convene the members' meeting. The managing directors are the body that is fundamentally empowered to convene the members' meeting of a limited liability company. When there is more than one managing director, the convocation decision should be made as a board decision. The provision of TCC 624/2 does not give power to the chairman to make a convocation decision. Based on this power regulated in TCC 642/2, the chairman can only execute the convocation decision made by the board.

The power to make a decision about the convocation cannot be given to the chairman through the delegation. Due to a regulation in the articles of incorporation, the chairman cannot be empowered to convene because of this title. If the chairman is also the company member holding the preferred capital contribution, he/she may decide to convene the members' meeting based on the title of preferred share contribution owner.

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44 Exc. see: TCC 360.

45 On the opposite page see: Hamamcıoğlu (n 5) 353.

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RESEARCH ARTICLE

Einseitige Beendigung des Auftragsvertrags gemäss den Bestimmungen von Artikel 512 des türkischen Obligationenrechts

Unilaterally Termination of the Mandate Agreement as per Article 512 of the Turkish Code of Obligations

M. Tolga Özer*

Zusammenfassung
Einer der für den Auftragsvertrag spezifischen Kündigungsgründe ist die einseitige Beendigung des Auftragsverhältnisses, die in Artikel 512 des türkischen Obligationenrechts geregelt ist. Gemäß der vorgenannten Bestimmung können der Auftraggeber oder dessen Vertreter das Auftragsverhältnis einseitig und ohne triftigen Grund oder vorherige Ankündigung beenden. Diese Bestimmung soll es den Parteien ermöglichen, das Vertragsverhältnis problemlos zu beenden, wenn das Vertrauensverhältnis, das die Grundlage des Auftrags bildet, aus irgendeinem Grund beschädigt wird. Eine Kündigung des Vertrags ohne Grund und ohne Zeitangabe kann der anderen Partei jedoch in einigen Fällen Schaden zufügen. In Anbetracht dieser Situation hat der Gesetzgeber geregelt, dass die Partei, die das Auftragsverhältnis zu einem unangemessenen Zeitpunkt beendet, der anderen Partei den entstandenen Schaden ersetzen muss (siehe Artikel 512 / S. 2 des türkischen Obligationenrechts). Ziel dieses Aufsatzes ist es, das in Artikel 512 des türkischen Obligationenrechts geregelte Recht zur einseitigen Beendigung des Auftragsvertrags zu untersuchen. In diesem Zusammenhang wird zunächst die Rechtsnatur des betreffenden Rechts, die Art seiner Anwendung und sein Anwendungsbereich erörtert. Anschließend wird die Rechtsgrundlage und der Umfang der Schadensersatzpflicht für die Beendigung des Auftrags zu Unzeit analysiert. Abschließend wird die Frage beantwortet, ob es sich bei den Bestimmungen von Artikel 512 des türkischen Obligationenrechts um eine zwingende Rechtsnorm handelt.

Schlüsselwörter
Auftrag, Auftragsvereinbarung, Kündigung, Widerruf, Beauftragter Auftraggeber, Vergütung

Abstract
One reason to end a mandate agreement involves the unilateral termination procedure regulated under Article 512 of the Turkish Code of Obligations (TCO). According to this provision, the mandatee and mandator are entitled to unilaterally terminate a mandate agreement without need to propound upon a rightful reason or grant a notice period. The purpose of this provision is to allow the parties to easily terminate a contractual relationship in the event of a deterioration between the parties in the mutual trust that lies at the foundation of the mandate agreement. However, terminating an agreement without any reason or notice period may have detrimental effects on the other party in certain cases. In consideration of this possibility, legislators have regulated that the party who terminates a mandate agreement at an inopportune juncture shall compensate the other party for the damages arising from such a termination (*qqv.* TCO Art. 512 /p. 2). This study aims to review the right to unilaterally terminate a mandate agreement regulated under Article 512 of the TCO. The study will review within this scope the legal nature of this right, the procedures for its use, and its field of application in the first stage. Following this stage, the study will peruse information on compensation liability due to the termination of a mandate agreement at an inopportune juncture and review the legal grounds and scope regarding this compensation. The study will conclude by questioning whether Article 512 of the TCO is a mandatory provision or not.

Keywords
Mandate, Mandate Agreement, Termination, Rescission, Mandatee, Mandator, Compensation

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Extended Summary

A mandate agreement may be ended or terminated for general reasons in relation to obligations or for special reasons in relation to the mandate as regulated under Articles 512 and 513 of the Turkish Code of Obligations (TCO). One of the special reasons for ending a mandate agreement involves unilateral termination as regulated under Article 512 of the TCO; this forms the subject of the current study. According to this provision, a mandate agreement can be unilaterally terminated by the mandatee or the mandator at any time without need to propound upon a valid reason or grant a notice period. The mandator's declaration for unilateral termination of an agreement is defined as a "dismissal," whereas the mandatee's declaration is defined as a "resignation." The reason for introducing this provision pertains to the mutual trust that exists between the parties and lies at the foundation of the mandate agreement. Legislators have aimed to allow the parties of a mandate agreement to void a mandate relationship in the case of a reduction in the mutual trust between the parties for any reason.

The right granted to parties under Article 512 of the TCO is exercised by a unilateral declaration that terminates the contractual relationship upon its receipt by the other party. Therefore, the legal nature of this right is accepted as formative right. Similar to other formative rights, the right stated under Article 512 of the TCO no longer exists upon being exercised and cannot be revoked once exercised. However, applying Article 10 of the TCO by analogy allows one to revoke the declaration of termination of an agreement before it becomes effective by submitting a withdrawal of the notification of declaration of termination to the other party before the declaration of termination is delivered to the other party, or at the very latest, at the same time the declaration of termination reaches the other party.

Another consequence of the formative nature of the right expressed under Article 512 of the TCO is that this right cannot be exercised conditionally. However, scholars have correctly stated that formative rights can be exercised with a condition that contains no uncertainty for the other party. Within this scope, the right expressed under Article 512 of the TCO can thus also be exercised with a condition that does not leave the other party in uncertainty. Conditions that are subject to the other party's will in particular are applicable for declarations of termination.

In addition, determining whether the right to unilaterally terminate a mandate agreement under Article 512 of the TCO has a proactive (*ex tunc*) or retroactive (*ex nunc*) effect importantly depends on whether the performance of obligation has started or not. In cases where performance has started but not yet been completed, the agreement will be terminated with proactive effect. In this case, the right exercised under Article 512 of the TCO will be defined as a termination. Meanwhile, in cases

where the agreement has ended before the performance of work has begun, the mandate relation will cease to exist retroactively. In other words, the right being exercised will be defined as a rescission. In cases where the mandated performance has an instantaneous nature in particular, the agreement can only be ended with retroactive effect.

In cases where the mandate agreement is terminated with proactive effect, the demands that occurred up to the point of termination shall not be affected by the termination of the agreement. Therefore, the mandatee's obligation for giving an account of its activities carried out up until the date of termination shall remain in force. Additionally, the mandatee is obliged to return anything received for whatever reason as a result of such activities. Termination of the agreement also does not eliminate the mandatee's confidentiality obligation within the framework of duty of care.

From the aspect of the mandator's obligations, if the parties agree on remuneration for the mandatee or if a custom is already in place in this regard, the mandatee shall be entitled to remuneration for the services conducted up until the date of termination. Another obligation of the mandator is to reimburse the expenses the mandatee has made in the course of services and release the mandatee from the obligations they bear in relation to the services. Commencement of services up until the date of termination shall be adequate for expenses demanded, and compliance with services shall no longer be required. As for the expenses made before the commencement of service, the mandatee in principle cannot demand remuneration for these expenses. However, if the right of termination is exercised at an inopportune juncture, these expenses can be demanded by the mandatee within the scope of compensation.

If the mandatee is authorized, required as per circumstances, or allowed by custom, the mandatee may delegate third parties to conduct the services wholly or partially through a sub-mandate agreement (*qqv*. Art. 506/1 of the TCO). When the primary mandate agreement is terminated, the benefit expected from the sub-mandate agreement usually ceases to exist. However, because these two agreements are separate legal affairs that are distinct from each other, termination of a primary mandate agreement under Article 512 of the TCO does not *ex officio* end the sub-mandate agreement.

As per Article 512 of the TCO, the party who terminates the mandate agreement is only liable for remuneration of damages in relation to the inopportunity of the termination. Dominancy among scholars states that the damages to be compensated as per Article 512 of the TCO are reliance damages. However, Ido not share this opinion. Reliance damages are those that would not have occurred had the agreement never been signed. However, the damages to be compensated under Article 512 of the

TCO are not the damages that would not have occurred had the agreement never been signed but rather the damages that would not have occurred had the agreement been terminated at the nearest opportune juncture instead of at an inopportune juncture. Therefore, the general ruling regarding the types of damages considered as excess damages or reliance damages under Article 512 / p. 2 is not applicable here. Excess or reliance damages can be included depending on the matters involved in case.

Whether the parties can agree to a repeal of the termination right under Article 512 of the TCO, namely whether the wording in Article 512 of the TCO is a compulsory provision or not, is disputable. The consensus opinion, which is also shared by me, states that Article 512 of the TCO is not a compulsory provision. I accept that parties can revoke the right to unilaterally terminate a mandate as regulated under Article 512 of the TCO within the framework of the freedom of contract. This freedom shall be limited in cases where revoking or restricting this right constitutes a violation of personal rights. In cases where the agreement is fundamentally based on a trust relationship in particular, any provisions that hinder the application of Article 512 of the TCO may be considered to contradict the personal rights and deemed void as per Article 27/1 of the TCO. Similarly, the provisions that stipulate excessive penalty amounts with regard to termination of a mandate in these kinds of agreements must be deemed void as per Article 27/1 of the TCO due to the violation of personal rights.

Einseitige Beendigung des Auftragsvertrags gemäss den Bestimmungen von Artikel 512 des türkischen Obligationenrechts

I. Einleitung

Ein Auftragsverhältnis kann aus verschiedenen Gründen beendet oder gekündigt werden. Diese Beendigung kann z.B. aus allgemeinen Gründen[1], die das Schuldverhältnis betreffende Gründen oder aus besonderen Gründen, die das Auftragsverhältnis betreffen und in den Artikeln 512 und 513 des türkischen Obligationenrechts geregelt sind, erfolgen. Einer der besonderen Gründe für die Beendigung des Auftragsvertrags ist die einseitige Beendigung des Vertrags, die in Artikel 512 des türkischen Obligationenrechts geregelt ist und die auch Gegenstand dieses Aufsatzes ist. Gemäß der vorgenannten Bestimmung kann der Auftragsvertrag jederzeit vom Auftraggeber oder von Beauftragter ohne Angabe von Gründen und ohne vorherige Ankündigung gekündigt werden. Während die einseitige Erklärung des Auftraggebers, den Vertrag zu beenden, als „Widerruf" bezeichnet wird, heißt die Erklärung der Beauftragten „Kündigung"[2].

Nach herrschender Auffassung in der Lehre ist der Grund für die Einführung dieser Regelung das der Auftragsvereinbarung zugrunde liegende Vertrauensverhältnis[3]. Diesen Autoren zufolge wollte der Gesetzgeber den Vertragspartnern die Möglichkeit geben, sich aus dem Auftragsverhältnis zu lösen, wenn ihr gegenseitiges Vertrauen aus irgendeinem Grund schwindet. Da jedoch eine einseitige Beendigung des Auftragsverhältnisses ohne zeitliche Begrenzung der anderen Partei in manchen Fällen Schaden zufügen kann, wurde zum Schutz der geschädigten Partei eine Entschädigungsklausel in die Bestimmung aufgenommen. Dementsprechend ist die Partei, die den Vertrag zu einem unangemessenen Zeitpunkt kündigt, verpflichtet, der anderen Partei den daraus entstehenden Schaden zu ersetzen.

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1 Ausführliche Informationen über die Beendigung des Auftragsvertrags aufgrund der allgemeinen Gründe, die das Schuldverhältnis beenden, siehe Şahin Akıncı, Beendigung der Auftragsvereinbarung, Sayram Yayınları, Konya, 2004, p. 34 ff.

2 Artikel 396 des türkischen Obligationenrechts, der Artikel 818 des Obligationenrechts entspricht, enthält diese Unterscheidung, indem er feststellt, dass „*die Entlassung aus der Auftrag und der Rücktritt vom Auftrag immer zulässig sind*". Andererseits besagt Artikel 512 des türkischen Obligationenrechts, dass „*der Auftraggeber und der Auftragnehmer den Vertrag jederzeit einseitig kündigen können*", womit die Verwendung unterschiedlicher Begriffe in Bezug auf die Erklärungen der Parteien zur Beendigung des Vertrags aufgegeben wird.

3 Walter Fellmann, Berner Kommentar (Art. 394-406 OR), Stämpfli Verlag, Bern, 1992, Art. 404, N. 8; Georg Gautschi; Berner Kommentar (Art. 394-406 OR), Stämpfli Verlag, Bern, 1971, Art. 404, N. 10b; Hugo Oser / Wilhelm Schönenberger, Kommentar Schweizerischen Zivilgesetzbuch, Obligationenrecht, 2. Teil (Halbband), Art. 184-418, Zürich 1936, Art. 404, N. 1; Eugen Bucher, Schweizerisches Obligationenrecht / Besonderer Teil, Zürich 1988, p. 227; Carl Dürr, Werkvertrag und Auftrag der 363 bis 379 und 394 bir 406 OR, Verlag Dürr, 1983, p. 182; Suat Sarı; Vekâlet Sözleşmesinin Tek Taraflı Olarak Sona Erdirilmesi, Beşir Kitabevi, 2004, p. 69 ff; Müge Ürem, Vekâlet Sözleşmeleri Kısa Şerhi, Aristo Yayınevi İstanbul, 2017, p. 148; Akıncı, p. 60; K. Emre Gökyayla, Avukatlık Sözleşmesinin Avukatın Azli ve İstifasıyla Sona Ermesi, Seçkin Yayıncılık, Ankara, 2007, p. 52; Şebnem Akipek, Alt Vekâlet, Yetkin Yayınları, Ankara, 2003, p. 238-239; Mustafa Alper Gümüş, Borçlar Hukuku Özel Hükümler Cilt II, Vedat Kitapçılık, İstanbul, 2012, p. 187; Mustafa Alper Gümüş, Borçlar Hukuku Özel Hükümler (Kısa Ders Kitabı), Filiz Kitabevi, İstanbul, 2022, s. 452; Aydın Zevkliler / K. Emre Gökyayla, Borçlar Hukuku Özel Borç İlişkileri, Vedat Kitapçılık, İstanbul, 2020, p. 671-672; Öz Seçer, İstanbul Şerhi / Türk Borçlar Kanunu / Özel Borç İlişkileri, Vedat Kitapçılık, İstanbul, 2018, Art. 512, N. 1. Bu yönde bkz. Yarg. 3 HD., 03/08/2021, E. 2020/5025, K. 2021/2396. Für eine ausführliche Analyse der Art. 512 des tOR zugrunde liegenden Überlegungen siehe Sarı, 65 ff.

Ziel unserer Studie ist es, Artikel 512 des türkischen Obligationenrechts zu untersuchen, der es dem Auftraggeber und dem Auftragnehmer erlaubt, die Beziehung zwischen ihnen einseitig zu beenden, und in diesem Zusammenhang die Rechtsnatur dieses Rechts, seine Anwendung, seine Auswirkungen auf den Vertrag und seine Folgen für die Parteien zu untersuchen. Eine weitere Frage, die in diesem Zusammenhang zu beantworten ist, ist die, ob das in Artikel 512 des türkischen Obligationenrechts geregelte Kündigungsrecht von den Parteien eingeschränkt werden kann, d.h. ob die Bestimmung zwingenden Charakter hat. Diese Fragen werden im Folgenden unter den entsprechenden Überschriften bewertet.

II. Rechtsnatur und Ausübung des in Artikel 512 des türkischen Obligationenrechts geregelten Rechts auf Vertragsbeendigung

Das den Parteien in Artikel 512 des türkischen Obligationenrechts eingeräumte Recht wird mit einer einseitigen Willenserklärung ausgeübt und beendet das Vertragsverhältnis mit dessen Zugang bei der anderen Partei[4]. Aus diesem Grund wird vertreten, dass die Rechtsnatur des fraglichen Rechts ein Gestaltungsrecht ist[5]. Wie bei anderen Gestaltungsrechten auch, kann das Recht aus Artikel 512 des türkischen Obligationenrechts nicht widerrufen werden, da es sich mit seiner Ausübung erschöpft. Einige Autoren in der Lehre sind jedoch der Meinung, dass das ausgeübte Recht widerrufen werden kann, wenn die Parteien sich einigen oder wenn die Interessen der anderen Partei nicht beeinträchtigt werden[6]. Da das Vertragsverhältnis zwischen den Parteien mit der Ausübung des Rechts aus Artikel 512 des türkischen Obligationenrechts beendet wird, ist es unseres Erachtens nicht mehr möglich, dieses Rechtsverhältnis durch den Widerruf des Rechts wieder aufleben zu lassen. Einigen sich die Parteien später auf die Fortsetzung des Auftragsverhältnisses, so ist dies als neuer Vertrag und nicht als Widerruf zu werten. Aufgrund der analogen Anwendung von Artikel 10 des türkischen Obligationenrechts ist es jedoch möglich, die Kündigungserklärung vor ihrem Zugang bei der anderen Partei oder vor ihrem

4 In der Meinung, dass die Erklärung vom Beauftragter erlernt werden muss, damit sie wirksam ist, siehe: Ahmet M. Kılıçoğlu, Borçlar Hukuku Özel Hükümler, Turhan Kitabevi, Ankara, 2021, p. 555.

5 Fellmann, Art. 404, N. 31; Oser / Schönenberger, Art. 404, N. 4; Gautschi, Art. 404, N. 8d; Roland Bühler, Der Auftrag / OR Handkommentar, Schweizeriches Obligationenrecht, Bern, 2009, Art. 404, N. 2; Peter Gauch, "Art. 404 OR - Sein Inhalt, seine Rechtfertigung und die Frage seines zwingenden Charakters", Recht 1992 / Heft 1, p. 10; Jürg Peyer, Der Widerruf im Schweizerischen Auftragsrecht, Schulthess, Zürich, 1974, p. 124; Rolf H. Weber, , Basler Kommentar / Obligationenrecht I, Helbing Lichtenhahn Verlag, Basel, 2019; Art. 404, N. 5; Haluk Tandoğan, Borçlar Hukuku / Özel Borç İlişkileri C. II, İstanbul 2010, p. 620; Sarı, p. 89; Ürem, p. 149; Akipek, p. 75; Öz Seçer, "Vekâlet Sözleşmesinin Vekâlete Özgü Sebeplerle Sona Ermesi", İnönü Üniversitesi Hukuk Fakültesi Dergisi, 2015 / Volume: 6 – Issue: 4; s. 822; Gökyayla, p. 43; Gümüş, Borçlar Hukuku Özel Hükümler Cilt II, p. 187-188; Gümüş, p. 452; Zevkliler / Gökyayla, p. 673; Akıncı, p. 56; Kılıçoğlu, p. 555; Seçer, Kommentar, Art. 512, N. 7. Zu den Entscheidungen des türkischen Obersten Gerichtshofs in dieser Richtung siehe: Yarg. 13 HD., 07/04/2016, E. 2015/12779, K. 2016/9780; Yarg. 1 HD., 23/10/2021, E. 2021/1620, K. 2021/15484; Yarg. 13 HD., 26/06/2018, E. 2016/226, K. 2018/7283; Yarg. 13 HD., 20/06/2018, E. 2016/16661, K. 2018/6898; Yarg. 13 HD., 11/04/2018, E. 2015/40736, K. 2018/4394.

6 Fellmann, Art. 404, N. 31-31

Wirksamwerden durch eine Widerrufserklärung zu widerrufen, die spätestens bei ihrem Zugang bei der anderen Partei abzugeben ist[7].

Eine weitere Folge des in Artikel 512 des türkischen Obligationenrechts geregelten Rechts ist, dass es bedingungsfeindlich ist. In der Lehre wird jedoch zu Recht argumentiert, dass die Ausübung von Gestaltungssrechten an eine Bedingung geknüpft werden kann, die keine Rechtsunsicherheit für die andere Partei bilden[8]. Daher kann das Recht aus Artikel 512 des türkischen Obligationenrechts auch unter einer Bedingung ausgeübt werden, die die andere Partei nicht in eine unsichere Lage bringt. Insbesondere kann das betreffende Recht unter einer Bedingung ausgeübt werden, deren Verwirklichung vom Willen der anderen Partei abhängt. Wenn beispielsweise erklärt wird, dass eine bestimmte Arbeit von der anderen Partei innerhalb eines bestimmten Zeitraums ausgeführt werden muss, da andernfalls das Auftragsverhältnis gemäß Artikel 512 des türkischen Obligationenrechts beendet wird, kann man sagen, dass die Erfüllung der Bedingung vom Willen der anderen Partei abhängt[9].

Wie bereits erwähnt, reicht nach Artikel 512 des türkischen Obligationenrechts eine einseitige Willenserklärung für die Beendigung eines Auftragsvertrags aus. Die Erklärung kann sowohl an die Gegenpartei als auch an deren (bevollmächtigten) Vertreter gerichtet werden. In der Lehre wird jedoch die Auffassung vertreten, dass auch Erklärungen, die gegenüber Personen abgegeben werden, bei denen davon ausgegangen werden kann, dass sie die Erklärung der anderen Partei übermitteln (z. B. der Ehegatte der anderen Partei, das Kind, das mit der anderen Partei in einem Haushalt lebt), als gültig angesehen werden sollten, selbst wenn die Erklärung nicht genehmigt ist. Diese Autoren erklären, dass die Willenserklärung in solchen Fällen ab dem Zeitpunkt wirksam ist, zu dem die andere Partei die Möglichkeit hat, von ihrem Inhalt Kenntnis zu nehmen[10]. Unseres Erachtens kann in solchen Fällen nur dann davon gesprochen werden, dass die Erklärung an die andere Partei gerichtet ist, wenn die betreffenden Dritten als Boten der Person, die die Kündigungserklärung abgibt, angesehen werden können.

Nach Artikel 512 des türkischen Obligationenrechts ist die Ausübung des Kündigungsrechts an keine Formvorschriften gebunden. Daher ist es möglich, diesen Vertrag formfrei zu kündigen, auch wenn das Zustandekommen des entsprechenden

7 Zu ähnlichen Einschätzungen bezüglich des in Artikel 39 des türkischen Schuldrechts geregelten Widerrufsrechts, das ein weiteres innovatives Recht zur Beendigung des Vertragsverhältnisses darstellt, siehe M. Tolga Özer, Medeni Hukukta Hata Kavramı, On İki Levha Yayınları, İstanbul, 2019, p. 244.

8 Ausführliche Informationen zu diesem Thema siehe Vedat Buz, Medeni Hukukta Yenilik Doğuran Haklar, Yetkin Yayınları, Ankara, 2005, p. 258 ff.

9 Fellmann, Art. 404, N. 38; Gautschi, Art. 404, N. 8c; Weber, Art. 404, N. 6; Hofstetter, p. 58; Sarı, p. 89; Gökyayla, p. 50.

10 Fellmann, Art. 404, N. 27.

Auftrags formgebunden ist[11]. Es ist jedoch möglich, dass die Parteien die Ausübung des Rechts im gegenseitigen Einvernehmen von einem vereinbarten Formerfordernis abhängig machen[12]. In diesem Fall führen Erklärungen, die ohne Einhaltung der freiwilligen Form abgegeben werden, nicht zur Beendigung des Auftragsverhältnisses.

Da es im Gesetz keine Beschränkung hinsichtlich der Form der Erklärung gibt, gibt es auch keine Beschränkung hinsichtlich des Inhalts der Erklärung. Daher ist es nicht zwingend erforderlich, dass eine gültige Erklärung einen Ausdruck wie „Entlassung", „Rücktritt" usw. enthält. Es reicht aus, dass die Absicht, den Vertrag zu kündigen, aus der betreffenden Erklärung zu entnehmen ist. Wenn diese Absicht nachvollziehbar ist, wird die Wirkung der Erklärung auch dann nicht beeinträchtigt, wenn der Bevollmächtigte eine falsche Formulierung verwendet, z. B. „Ich bin zurückgetreten" anstelle von „Ich habe gekündigt"[13].

Im Rahmen von Artikel 512 des türkischen Obligationenrechts ist für die Beendigung des Vertragsverhältnisses keine Kündigungsfrist gegenüber der anderen Partei erforderlich. Es ist jedoch möglich, dieses Recht für einen bestimmten Zeitraum auszuüben. In diesem Fall bleibt das Auftragsverhältnis zwischen den Parteien bis zum Ablauf der genannten Frist bestehen, und der Vertrag wird mit Ablauf der Frist beendet[14].

Ein letzter Punkt, der in Bezug auf die Ausübung des in Artikel 512 des türkischen Obligationenrechts geregelten Kündigungsrechts hervorzuheben ist, ist die Frage, wie dieses Recht ausgeübt werden kann, wenn es mehr als einen Auftraggeber oder Bevollmächtigten gibt. In diesem Fall kann man in der Regel sagen, dass jede Person ein eigenständiges Kündigungsrecht hat. Daher ist es möglich, das Auftragsverhältnis nur mit einem oder mehreren von ihnen zu beenden und das Vertragsverhältnis mit den anderen fortzusetzen. Im konkreten Fall, in dem die Auftraggeber oder Beauftragter zusammen eine Erbengemeinschaft oder eine ähnliche Rechtsgemeinschaft bilden, sind jedoch die einschlägigen Vorschriften zu beachten und entsprechend zu handeln[15]. Wenn die Grundlage des gemeinsamen Auftrags beispielsweise ein Gemeinschaftsunternehmen ist, kann die Vereinbarung nur mit Zustimmung aller Auftraggeber gekündigt werden[16].

11 Die Beweislast dafür, dass die Erklärung abgegeben wurde, liegt bei der Partei, die den Vertrag kündigt (Fellmann, Art. 404, N. 28).

12 Fellmann, Art. 404, N. 34; Hofstetter, p. 58; Sarı, p. 87. In den Fällen, in denen die Bestimmung zwingend ist, kann keine Formvorschrift vereinbart werden, die die Ausübung der Kündigungs- und Rücktrittsrechte erheblich erschwert und diese Rechte daher einschränkt (Hofstetter, p. 58, fn. 28; Sarı, p. 87).

13 Fellmann, Art. 404, N. 35.

14 Gautschi, Art. 404, N. 8c und 14a; Fellmann, Art. 404, N. 36.

15 Fellmann, Art. 404, N. 45; Hofstetter, p. 145; Sarı, p. 231.

16 Sarı, p. 231.

III. Anwendungsbereich von Artikel 512 des türkischen Obligationenrechts

Eine weitere Frage, die es zu beantworten gilt, ist, ob der Anwendungsbereich von Artikel 512 des türkischen Obligationenrechts nur auf Auftragsverträge beschränkt ist oder ob er auch für Sui-generis- und gemischte Verträge gilt.

Art. 502 des türkischen Obligationenrechts legt fest, dass die Bestimmungen des Gesetzes über den Auftragsvertrag auch für die Erfüllung von Verträgen über Arbeitsleistung, die keiner besonderen Vertragsart des Gesetzes unterstellt sind, gelten, soweit sie angemessen sind. Wie man sieht, hat der Gesetzgeber nicht festgelegt, dass alle Vorschriften über den Auftrag in allen Fällen auf sui generis Verträge anzuwenden sind, sondern nur die Vorschriften, die im konkreten Fall für das Rechtsverhältnis „angemessen" sind.

Der Grund für die Einführung der Bestimmung in Artikel 512 des türkischen Obligationenrechts ist der Schutz des Vertrauensprinzips, das die Grundlage der Auftragsverträge bildet. Da das bestehende Auftragsverhältnis unerträglich werden kann, wenn dieses Vertrauensverhältnis aus irgendeinem Grund beschädigt wird, hat der Gesetzgeber den Parteien durch Artikel 512 des türkischen Obligationenrechts die Möglichkeit gegeben, sich vom Vertrag zu lösen. Daher kann gesagt werden, dass Artikel 512 des türkischen Obligationenrechts auf Verträge sui generis anwendbar ist, die wie der Auftragsvertrag auf dem Grundsatz des Vertrauens beruhen. Mit anderen Worten: Die Bestimmung ist nicht auf Verträge anwendbar, die nicht auf ein besonderes Vertrauensverhältnis beruhen.

Unseres Erachtens ist Artikel 512 des türkischen Obligationenrechts nur dann anwendbar, wenn die Sorgfalts- und Loyalitätspflicht die dominierende Leistung in dem betreffenden Vertrag sind und ein Vertrauensverhältnis zwischen den Parteien besteht[17].

VI. Die Wirkung der Vertragskündigung im Rahmen von Artikel 512 des türkischen Obligationenrechts

A. Allgemein

Um festzustellen, ob die Wirkung des in Artikel 512 des türkischen Obligationenrechts geregelten Kündigungsrechts ex tunc oder ex nunc eintritt, ist es wichtig, festzustellen, ob schon mit der Besorgung des beauftragten Geschäftes/ Erfüllung des Vertrags begonnen wurde. Bei Dauerschuldverhältnissen wird der Vertrag mit Wirkung für die Zukunft gekündigt, wenn mit der Ausführung der

17 Vgl. Sarı, 325-326; Ürem, p. 154. Für einen Entscheid des Schweizerischen Bundesgerichts, wonach Art. 404 OR, der im Schweizer Recht Art. 512 tOR entspricht, auch auf gemischte Verträge angewendet werden kann, die Leistungen im Zusammenhang mit dem Auftragsvertrag enthalten, siehe BGE 109 II 462.

Arbeiten begonnen wurde, die Arbeiten aber noch nicht abgeschlossen sind. In diesem Fall ist die Art des Rechts, das gemäß Artikel 512 des türkischen Obligationenrechts ausgeübt wird, die Kündigung[18].

Wird der Vertrag hingegen vor Beginn der Ausführung der Arbeiten gekündigt, wird das Auftragsverhältnis rückwirkend aufgelöst. Mit anderen Worten ist die Art des Rechts der Widerruf. Insbesondere in den Fällen, in denen die im Rahmen der Auftragsvereinbarung zu erbringenden Leistungen den Charakter einer sofortigen Leistung haben, kann der Vertrag nur dann rückwirkend gekündigt werden, wenn die Verpflichtung zur Erbringung der Leistung nicht erfüllt wurde[19].

In den Fällen, in denen die im Rahmen des Auftragsvertrags auszuführenden Arbeiten abgeschlossen sind, ist eine einseitige Kündigung des Vertrags gemäß Artikel 512 des türkischen Obligationenrechts nicht mehr möglich. Denn die Parteien können die nicht vollständig erfüllten Auftragsverträge nur im Rahmen von Artikel 512 des türkischen Obligationenrechts einseitig kündigen[20].

In den Fällen, in denen das Auftragsverhältnis mit Wirkung für die Zukunft beendet wird, werden die bis zum Zeitpunkt der Beendigung entstandenen Ansprüche von der Beendigung des Vertrags nicht berührt. Aus diesem Grund besteht die Verpflichtung der Beauftragter, über die bis zum Zeitpunkt der Beendigung getätigten Geschäfte Rechenschaft abzulegen. Darüber hinaus ist der Beauftragte auch verpflichtet, das zurückzugeben, was er vom Auftraggeber für die Erfüllung des Vertrages oder aufgrund der Erfüllung des Vertrages erhalten hat[21].

Die Beendigung des Vertrages beseitigt nicht die Verpflichtung des Auftraggebers, im Rahmen der Treuepflicht Geheimnisse zu wahren. Wie in der Doktrin, insbesondere im Hinblick auf die Geheimhaltungspflicht, richtig festgestellt wird, macht es keinen Unterschied, ob das Auftragsverhältnisses rückwirkend oder in die Zukunft wirkend beendet wird. Denn mit der Aufnahme der Vertragsverhandlungen und dem Bekanntwerden bestimmter Geheimnisse in diesem Rahmen entsteht für den Beauftragter eine von der Leistungspflicht unabhängige Geheimhaltungspflicht, die auf dem Gebot der Ehrlichkeit beruht. Die rückwirkende Beendigung des Auftragsvertrags beseitigt diese Verpflichtung der Beauftragten nicht[22].

18 Ürem, p. 155; Fellmann, Art. 404, N. 29; Sarı, 257. Zu den Entscheidungen des türkischen Obersten Gerichtshofs über die Beendigung des Vertretungsverhältnisses mit Wirkung für die Zukunft gemäß Artikel 512 des tOR siehe: Yarg. 1 HD., 23/10/2021, E. 2021/1620, K. 2021/15484; Yarg. 13 HD., 24/10/2018, E. 2016/2876, K. 2018/10010; Yarg. 13 HD., 26/06/2018, E. 2016/226, K. 2018/7283; Yarg. 13 HD., 20/06/2018, E. 2016/16661, K. 2018/6898; Yarg. 13 HD., 11/04/2018, E. 2015/40736, K. 2018/4394.

19 Sarı, p. 256; Ürem, p. 156.

20 Fellmann, Art. 404, N. 29; Oser / Schönenberger, Art. 404, N. 4; Weber, Art. 404, N. 7; Sarı, p. 256.

21 Fellmann, Art. 404, N. 30; Sarı, p. 294; Seçer, Kommentar, Art. 512, N. 26. Selbst wenn im Vertrag ein anderes Datum für die Fälligkeit dieser Rückgabepflicht festgelegt ist, wird die Verpflichtung des Vertreters zur Rückgabe der Forderungen fällig, wenn das Auftragsverhältnis gemäß Artikel 512 des türkischen Obligationenrechts beendet, wird Sarı, p. 294.

22 Fellmann, Art. 398, N. 77; Weber, Art. 398, N. 8; Hofstetter, p. 114; Gautschi, Art. 398, N. 5d; Sarı, p. 305-306. Siehe Sarı,

Was die Pflichten des Auftraggebers betrifft, so ist, wenn zwischen den Parteien eine Vereinbarung über die Zahlung eines Honorars / einer Gegenleistung an der Beauftragten oder ein entsprechender Brauch besteht, das Entgelt für die bis zum Zeitpunkt der Beendigung des Auftraggebers geleistete Arbeit an der Beauftragten zu zahlen. Der Auftraggeber ist verpflichtet, dieses Honorar zu zahlen, auch wenn er keinen Nutzen aus dem ausgeführten Teil der Arbeit zieht[23]. Der Grund dafür ist, dass der Beauftragter sich im Vertrag zu einem beliebigen Ergebnis verpflichtet hat, und selbst wenn der Vertrag vollständig erfüllt wird, besteht die Möglichkeit, dass der Auftraggeber nicht davon profitiert. Einige Autoren in der Lehre vertreten jedoch die Auffassung, dass der Auftraggeber, wenn die Kündigung aus Gründen erfolgt, die beim Auftraggeber liegen, nur Anspruch auf das Honorar für den Teil der geleisteten Arbeit hat, aus dem der Auftraggeber Nutzen zieht[24]. Diese Auffassung entbehrt jedoch unserer Meinung nach jeder rechtlichen Grundlage. Der Auftraggeber kann jedoch die Ausgleichsforderung aufgrund der Pflichtverletzung der Beauftragten mit der Lohnverpflichtung gegenüber dem Auftraggeber anrechnen.

Eine weitere Verpflichtung des Auftraggebers besteht darin, dem Beauftragter die Kosten für die bis zum Zeitpunkt der Beendigung des Auftraggebers geleistete Arbeit zu erstatten und ihn von den Schulden zu befreien, die er zu diesem Zweck eingegangen ist. Die Tatsache, dass die Arbeiten bis zum Zeitpunkt der Beendigung begonnen wurden, reicht für die Geltendmachung der Kosten aus; die betreffenden Arbeiten müssen nicht abgeschlossen sein[25]. In der Regel ist es nicht möglich, der Beauftragten die Kosten geltend zu machen, die ihm vor Aufnahme seiner Tätigkeit entstanden sind. Wenn die Kündigung jedoch zu einem ungünstigen Zeitpunkt erfolgt ist, kann der Beauftragter diese Kosten im Rahmen der Entschädigung geltend machen[26].

B. Auswirkung auf die Unterauftragsvereinbarung

In Fällen, in denen der Bevollmächtigte befugt ist oder die Situation zwingend oder üblich ist, ist es möglich, die Arbeit ganz oder teilweise von einem Dritten ausführen zu lassen und in diesem Rahmen einen Unterbevollmächtigungsvertrag zu schließen (siehe Artikel 506/1 des türkischen Obligationenrechts). Bei Beendigung des Hauptvertrags entfällt in der Regel auch der erwartete Nutzen aus

p. 306, dass die Verpflichtung zur Geheimhaltung nur dann endet, wenn die betreffenden Informationen ihren geheimen Charakter verlieren oder das Interesse des Auftraggebers an diesen Geheimnissen verschwindet.

23 Artikel 174/2 des Rechtsanwaltsgesetzes sieht vor, dass der Rechtsanwalt im Falle der Entlassung Anspruch auf das gesamte vereinbarte Honorar hat. In der Fortsetzung der Vorschrift ist jedoch geregelt, dass der Rechtsanwalt keinen Anspruch auf ein Honorar hat, wenn die Entlassung auf ein Verschulden des Anwalts zurückzuführen ist.

24 Hofstetter, p. 84.

25 Fellmann, Art. 404, N. 30; Gauch, p. 10; Weber, Art. 404, N. 30, Sarı, p. 283; Ürem, p. 156; Akipek, p. 67; Tandoğan, p. 631; Gökyayla, p. 55; Seçer, p. 894; Seçer, Kommentar, Art. 512, N. 26.

26 Sarı, p. 283.

dem Untervertrag. Da es sich bei diesen beiden Verträgen jedoch um unabhängige Rechtsverhältnisse handelt, führt die Beendigung des Hauptauftragsvertrags gemäß Artikel 512 des türkischen Obligationenrechts nicht automatisch zur Beendigung des Unterauftragsvertrags[27]. Obwohl Artikel 507/3 des türkischen Obligationenrechts vorsieht, dass der Bevollmächtigte die Rechte des Auftraggebers gegenüber dem Unterbevollmächtigten geltend machen kann, erlaubt diese Bestimmung dem Bevollmächtigten nicht, einen Vertrag zu kündigen, an dem er nicht beteiligt ist[28]. Es ist jedoch möglich, dass die Parteien diese Vereinbarung im Rahmen von Artikel 512 des türkischen Obligationenrechts kündigen, wenn für die Untervermittlungsvereinbarung kein Nutzen mehr besteht, da der Hauptvertrag gekündigt wurde. Wenn der Hauptvermittler in einem solchen Fall verpflichtet ist, dem Untervermittler einen Ausgleich zu zahlen, weil er den Untervermittlungsvertrag zu einem unangemessenen Zeitpunkt gekündigt hat, ist es unseres Erachtens möglich, dass der gezahlte Betrag vom Hauptvermittler zurückgefordert werden kann, wenn der Hauptvermittler den Untervermittlungsvertrag zu einem unangemessenen Zeitpunkt gekündigt hat.

V. Beendigung des Vertrags zu einem unangemessenen Zeitpunkt

A. Die Rechtsgrundlage des Schadensersatzanspruchs wegen unzulässiger Vertragsbeendigung gemäß Artikel 512 / S. 2 des türkischen Obligationenrechts

Nach Artikel 512 des türkischen Obligationenrechts können die Parteien den Auftragsvertrag ohne zeitliche Begrenzung kündigen. Wird von diesem Kündigungsrecht Gebrauch gemacht, muss in der Regel der Schaden, der der anderen Partei durch die Vertragsbeendigung entsteht, nicht ersetzt werden. Eine Ausnahme bildet die Beendigung des Vertrags zu einem unpassenden Zeitpunkt. Dementsprechend ist die Partei, die den Vertrag zu einem ungünstigen Zeitpunkt kündigt, verpflichtet, den der anderen Partei entstandenen Schaden zu ersetzen (siehe Artikel 512/ S. 2 des türkischen Obligationenrechts). Obwohl dies im Wortlaut des Artikels nicht ausdrücklich erwähnt wird, sollte die Bestimmung unseres Erachtens weit ausgelegt werden, und angenommen werden, dass die kündigende Partei auch eine Entschädigung im Rahmen von Artikel 512 / S. 2 des türkischen Obligationenrechts verlangen kann, wenn die andere Partei die Beendigung des Vertrags zu einem unpassenden Zeitpunkt verursacht.

Die Rechtsgrundlage der Entschädigungsvorschrift nach Artikel 512 des tOR ist

27 Fellmann, Art. 404, N. 46; Weber, Art. 404, N. 7; Gautschi, Art. 404, N. 13a; Oser / Schönenberger, Art. 404, N. 7; Tandoğan, p. 644; Akipek, p. 236 ve 239; Gökyayla, p. 135, Seçer, p. 903. In Bezug auf die Vollmacht endet mit dem Erlöschen der dem Hauptbevollmächtigten vom Hauptbevollmächtigten erteilten Vollmacht auch die dem Unterbevollmächtigten im Rahmen dieser Vollmacht erteilte Untervollmacht.

28 Fellmann, Art. 404, N. 46.

umstritten. Nach einer Ansicht in der Lehre besteht eine Schadensersatzpflicht aus der Verletzung der den Parteien durch den Auftragsvertrag auferlegten Treuepflicht[29]. Diesen Autoren zufolge besteht eine der Pflichten des Bevollmächtigten im Auftragsvertrag in der Treuepflicht gegenüber dem Auftraggeber, und der Bevollmächtigte ist verpflichtet, die Interessen des Auftraggebers zu schützen. Eine der Ausprägungen dieser Treuepflicht ist, dass der Beauftragter das Vertragsverhältnis nicht zu einem unpassenden Zeitpunkt beenden sollte. Der Bevollmächtigte muss auch die Interessen des Auftraggebers schützen, wenn er sein Recht aus Artikel 512 des tOR ausübt. Kündigt der Beauftragter das Vertragsverhältnis zu einem unpassenden Zeitpunkt, ohne die Interessen des Auftraggebers zu berücksichtigen, so haftet er gemäß Artikel 512 / S. 2 des türkischen Obligationenrechts wegen Verletzung der Treuepflicht auf Schadensersatz. Aus der Sicht des Auftraggebers hat er zwar keine besondere Verpflichtung aus dem Auftragsvertrag, die Interessen des Bevollmächtigten zu schützen, muss jedoch einem Mindestmaß an Sorgfalt und Loyalität beachten. Kündigt der Auftraggeber den Vertrag zu einem unpassenden Zeitpunkt ohne rechtfertigenden Grund, so ist er verpflichtet, dem Beauftragter den entstandenen Schaden zu ersetzen, da er diese Pflicht verletzt hat. Die Autoren, die diese Auffassung vertreten, gehen jedoch davon aus, dass, da der Auftraggeber im Rahmen des Auftragsvertrages keine besonderen Sorgfalts- und Treuepflichten hat, die Grenze für die unzulässige Zeit für ihn enger gehalten werden sollte. Dementsprechend ist der Auftraggeber nur dann verpflichtet, der anderen Partei eine Entschädigung zu zahlen, wenn er sein Recht aus Artikel 512 des türkischen Obligationenrechts missbraucht.[30].

Eine andere Meinung in der Lehre, der wir uns ebenfalls anschließen, ist, dass das Recht zur Vertragsbeendigung gemäß Artikel 512 des türkischen Obligationenrechts ein vom Gesetz anerkanntes Recht ist und dass selbst dann, wenn dieses Recht zu einem unpassenden Zeitpunkt ausgeübt wird, keine Pflichtverletzung genannt werden kann. Mit anderen Worten: Man kann nicht sagen, dass derjenige, der ein ihm vom Gesetz eingeräumtes Recht nutzt, schuldhaft gehandelt hat. Daher sollte die in Artikel 512 / S. 2 des türkischen Obligationenrechts geregelte Schadensersatzpflicht als rechtliche Verpflichtung charakterisiert werden[31].

Der für die Praxis wichtige Unterschied zwischen den beiden Auffassungen besteht darin, dass bei Annahme der in Art. 512 / S. 2 des türkischen Obligationenrechts

29 Fellmann, Art. 404, N. 49 ff; Gautschi, Art. 404, N. 18a; Oser / Schönenberger, Art. 404, N. 8; Tandoğan, p. 639-640; Gökyayla, p. 115; Akıncı, p. 114.

30 Fellmann, Art. 404, N. 53.

31 Gauch, p. 11-12; Hofstetter, p. 71; Weber, Art. 404, N. 16; Peyer, p. 129; Peter Derendinger, Die Nicht und die Nichtrichtige Erfüllung des Einfaches Auftrages, Freiburg 1988, p. 73; Sarı, p. 130 ff; Seçer, p. 898; Seçer, Kommentar, Art. 512, N. 33. Für eine Entscheidung des türkischen Obersten Gerichtshofs, die besagt, dass die Grundlage der gemäß Artikel 512 / c / 2 des TMK geforderten Entschädigung keine Schuldverletzung ist, siehe: Yarg. 23 HD., 09/09/2020, E. 2017/950, K. 2020/2675.

geregelten Rechtsgrundlage der Entschädigung als Pflichtverletzung die Partei, die den Vertrag zur Unzeit kündigt, von der Haftung befreit wird, wenn sie beweist, dass sie verschuldensfrei ist[32]. Nach Artikel 112 des türkischen Obligationenrechts wird eine Person, die ihre vertraglichen Pflichten verletzt, von der Haftung befreit, wenn sie beweist, dass sie diesbezüglich kein Verschulden trifft. Wird hingegen die Rechtsauffassung vertreten, dass die Partei, die das Auftragsverhältnis zu einem unpassenden Zeitpunkt beendet, verpflichtet ist, den der anderen Partei entstandenen Schaden zu ersetzen, unabhängig davon, ob sie ein Verschulden trifft oder nicht, so besteht für die entsprechende Partei keine Möglichkeit der Haftungsbefreiung.

B. Das Konzept der unangemessenen Zeit

Gemäß Artikel 512 / S. 2 des türkischen Obligationenrechts muss der Vertrag zu einem ungünstigen Zeitpunkt gekündigt werden, um eine Entschädigung zu erhalten. Andererseits gibt es im Gesetz keine Klarheit darüber, was unter dem Begriff der „unangemessenen Zeit" zu verstehen ist. In der Doktrin wird zu Recht darauf hingewiesen, dass die unangemessene Zeit für den Auftraggeber und den Auftragnehmer getrennt zu bewerten ist[33].

Aus der Sicht des Auftraggebers kann man sagen, dass das Recht aus Artikel 512 des türkischen Obligationenrechts zu einem unangemessenen Zeitpunkt ausgeübt wird, wenn die Beendigung des Vertrags zu diesem Zeitpunkt der Beauftragter einen schweren Schaden zufügt und der Auftraggeber sich dieser Situation bewusst ist oder zumindest bewusst sein müsste. Insbesondere in den Fällen, in denen der Bevollmächtigte bestimmte Vorbereitungen für die Ausführung der der Auftrag unterliegenden Arbeiten getroffen hat (z. B. Absprachen mit Dritten) und es nicht möglich ist, diese zu widerrufen, oder in den Fällen, in denen der Auftraggeber die für die Ausführung der Arbeiten angefallenen Vorbereitungskosten im Falle der Beendigung des Vertrags nicht vom Beauftragter verlangen kann, kann nun von einer Beendigung des Vertrags zu einem unangemessenen Zeitpunkt gesprochen werden[34]. Ebenso kann der Auftraggeber in Fällen, in denen der Beauftragte eine andere Arbeitsgelegenheit ablehnt, um den aktuellen Auftrag im Rahmen eines entgeltlichen Auftragsvertrags zu erhalten, für den Fall, dass der Beauftragte aufgrund der Beendigung des Vertrags keinen Anspruch auf das vertraglich vereinbarte Honorar hat, gemäß Artikel 512 / S. 2 des türkischen Obligationenrechts zum Schadensersatz verpflichtet werden[35]. Eine der in der Lehre vertretenen Auffassungen verlangt als zusätzliche Bedingung, dass diese Möglichkeit für den Beauftragter unvorhersehbar sein muss, um sagen zu können, dass dieser den Vertrag zu einem unangemessenen Zeitpunkt gekündigt

32 Fellmann, Art. 404, N. 81; Sarı, 132-133; Gauch, p. 12.

33 Fellmann, Art. 404, N. 51.

34 Fellmann, Art. 404, N. 55; Oser / Schönenberger, Art. 404, N. 8; Gökyayla, p. 69; Seçer, p. 895.

35 Fellmann, Art. 404, N. 56; Oser / Schönenberger, Art. 404, N. 8.

hat[36]. Wir sind hingegen der Meinung, dass diese Frage für das Entstehen des Entschädigungsanspruchs nicht von Relevanz ist. Denn auch wenn der Beauftragte das Risiko kennt, dass das Auftragsverhältnis zu einem für ihn unpassenden Zeitpunkt beendet wird, hat er keine Möglichkeit, dies zu verhindern. In diesem Fall ist es unserer Meinung nach nicht möglich, die Kenntnis der betreffenden Möglichkeit bzw. des Risikos als Grundlage für die Entstehung der Schadensersatzpflicht zu nehmen. Unseres Erachtens ist es jedoch möglich, dies bei der Berechnung des Ausgleichsbetrags zu berücksichtigen, wenn der Beauftragter trotz Kenntnis eines solchen Risikos nicht entsprechend der Schadensminderungspflicht handelt.

Wenn der Beauftragter den Vertrag zu einem Zeitpunkt kündigt, zu dem der Auftraggeber nicht die Möglichkeit hat, die vertragsgegenständliche Arbeit auf andere Weise einzusehen (z.B. ein anderer Beauftragter zu finden, der die Arbeit einsehen kann), kann man sagen, dass das Recht aus Artikel 512 des türkischen Obligationenrechts zu einem unpassenden Zeitpunkt ausgeübt wird. Wenn ein Rechtsanwalt beispielsweise kurz vor Ablauf der Beschwerdefrist zurücktritt, kann er wegen dieses Rücktritts zur Unzeit entschädigungspflichtig werden. Dies liegt daran, dass er seiner Mandantin nicht die nötige Zeit ließ, einen neuen Anwalt zu finden, um Berufung einzulegen[37]. Es sei darauf hingewiesen, dass in Fällen, in denen es um einen Auftragsvertrag geht, die Lösung, die der Auftraggeber findet/finden kann, um die Arbeit ausführen zu lassen, nicht unentgeltlich sein muss. Mit anderen Worten: Wenn es dem Auftraggeber möglich ist, die betreffende Arbeit zum Zeitpunkt des Ausscheidens des Vertreters von einer anderen Person gegen Entgelt ausführen zu lassen, kann man nicht sagen, dass der Vertrag zu einem unangemessenen Zeitpunkt gekündigt wurde[38].

Die Beweislast dafür, dass der Vertrag zu einem unangemessenen Zeitpunkt gekündigt wurde, liegt bei der Partei, die eine Entschädigung fordert [39]. Dies liegt daran, dass Artikel 512 des türkischen Obligationenrechts keine besondere Vorschrift über die Beweislast enthält und dass gemäß Artikel 190 der Zivilprozessordnung die Beweislast bei der Partei liegt, die aus der rechtlichen Schlussfolgerung, die der behaupteten Tatsache zugeschrieben wird, ein Recht zu ihren Gunsten ableitet.

C. Umfang der Entschädigung

Gemäß Artikel 512 des türkischen Obligationenrechts haftet die Partei, die das Auftragsverhältnis beendet, nur für die Schäden, die in einem kausalen Zusammenhang

36 Fellmann, Art. 404, N. 57.

37 Fellmann, Art. 404, N. 60. Es sei jedoch darauf hingewiesen, dass Artikel 41/1 des Rechtsanwaltsgesetzes folgende Bestimmung enthält: Der Rechtsanwalt, der sich freiwillig von der Verfolgung oder Verteidigung in einer bestimmten Angelegenheit zurückzieht, ist noch fünfzehn Tage lang ab dem Datum der Mitteilung an seinen Mandanten als Rechtsanwalt tätig.

38 In einer ähnlichen Richtung Fellmann, Art. 404, N. 64.

39 Fellmann, Art. 404, N. 65 und 103.

mit der Beendigung des Vertrags zu einem unangemessenen Zeitpunkt stehen. Der Gesetzgeber hat das Erfüllungsinteresse der anderen Partei im Falle der Fortsetzung des Vertrages nicht geschützt[40]. Es kann daher nicht gesagt werden, dass ein positiver Schaden im Rahmen von Artikel 512/ S. 2 des türkischen Obligationenrechts ausgeglichen wird.

Die herrschende Meinung in der Lehre ist, dass der zu ersetzende Schaden der negative Schaden ist[41]. Wir halten diese Ansicht jedoch nicht für zutreffend. Denn das negative Interesse ist der Schaden, der nicht eingetreten wäre, wenn der betreffende Vertrag nicht geschlossen worden wäre. Andererseits ist der gemäß Artikel 512 / S. 2 des türkischen Obligationenrechts zu ersetzende Schaden nicht der Schaden, der nicht entstanden wäre, wenn der Vertrag nie geschlossen worden wäre, sondern der Schaden, der nicht entstanden wäre, wenn der Vertrag zum nächstgelegenen angemessenen Zeitpunkt statt zum unangemessenen Zeitpunkt gekündigt worden wäre. Aus diesem Grund ist es unseres Erachtens nicht möglich, den im Rahmen von Artikel 512 / S. 2 des türkischen Obligationenrechts zu ersetzenden Schaden allgemein als positiven oder negativen Schaden zu bezeichnen. Je nach den Umständen des konkreten Falles ist es möglich, positive oder negative Schadenspositionen in den Entschädigungsumfang einzubeziehen[42].

Ein weiterer in der Lehre akzeptierter Punkt ist, dass die Obergrenze des im Rahmen von Artikel 512 / S. 2 des türkischen Obligationenrechts zu ersetzenden Schadens das positive Interesse ist. Erstens ist festzustellen, dass der Gesetzestext keine Obergrenze für den zu entschädigenden Betrag vorsieht[43]. Andererseits argumentieren diese Autoren, dass der maximale Schaden, der aufgrund der Beendigung des Vertrags zu einem unangemessenen Zeitpunkt geltend gemacht werden kann, der Nutzen ist, der im Falle der Erfüllung des Vertrags erzielt worden wäre. Wir halten auch diese Ansicht nicht für zutreffend[44]. Denn im Rahmen eines Auftrags wird kein Erfolg/ Ergebnis versprochen. In diesem Fall stellt sich die Frage, wie der im Falle der Vertragserfüllung zu erzielende Vorteil, d. h. das positive Interesse, zu ermitteln ist. Wenn zum Beispiel ein Rechtsanwalt kurz vor der Berufungsphase zurücktritt, ist nicht klar, ob das betreffende Urteil auch dann ergangen wäre, wenn der Anwalt

40 Fellmann, Art. 404, N. 68; Bühler, Art. 404, N. 7; Gökyayla, p. 115; Seçer, p. 899.

41 Oser / Schönenberger, Art. 404, N. 9; Gautschi, Art. 404, N. 19 a-b; Weber, Art. 404, N: 17; Akipek, p. 76; Bühler, Art. 404, N. 7; Philippe Gmür, Die Vergütung des Beauftragter Ein beitrag zum Recht des einfachen Auftrages, Freiburg 1994 s. 523; Bucher, p. 229; Tandoğan, p. 640; Ürem, p. 154; Sarı, p. 138-139; Seçer, p. 85; Zevkliler / Gökyayla, p. 675; Nil Karabağ Bulut, Medeni Kanunun 23. Maddesi Kapsamında Kişilik Hakkının Sözleşme Özgürlüğüne Etkisi, İstanbul 2014, p. 155. Für eine Entscheidung des türkischen Obersten Gerichtshofs in dieser Richtung, siehe: Yarg. 23 HD., 09/09/2020, E. 2017/950, K. 2020/2675. Für eine Entscheidung des Appellationsgerichts, siehe: Ankara BAM 23 HD., 20/10/2021, E. 2018/962, K. 2021/1505.

42 Fellmann, Art. 404, N. 70 ff.

43 Gauch, p. 12; Gautschi, Art. 404, N. 20b; Hofstetter, p. 64, fn. 60.

44 Für einen anderen Autor, der dieser Ansicht nicht zustimmt, siehe Sarı, p. 163 ff.

nicht zurückgetreten wäre.[45]. Daher ist es in diesem Fall nicht möglich, das positive Interesse auf der Grundlage der Möglichkeit, das Berufungsverfahren zu gewinnen, zu berechnen. Daher ist der Gedanke, dass die Obergrenze des gemäß Artikel 512 / S. 2 des türkischen Obligationenrechts zu haftenden Betrags der positive Schaden, d. h. das Erfüllungsinteresse, ist, unserer Meinung nach nicht gerechtfertigt.

Schließlich liegt die Beweislast für das Vorliegen und die Höhe des Schadens beim Antragsteller[46]. Wie auch das Schweizerische Bundesgericht in seinen Entscheidungen anerkannt hat, ist es jedoch möglich, dass die Parteien die Höhe der Entschädigung, die in Form eines Pauschalbetrags zu zahlen ist, im Voraus durch eine Vereinbarung festlegen[47]. In diesem Fall entfällt der Ermessensspielraum des Richters bei der Festlegung der Höhe der Entschädigung. In einem Fall, in dem Artikel 512 des türkischen Obligationenrechts als zwingend gilt, kann die Festlegung eines sehr hohen Entschädigungsbetrags durch die Parteien jedoch eine indirekte Einschränkung des den Parteien eingeräumten Rechts zur Kündigung des Vertrags bedeuten. In solchen Fällen (wenn man die Auffassung vertritt, dass die Bestimmung zwingend ist) sollte man akzeptieren, dass die Vereinbarungen über die pauschale Festlegung des Entschädigungsbetrags nichtig sind.

D. Ob die Kündigung des Vertrags aus wichtigem Grund die Schadensersatzpflicht beseitigt

Das türkische Obligationenrecht regelt zwar ausdrücklich die Beendigung einiger Arten von Verträgen aus wichtigem Grund, doch gibt es keine derartige Regelung für die Auftragsvereinbarung. Aus diesem Grund wird anerkannt, dass Artikel 512 des türkischen Obligationenrechts auch im Falle der Beendigung eines Auftragsverhältnisses aus wichtigem Grund anwendbar ist. In der Lehre wird jedoch argumentiert, dass keine Entschädigungspflicht gemäß Artikel 512/c/ 2 des türkischen Obligationenrechts entsteht, wenn die Partei, die den Vertrag kündigt, einen berechtigten Grund hat[48]. Bei der Feststellung, ob der geltend gemachte Grund gerechtfertigt ist oder nicht, können nach Ansicht der Autoren, die diese Auffassung vertreten, Artikel 435/2 des türkischen Obligationenrechts analog herangezogen werden, und die Gründe, die die Fortsetzung des Auftragsverhältnisses gemäß dem Gebot der Redlichkeit verhindern, werden als gerechtfertigt angesehen.

45 Für eine andere Auffassung, wonach der Vertreter in solchen Fällen die Verpflichtung zum Ausgleich dadurch vermeiden kann, dass er nachweist, dass die vertragliche Leistung auch dann nicht erbracht worden wäre, wenn der Vertreter den Vertrag nicht vorzeitig gekündigt hätte, siehe Fellmann, Art. 404, n. 71.

46 Fellmann, Art. 404, N. 65; Gökyayla, p. 126; Seçer, p. 902. In der gleichen Richtung, siehe: Yarg. 23 HD., 06/06/2017, E. 2015/6496, K. 2017/1683.

47 BGE 109 II 462, für den entsprechenden Teil siehe 467-468; BGE 110 II 380, für den entsprechenden Teil siehe 383; in die gleiche Richtung siehe Fellmann, Art. 404, N. 77; Weber, Art. 404, N. 10; Bühler, Art. 404, N. 7.

48 Fellmann, Art. 404, N. 84; Gautschi, Art. 404, N. 17b-c; Bühler, Art. 404, N. 5; Peyer, p. 128; Weber, Art. 404, N. 16; Gmür, p. 527; Derendinger, p. 75; Seçer, p. 897; Gümüş, Borçlar Hukuku Özel Hükümler Cilt II, p. 190-191; Zevkliler / Gökyayla, p. 674; Kılıçoğlu, p. 558; Seçer, Kommentar, Art. 512, N. 29.

Dementsprechend muss der berechtigte Grund nicht durch das Verschulden der anderen Partei verursacht worden sein. Jeder Grund, der das Vertrauensverhältnis, das die Grundlage des Auftragsvertrags bildet, beeinträchtigen kann, kann als gerechtfertigt angesehen werden. Allerdings weisen die Autoren auch darauf hin, dass geprüft werden sollte, ob das Auftragsverhältnis im konkreten Fall ein besonderes Vertrauensverhältnis erfordert.

Wir sind hingegen der Meinung, dass eine Entschädigung nur dann nicht gefordert werden kann, wenn der gerechte Grund durch ein pflichtwidriges Verhalten der anderen Partei verursacht wurde. Denn wenn die Person durch ihr eigenes Verhalten die Beendigung des Vertragsverhältnisses zu einem unpassenden Zeitpunkt herbeiführt, ist es nicht mehr möglich, unter Berufung auf diese Situation eine Entschädigung zu fordern[49]. Aufgrund der weiten Auslegung der Vorschrift ist unseres Erachtens davon auszugehen, dass die kündigende Partei auch dann eine Entschädigung im Rahmen von Art. 512 / S. 2 des türkischen Obligationenrechts verlangen kann, wenn die andere Partei die Vertragsbeendigung zu einem unpassenden Zeitpunkt veranlasst.

VI. Ob Artikel 512 des türkischen Obligationenrechts eine zwingende Vorschrift ist

Es ist umstritten, ob die Parteien das in Artikel 512 des türkischen Obligationenrechts geregelte Kündigungsrecht im gegenseitigen Einvernehmen abbedingen können, d.h. ob die genannte Regelung zwingend ist oder nicht.

In der Lehre gibt es grundsätzlich drei verschiedene Ansichten zu diesem Thema. Die erste ist, dass Artikel 512 des türkischen Obligationenrechts zwingend ist[50]. Diesen Autoren zufolge sollten die Parteien die Möglichkeit haben, den Vertrag aufzulösen, sobald das Vertrauensverhältnis, das die Grundlage des Auftragsvertrags bildet, aus irgendeinem Grund beschädigt ist. Aus diesem Grund sollte Artikel 512 des türkischen Obligationenrechts, der den Parteien das Recht einräumt, das Auftragsverhältnis jederzeit und ohne Angabe von Gründen zu beenden, als zwingend angesehen werden. Nach dieser Auffassung ist es auch nicht möglich, die Beendigung des Vertrages an eine Vertragsstrafe zu knüpfen. In diesem Fall ist das Kündigungsrecht nach Artikel 512 des türkischen Obligationenrechts mittelbar eingeschränkt. Für den Fall, dass der Vertrag zu einem ungünstigen Zeitpunkt gekündigt wird, kann die Entschädigung gemäß Artikel 512 / S. 2 des türkischen Obligationenrechts im Voraus pauschal festgelegt werden[51].

49 Sarı, p. 179.

50 Oser / Schönenberger, Art. 404, N. 2-3; Gautschi, Art. 404, N. 10 ff; Bühler, Art. 404, N. 3; Hofstetter, p. 48 ff; Akipek, p. 75; Üren, p. 150; Gökyayla, p. 65; Akıncı, p. 66; Gümüş, Borçlar Hukuku Özel Hükümler Cilt II, p. 188-199; Gümüş, p. 452; Zevkliler / Gökyayla, p. 672.

51 Fellmann, Art. 404, N. 77; Bühler, Art. 404, N. 7.

Die Analyse der Entscheidungen des schweizerischen Bundesgerichts[52] und des türkischen Kassationshofs (Yargıtay)[53] zeigt, dass die höheren Gerichte diese Auffassung teilen. Es ist jedoch festzustellen, dass das Schweizerische Bundesgericht in einigen seiner Entscheidungen versucht, eine Lösung zu finden, indem es den Vertrag im konkreten Fall als Werkvertrag oder sui generis bezeichnet, wenn es einen freien Widerruf des Vertrags für unbillig hält. Das Gericht hat jedoch übersehen, dass gemäß Artikel 502 / S. 2 des türkischen Obligationenrechts auf sui generis Verträge, die die Ausführung von Arbeiten zum Gegenstand haben, zum Gegenstand haben, die Bestimmungen des Gesetzes über den Auftragsvertrag anzuwenden sind. Die Charakterisierung des Vertrags im konkreten Fall als Werkvertrag sui generis reicht daher für die Lösung des Problems nicht aus.

Eine andere Ansicht in der Lehre zur Frage, ob Artikel 512 des türkischen Obligationenrechts zwingend ist oder nicht, nimmt die Bestimmung als zwingend für typische Auftragsverträge an, während sie für atypische Auftragsverträge nicht zwingend ist[54]. Denn während typische Auftragsverträge auf dem Grundsatz des Vertrauens beruhen, ist dies bei atypischen Auftragsverträgen nicht der Fall. Daher kann in atypischen Auftragsverhältnissen, in denen das Vertrauenselement des Auftragsvertrags nicht besteht, das in Artikel 512 des türkischen Obligationenrechts geregelte Recht zur einseitigen Vertragsbeendigung aufgehoben werden.

Die letzte Meinung in der Lehre, der wir uns anschließen, ist, dass Artikel 512 des türkischen Obligationenrechts keine zwingende Vorschrift ist[55]. Die Autoren, die diese Ansicht vertreten, führen aus, dass die Parteien das Kündigungsrecht nach Artikel 512 des türkischen Obligationenrechts im Rahmen der Vertragsfreiheit aufheben können. Die Grenze liegt darin, dass die Aufhebung oder Einschränkung dieses Rechts im konkreten Fall eine Verletzung der Persönlichkeitsrechte darstellt. Insbesondere in Fällen, in denen der Vertrag im konkreten Fall stark auf Vertrauen basiert, kann gesagt werden, dass die Vertragsbestimmungen, die die Anwendung von Artikel 512 des türkischen Obligationenrechts verhindern, gegen die persönlichen Rechte verstoßen und daher gemäß Artikel 27/1 des türkischen Obligationenrechts ungültig sind. Ebenso sollten in solchen Verträgen die Bestimmungen, die das Kündigungsrecht an eine hohe Vertragsstrafenklausel binden, wegen Verletzung der Persönlichkeitsrechte gemäß Artikel 27/1 des türkischen Obligationenrechts als ungültig angesehen werden.

52 Für die Entscheidungen: BGE 57 II 187; BGE 59 II 260; BGE 104 II 108; BGE 98 II 306; BGE 109 II 462; BGE 115 II 464.

53 Für die Entscheidungen: Yarg. 13 HD., 16/06/2015, E. 2014/19562, K. 2015/20555; Yarg. 13 HD., 07/11/1997, 7395/8932.

54 Peyer, p. 183 ff; Bucher, p. 228; Gauch, p. 15 ff; Fellmann, Art. 404, N. 115 ff; Derendinger, p. 65; Weber, Art. 404, N. 10; Seçer, p. 891-892; Seçer, Kommentar, Art. 512, N. 21.

55 Sarı, p. 111 ff; Karabağ Bulut, p. 166-167.

VII. Ergebnis

Zur Zusammenfassung unserer Bewertungen ist zu sagen, dass die Rechtsnatur des Rechts zur einseitigen Vertragsbeendigung, das den Parteien des Vertretungsverhältnisses gemäß Artikel 512 des türkischen Obligationenrechts gewährt wird, ein Gestaltungsrecht darstellt. Daher kann dieses Recht, wie auch andere Gestaltungsrechte, nicht widerrufen werden, wenn es einmal ausgeübt wurde. Einigen sich die Parteien auf die Fortsetzung des Vertrags nach der Ausübung des Rechts, so ist dies als neuer Vertrag zu betrachten. Da es sich bei dem in Artikel 512 des türkischen Obligationenrechts geregelten Recht um ein Geslatungsrecht handelt, kann es in der Regel nicht unter Vorbehalt ausgeübt werden. Eine Ausnahme bildet die Ausübung des Rechts unter einer Bedingung, die die andere Partei nicht in eine unsichere Lage bringt. Insbesondere in Fällen, in denen der Eintritt der Bedingung vom Willen der anderen Partei abhängt, kann das Vorliegen einer solchen Bedingung erwähnt werden.

Artikel 502 / S.2 des türkischen Obligationenrechts sieht vor, dass die Bestimmungen über den Auftragsvertrag auch für die nicht gesetzlich geregelten Arbeitsverträge gelten, soweit sie angemessen sind. Bei der Bestimmung der Anwendung von Artikel 512 des türkischen Obligationenrechts auf andere Verträge als Auftragsverträge ist der Zweck der Bestimmung zu berücksichtigen. Der Grund für die Einführung von Artikel 512 des türkischen Obligationenrechts besteht darin, den Parteien die Möglichkeit zu geben, von dieser Vereinbarung zurückzutreten, falls das den Auftragsverträgen zugrundeliegende Vertrauensverhältnis beschädigt wird Deswegen kann gesagt werden, dass Artikel 512 des türkischen Obligationenrechts auf Verträge sui generis anwendbar ist, die wie der Auftragsvertrag auf dem Grundsatz des Vertrauens beruhen. Mit anderen Worten: Die Bestimmung ist nicht auf Verträge anwendbar, die nicht auf ein besonderes Vertrauensverhältnis beruhen.

Ob das in Artikel 512 des türkischen Obligationenrechts geregelte Kündigungsrecht prospektiv („ex tunc“) oder rückwirkend („ex nunc“) wirkt, sollte danach bestimmt werden, ob mit der Erfüllung des Vertrags begonnen wurde oder nicht. In den Fällen, in denen die Leistung bereits begonnen hat, wird der Vertrag mit Wirkung für die Zukunft gekündigt, in den Fällen, in denen die Leistung noch nicht begonnen hat, wird der Vertrag rückwirkend gekündigt.

Artikel 512 / S. 2 des türkischen Obligationenrechts ist der Schaden, der nicht entstanden wäre, wenn der Vertrag zum nächstmöglichen Zeitpunkt statt zum ungünstigen Zeitpunkt gekündigt worden wäre. Unserer Meinung nach ist es nicht möglich, diesen Schaden allgemein als positiven oder negativen Schaden zu bezeichnen. Je nach den Umständen des konkreten Falles können im Rahmen von Artikel 512 / S. 2 des türkischen Obligationenrechts die Punkte geltend gemacht

werden, die zu den beiden Arten von Schadenersatz gehören. Wird der Vertrag aufgrund einer Pflichtverletzung der Gegenpartei beendet, kann die Gegenpartei keine Entschädigung mehr verlangen.

Schließlich handelt es sich bei Artikel 512 des türkischen Obligationenrechts nach der von uns vertretenen Auffassung nicht um eine zwingende Rechtsnorm. In Fällen, in denen der Vertrag im konkreten Fall stark auf Vertrauen basiert, kann jedoch gesagt werden, dass die vertraglichen Bestimmungen, die die Anwendung von Artikel 512 des türkischen Obligationenrechts verhindern, gegen das Persönlichkeitsrecht verstoßen und daher gemäß Artikel 27 des türkischen Obligationenrechts ungültig sind.

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RESEARCH ARTICLE

Concept of Legal Aid in Civil Litigation in Accordance with the Decisions of the European Court of Human Rights

Mehmet Ertan Yardım*

Abstract
Access to a fair trial is a fundamental human right that has been addressed both in international law and in the context of the European Convention on Human Rights (ECHR). Legal aid (free or affordable legal support/assistance/service) is evaluated as one of the elements of a fair trial. The well-known sixth article of the ECHR refers directly to legal aid. However, the third paragraph of ECHR art. 6 issues only criminal offenses. The European Court of Human Rights (ECtHR) implies the right to free legal assistance (legal aid) in civil cases. In our study, we will focus on the term of legal aid, types of legal aid and main legal aid systems, features of legal aid in civil matters, subject of legal aid and litigation costs and the procedure of legal aid application and who will be granted by legal aid in civil litigation.

Keywords
Fair Trial, Access to Justice, Types of Legal Aid, Litigation Costs, Legal Aid Provisions

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I. Introduction

It would be helpful to start with the term 'legal aid'. The term legal aid has many potential meanings such as legal support, legal service or legal assistance, which has also been used in article 6. However, one of the most commonly used terms is legal aid. We think it emphasizes the urgency and necessity of the service. Legal service and legal assistance terms usually need to be used with the word 'free' to explain what is implied. As a term, 'legal support' would not clearly express the extent of legal service provided during legal aid procedures. Therefore we would prefer to use the general phrase 'legal aid' in our study.

Legal aid includes legal advice, assistance, and representation similar to any legal service. However, this is only one side of legal aid; on the other side, legal aid also includes reducing or exemption of court fees and expenses before legal bodies. Still, the critical part is that this kind of service is served free of charge or at a reduced rate with the government's financial support in many countries or with the help of social funds or charitable organizations (e.g., pro bono legal services working on civil cases in the United States). In this manner, legal aid is a financial term that indicates entirely or partly free legal service and litigation costs such as court fees and proceeding expenses. As such legal aid can be defined as free or cost-reduced legal service and/or the 'exemption of court fees and expenses' provided to people who cannot afford it/who have sufficient resources, according to jurisdictional criteria[1].

In a perfect and idealistic world, we can easily say that there should be no conditions, no criteria, or limitations on getting legal aid; everyone, whatever their situation is, should be able to obtain legal aid in any condition. An even better alternative would be providing entirely free (no charge) access to justice. But as all we know, financial resources are limited and it seems financial barriers are getting more severe in the last couple of years. Many developed countries, like the United States and England, have budget cuts on legal aid. Financial limitations increase the importance of conditions that we seek in the process of identifying who obtains legal aid and who doesn't.

Furthermore, collecting litigation costs from parties, such as court fees and expenses from proceedings and legal service fees of the adverse party, have essential functions. The distribution of litigation costs at the end of the trial according to the rightful party serves individual justice. Responsibility for litigation costs makes plaintiffs think twice before they bring a suit. And it is obvious that collecting litigation costs from parties is a significant money source for governments to sustain the justice system. Of course, those who want to access the court due to a specific demand or claim may contribute to costs. In this aspect, collecting litigation costs from parties serves social

1 Model Law on Legal Aid in Criminal Justice Systems with Commentaries, United Nations Office On Drugs And Crime, (United Nations, March 2017), 5; Ayşe Kılınç, *Medeni Usul Hukukunda Adli Yardım,* (Ankara: Adalet Yayınevi 2013), 8.

justice[2]. As a result, the legal service of advocates or the state is not free, nor should it be not free, but we need to answer a critical question: who will be granted legal aid and who will not?

Before examining legal aid conditions, it would be helpful to mention the fundamentals of legal aid. Legal aid is directly and intensely related to human rights. The well-known sixth article of the European Convention on Human Rights (ECHR) refers directly to legal aid. According to the third paragraph of Article 6, *'Everyone charged with a criminal offense has rights to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*'. Article 6 mentions only criminal proceedings according to Article 6 (3) letters. However, the European Court of Human Rights (ECtHR) found in 1979 that Article 6 (1) also implies the right to free legal assistance in certain civil cases (Airey v. Ireland, Application No 6289/73, Judgment of 9 October 1979). In newer documents of Human Rights Law, we see provisions on legal aid that indicate undoubtedly the right to legal aid in both criminal and civil matters. For example, the 47th article of 'Charter of Fundamental Rights of the European Union' states that there is no difference between criminal and civil matters. According to his article, *'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*'

Also, in United States Law, legal aid was born in criminal proceedings. As Rhode states, in 1932, the United States Supreme Court offered the common-sense observation that an individual's 'right to be heard (in legal proceedings) would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' (Powell v. Alabama, 287 U.S. 45, 68-69, 1932). In the years that followed, courts gradually built on that recognition to find a constitutional right to lawyers for indigent criminal defendants. However, judges have largely failed to extend guarantees of

2 Stamps explains why legal aid is restricted in the fourth title. The first reason is that a full national service without any limit can be more easily abused than rights under other social services; and the fact that the litigant must pay a part of the cost will prove a powerful and proper deterrent against bringing unjustified claims. A second reason for these restrictions is the expense involved. Since not all taxpayers are expected to have recourse to the courts, they should not be expected to contribute more than enough to make the courts available to everyone who should need to bring an action to protect his rights. Thirdly, if a means test is to be applied, something must be done to preserve a balance between the assisted and unassisted taxpayers. It would be unfair for the state to entirely finance the expense of an assisted litigant and at the same time compel his unassisted opponent to pay the costs of his defense. A fourth reason for these restrictions is the very practical consideration that there must be some limitation to the scheme if the legal profession is to be able to work it. [L. Norman Stamps, 'Equal Justice Under Law: The English Approach' (1952) 20 University of Missouri-Kansas City Law Review, https:// heinonline.org/ accessed 20 October 2022 49, 51-52].

legal assistance to civil contexts, even where crucial interests are at stake. In the leading decision on point, Lassiter v. Department of Social Services., the Supreme Court interpreted the due process clause to require appointment of counsel in civil cases only if the proceeding would otherwise prove fundamentally unfair. In making that determination, courts must consider three basic factors: 'the private interests at stake, the government's interest, and the risk that [lack of counsel] will lead to erroneous decisions.' (Lassiter v. Department of Social Services, 452 U.S. 18, 27, 31, 1981)[3].

Besides being a significant element of a fair trial, we can seek roots of legal aid deeper in law. Legal aid is also a significant element of the equality principle, one of the oldest and major law principles. It has long been recognized that equality before the law includes more than equal treatment by the judge, and something should be done to give the poor man equal access to the courts[4]. Without an effective legal aid system, legal protections that are available in principle may be inaccessible in practice. 'Equal justice' implies equal access to the justice system. The underlying assumption is that social justice is available through procedural justice[5]. Various arrangements were worked out at different times to improve access to justice, and we are still working on it.

Legal aid is also directly connected with the social state or welfare state principle. In many European countries (for example, Germany, France, Turkey), one of the fundamental principles of constitutions is the social state principle. The social state is such a deep and complicated concept and is explained in many different ways. In the scope of our study, we can simply quote a sentence from a decision of the Turkish Constitutional Court (16.10.1988 dated and 19/13 numbered decision, Offical Gazette 11.12.1988 and 20016): *'The social state is a state which is liable to confirm social justice and public balance thus true equity via protecting weak people against strong people'.* An effective legal aid program also helps redress social unbalances and ensures everyone shall have an effective remedy in which he will be heard by a tribunal[6].

The right to access justice is a well-known but complicated expression and undoubtedly one of the fundamental human rights. The right to access justice ensures that everyone can equally access justice through courts, whether rich or poor, guilty or innocent, child or adult. Much of the discussion of civil legal aid occurs within the context of conversations about access to justice[7]. Proper settled conditions for

3 Deborah Rhode, 'Access to Justice: Connecting Principles to Practice', (2004) 17 Georgetown Journal of Legal Ethics, https://heinonline.org/ accessed 25 November 2022 369, 375.

4 Stamps, (no 2), 49.

5 Rhode, (no 3), 372.

6 Muhammet Özekes, *Medeni Usul Hukukunda Hukuki Dinlenilme Hakkı*, (Ankara Yetkin Yayınevi, 2003), 303-306.

7 John Bolan, 'Civil Legal Aid and Global Access to Justice', (2012) 6 Toronto Associations of Law Libraries 5, 6.

legal aid will prevent the inability to access justice because of insufficient means. It can be considered that providing legal aid is an obligation of governments in the jurisdictional circumstances according to human rights law[8].

The relationship between access to justice and a fair trial is getting complex. The right to have access to justice has no normative basis as the right to a fair trial. In recent years, we have increasingly seen the term 'right to access to justice' used as an term that includes the right to fair a trial, an effective remedy, and some other related rights. Juriloo indicates the relationship between the right to access justice and legal aid that

> 'Access to justice is an umbrella term encompassing several fundamental human rights, such as the right to a fair trial, the right to have access to the court, the right to an effective remedy, and equality before the law. Using access to justice as a starting point, the argument that free legal aid is a human right touches upon all aspects of the wide-ranging right to access justice.'[9]

ECtHR mentioned even in 1975 that the Article 6 guarantee of the right to a fair trial must be considered to include the right to have access to the courts in general, in civil as well as in criminal matters (Golder v. United Kingdom, Application no 4451/70, Judgment of 21 February 1975). As the title of Article 6' is 'fair trial' and the right to access justice is not regulated separately in ECHR, the ECtHR considers that the right to a fair trial includes access to a tribunal. In view of these statements, access to justice has two different meanings: one narrow and one broad meaning. The narrow meaning of access to justice corresponds to the right of access to a tribunal and shall be evaluated as an element of a fair trial. According to the main and classical opinion, which we endorse, a fair trial has four fundamental elements; (1) trial before an independent and impartial tribunal (access to the tribunal) (2) trial within a reasonable time (3) fair hearing (right to heard by the tribunal) (4) public hearing. These four elements are not independent of each other; on the contrary, they are mixed up and related[10]. The broad meaning of access to justice covers similar but also different topics regarding a fair trial and broader in some aspects; as we described above. The broad meaning of access to justice includes the right to a fair trial and other related concepts which cover bringing a suit before a tribunal to achieve a fair definitive judgment.

8 Paula Galowitz, 'Litigating Economics Social and Cultural Rights: Legal Practitioner's Dossier', (2006) Centre on Housing Rights & Evictions, *'Right to Legal Aid and Economic, Social and Cultural Rights Litigation'*, http://www.right-to-education.org/resource/litigating-economic-social-cultural-rights-legal-practitionersdossier accessed 10 November 2022 41, 42-43; Kristel Jüriloo, 'Free Legal Aid – a Human Right', (2015) 33:3 Nordic Journal Of Human Rights 204, 210.

9 Jüriloo, (no 8), 204.

10 Hakan Pekcanıtez, Medeni Yargıda Adil Yargılanma, (1997) 2 İzmir Barosu Dergisi 35, 39-51; Süha Tanrıver, Hukuk Yargısı (Medenî Yargı) Bağlamında Adil Yargılanma Hakkı, (2004) 53 Türkiye Barolar Birliği Dergisi 191, 193-194.

II. Type of Legal Aid Procedures

A. Legal Aid in Civil Proceedings and Criminal Proceedings

In many European civil justice systems, having an attorney is permissive, but the complexity of law rules may force parties to apply for professional legal assistance. Mandatory representation practice is seen far more in criminal proceedings. However, in some countries, representation by an attorney is mandatory as a principle even in civil proceedings. For instance, in Germany, parties have to be represented by an attorney (deZPO § 78); of course, this rule has many exceptions for specific conflicts (for example, FamGO art. 114). In Turkey, there is no obligation for parties to represent themselves by a lawyer in civil litigation as a principle (there are a few exceptions); however, a criminal defendant has to be represented by a lawyer in many criminal proceedings. For example, if the criminal defendant is a child or charged with a criminal offense that requires more than five years in jail, attorney representation is mandatory.

We can mention fundamental legal aid differences in criminal proceedings and civil proceedings. First, we must express that governments' policies can be different. The Turkish legal system is a typical example that establishes different systems for these two types of proceedings. When the representation is mandatory, it is adequate to provide legal aid and appoint a lawyer whom the bar association selects when the criminal defendant declares that he has no attorney to represent them. After this declaration, an attorney is appointed whose charges are covered by the government even though the defendant does not want one. In permissive representation, the defendant is asked if they want an attorney during transactions before the police, prosecutor or judge. If the defendant wants an attorney, but has not arranged one already, the government offers an attorney whose wage is paid by the government. Whether mandatory or permissive representation in criminal proceedings, nobody determines personal conditions like sufficient means for granting legal aid in Turkish law. Of course, the usage of limited resources in this way could possibly be criticized. However, legal aid is granted limitless in criminal litigation, and nobody will suffer because of the lack of legal support.

In civil proceedings which do not render compulsory representation, a declaration or the will of a litigant is never enough to be granted legal aid. Despite criminal proceedings, the state is not required to provide legal aid for every dispute relating to civil rights; that's why the state may determine specific conflicts, conditions or law fields to provide legal aid. The ECtHR decided that the Convention does not impose a duty on the state to provide free legal aid in every civil case brought before a court (Airey v Ireland).

Family law matters are among the most common legal aid practices in civil proceedings[11]. In many countries, governments establish special provisions to protect children during the divorce process or prevent any illegal acts against children. Labour law is another common practice of legal aid; workers whose rights are breached have financial problems and usually do not have enough knowledge about their rights. In many labor law cases, workers may not have sufficient financial income because of the conflict between them and their employers.

There are no limitations or special rules in the Turkish legal system regarding the type of dispute in civil proceedings [e. g. contrary to Norwegian law][12]. People can apply for/demand legal aid within the same conditions in family matters, labor matters, and commercial conflicts. Besides, the criteria for getting legal aid are not related to criticism of the conflict or the importance of what is at stake according to Turkish Civil Procedure Law. However, we would like to mention that Turkey has two different legal aid systems. One is provided and determined by the Bar in every province of Turkey according to the Regulation (The Legal Aid Regulation of Turkish Bar Associations, adopted 30 May 2004), and the other is determined by courts/judges according to civil procedure law. In practice, province bars usually evaluate how critical the conflict is depending on the broad consideration of authority recognized by the related Regulation. In our study, we will examine conditions in the Turkish Civil Procedure law which was amended recently according to European Union legislation and the ECtHR's decisions.

B. Legal Aid Systems Depending on Legal Service Funding and Provider

One of the most critical problems concerning legal aid is funding. Who will fund and provide legal aid? Government, private entities like bar associations, charity organizations or independent public authorities or a mix of all these… Even among countries with a common legal ancestry like the UK, Canada and the United States, the structure of legal aid systems varies with local culture and history, there are numerous types of legal aid delivery systems in place, and many modern systems incorporate mixed models that rely on a combination of public funding, support from the legal profession, and the participation of non-government entities[13].

11 Dickson G, 'Legal Aid Breakthrough', (1999) 24:3 LawNow 52, 58-59.

12 Jüriloo explains which civil matters are within the scope of legal aid according to Norwegian law (Jüriloo, no 8, 203-204). Stamps found a similar approach in the English Advice Act (Stamps, n 2, 51). Of course, specific litigants may need more legal support in specific matters, such as a woman in divorce conflict or an employee who has a conflict with the employer. However, it is challenging to differentiate matters as simple or hard, important or unimportant. For example, Rhode states that two-thirds of surveyed Americans agree that simple wills, uncontested divorces, minor accidents, consumer disputes, landlord-tenant problems, employee grievances, and government benefit claims are the kinds of matters for which legal representation is an unaffordable luxury (Rhode, no 3, 369). In this manner, legal aid shall be granted with no limitation on civil matters as Turkish law system.

13 Bolan, (n 7), 6-7; Smith R, 'International and Legal Aid', *Türkiye'de Adli Yardım: Karşılaştırmalı İnceleme ve Politikalar Yuvarlak Masa Toplantısı 16 Nisan 2004,* (İstanbul Bilgi Üniversitesi Yayınları 90, İnsan Hakları Hukuku Çalışmaları 3, İstanbul, Şubat 2005) 140, 146.

Legal aid-providing systems could be generally classified into three categories: Assigned counsel/panel lawyers or ex officio (judicare) system, public defender (staff attorney) system, and contract service system (contract firms). Of course, these systems have no sharp edges; countries may have mixed or combined systems models, but these models mainly describe many countries' legal systems[14].

The Judicare model is the most common way of delivering legal aid services worldwide. In this model, private lawyers provide legal aid services to clients either systematically (by state or bar association) or on an ad hoc basis and are compensated for their services by the State. In an ad hoc assigned counsel system, the appointment of a counsel is generally made by the court, without benefit of a formal list or rotation method and without specific qualification criteria for lawyers. In such systems, lawyers are often assigned on rotation, must meet minimum education and qualification standards. Assigned counsel systems may pay lawyers either on an hourly basis or a flat rate per case or hearing. Assigned counsel systems are often criticized for fostering patronage and lacking control over the experience level and qualifications of the appointed lawyer. In many countries, it is common for appointments to be taken by recent law school graduates looking for experience. Additionally, flat-fee arrangements can create a disincentive for lawyers to devote time to a particular case. In others, bar associations play an active role; they organize and bound advocates, beneficiaries and courts, arrange rotation between advocates and establish qualifications and training requirements. Similar issues such as lack of experience and inability to devote enough time are also observed with advocates appointed systematically by bar associations[15].

The main legal aid system in the United Kingdom is classified as the judicare system. The legal aid system in the United Kingdom is presently (until 1988) administered by the Legal Services Commission, which the Ministry of Justice oversees. The civil and criminal aid services are run under different schemes. The Community Legal Service scheme applies to civil cases and the Criminal Defence Service to criminal cases. To obtain legal advice, applicants select a solicitor from a list of participating lawyers. Individuals must apply to determine whether they qualify for assistance, which is awarded based on a sliding scale. The legal aid system in the United Kingdom is plagued by issues like the sufficiency of payments and limitations of coverage[16]. In Turkey, the legal aid system is also classified as a judicare system. There is no administrative office of the State. The court or the bar association (especially before bringing a case) may decide on legal aid depending on the demand of the related person in civil litigation. In criminal litigation, polices or prosecutors shall

14 Model Law, (n 1), 82; Bolan, (n 7), 7; Smith, (n 13), 149.

15 Model Law, (n 1), 83-84.

16 Bolan, (n 7), 7

or may call the bar association for legal aid even without the demand of the related person according to the accusation. The bar association appoints the advocate from a previously determined list, including assigned and certified lawyers, whether the legal aid decision is made by the court or the bar association. As in other countries, the honourees of advocates are not high and participating advocates are certified but not really experienced. However, the system works fast and without delay; in many cases, an advocate may be ready at a police station or courthouse in one or two hours. In civil litigation, the bar association can also make an appointment instantly and the offended party may meet with an advocate the same day.

Public defender (staff attorney) systems include governmental, quasi-governmental or sometimes non-governmental legal aid institutions that employ staff to provide legal aid services to qualified recipients, usually on a full-time basis. Public defender institutions can include: (a) State institutions or agencies or (b) independent or quasi-governmental institutions. Public defender systems ensure that the staff working in these institutions are trained specifically to provide legal aid services. A dedicated staff and budget also allow for more robust data-collection systems to monitor the quality of services and more effective advocacy for systemic reform to improve access to justice. Public defender systems convene their staff regularly for the systematic exchange of knowledge, experience and perspective. This helps to improve the quality of legal aid services. However, funding is often limited and demand for services can be high, thus leading to excessive caseloads and negatively affecting the quality of services delivered[17].

The system in the United States is based on a staff-attorney model that relies on government-funded offices employing salaried lawyers to provide legal services. The American landscape features separate systems at local, state and federal levels. However, these systems are in practice commingled and jointly funded. To the extent that there is a 'system' of civil legal aid in the United States, it is made up of different types of service providers funded by different sources. In general, there is no sliding scale of eligibility and aid is restricted to those close to the poverty line. The US Legal Services Corporation (LSC) funds civil legal advice centres across the country. Organizations that accept LSC funding are prohibited from engaging in activities such as class actions and lobbying. The US legal aid scene features public interest law firms, various legal aid centres and a substantial amount of pro bono work by attorneys at private law firms[18].

The contract service model involves a government contract with a lawyer, a group of lawyers, a bar association or a non-governmental organization that will provide representation in some or all of the criminal legal aid cases in a particular jurisdiction.

17 Model Law, (n 1), 83.

18 Bolan, (n 7), 7.

Under this system, individuals or organizations enter into contracts with the government to provide legal services to a defined class of eligible clients in a given geographical region. Contract service systems can be an effective way for governments to effectively and efficiently deliver legal aid services through privatization or contracting with effective and well established law firms or non-governmental organizations. It can also achieve many of the benefits of a public defender model, without burdening the State with the need to establish a government public defender agency. One concern about many contract systems is that governments may be incentivized to offer the lowest possible bids and they may fail to provide appropriate budgets for necessary support staff (e.g. paralegals, investigators, experts), and often have unrealistic or non-existent caseload limits. Additionally, quality may suffer because once a firm has successfully obtained the contract for a bundle of cases, it has an incentive to treat every case as a simple one—the firm's income for that bundle of cases is now fixed, and it can only increase its own profit margin by reducing its own operational costs for each case, which may lead to rushing or cutting corners. However, regular and effective control of the government may reduce these disadvantages[19].

C. Different Types of Legal Aid

We can classify legal aid depending on different criteria. For example, legal aid can be classified into four stages according to the periods in which legal aid is provided: (1) the preliminary stage to litigation, (2) applying to a tribunal, (3) during litigation and (4) the enforcement stage of the decision. In the first period, legal aid services were conducted as legal advisers to determine possible rights and claims and also possible legal remedies. ADR procedures, which could be applied before bringing a case, shall also be within legal aid's scope[20]. The necessity of legal aid mainly occurs in the second period, when applying to court because the court allowances and some litigation expenses are paid at this stage. The requirement for legal aid continues during litigation. At this stage, the sum of evidence may cause expenses; investigation processes may cause expenses. The assistance of an interpreter may be needed related to ECHR art. 6/III e.. The cost of interpreter assistance shall be considered in the scope of legal aid[21]. At the last stage, legal aid shall be necessary to apply for enforcement procedures. A court decision may not be enough for a person who seeks justice; justice on paper may mean nothing. Because procedures may also be expensive and complex; legal aid shall also cover enforcement procedures.

19 Model Law, (n 1), 85.

20 It is clearly stated that a party may benefit from legal aid for mediator fees in Turkish Law. A party who needs legal aid may apply to a competence court to have legal aid for mediator fees according to Turkish Mediation in Civil Matters Code art. 13/III.

21 Pekcanıtez, (n 10), 51; Tanrıver, (n 10), 212.

Legal aid can be classified into three according to people who are granted legal aid; legal aid for plaintiff, defendant and intervener. Of course, this classification is related to civil litigation. In criminal litigation, subjects may differ.

III. Litigation Costs

A. Court Fees

To evaluate legal aid, we have to start from the basics; in other words, we have to look for reasons which make establishing legal aid systems necessary. Put simply, we need a legal aid system because accessing the court is not free and not affordable for many people. Why is justice so expensive? Because three different types of costs are required to be paid by litigants in almost every lawsuit. We can simply name these three types of costs: court fees, litigation expenses and attorney's wages.

Many people serve in the legal system like judges, legal officers, ministry of justice employees… The official system needs many workers to run the system, besides complex facilities such as courthouses, enforcement offices, prisons… When we consider all these, legal services of government costs can be really high. In this manner, the claimant shall generally pay court fees at the beginning of the trial to participate in the government's expenditure in almost every lawsuit. As a principle, court fees are not collected to suspend all government expenditures on the jurisdiction system. Court fees are only a particular value, which has to be paid by claimants or plaintiffs. The primary financial source of the official legal system is obviously taxes. That's why court fees are relatively affordable, in some cases totally free. Often, court fees are the smallest part of the claimant's total financial burden. Legal aid practice regarding court fees usually appears as provided an exemption for the related party by the government.

We would like to express that eliminating court fees and making courts totally free should not be an option. This will cause an increase in general taxes and it will be unfair when we consider some people have not experienced legal conflicts. Regarding the functions of court fees mentioned above, we do not support making litigation free of charge for parties. Of course, our opinion is limited to civil litigation. Criminal litigation principles and procedures are significantly different from civil litigation; that's why full-free litigation may be seen as rightful.

B. Proceeding Expenses

In the jurisdiction process, judges and parties need help or service from people who do not work directly in the legal system. For instance, post officers deliver legal notices, legal experts assist in evaluating the matters subject to conflict, and in

some discovery processes may need transportation… As it is seen, one group of the cost is litigation expenses. In many legal systems, including Turkey, court fees and sometimes even litigation expenses shall be paid at the beginning of the trial. If the plaintiff does not pay costs, his action will be dismissed even without investigating whether he is right. The ECtHR does not consider a violation of the sixth article to laying down payment conditions in civil lawsuits (Tunc v. Turkey, Application no 20400/03, Judgment of 21 February 2008).

C. Lawyer Fees

The last type of cost is attorney's fees. As a principle, attorney's fees are determined freely between lawyer and client but there are many rules, especially in continental European law systems that limit the freedom of determination of fees to protect both attorney and client. Determination of very low or very high attorney's fees could be considered an interruption to public order or public welfare. That's why states limit the minimum amount of attorney fees according to related civil or criminal cases. A plaintiff shall pay for his advocate in advance and he may have to pay the adverse party's advocate fee if his case is dismissed at the end of the trial. Of course, the same principle is also valid for the defendant. He shall pay for his advocate in advance and may have to pay the adverse party's advocate fee if the action is accepted.

In many cases, lawyers' fees are the most expensive part of the sum of costs. As a general principle in civil proceedings, we can say that lawyer fees and other litigation costs are collected from the unjustifiable party at the end of the proceeding. Although this principle is an important rule on the share of the financial burden, the main problem is providing a serious amount of money during preparation and application period.

IV. Conditions for Legal Aid

A. In General

We would like to explain that the main conditions, which we will examine in further paragraphs, were determined according to ECHR and Judgments of the ECtHR. It is clear that the European Convention on Human Rights is not the only treaty that includes provisions on legal aid. For example, the African Charter on Human and People's Rights and the InterAmerican Convention on Human Rights and related regulations also have conditions for legal aid and assessment criteria. However, significant scientific articles also include suggestions on conditions for legal aid[22]. But we will focus on conditions settled by the European Convention on Human Rights and ECtHR in our current study because of lack of time and room.

22 Galowitz (n 8); Jüriloo (n 8); Durbach A, 'The Right to Legal Aid in Social Rights Litigation', *(2008)* In M. Langford (Ed), *Social Rights Jurisprudence – Emerging Trends In International And Comparative Law*, Cambridge University Press 59.

Before an examination of these conditions, we may emphasize that these conditions will be proven by the litigant who demands legal aid. However, the judge or related body shall not seek conclusive proof for these conditions. Submitting convincing evidence will be considered sufficient to grant legal aid. Of course, the adverse party may maintain the contrary and object to the legal aid demand and submit his own evidence to ensure the dismissal of the demand. According to one point of view, the adverse party has no opportunity to object to the insufficient means condition because this condition is related only to the beneficiaries party but generally accepted that the adverse party can object to legal aid demand and submit evidence against this demand and related conditions[23].

B. Insufficient Resources/Means

The main condition for granting legal aid is the lack of sufficient resources to pay litigation costs. The ECtHR has no definite 'sufficient means' in general; instead, the court indicates taking all individual circumstances of each case to determine the litigant's financial situation. The ECtHR requires a case-by-case assessment of legal aid conditions.

First of all, insufficient means criteria do not refer directly to poorness or low income. A person with no problem providing for his and his family's living in normal conditions can also be granted legal aid. To determine the financial situation of the litigant, the amount required to ensure his and his family's living shall be decreased from the litigant's total income. After that, this amount should be compared with litigation costs that had been calculated for specific conflicts. If litigation costs are far more than the determined part of income, the litigant shall obtain legal aid. Some countries, such as France and England, also establish certain monetary limits to determine financial situation[24].

The litigant bears the burden of proving that he cannot afford to pay legal assistance, but he does not have to prove his indigence 'beyond all doubt'. In Pakelli v Germany, the court relied on 'some indications' that the applicant had been unable to pay for his lawyer, including tax-related statements and the fact that the applicant had spent the previous two years in custody. But I would like to express that only a declaration of the applicant is not enough and indications are required. In Bakan v Turkey, the ECtHR decided that representation by a lawyer could not be the only reason for the dismissal of legal aid; evaluation should be on the litigant's financial status **(**Bakan v. Turkey, Application No 50939/99, Judgment of 12 June, 200; exactly the same assessment, 10.02.2021 dated and 2017/21882 numbered decision of the Turkish Constitutional Court, Official Gazette 19.3.2021 and 31428). Of course, lawyers can

23 Özekes, (n 6), 309-310.

24 Kılınç, (n 1), 199-200.

work pro bono or delay their fees in some cases. However, the ECtHR also took into account that the applicant was represented by a lawyer retained by his family in the case of Santambroggio v. Italy (Santambroggio v. Italy, Application no 50939/99, Judgment of 21 June 2004).

The 2013/C 378/03 numbered European Commission Recommendation refers to a means test in the process of assessing insufficient income conditions. Of course, the test itself should be prepared by states, but the Recommendation expresses some criteria for this test. Accordingly, the applicant's economic situation assessment should be based on objective factors such as income, capital, etc., and a defense lawyer's cost.

Understanding insufficient income in the Turkish legal system is not different from the ECtHR. Provisions regarding legal aid in Turkish Civil procedure law rules have been amended recently to adopt ECtHR decisions but provisions on insufficient means have not been changed. There are no monetary limits in the Turkish Law System; the judge shall decide to consider all specific circumstances in every case.

C. The Interests of Justice

The interest in justice is also not defined by the ECtHR or international regulations. One of the most important Judgments of SCtHR about the interest of justice is Quaranta v. Switzerland case. The court stated specific tests depending on the interest of justice that triggers legal aid, which is considered the seriousness of the offense, the complexity of the case and the ability of the defendant to provide his representation (Quaranta v. Switzerland, Application no 12744/87, Judgment of 24 May 1991). ECtHR decisions are consistent in the interest of justice. The ECtHR determined similar factors as relevant in its assessment of the obligation to provide free legal aid in the case of Airey (Airey v Ireland, Application No 6289/73, Judgment of 9 October 1979, para 26) and in the case of Steel and Morris (Steel and Morris v. United Kingdom, Application no. 68416/01, Judgment of 15 February 2005): the importance of what is at stake for the applicant in the proceedings; the complexity of relevant law and procedure; the applicants capacity to represent himself effectively. ECtHR found no violation of Article 6 because of the denial of legal aid demand in a case of a customs offence where neither the legal nor the factual issues are complex, there was no indication of the possibility of a sentence of imprisonment and the applicant was capable of defending himself because he was an educated economist (Wolff v. Switzerland, Application no 31983/96, Commission admissibility decision of 24 May 1991).

The importance of what is at stake for the applicant in civil matters and the seriousness of the offense and the severity of the potential penalty in criminal

matters should be considered in the assessment of legal aid demand. For instance, when the penalty includes a custodial sentence, the interest of justice criterion should be considered as fulfilled in criminal proceedings according to the 2013/C 378/03 numbered European Commission Recommendation. The ECtHR decided that applicants should be granted legal aid while contesting the severance of their parental right in child abuse proceedings, because of the complexity of the case, the importance of what was at stake and the highly emotional nature of the subject matter (P, C & S v. United Kingdom, Application no 56547/00, Judgment of 4 October 2003). However, the European Commission of Human Rights mentioned that defamation cases are not necessarily serious as family matters (Airey test) for the litigants when the consequences are considered (Munro v. United Kingdom, Application no 10594/83, Commission decision of 14 July 1987).

The complexity of the case, particularly when the legal representation is mandatory by law and the capacity of the applicant to effectively exercise his right to have access to the court should be evaluated together. Especially immigrants, foreign workers, or those with the inability to communicate with skilled people can be granted legal aid more easily than merchants or landlords. The ECtHR decided that the applicant, who was an illegal immigrant with no settled employment did not have the means to retain counsel before the Court of Cassation (Biba v. Greece, Application no 33170/96, Judgment of 26 September 2000). In the Airey v Ireland case, the ECtHR drew attention to the fact that the applicant was from a humble background, had gone to work as a shop assistant at a young age before marrying, had four children and had been unemployed for much of her life. On the other hand, the ECtHR found no violation of the Article 6 (1) in McVicar v United Kingdom case because the applicant was a well educated and experienced journalist, and the law was not sufficiently complex to require a person in the applicant's position to have legal assistance (McVicar v United Kingdom, Application no 46311/99, Judgment of 7 May, 2002).

Despite the first condition, Turkey had hard times before the ECtHR because of abandoned provisions of the Civil Procedure Code. Turkey sought basic/simple proof of rightfulness on the claim regarding the legal aid application. Judges considered the possibility of accepting the claim at the beginning of the case to decide whether to grant or not grant legal aid. The ECtHR found this criterion against the Convention in the Bakan v Turkey case even though the court accepted the assessment of the successful chance of the claim regarding legal aid application but refused the assessment rightfulness of the claim. The Turkish Civil Procedure Code's related provisions had amended by 6459 numbered and 11.04.2013 dated Law after a serious time following the ECtHR decisions. According to the new provision (Turkish Civil Procedure Code art. 334/I), the applicant's claim should not be clearly unmeritorious for granting legal aid.

We believe not having obviously unmeritorious criteria should be consistent with Article 6 and the ECtHR's judgments and ECtHR Commission's decisions. In Thraw v. United Kingdom, the applicant, the administrative authority (of the United Kingdom) refused legal aid on the basis that the applicant had shown no grounds for being a party to the proceedings and his claim had very little prospect of success and the Commission found the applicant's complaint ill-founded (Thaw v. United Kingdom, Application No 27435/95, Commission decision of 26 June, 1996). In the first related case of Belgium (Aerts v. Belgium) the court decided that the right to tribunal had been impaired when the Legal Aid Board had refused the application because the claim did not at that time appear to be well-founded (Aerts v Belgium, Application no 25357/94, Judgment of 30 July 1998). After that, the related Belgium Law was amended and the rule that came into force states that the claim should not be manifestly ill founded. This new rule was not considered a violation of the European Convention by ECtHR in the Debeffe v Belgium Case (Debeffe v. Belgium, Application no 64612/01, Judgment of 9 July 2002). Also, Jüriloo suggested without any relation to the Court decision that the criterion should be regarded as unfulfilled only if it is clear that there is no chance of success[25].

VI. Conclusions

In many cases, access to courts requires payment of serious litigation costs. Sum of court fees, proceeding expenses and lawyer fees can reach non-affordable amounts for many people who want to bring a claim to seek justice. The right to access justice is undoubtedly a fundamental human right that requires everyone to be able to bring a case or claim before a court whether he is rich or not, competent enough or not. Ineligibility to have access to justice because of insufficient means is a breach of the ECHR.

The scope of legal aid varies in civil and criminal litigation and varies country by country and system by system. All kinds of legal support, before a case, during or after a case and all kinds of financial support for litigation costs or reduction of litigation costs by the government may be considered as legal aid. Of course, providing legal aid unconditionally and limitlessly does not serve the legal aid's purpose.

Providing legal aid is basically a financial issue, even though there are other ways to obtain legal aid like simplifying the applicant's procedure. Financial sources have limits as always. States are allowed to settle conditions or criteria for granting legal aid because it is clear that there is no option to provide everyone with legal aid. However, organizing all judicial systems out of litigation costs is also not seen as possible or necessary. In light of these facts, we should settle proper conditions to determine who is granted legal aid and who is not. We have to be sure to provide legal

25 Jüriloo, (n 8), 217.

aid to those who need it most. Two main criteria are established as insufficient means and interest of justice in this aspect.

The assessment of legal aid criteria should be done case by case according to the individual properties of the case and applicant. The litigant bears the burden of proving that he cannot afford to pay legal assistance, but he does not have to prove his indigence 'beyond all doubt'. The litigant should indicate that his income is not enough to pay both litigation costs of the specific conflict and his or his family's living expenses.

The interest of justice conditions for granting legal aid mainly refers to the consideration of the seriousness of the offense, the complexity of the case and the ability of the litigant to provide his representation. All these should be taken into account for every specific case. Prevention of ineligibility to access justice depends on the precious assessment of criteria for legal aid in every case.

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RESEARCH ARTICLE

Legal Aid Under Turkish Administrative Judicial Procedural Law

Nilay Arat*

Abstract
In this paper, the "legal aid" mechanism, which is an institution that enables parties to participate effectively in the judicial process and "balances" interference with the right of access to court, is discussed. The discussion focusses on the way it facilitates various possibilities of putting forward the claims and pieces of evidence of parties wishing to prove their claims. In this context, the legal aid institution is dealt with primarily within the framework of the right of access to court within the scope of the right to a fair trial. Then, under article 31 of the İYUK, the legal framework of the legal aid institution in the civil procedure is drawn and the application of the legal aid institution in the administrative jurisdiction is examined. This is done only in terms of administrative disputes, excluding cases related to tax disputes due to the difference in the nature of taxation transactions.

Keywords
Legal aid, Judicial assistance, Right to fair trial, Right to court, Administrative judicial procedure

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Introduction

Legal aid provides for a temporary exemption to any rightful person from the financial burdens of a case, due to his/her poverty.[1] In other words, legal aid is a mechanism foreseen to prevent injustice from being endured due to the inability to file a lawsuit or set up a defense properly in cases where the payment of the costs required by the claim and defense leaves the financial power of the claimant or defendant insufficient compared to the case in question.[2] Legal aid is considered to be an institution that enables parties to participate effectively in the judicial process and "balances" interference with the right of access to court, as it facilitates the parties' opportunities to put forward their demands and evidence, and to prove their claims.[3]

Legal aid provides an opportunity to realize the right of access to justice, as a requirement of the social state principle.[4] On the same parallel, the elimination of "inequality" between those in different economic positions in terms of bringing their cases to court also necessitates the existence of the legal aid institution. Indeed, legal aid finds its basis in the principle of equality.[5] As is well known, requesting legal protection through the court requires a certain fee and the expenses of the notification, witness and expert to be covered in this process. In the presence of certain conditions, the legal aid institution has taken its place in legal systems as a facilitating mechanism, as an opportunity which enables these payments not to be a barrier to the right to a fair trial in the pursuit of legality.

Legal aid has been enshrined in numerous international and supranational legal documents, such as the International Covenant on Civil and Political Rights[6], the

1 Baki Kuru, *Hukuk Muhakemeleri Usulü*, (6th edn, Demir 2001) 5418

2 İlhan Postacıoğlu and Sümer Altay, *Medeni Usul Hukuku Dersleri* (8th edn, Vedat 2020) 955

3 *Tacettin Ceylan*, App no 2017/39062 (AYM, 10 November 2021), § 66

4 "Today, in modern legal systems, the delivery of justice is free. … the parties do not pay any fee to the judge for this work. However, the parties have to pay some necessary expenses due to the trial, which may exceed the economic power and possibilities of the parties in some cases, and for this reason, there may be a danger of losing their rights for these people. The loss of a right just because of economic impossibilities and financial difficulties does not comply with social justice. In order to save the justice delivery service from being a service that only those with financial means can benefit from, people who are unable to pay the costs required by the trial should be exempted from these costs, albeit temporarily, and a proxy should be appointed if necessary." Ayşe Kılınç, "Bir İnsan Hakkı Olarak 'Adli Yardım'" (2011) 3(1) *Hukuk ve İktisat Araştırmaları Dergisi*, 1-10, 2; Ejder Yılmaz, "Yargılama Giderlerinin İşlevi ve Sosyal Hukuk Devleti", *Ejder Yılmaz Makaleler (1973-2013)* (Yetkin 2014), 399

5 Faruk Erem, "Adli Yardım", *İmran Öktem'e Armağan*, (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1970) 108; Ejder Yılmaz "Adli Yardım Kurumunun İdari Yargıda Uygulanması", *Ejder Yılmaz Makaleler (1973-2013)* (Yetkin 2014), 566.

6 "Article 14/3: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; .."

European Agreement on the Transmission of Applications for Legal Aid[7], the Council of Europe Committee of Ministers Resolution 78(8) on Legal Aid and Advice[8], the Council of Europe Committee of Ministers Resolution 93(1) on Effective Access to the Law and to the Justice for the Very Poor[9], and last but not least the Guidelines of the Committee of Ministers of the Council of Europe on the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law[10].

I. Legal Aid as a Human Right

Legal aid is evaluated in terms of the right of access to a court within the scope of the right to a fair trial. Accordingly, the right of access to a court, which includes taking a dispute to court and asking for the dispute to be decided effectively, is an aspect of the right to a fair trial. Within the framework of the right to a fair trial under article 6 of the European Convention on Human Rights, "right to access to courts" is granted. However, this right is not absolute and is subject to limitations. Right of access to court is subject to limitations which do not impair the essence of the right while pursuing a legitimate aim. This right can be used if there is a reasonable relationship of proportionality between the means employed and the aims to be achieved.[11] Within the scope of the right to a fair trial regulated by article 6 of the ECHR, the right of access to a court is subject to limitations, as the right in question can be regulated by the state due to its nature and may change according to time and place in accordance with the needs and resources of the person and society.[12]

ECtHR takes the issue in hand and evaluates legal aid under two criteria: "lack of sufficient means to pay for legal assistance" (financial eligibility) and "the interest of justice requirement" (merits assessment).

If the expense of a trial process creates obstacles that undermine the essence of the right to access a court, it can be considered to be a violation under article 6/1 of the ECHR.[13] In this context, in cases where an effective defense cannot be made due to the material and legal complexity of the case and the procedure applied in the case, or in cases where representation with a lawyer is required, there may be a violation of the right to apply to the court according to the assessment made in terms of the

7 For full text, see < https://rm.coe.int/1680077322 > accessed 29 December 2022

8 For full text, see < https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e2bb2 > accessed 29 December 2022

9 For full text, see < https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804df0ee > accessed 29 December 2022

10 For full text, see < https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a1a347 > accessed 29 December 2022

11 *Ashingdane v UK*, App no 8225/78 (ECHR, 12 May 1983), § 57. *Stubbings and Others v UK* App no 22083/93, 22095/93 *(*ECtHR, 22 October 1996), § 50-52. *Sialkowska v. Poland* App no 8932/05 (ECtHR, 9 July 2007), § 102

12 *Golder v UK*, App no 4451/70 (ECHR, 21 February 1975), § 38

13 *Airey v Ireland*, App no 6289/73 (ECHR, 9 October 1979), § 24

financial situation of the person.[14] However, it is possible to examine the existence of these conditions separately for each case and to conclude a violation assessment.

Emphasizing the importance of the right of access to court in a democratic society, the ECtHR looks at the balance between the interest of proving the claim of the applicant in court and the costs of the proceedings, and it may consider that the essence of the right of access to court is violated when this balance is not observed.[15] Considering the special circumstances of the case, high costs of litigation can also be seen as violating the right of effective access to court.[16] In addition, sometimes decisions are made to the effect that the high amount of payment demanded is disproportionate and violates the right of access to court in the event that the applicant, who has insufficient financial resources, could not get a response from the legal aid office and decided to pay a high amount of security.[17] In this context, in cases where there is a disproportionate relationship in the balance between the applicant's financial means and the costs of going to court, his/her right of access to court is taken away, resulting in a violation of the right to seek justice.[18] However, the ECtHR refers to the margin of appreciation of the states in terms of the choice of means that realize the right of access to court, so although the legal aid institution could be chosen as one of these tools, it is not imposed on the states as an obligation[19], but the chosen method by the domestic authorities in a particular case must be compatible with the ECHR.[20] In cases where the legal aid institution is offered, said opportunity should be used in a non-arbitrary way: "It is also essential for the legal aid system to offer individuals substantial guarantees to protect those having recourse to it from arbitrariness".[21] At this point, the fact that the decision regarding the legal aid request is not subject to objection leads us to conclude that "the legal aid system does not offer all the necessary procedural safeguards that will protect the prosecutable from

14 *Airey v Ireland*, App no 6289/73 (ECHR, 9 October 1979), § 24; on the same parallel, the ECtHR takes into account the seriousness of the offense, severity of the sentence and the complexity of the case along with the personal situation of the accused, see *Quaranda v Switzerland*, App no 12744/87 (ECtHR, 24 May 1991), § 33ff

15 *Kreuz v Poland*, App no 28249/95 (ECtHR, 19 June 2001), § 60ff; *Mehmet and Suna Yiğit v Turkey*, App no 52658/99 (ECtHR, 17 July 2007)

16 "The fact that high court fees may constitute a violation of the right to access to court and right to a fair trial" see Ali Ulusoy, *İdari Yargılama Hukuku* (3rd edn, Yetkin 2022) 165

17 *Ait-Mouhoub v France*, App no 103/1997/887/1099 (ECtHR, 28 October 1998), §§57-58

18 Sibel İnceoğlu, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı -Kamu ve Özel Hukuk Alanlarında Ortak Yargısal Hak ve İlkeler* (4th edn, Beta 2013) 131; for detailed information on the ECtHR case law on right to court see David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *European Convention on Human Rights* (Oxford 2018); for detailed information on the ECtHR case law on legal aid in terms of Turkish Administrative Law see Müslüm Akıncı, *İdari Yargıda Adil Yargılanma Hakkı* (Turhan 2008) 201ff; Onur Kaplan "The Legal Aid in Turkish Administrative Procedure Law in the Light of the ECHR Case-Law", (2020) 20 *Law & Justice Review*, 89ff; for detailed information on the ECtHR, Turkish Constitutional Court and the Council of State case law on right to court see Sibel İnceoğlu, Nilay Arat and Erkan Duymaz *İdari Yargıda Adil Yargılanma Hakkına İlişkin Emsal Kararlar* (Avrupa Konseyi Yayınları 2022) 250ff

19 İnceoğlu, (n 18) 126

20 *Sialkowska v Poland*, App no 8932/05 (ECtHR, 9 July 2007), §107

21 *Eyüp Kaya v Turkey*, App no 17582/04 (ECtHR, 23 September 2008); §§22-26; *Kaba v Turkey*, App no. 1236/05, (ECtHR, 1 March 2011), § 24; *İlbeyi Kemaloğlu and Meriye Kemaloğlu v Turkey*, App no 19986/06, (ECtHR, 10 July 2012), §53; *Bakan v Turkey*, App no. 50939/99 (ECtHR, 12 June 2007), §74-78; *Mehmet and Suna Yiğit v Turkey*, App no 52658/99 (ECtHR, 17 July 2007), §31-39

arbitrariness".[22] Accordingly, the fact that the legal aid request is not decided with sufficient justification or that there is no objection mechanism against it points to the arbitrariness of the legal aid system.

Restrictions that prevent a person from applying to court or that make a court decision "significantly ineffective" constitute violation of the right of access to court.[23] In this context, the legal aid institution enables the parties to participate effectively in the proceedings by facilitating the opportunity to present their demands and evidence and to prove their claims, and it is accepted that it "balances" the interference with the right of access to the court.[24]

Considering the concept of "equality", "respect for human rights" and "social state" attributions expressed in article 2 of the Constitution, together with the phrase "Every Turkish citizen's enjoyment of the fundamental rights and freedoms in this Constitution in accordance with the requirements of equality and social justice" given in the preamble of the Constitution, the constitutional foundations of the legal aid institution are formed as a requirement of the right to a fair trial under article 36 of the Constitution.

There is no specific reason for restriction in terms of the right to a fair trial regulated in article 36 of the Constitution. However, this does not lead us to the conclusion that the right to a fair trial is an absolute right that cannot be limited. As stated in several decisions of the Constitutional Court, it is accepted that the rights and freedoms in other articles of the Constitution and the duties imposed on the State may constitute a limit to rights and freedoms for which no specific reason for restriction has been indicated.[25] In this context, it is accepted that imposing an obligation to pay judicial fees to those who benefit from judiciary serves the purpose of "disciplining exaggerated, coercive and frivolous demands" and thus preventing the courts from being busy with unnecessary applications.[26] In addition, since the purpose of the litigation expenses other than the fees is to finance the obligatory expenses during the trial, and since these are also considered by the person requesting the judicial service to be covered by the nature of the process, the obligation to pay the fees and other trial expenses results "from the nature of the right to access the court and is based on constitutionally legitimate purposes".[27] However, the restrictions in question should not harm the essence of the right and should be based on a legitimate aim. The means used should be proportional to the purpose of restriction, and should not impose

22 *Bakan v Turkey*, App no 50939/99 (ECtHR, 12 June 2007), §74-78

23 *Özkan Şen,* App no 2012/791 (AYM, 07 November 2013), §52

24 *Tacettin Ceylan*, § 66

25 File nr. 2014/177, Decision nr. 2015/49 (AYM, 14 May 2015)

26 *Famiye Beğim ve Mehmet Tahir Beğim*, App no 2017/21882 (AYM, 10 February 2021), §§41-49; *Özkan Şen*, §61; *Serkan Acar,* App no 2013/1613, (AYM, 02 October 2013), §39; see also Ulusoy (n16) 164

27 *Famiye Beğim ve Mehmet Tahir Beğim*, §45

hard burdens on the individual that would ultimately upset the fair balance sought to be established between the requirements of the public interest and the rights of the individual.[28] Based on all this , it is accepted that individuals may be charged with certain obligations in order to prevent the courts from being busy with unnecessary applications, the scope of which can be determined by the public authorities at their discretion, and that the stipulated obligations do not violate the right of access to the court unless they "make filing the case impossible or make it extremely difficult".[29]

Legal aid evaluation, which decides whether the fees and litigation expenses constitute an excessive burden for the applicant, should be carefully made in each case, so that a proportionality test is examined. The issue of whether it is determined with sufficient justification is also important when seeking the balance of the individual's right to court.[30]

II. Legal Aid Procedure

For administrative judicial proceedings, the legal aid institution is implemented by making use of the provisions of the Law No. 6100 on Civil Procedure (HMK), according to article 31 of the Law No. 2577 on Administrative Judicial Procedure (İYUK). Accordingly for the issues and concepts articulated under article 31 of the İYUK, in cases where there is no provision therein, the legal aid institution, (being one of the institutions under article 31) is applied to by making use of the civil trial procedure with reference to the HMK. However, legal aid is used by adapting it to the purpose, content, features and practice of the administrative judiciary, as with every concept that is used in the HMK with article 31 of the İYUK reference.[31] It is asserted that, for the application of the provisions of the HMK pertaining to the referred institutions under article 31 of the İYUK in an administrative case, it is necessary to investigate whether these provisions create results contrary to the specific characteristics of the administrative procedure and the requirements of the judicial review of the administration.[32] However, an opposite point of view might state that there is no difference between administrative jurisdiction and civil jurisdiction in terms of the principles and rules of the legal aid institution.[33] In point

28 *Özkan Şen,* §62

29 *Serkan Acar,* §39

30 *Tacettin Ceylan,* §67

31 Şeref Gözübüyük and Güven Dinçer *İdari Yargılama Usulü (Kanun – Açıklama – İçtihat)* (2nd edn, Turhan 2001) 794

32 "Due to the differences … between private law disputes and administrative disputes; it is not appropriate to identically apply the provisions of the Code of Civil Procedure regarding the institutions referred to in the first paragraph of Article 31, even in cases where there is no provision in the Administrative Judicial Procedure. The application of these institutions in an administrative case, however, is related to the specific characteristics of the relevant rule, the Administrative Judicial Procedure, the requirements of the Administrative Regime that dominates the public administration's activities in the field of public law, and the legality of the legal situation created by this procedure by the judicial body." Turgut Candan, "Hukuk Muhakemeleri Kanunu'nun Hükümlerinin İdari Yargıda Uygulanabilirliği", <https://turgutcandan.com/2021/04/08/hukuk-muhakemeleri-kanununun-hukumlerinin-idari-davalarda-uygulanabilirligi/ > accessed 14 December 2022

33 Yılmaz, (n 5) 568

of fact, there are indeed significant differences between the civil and administrative judicial procedures, as the parties to the case in administrative judicial procedure are not private law persons who are in legal relationship with equal and free will as in private law disputes.[34] From this point of view, the institutions utilized in the administrative judicial procedure by referring to the HMK find a field of application in accordance with the nature of the Administrative and Administrative Judicial Proceedings Law. It is also stated in the Danıştay Plenary Session of Administrative Law Chambers that "… it should be accepted that İYUK article 31 can be applied to the extent that it is compatible with the types of administrative cases, taking into account the nature of administrative cases."[35] In that sense, withdrawal from and acceptance of the case or recusation, referred by article 31 of the İYUK to HMK, the administrative judiciary builds up its own application compatible with the principles of rules of the Administrative and Administrative Judicial Procedural Law. In such cases it is observed that the administrative judiciary benefits from the jurisprudence of civil courts (Yargıtay and Regional Civil Courts) in the application of the referred institutions.[36] As for the legal aid institution it is observed that the administrative judiciary follows mostly the provisions of the HMK with almost no reference to the jurisprudence of civil courts. Although, the practice to date is as such it should not be overlooked that the İYUK reference to HMK also aims to benefit from the experience and jurisprudence of civil proceedings.[37] While utilizing legal aid provisions in the administrative judiciary, the administrative and civil procedures feature both identical and distinct applications. In addition, it also needs to be pointed out that, according to articles 27/6 and 52/3 of the İYUK, financial guarantee is not required for the stay of execution claims for the ones that are granted legal aid. Therefore, the HMK reference is not applicable to the extent that legal aid is regulated under the İYUK.

A. Conditions for Benefiting from Legal Aid

Legal aid is regulated under articles 334-340 of the HMK. According to article 334/1 of the HMK, those who are partially or completely incapable of paying the necessary trial or follow-up expenses without putting the livelihood of themselves and their family into serious difficulty could benefit from legal aid. However, in order for these persons to benefit from this aid, it must be clear that their claims are not groundless. Legal aid could be used in claims and defenses, temporary legal protection requests and enforcement proceedings.

34 Metin Günday, "Hukuk Usulü Muhakemeleri Kanunu Hükümlerinin İdari Yargıda Uygulanma Alanı", *İdari Yargının Yeniden Yapılandırılması ve Karşılaştırmalı İdari Yargılama Usulü Sempozyumu (11-12 May 2001)* (Danıştay Başkanlığı Yayınları No.63 2003) 9ff; see also Erol Çırakman, "Hukuk Yargılama Usulünün İdari Yargıda Uygulanabilirliği" *İdari Yargıda Son Gelişmeler Sempozyumu* (Danıştay Yayınları 1982) 102ff

35 File nr. 2020/1094, Decision nr. 2020/1856 (Danıştay Plenary Session of Administrative Law Chambers, 14 October 2020)

36 As an example, see File nr. 2017/915, Decision nr. 2017/2524, (Danıştay 6th Chamber, 12 April 2017).

37 Bahtiyar Akyılmaz and Murat Sezginer and Cemil Kaya, *Türk İdari Yargılama Hukuku*, (6th edn, Savaş 2021) 668.

In this context, there are two conditions in which one could benefit from legal aid:

- Inability to pay

- The claim not being manifestly ill-founded.

The condition regarding inability to pay is not considered to be an ongoing state of poverty, but rather has to do with the financial situation of the person and his/her inability to meet the costs of the trial.[38] Therefore, the lack of solvency here is not a "poverty" condition, but a situation of "economic inadequacy" in terms of litigation expenses.[39] In this context, when an individual has to meet the costs of the trial, there must be a situation of "danger of financial distress".[40] In this context, it is accepted that the fact that individuals are represented by a lawyer during the trial process would not result in the rejection of the legal aid request due to the lack of "inability to pay" condition.[41]

In the examination of solvency, it is important that the courts not make a "categorical evaluation" by determining the financial situation of the person requesting legal aid, as well as litigation expenses.[42] There is no legal provision regarding the means of proof to be evaluated in the examination of the person's inability to pay. In this framework, it should be accepted that all kinds of documents enabling the judge to evaluate the financial situation of the person and create an opinion about the inadequacy of the financial situation could be submitted.[43] Besides, the legislator puts forth that not only the claimant's own economic situation, but also his/her family's economic situation should be taken into consideration. In point of fact, article 334/1 of the HMK defines those who can benefit from this right as "People who are partially or completely incapable of paying the necessary trial or follow-up expenses without putting their own and their family's livelihood into a difficult situation". In this regard, jurisprudence of the Council of State considers the following documents as proof of poverty: a poverty certificate received from the elected neighborhood

38 Hakan Pekcanıtez and Oğuz Atalay and Muhammed Özekes, *Medeni Usul Hukuku*, (9th edn, Oniki Levha 2021) 568

39 Ramazan Arslan and Ejder Yılmaz and Sema Taşpınar Ayvaz and Emel Hanağası, *Medeni Usul Hukuku* (7th edn, Yetkin 2021) 728

40 Hakan Pekcanıtez, *Medeni Usul Hukuku* (15th edn, Oniki Levha 2018) 2418

41 "… the applicants, claiming that they do not have the financial means, applied for legal aid and submitted documents to the court in order to fulfill their obligations to prove their poverty. However, considering that the applicants were represented in the case with a lawyer, the Court rejected their legal aid requests without making any effort to investigate their poverty situation. … The fact that the applicants were represented by a lawyer alone cannot be a sufficient reason for the rejection of the legal aid request. Such a categorical approach prevents the real financial situation of those concerned from being taken into account. … Based on the fact that the applicants hired a lawyer, it cannot be concluded that their financial strength is sufficient to cover the costs of the proceedings – without making a determination that they paid the lawyer a fee. This approach of the court deprived the applicants of the possibility of benefiting from temporary exemption from paying legal costs by proving their poverty." *Famiye Beğim ve Mehmet Tahir Beğim*, §§55-56; on the same parallel see *Tacettin Ceylan*, § 69

42 Zehreddin Aslan and İrfan Barlass and Kahraman Berk and Nilay Arat and Mutlu Kağıtçıoğlu and Halil Altındağ, Gamze Gümüşkaya and Şebnem Sayhan and Mehmet Akif Bardakçı and Cihan Yüzbaşıoğlu, *Açıklamalı İçtihatlı İdari Yargılama Usulü Kanunu (Vergi Yargılaması Dahil)*, Zehreddin Aslan (Ed) (3rd edn, Seçkin 2022) 396

43 Aslan et al (n 42) 395

representative/headman (signed by the headman and two members), letters from the traffic branch directorate that there is no vehicle registered in the name of the person in question, letters from the Bağ-Kur and Social Insurance Directorate that no pension or assistance is attached to the person making the request.[44] The decision is generally based upon the evaluation of registered movable and immovable property. In addition, it is observed that in practice, the fact that all the litigation expenses related to the case have been covered by the plaintiff is put forward as a reason for the rejection of the legal aid request.[45]

The proof of the claimant's inability to pay is accepted as full proof.[46] It is accepted that the court could conduct research on the financial and social situation of the claimant in order to evaluate and determine whether this condition is fulfilled due to the fact that the principle of ex officio investigation becomes operational.[47] In Civil Procedure Law, it is accepted that the request for legal aid is an ex parte proceeding, that the principle of ex officio investigation is applied in ex parte proceedings unless there is a contrary provision, and, since there is no contrary provision regarding legal aid, that the principle of ex officio investigation is valid in the request for legal aid.[48] Accordingly, an individual making the request in terms of concrete events will already have submitted documents and evidence to the file that shows his/her lack of solvency. However, since the ex officio investigation principle is applicable, the court may, for example, request information and documents by writing to the relevant official institutions and consider the economic situation. Even if the requesting individual has not submitted a "poverty certificate" obtained from the headman's office, the court, if it deems necessary, may request this document from the relevant headman and take it into account in its evaluation.

In examining the decisions of the Council of State as regards to the lack of solvency proof, it is observed that the legal aid request was rejected in cases where the plaintiff did not present the documents regarding the financial situation showing that s/he was not in a position to cover the legal expenses, together with the summary of the case and the evidence on which s/he would base his/her claim.[49] However, in such cases, an interim decision that would be issued to further request a financial situation document[50] would be more appropriate in terms of realizing the right of access to

44 File nr. 2017/333, Decision nr. 2018/503, (Danıştay 10th Chamber, 12 Februry 2018); File nr. 2016/13856, Decision nr. 2018/505, (Danıştay 10th Chamber, 12 February 2018); File nr. 2009/3631, Decision nr. 2009/3579, (Danıştay 8th Chamber, 01 June 2009); File nr. 2008/2007, Decision nr. 2010/1843, (Danıştay 10th Chamber, 09 March 2010)

45 File nr. 2014/5592, Decision nr. 2016/720, (Danıştay 6th Chamber, 23 February 2016); File nr. 2020/955, Decision nr. .2020/993 (İzmir Regional Administrative Court 5th Administrative Case Chamber, 13 October 2020)

46 Süha Tanrıver, *Medeni Usul Hukuku*, (4rd edn, Yetkin 2022) 1204.

47 Tanrıver (n 46) 1204.

48 Pekcanıtez and Atalay and Özekes (n 38) 573.

49 Danıştay Plenary Session of Tax Court Chambers 30.12.2020 File nr. 2019/1801, K.2020/1610.

50 File nr. 2021/4257 Decision nr. 2022/120 (Danıştay 13th Chamber, 19 January 2022); see dissenting vote in File nr. 2019/1801, Decision nr. 2020/1610, (Danıştay Plenary Session of Tax Court Chambers, 30 December 2020); also see File

court. There are also cases in which Danıştay decided that examining the solvency requirement would require the evaluation of further documents.[51]

In addition, it is accepted that the applicant's claim is weakened in terms of proof since the courts do not give credit to all the documents which claimants submit to reveal their financial situation in the legal aid request and neither do they specify which documents will be relied upon to reveal the unfavorable economic situation of the parties.[52] Accordingly, in cases where the request for legal aid is not supported with sufficient proof of poverty, it may be suggested that the courts should reveal/ indicate which documents fall within the scope of those that are deemed suitable.

In situations where the request is not manifestly ill-founded, it is not necessary to prove that the person is the rightful party of the case.[53] The claimant must not be in a "clearly unfair situation" in his/her claim and must form an "approximate opinion" before the judge.[54] It is observed that the Council of State rejected the legal aid request on the grounds that the condition of not being manifestly ill-founded was not met in full remedy cases where the application to the administration was not made within the time limit, and the refusal decision taken upon the late application was the subject of the lawsuit.[55] It is suggested that the condition of not being manifestly ill-founded should be interpreted narrowly and therefore the person should not be expected to prove that s/he is justified in his/her claim.[56] Indeed, at this stage, it is sufficient for the court to conclude that the person is right in his/her claim by interpreting the condition narrowly, since the court will not make an assessment by going into the merits of the case. In this context, approximate proof is accepted in the proof of the justification condition.[57]

In a few cases, if there are specific regulations regarding legal aid, it may be possible for the claimant to benefit from this aid without being subject to the aforementioned two conditions.[58] Law No. 4539 on the Adoption of the Decree-Law on the Settlement of Legal Disputes Arising from Disasters and Facilitating Certain

nr. 2009/313 (Van 2nd Administrative Court's judgment, 12 February 2009) (unpublished court decision) from Mustafa Köksal "Adli Yardım (Müzahereti Adliye) Kurumunun İdari Yargıdaki Uygulaması (2009) 40 *Terazi Hukuk Dergisi*, 97, 101, fn. 6 "By considering this interim decision … by applying to the municipality if he resides within the boundaries of the municipality, or to the village council of elders if he resides within the boundaries of the village. Requesting information on a) the profession of the plaintiff and what job he is engaged in, how he makes a living, b) his movable and immovable property, c) the amount of tax he pays to the state, d) the state and situation (economic situation) of his family, e) requesting the attorney of the claimant to obtain a certificate showing whether he has the ability to pay the cost of the lawsuit and submit it to the case file."

51 File nr. 2008/1136, Decision nr. 2011/4131 (Danıştay 10th Chamber, 10 October 2011)

52 *Tacettin Ceylan*, §§ 68-70

53 Arslan and Yılmaz and Taşpınar Ayvaz and Hanağası (n 39) 729

54 Pekcanıtez and Atalay and Özekes (n 38) 569

55 File nr. 2012/8689, Decision nr. 2015/795, (Danıştay 10th Chamber, 26 February 2015)

56 Aslan et al (n 42) 396

57 Tanrıver (n 46) 1204

58 Kuru (n 1) 5420

Transactions in Natural Disaster Zones article 3/1, Law No. 4308 on the Treatment of Civil Actions and Enforcement Proceedings of Military Persons during Mobilization or in Extraordinary Situations, article 1.

B. Persons Eligible to Benefit from Legal Aid

Eligibility criteria are set out under article 334 of the HMK. Although legal aid is regulated as an opportunity for real persons to use, article 334/2 of the HMK stipulates that public benefit associations and foundations could benefit from legal aid if they are justified in their claims and defenses and are unable to pay the necessary expenses partially or completely without being in financial difficulty. In this overall picture, as can be understood from the text of the article, legal entities, except for public-benefit associations and foundations, do not fall under the category for benefiting from legal aid. In that case, as could also be construed from the jurisprudence of Yargıtay[59], corporations and alike legal entities are not eligible for benefitting from legal aid. From this point of view, as will be expressed below under the title "Foreigners and Legal Aid", it is not possible for companies with foreign element to benefit from such opportunity.

Being a party in administrative courts depends on the acquisition of legal personality within the scope of the capacity to be a party, and the capacity to sue/file a lawsuit is dependent on the condition of violation of interest in terms of annulment cases and the condition of violation of rights in terms of full remedy cases. Private legal personalities such as companies, associations, foundations or unions can acquire legal personality as specified in their legislation. Only as such can legal personalities of private law acquire the capacity to become parties. It is accepted that private legal persons who do not have legal personality do not have the capacity to be a party in administrative cases.[60] It is observed that public legal personalities are handled with a different approach in terms of being a plaintiff and defendant. It is generally accepted that a legal entity that is not a public legal personality could be a defendant in administrative cases. However, there is no consensus on the point that legal entities that are not public legal personalities can be plaintiffs.[61]

59 File nr. 2012/16745, Decision nr. 2013/15211 (Yargıtay 11th Chamber, 09 September 2013); File nr. 2015, 5208, Decision nr. 2015/5910 (Yargıtay 15th Chamber, 19 November 2015); File nr. 2015/3915, Decision nr. 2015/4401 (Yargıtay 15th Chamber, 14 September 2015)

60 For an example see "… It is not possible for an unincorporated company, which does not have a legal personality and does not have the capacity to benefit from and use civil rights, to become a party at any stage of the proceedings, including the appeal, in the judicial authorities. … the lawsuit filed on behalf of the partnership should be rejected in terms of competence; ..." File nr. 2000/8454, Decision nr. 2003/4807 (Danıştay 7th Chamber, 19 November 2003)

61 See "… to accept the title of defendant of administrative authorities that do not have legal personality; while not accepting that they be plaintiffs cannot be reconciled with the principles of procedural law in general and administrative procedural law in particular. Even though public administration organizations that have certain powers and duties in the administrative structure do not have legal personality, they should be given the capacity to be a party and litigation for disputes arising from their activities." (Lutfi Duran, «Danıştay'ın 1979 Yılı Kararları Üzerine Kısa Mülahazalar», 13 (3) Amme İdaresi Dergisi, 1980); " … If it is necessary to take all kinds of legal initiatives – including jurisdictions – for the resolution of legal disputes that may arise from its actions and transactions, being a plaintiff or a defendant is the inevitable result of

Legal entities that can benefit from legal aid are determined by the HMK as public benefit associations and foundations. If their status as legal entities is evaluated within the scope of administrative cases, their formation of legal personality is determined by the provisions of the Civil Code. Thus, for public benefit associations, the notification of establishment, the association's charter and the necessary documents are given to the highest local authority, and for the latter, these documents are kept in the registry of the court of the settlement. Accordingly, public benefit associations and foundations will be able to request legal aid in administrative cases which fall within the scope of having the capacity to take action in a lawsuit filed since the date of acquiring legal personality.

A recent case is given of a request for legal aid being examined at the Konya Regional Administrative Court in which a union was party to the case to sue an individual administrative act regarding a member. By referring to article 19/f of the Code on Public Servants Unions and Collective Bargaining the court found that the union was acting as a "custodian" and therefore the legal aid request was to be determined by taking into account the claimant (individual)'s financial situation, not the union's.[62] Therefore, the administrative judiciary, having a legitimate ground in a specific law, took the issue in hand by gaining a broad perspective and allowing the applicant to enjoy his/her right to court by ensuring equality of arms.

Moreover, though this would be rare, some public legal entities could be plaintiffs in administrative cases. In such exceptional cases, since it is accepted that a request for legal aid could only be made by public benefit associations and foundations under the HMK, it should be clear that such legal aid requests would not be accepted.

Under the HMK, both parties of the case could benefit from legal aid.[63] However, since the defendant is generally the administration in administrative proceedings, it is accepted that the plaintiff could benefit from legal aid in such proceedings.[64] It is argued that due to the "unequal" relationship between the parties to the proceedings in the administrative jurisdiction, it is more likely that interpretation in favor of the person would be applied in order to eliminate this inequality.[65] It is not possible to disagree with the aforementioned proposition, because in ensuring the equality of arms, individuals who have an unequal relationship with the public power should be able to enjoy their right to defense in the most effective way during the trial process.

these administrative activities. ... it is not possible to deprive the administrations of being parties and litigation capacity within narrow molds by strictly adhering to the legal personality, and to keep it on the defendant scale of the procedural law scales." File nr. 1971/1, Decision nr. 1979/1 (Danıştay General Assembly on Unification of Case Law, 08 March 1979)

62 File nr. 2020/957, Decision nr. 2020/776 (Konya Regional Administrative Court 2nd Administrative Case Chamber, 31 March 2020)

63 Arslan and Yılmaz and Taşpınar Ayvaz and Hanağası (n 39) 729

64 Turgut Candan, *İdari Yargılama Usulü Kanunu*, (4th edn, Adalet 2011) 791

65 Güven Süslü, "Türk Hukuku'nda Adil Yargılanma Hakkı Çerçevesinde Bir Mahkemeye Başvuru Hakkı ve Bu Alanda Devletin Pozitif Yükümlülüğü", (2014) 6(16) *Hukuk ve Adalet Eleştirel Hukuk Dergisi*, 83, 115

Apart from the parties, it is accepted that those who intervene in the case or who are notified of the case could also benefit from legal aid.[66]

C. Scope of the Legal Aid

Legal aid provides a "temporary" exemption to a person whose claim is not clearly ill-founded and who is incapable of meeting the costs of the proceedings. While the said exemption covers the court fees, it does not result in the exemption from expenses such as the notification expenses to be made during the trial, the advance of evidence or the expense advance for the plaintiff.[67] The latter are paid in advance from the Treasury.

According to the evaluation of the court, the institution of legal aid provides one, more, or all of the following opportunities, as per article 335 of the HMK:

- Temporary exemption from all litigation and follow-up expenses,
- Exemption from providing security for litigation and follow-up expenses,
- Advance payment by the State for all expenses that must be incurred during the lawsuit and enforcement proceedings,
- If the case needs to be followed up with a lawyer, obtaining a lawyer to be paid later.[68]

Under the HMK there is no specification for types of cases in which a request for legal aid could, or could not, be made. Under the case law of civil procedure, and also in scholarly writing, it is observed that there is no distinction for types of cases. Under the administrative judiciary legal aid is dealt with in both annulment actions and full remedy actions.

If the request for legal aid is accepted, this does not include the automatic provision of a lawyer. However, pursuant to Article 335/3 of the HMK, if the case needs to be followed up with a lawyer, the provision of a lawyer to be paid later depends on the court's separate decision.

Legal aid continues until the finalization of the court decision. Accordingly, individuals whose legal aid request is accepted from the court of first instance continue to benefit from this opportunity at the legal remedy stage. Accordingly, the Council of State decides that there is no need for a new decision to be made about the legal aid request - made at the legal remedy stage - of the plaintiffs whose legal aid

66 Gözübüyük and Dinçer (n 31) 794

67 Arslan and Yılmaz and Taşpınar Ayvaz and Hanağası (n 39) 730

68 In this context, articles 176-181 of the Attorneyship Law No. 1136 and the Legal Aid Regulations of the Union of Turkish Bar Associations are applicable.

requests had previously been accepted.[69]

Legal aid does not cover litigation expenses prior to the request and acceptance of legal aid, as per article 337/3 of the HMK. Indeed, the Council of State declares that, "it is clear that the decision regarding the acceptance of the legal aid request will not cover the trial expenses for the whole phase of the case, but only the trial expenses after the date when the plaintiff appealed against the decision and requested legal aid ….".[70]

Since the legal aid decision is personal, it only applies to the person who made the legal aid request and to whom the aid was provided, and it is valid only for the disputed decision.[71]

In cases where the subject matter of the lawsuit is increased through an amendment petition, it is accepted that the legal aid decision covers the further expenses incurred due to this improvement and that these fees and expenses will also be paid.[72]

D. Procedure for Requesting Legal Aid

Legal aid is requested from the court where the request regarding the original claim will be made pursuant to Article 336 of the HMK.[73] Since the general rule is for requests to be made in "written form" in administrative proceedings, it is accepted that the request for legal aid must also be made in writing and that verbal applications will not be processed.[74] The aforementioned request could either be brought before filing a lawsuit or together with the lawsuit.[75] It is accepted that the request for legal aid could be made at the same time as the petition is made , or it could be made at any stage of the lawsuit before the final decision is reached.[76] The request is made to the court of first instance if the case is in the first instance proceedings, and to the

69 "From the examination of the file; upon the plaintiff's request for legal aid …, the claimant's legal aid request has been accepted by the decision of the Administrative Court … and the decision to accept the legal aid request will continue until the final judgment is finalized in accordance with the legislation; As the trial process of the case continues and the decision of the first instance court regarding the merits of the plaintiff has not been finalized yet, it has been concluded that there is no room for a decision on the claimant's request for legal aid at the appeal stage." File nr. 2020/2273, Decision nr. 2020/3453, (Danıştay 2nd Chamber, 24 November 2020); on the same parallel also see File nr. 2020/4737, Decision nr. 2021/965, (Danıştay 12th Chamber, 24 February 2021); File nr. 2020/2272, Decision nr. 2020/3667, (Danıştay 2nd Chamber, 29 December 2020)

70 File nr. 2020/2476, Decision nr. 2020/2418, (Danıştay 5th Chamber, 17 June 2020)

71 Pekcanıtez (n 40) 2430

72 Pekcanıtez (n 40) 2431

73 "…it is clear that the legal aid would be requested from the court where the original claim or the matter will be decided and will be decided by that court." File nr. 2021/744, Decision nr. 2021/1098, (Danıştay 10th Chamber, 11 March 2021,); on the same way see also File nr. 2014/10421, Decision nr. 2015/5156, (Danıştay 6th Chamber, 11 September 2015)

74 Candan (n 64) 792

75 Arslan and Yılmaz andTaşpınar Ayvaz and Hanağası (n 39) 730

76 Gözübüyük, Dinçer (n 31), p.794. As there is no time limit in the law regarding the request for legal aid in terms of the civil trial procedure, it is accepted that it is possible to make this request up to the end of the trial. Pekcanıtez, (n 40) 2424

regional administrative court or the Council of State in the legal remedies stage.[77] In practice, in the administrative judiciary, in cases where an application for legal aid is made, there is a procedure that the court of first instance should give the decision on the request for legal aid.[78]

The person requesting legal aid is obliged to submit to the court a summary of his/her claim regarding the case, the evidence on which (s)he will base his/her claim, and a document showing his/her financial situation that shows that (s)he is not in a position to meet the litigation expenses of the case. In practice, mostly income and assets documents are submitted. It is very important at this stage that all the necessary documents for the legal aid request are added to the application in their entirety, since a delayed decision made by the court for the completion of the necessary documents would prolong the court process. The document regarding the legal aid request is exempt from all kinds of fees and taxes.

In case the legal aid is requested before the lawsuit is filed, the statute of limitations regarding the right of the subject to the actual lawsuit is not interrupted, since in fact, the legal aid request is not a subjective right request.[79]

E. Examination of the Request for Legal Aid by the Court

Pursuant to Article 337 of the HMK, the court may decide on the legal aid request without holding a hearing, or it may decide by holding a hearing upon a request. In the administrative jurisdiction procedure, it is accepted that the legal aid request will be examined and decided on the basis of the documents.[80] It is accepted that the legal aid request should be examined first by the court, and that if there is an issue in any of the first examination matters, a decision cannot be made on these issues without a decision on legal aid, with the exception of distinct applications regarding authority.[81] In addition, in the event that a legal aid request is submitted after the court decision regarding the payment of missing fees, postage stamps or legal expenses during the lawsuit, the legal aid request must be decided first.[82]

As the legal aid request is not considered to be one of the issues to be decided by single judge courts under the İYUK, Danıştay – for the evaluation of the legal aid request by the courts – concludes that if the legal aid request is not examined by the court but by a rapporteur judge at the first examination stage, the legal aid evaluation should be considered not to have been examined in a manner compatible

77 File nr. 2021/17256, Decision nr. 2021/2428, (Danıştay 2nd Chamber, 07 July 2021)

78 Akyılmaz and Sezginer and Kaya (n 37) 735 fn. 263-264

79 Pekcanıtez, (n 40) 2424

80 Candan (n 64) 792

81 Köksal (n 50) 104

82 Akyılmaz and Sezginer and Kaya (n 37) 735-736

with the legal procedure and should be found to be unlawful. However, as all other issues until the perfection of the file are in line with the law - other than the legal aid evaluation - Danıştay deems it unnecessary for other matters to be repeated other than the legal aid request by referring to the "procedural economy principle". In addition, after the court's decision on the legal aid request (to be valid from the stage of the lawsuit petition) has been made, a decision based again on merits shall accordingly be given.[83]

It must also be pointed out that the legal aid request is not an issue which the appellate courts can examine upon the decisions of first examination of the first instance courts. The reason for such, as stated by Danıştay, is that issues to be examined by the regional administrative courts on the first examination of the first instance courts are laid down *numerous clausus* under the İYUK.[84]

In the evaluation of a request for legal aid, proof that the requirements exist for the request to be accepted is also examined. In this context, in assessing whether the claim is manifestly ill-founded, as stated above, the claimant should not be asked to form an opinion on whether or not (s)he is right.[85] In point of fact, the examination made regarding the aforementioned conditions is not an evaluation on the same level as the clear illegality sought in the terms of the decision of stay of execution or on the merits of the case.[86] If the legal aid request is rejected, the reason for not accepting the information and documents submitted to the court must be clearly stated in the court decision. In this context, the Constitutional Court, in its individual application decisions, points to the function of the courts of first instance in terms of evaluating the legal aid requests. It also mentions the importance of the reason for rejection within the framework of its duty to examine the effects of the rejection of requests on the rights guaranteed by the Constitution.[87] In this context, the importance of justification of refusal in the evaluation of proportionality is revealed by emphasizing that the protection of fundamental rights and freedoms is primarily the duty of the first instance courts and, in parallel, that the courts of first instance are more suited to the task of evaluating material facts than the Constitutional Court.[88]

83 File nr. 2020/3499, Decision nr.2020/3381 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 09 December 2020); File nr. 2019/6086, Decision nr. 2020/3591 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 17 December 2020); File nr. 2019/5812, Decision nr. 2020/2639 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 10 November 2020); File nr. 2019/3824, Decision nr. 2020/1625 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 25 June 2020)

84 File nr. 2018/6356, Decision nr. 2020/3661 (Danıştay 8th Chamber, 17 September 2020)

85 Aslan et al (n 42) 398-399

86 Aslan et al (n 42) 398

87 *S.B.,* App no 2017/19758, (AYM, 02 December 2020), §39

88 *Famiye Beğim ve Mehmet Tahir Beğim*, § 49. "… Courts of Instance are in a better position than the Constitutional Court in terms of evaluating the legal aid requests of the applicants. As a matter of fact, the Constitutional Court has no duty to determine whether the applicants are entitled to legal aid during the trial in the court of instance. However, it is the duty of the Constitutional Court to examine the effects of the rejection of the aforementioned demands on the rights guaranteed by the Constitution. In this context, the reasoning of the courts of instance when rejecting their legal aid requests is important." *S.B.,* § 39

In case the legal aid request is rejected, an objection can be made to the court that issued the decision within one week from the notification. The decision made after the objection is final.

The legal aid decision could not be taken to appeal alone. It is possible to examine the court decision regarding the legal aid request at the stage of appellate procedure followed by the final decision.[89] The Council of State, even at times when the objection procedure against the rejection of the legal aid request is not provided under the law, accepted that the rejection of the legal aid request may be subject to appeal together with the final decision, by emphasizing that the finality of the decisions regarding the legal aid request is an interim decision.[90]

Providing the opportunity to object against legal aid decisions and the necessity of presenting the reason for the refusal of legal aid, has a strengthening effect on the right to legal aid within the scope of the right to a fair trial. Hence, such a scenario strengthens the effectiveness of the legal aid institution and uplifts the standard of examination of the legal aid decision in cases of refusal.

In appeal applications, where the legal aid request has been accepted at the first instance stage, the file is accepted together with the legal aid request, and all procedures are held and concluded as such.

A first-time request for legal aid could be made at the appeal stage to the regional court of appeals as well as to the Council of State at the cassation stage. As for the procedure at the appeal and cassation stages[91], in the case of a first-time request for legal aid at the stage of appeal, fees and expenses are not charged until a decision is made on legal aid. The file is first examined in terms of the legal aid request, and if the request is accepted by the Chamber Committee, the expenses are covered from the legal aid services allowance, the perfection of the file is completed, and the proceedings of the case are held over as a file with legal aid. In case the legal aid request is not accepted, the petitioner is notified that it has not been accepted and that the deficiency regarding the fee and postage should be completed within seven days. If legal aid is requested at the stage of cassation, fees and expenses are not charged and the file is first sent to the Council of State to be examined in terms of legal aid request. If the legal aid request is not accepted, the claimant is notified that it has been denied and that the deficiency regarding the fees and postage fee should be completed within fifteen days, pursuant to article 48/2 of the İYUK.[92]

89 Akyılmaz and Sezginer and Kaya (n 37) 736

90 File nr. 2009/9171, Decision nr. 2013/2229, (Danıştay 10th Chamber ,12 March 2013); File nr. 2012/335, Decision nr. 2013/1490, (Danıştay 15th Chamber, 21 March 2013); File nr. 2013/100, Decision nr. 2013/1943, (Danıştay 15th Chamber, 14 March 2013)

91 See Leyla Kodakoğlu, *İstinaf Sürecinde Bölge İdare Mahkemesinde Görevli Personelin Görev Tanımı ve İş Akışı Rehber El Kitabı*, (Avrupa Konseyi Yayınları, 2022)

92 File nr..2015/4528, Decision nr. 2016/1687 (Danıştay 10th Chamber, 28 March 2016)

Although it is not possible to file an individual application before the Constitutional Court directly against the interim decision without exhausting the judicial process, the Constitutional Court states that "in cases where not filing individual application against the interim decision may cause the consequences of the violation of fundamental rights and freedoms to aggravate, it is possible to file an individual application against the interim decision before the judicial process is completed."[93]

Although the refusal of a legal aid request constitutes a final provision, since it is a certainty in a formal sense[94], the person whose legal aid request is rejected pursuant to Article 337/2 of the HMK may request legal aid again based on any subsequent changes in his/her financial situation.

When the legal aid request is rejected, the lawsuit fee must be paid by the individual who requested legal aid upon the refusal decision.

According to HMK article 338, if it is revealed that the beneficiary of legal aid deliberately gave false information about his/her financial situation or if his/her financial situation is understood to have improved, the legal aid decision is annulled.

F. Payment of Delayed Trial Expenses

In the event that the person benefiting from legal aid loses the case, according to the principle of "loser pays the costs of the case" under Turkish Law, all advancing expenses and advances paid by the State due to the legal aid decision are collected from the losing plaintiff. In such cases, pursuant to Article 339/1 of the HMK, if deemed appropriate by the court, it may be decided that plaintiff may pay the litigation expenses in equal installments within a maximum of one year. However, within the framework of Article 339/2 of the HMK, in cases that will cause the victimization of the person benefiting from legal aid, the court may also decide to fully or partially exempt the collection of litigation expenses to be paid, or the person may be exempted by the State. Accordingly, it could be asserted that it is possible for economically weak individuals who request legal aid to benefit from such aid with absolute exemption as well as temporary exemption.[95]

If the person renounces the case, (s)he will be liable for litigation expenses as if (s)he loses the case in accordance with Article 312 of the HMK. However, in this case, the court must decide whether this situation will lead to the victimization of the person and decide for full or partial exemption from payment.[96]

93 *Famiye Beğim ve Mehmet Tahir Beğim*, § 34.

94 Pekcanıtez and Atalay and Özekes, (n 38) 572; *Tacettin Ceylan*, § 33

95 Süslü, (n 65) 113.

96 Akyılmaz and Sezginer and Kaya (n 37) 734-735

For persons whose legal aid request has been accepted and who have benefited from this opportunity, the attorney's fee of the lawyer appointed by the bar association with the request of the court is paid from the Treasury pursuant to Article 340 of the HMK.

G. Foreigners and Legal Aid

The requirements explained above are also applicable for foreigners in terms of legal aid. Foreigners' ability to benefit from legal aid depends on reciprocity. In this context, in addition to the conditions required for the acceptance of the legal aid request (namely, inability to pay and the claim not being clearly groundless), an evaluation will also be made regarding whether or not the reciprocity condition is fulfilled.[97]

Reciprocity could either be legal or de facto.[98] In the legal framework, the existence of an international agreement to which the country of nationality of the claimant and Turkey are both party , or the existence of a bilateral agreement between Turkey and the country of which the claimant is a citizen, is required to prove reciprocity.[99] In the absence of such, it is accepted that it is sufficient to prove that there is an actual practice in favor of Turkish citizens in the country of which the claimant is a citizen.[100]

Regarding the eligibility criteria for foreigners, it is not possible for companies with foreign element to benefit from legal aid, as other than real persons, only public benefit associations and foundations are allowed to request legal aid.

Within the scope of the Law on Foreigners and International Protection No. 6458, it is important that the necessary information and documents are fully submitted in the application for legal aid, since the evaluation process of the legal aid request will be interrupted if the foreigners in the country do not have or do not submit an identity document such as a passport, not to mention the communication problems that may arise due to residence problems.

Concluding Remarks

"Legal aid" that enables parties to participate effectively in the judicial process and "balances" the interference with the right of access to court by facilitating the

97 "Considering that there is a multilateral agreement between the Russian Federation and the Republic of Turkey regarding the issue of legal aid in the response letter given by the Ministry of Justice in the incident, it is understood that the reciprocity condition sought as a condition of benefiting from legal aid has been fulfilled. In this case, the court should investigate whether the necessary conditions for legal aid (lack of ability to pay and the claims are not clearly groundless) are met and a decision should be made on this issue, but in its decision the Court rejects the legal aid request … on the ground that the condition of reciprocity with the Russian Federation is not fulfilled. … the decision is not legal." File nr. 2015/4837, Decision nr. 2016/1832, (Danıştay 10th Chamber, 31 March 2016)

98 Pekcanıtez (n 40) 2421

99 Pekcanıtez (n 40) 2421

100 Kılınç (n 4) 207; Pekcanıtez (n 40) 2421

opportunities of the parties to put forward their claims and evidence, undoubtedly has great significance in ensuring equality between the parties within the scope of "equality of arms" before the administrative courts. It effectively serves to ensure the right to a fair trial in administrative proceedings. The application of legal aid in administrative judicial procedural law is utilized through article 31 of İYUK that makes reference to the HMK. Accordingly, the organization and implementation of the institution in the civil procedure law directs the practice of the institution in the administrative judiciary. However, the concept in question finds an area of application in the administrative judiciary in accordance with the principles and nature of Administrative and Administrative Judicial Procedural Law.

It is clear that the legal aid institution, which is considered to be a requirement of the social state principle and is applied under the principle of equality, is implemented with some differences from the civil procedure law. Indeed, there are distinct applications in the administrative judicial procedure due to the unique features of this procedure. In examining the rules and practice of the legal aid institution several important issues stand out.

As a written procedure is the general rule in administrative judiciary it results in distinct utilization of legal aid claims within the administrative judiciary rather than in civil judicial procedure. According to the HMK the evaluation may also be made by hearing, whereas under the practice of the administrative judicial procedure – by taking into account the written procedure – such requests are mostly made in writing and examined on the basis of petition.

In addition, both sides of the proceedings under the HMK can request legal aid. However, for administrative cases it is accepted that the plaintiff could benefit from legal aid, since the defendant is generally the administration in administrative judicial procedure.

As regards the evaluation of the legal aid request by administrative courts, in case of lack of financial eligibility while making such examination courts shall be proactive and should ask for all required documents from the necessary authorities. There is a tool for both in civil and administrative judicial procedure law, namely "ex officio investigation". By exercising ex officio authority, the court can get the necessary information in order to examine the need of legal aid and make maximum use of such opportunity for those that most need it.

Administrative courts' "ex officio investigation" authority in the examination of files within the scope of article 20 of the İYUK gives room to enable individuals to enjoy their right to court through the evaluation of the financial eligibility criteria for granting legal aid. In cases where the applicant requesting legal aid is unable to

submit the necessary documents, or where an adequate evaluation cannot be made from the documents submitted by the claimant, administrative courts may act within the scope of the "equality of arms" principle which in turn results in requesting for information and documents in order to carry out comprehensive research and to realize the right of access to court. Indeed, in a few administrative cases, it is observed that determination without further detailed examination of the financial condition is held unlawful on the grounds that it is not possible to conduct sufficient research with the available documents. In particular, since there are also fee exemptions for a few administrations, it becomes necessary for the administrative courts to perform ex officio investigation more carefully in favor of individuals in terms of legal aid requests.

The legal aid request is applied without distinction of case type. However, it is significant that the financial situation examination is evaluated sensitively within the framework of the ex officio investigation principle especially in terms of full remedy actions, taking into account that such cases are subject to proportional fees/charges. The fact that the amount of fees is determined depending on the amount of compensation claimed in full remedy cases could sometimes create an obstacle to individuals' right to access courts.

Other than the distinct features of application of legal aid under administrative judiciary there are two issues to be pointed out in realizing the right of access to court in terms of the legal aid institution. The first is the reason for the refusal of the legal aid request and the second is the objection/appeal procedure against the rejection of the legal aid request.

The obligation of the court to put forward a reason for the rejection of the legal aid request is of vital importance in terms of realizing the right to a fair trial. Indeed, the unjustified rejection of the said request may lead to the conclusion that the evaluation might be arbitrary. It should be demonstrated with concrete evaluation and justification that the examination of the issue by the court is not arbitrary. The Constitutional Court draws attention to the importance of the function of the courts of instance, which examines the request for legal aid, in this regard.

Additionally, in order to use the right of access to court more effectively, a full and complete judicial review of the refusal of the legal aid request shall be possible, and this will only be possible if the refusal is presented with concrete justification. Besides, the existence of the mechanism of objection to the court decision regarding the legal aid request in the legal system is one of the most important building blocks that ensure the right of access to court. It is essential for the realization of the right to a fair trial that the above-mentioned issues, in the legal framework and in practice regarding legal aid, are carefully considered and implemented.

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RESEARCH ARTICLE

Executive Remuneration of Company Directors under EU Law and Turkish Law

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Abstract

The criteria to determine the material scope of executive pay has always been a controversial aspect of corporate law and corporate governance. The controversy stems from the fact that the board of directors generally tends to determine a suitable executive remuneration for its members, not considering the interests of other stakeholders. In some cases, an independent compensation/remuneration committee is appointed by the board of directors and determines the amount of executive pay. Depending on the legislation, this may require additional approval at the annual general meeting by the shareholders.

European legislators have differing approaches with regards to regulating this very area of corporate pay. The revised Shareholders Rights Directive requires an enhanced approach for the shareholders' role by determining the remuneration policy of the company. These amendments can be identified as the promotion of the say on pay, on the remuneration policy, and remuneration report. Furthermore, the previous recommendations have also set the criteria to determine the amount of remuneration. The Directive contains provisions for setting up a clear and transparent corporate remuneration policy and shareholders' binding vote with temporary derogations.

The corporate remuneration system of Turkish law is legislated under Art. 394 TCC (Turkish Commercial Code Nr. 6102), which only requires that board members can be paid an honorarium, salary, bonus, premium, and a portion of the annual profit, provided that this amount is determined by the articles of association, or by way of a general meeting resolution. Art. 408 TCC also stipulates a binding general meeting approval of the remuneration policy, whereas Art. 513 TCC requires the framework with regard to bankruptcy procedures.

Keywords

Remuneration Of Company Directors, Say on Pay, Shareholders Right Directive, Shareholders' Oversight, Corporate Governance

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I. Introduction: The Rationale Behind Executive Pay Systems

The design of executive pay systems concerning corporate managers has reflections on a wider scale, especially with regard to previous economic crises where unsupervised corporate compensation schemes played a crucial role[1].

The subject of how to determine executive pay is closely related with the "principal-agent" conflict[2]; however, agency theory has come under significant criticism lately in literature on the basis that it is insufficient to explain the legal grounds for the shareholder-manager relationship[3].

Executive pay systems are of crucial importance to a company, as companies are managed by their board of directors.

There are five globally accepted characteristics of business corporations: *(i)* legal personality, *(ii)* limited liability, *(iii)* transferable shares, *(iv)* investor ownership and *(v)* delegated management with a board structure[4]. Other than partnerships[5], corporations are managed by a board of directors, which is elected by the general meeting of shareholders, i.e. there is a statutory organ responsible for the management of the corporation. Being a shareholder does not result in managing the corporation; as opposed to the partners in a partnership. The members of the board of directors are called managers or directors[6]. According to the system of any given country, the board can be structured as either a one-tier or two-tier board system. A two-tier board system requires a supervisory board and a managerial board, with executive members[7]. In one-tiered board systems, e.g. Turkey, commercial codes mostly enable the delegation of management. (Art. 367 TCC) Delegation of management is the separation of day-to-day business of the firm from strategic management. Corporate officers who run the operational day-to-day business of the corporation are called executive managers, as they are in fact managing the commercial affairs of the

1 Guido Ferrarini, Niamh Moloney and Maria Cristina Ungureanu, 'Understanding Directors' Pay in Europe: A Comparative and Empirical Analysis' (2009) SSRN ECGI - Law Working Paper 126/2009, 5 <https://ssrn.com/abstract=1418463> accessed 10 April 2023; John Armour, Luca Enriques, et. al.: *The Anatomy of Corporate Law, A Comparative and Functional Approach*, (third edn, Oxford University Press 2017) 155. Huriye Kubilay, 'Anonim Ortaklıkta Yönetim Kurulu Üyelerinin Ücretlerinin Belirlenmesi' in *Ticaret Hukuku ve Yargıtay Kararları Sempozyumu XXIV* (2010) BTHAE 11.

2 Mathias Habersack, 'Vorstands- und Aufsichtsratsvergütung – Grundsatz- und Anwendungsfragen im Lichte der Aktionärsrechterichtlinie' (2018) (127) NZG 129.

3 Jean-Philippe Robé, 'The Shareholders Rights Directive II' in *ERA Forum 17* (2016) 45-55, 51.

4 Armour and Enriques (n 5) 5.

5 Partnerships are also commercial companies, where the identities of partners are important, other than the investment they bring in to the company. With regard to the management of partnerships, all of the partners are vested with managerial duties and responsibilities, unless the partnership agreement stipulates otherwise. In other words, all of the partners are managers. The feature of partnerships is also linked with the rule that limited liability is not applicable to partnerships, i.e. partners are liable for the debts of the company.

6 Within this paper the terms "*directors*" and "*managers*" will be used interchangeably. In specific legal systems there might be technical differences between these two terms, however in this paper both of the terms will be referred to within their general meaning.

7 Armour and Enriques (n 5) 50.

corporation. These executive directors may also be professionals appointed outside of the members of the board of directors. The non-executive directors are the members of the board of directors who are not vested with the managerial power to run the daily management of the corporation and are responsible for the supervision of these executive directors. The function and powers of non-executive directors are reduced to the strategic management and oversight of the executive directors[8].

The obligation to run a company is burdensome. The members of the board of directors[9] are bound with fiduciary duties. Generally, these duties may be classified as the duty of loyalty and the duty of care. In this sense acting as a director bears high risks, as directors can personally be exposed to claims from shareholders[10], the company itself, and from the creditors of the company on the grounds of mismanagement[11]. A generally used benchmark for the determination of fiduciary duties is the "business judgement rule"[12]. This rule foresees that the decisions taken by the board shall be made with business discretion. This refers to the procedure of commercial decision-taking. In the event that the members of the board of directors or the managerial board are making informed decisions on a certain topic, even if the decision will result in the loss of the corporation, the managers will not be held liable as the decision was taken in due process[13].

Despite this duty being incumbent with a high-risk potential, another important aspect to be considered is that it is easy to abuse the power to determine the amount of corporate remuneration. In other words, depending on the national system, the system can be abused by way of tunneling corporate assets for the personal needs of the directors. The national system of remuneration policy must be designed in a way to abolish these risks.

8 Marco Ventoruzzo, Pierre-Henri Conac and et. al., *Comparative Corporate Law* (West Academic Publishing 2015) 250.

9 A technically more accurate determination would be that all the persons involved in the management of the corporation are bound with fiduciary duties based on the general principle stipulated in Art. 754 OR.

10 The claims of the shareholders are called derivative actions, as these derive from the right of the company to bring claims. In some jurisdictions, shareholders and creditors of the company are vested to substantiate their claims on the employment agreement between the company and the director, such as the Art. 553 TCC.

11 Mismanagement of course is not the only ground for the responsibility claims to be initiated, here it is referenced as a general reason for the claims. According to Art. 553, Turkish Commercial Code (TCC), directors are held liable for the damages the company sustains when they fail to fulfil their obligations originating from the TCC and the articles of association (AoA).

12 Art. 369 TCC prescribing the duty of care and the duty of loyalty of the board of directors, stipulates that "*Board of Directors and third parties in charge of management shall be held liable for prudent performance and protection of the company's interests*.". Also, in the preamble of this very provision, the legislator stipulates that the threshold for the duty of care is set as the "business judgement rule" which requires a diligent decision mechanism to be initiated on an informed judgement.

13 Ventoruzzo and Conac (n 12) 297.

A. Theories Approaching the Concept: Principal-Agent Conflict

As agency theory suggests, the discrepancy of the management of a company by the managers for the shareholders can be eliminated by way of aligning the interests of shareholders with those of the managers. In other words, performance-based remuneration contracts are an effective tool for keeping the managers motivated to consider shareholders' interests[14]. However, keeping these interests aligned with each other can lead to excessive risk taking, which is also considered to be the main reason behind the 2007-2009 financial crisis[15].

The underlying fact of agency problems lies in the phenomenon of delegated management. As stated above, the modern corporation is managed by a professional board consisting of managers, whereas in a partnership all the partners are vested with managerial powers. As they are managing their own investment and acting on their own behalf, there is no agency problem in partnerships. However, the modern corporation is embedded with this very problem, i.e. the management board of a corporation is an elected body of professionals, they are running others' investments, not their own. This is the structure of agency problems and as a result of this fact, the board of directors are vested with fiduciary duties, i.e. duty of care and duty of loyalty[16].

The "Agency Problem" or the "Principal-Agent Conflict" arises, when the interests of the principal must be considered by the "agent", whose actions result to affect the financial situation of the principal. The main problem, and the grounds for a substantial conflict of interest, is that the agent has to abstain from acting in its own interests and has to follow those of the principal[17].

As the agent is the one who is closer to the "transaction" at issue, the principal has to monitor the agent, in order to be sure that the agent is acting in good faith and in line with the interests of the principal. It is claimed that there are three main agency conflicts with regard to corporate law[18]: The first one is between the "firm's owners"[19] and its managers. The other agency problems are claimed to occur between the majority and minority shareholders of a company and a third appearance comes between the company and third parties[20]. As mentioned above, the costs for observing the agent are costly in the sense that there are different ways and approaches designed to reduce these costs, one of which is the "trusteeship and rewards strategy".

14 Ferrarini, Moloney and Ungureanu (n 5) 3.

15 Ferrarini, Moloney and Ungureanu (n 5) 6.

16 Ventoruzzo and Conac (n 12) 561.

17 Armour and Enriques (n 5) 29.

18 Armour and Enriques (n 5) 30.

19 With regard to "firm owners" the term refers to the shareholders of the company, however the fact whether the shareholders are the "owners" or even the "economical owners" of the firm is controversial according to new approaches with regards to corporate law. For a recent point of view and a critical approach towards the Agency Theory see: Robé (n 7) 47.

20 Armour and Enriques (n 5) 30.

Trusteeship strategy mostly refers to "independent directors". It is believed that in the event that there is a lack of high monetary gains, or even the lack of interest towards those, the "agents" will be closely bound with the incentives of honesty, impartiality and prudency. Now, many jurisdictions rely on the impartiality of the independent directors in order to monitor the executive directors and, in a general sense, the board of directors[21].

Furthermore, the reward strategy aims to reward the agents for successfully fulfilling their duties, and serving for the interests of the principal. Considering this, the crucial link of agency theory is that the statutory rules with regards to corporate remuneration find their roots in this very reward mechanism[22]. In a more general sense, and in line with this "reward strategy", legislators do not opt for high returns with regard to corporate remuneration. The main problem here is to be considered as taking excessive risks[23].

As all the directors -"agents"- are not equal in many aspects, there is no reason to pay the same amount of remuneration to every director; the benefit/reward packages, namely the contracts granting these rights can only be designed on an individual basis. However, this procedure of determining individual pay regimes can result in controversy, as the preparation of such a contract will not be supervised by any third party. Again, the core part aims to examine this very sophisticated structure of shareholders' control on remuneration. However even this "shareholder supervision", namely the concept of "say on pay" is not sufficient to solve the agency costs problem, as in most jurisdictions only the remuneration policy, but not the individual remuneration agreements are subject to shareholders' approval.

Within this scope, the remuneration of the "agent" must be determined in a way that does not exceed a certain threshold, so that the agent is dissuaded from taking excessive risks. However, remuneration must be in line with the heavy burden of employment, and at the same time it must be enough of a deterrent to dissuade agents from participating in fraudulent activities[24].

However, agency theory is criticized on the basis that the shareholders are not the owners of a company, and that the managers are not the agents of the shareholders, but agents of the company[25]. *Robé* further argues that aligning the interests of shareholders with those of the company will not result in the affirmative. As discussed further in

21 According to Art. 4.3.4 Turkish Corporate Governance Principles, at least one third of the members of the board of directors of a listed company must consist of independent board members. The number of independent board members shall not be less than two.

22 Although highly criticized and sort of outdated, Agency Theory still is one of the main approaches construing the management of a corporation.

23 Armour and Enriques (n 5) 36. ,

24 Armour and Enriques (n 5) 36.

25 Robé (n 7) 51.

the paper, *Robé* argues that giving more incentives to shareholders with regard to supervisory powers will not change their behaviour. In other words, he argues that based on factual data, passive shareholders are not going to become active and take part in decision making processes[26].

B. Objectives of the Pendulum

As stated above, the issue with the determination of corporate remuneration policies is that the factors to be considered are very broadly defined. In other words, one end of the pendulum aims to not leave enough room for the directors to commit fraud and serve their own personal interests, while the other threshold must be defined in a manner that allows the allocation of sufficient funds to the directors.

Determining remuneration either as too high or too low can result in fraudulent activities. If it is too low, then the directors might resort to seeking out alternative sources of income; while if it is too high, with regard to alignment of the interests of the shareholders, it might result in excessive risk taking. In this sense, the aforementioned[27] "trusteeship and reward strategy" may serve to prevent deceitful activities. As reward strategy basically means aligning the interests of the shareholders with those of the directors, remuneration must be assessed proportionally if it is to be an effective solution[28].

However, Commission's Proposal for the amendment in the Shareholders Right Directive 2007/36[29] stated that shareholder control over remuneration policies will stop directors to act only in their own interests and reward them personally, instead of serving the best interests of the company. As a result, the amendment included a solution for this problem by way of inserting new rules with regards to better shareholder oversight of directors' remuneration, which is believed to strengthen the link between the pay and performance of directors.

As stated by *Gordon*, it is still unknown what level of remuneration will be sufficient to prevent an executive from engaging in fraudulent activities. Excessive risk taking and deceitful behaviour are the two extreme points of the pendulum, which cannot be easily solved by way of aligning the interests of the shareholders and the directors[30].

26 Robé (n 7) 52.

27 Please see above under the heading: "A.Theories Approaching the Concept: Principal-Agent Conflict".

28 Guido Ferrarini and Maria Cristina Ungureanu, in J. Gordon and G. Ringe (eds) 'Executive Remuneration. A Comparative Overview' (2014) *Oxford Handbook of Corporate Law and Governance* (Oxford University Press, European Corporate Governance Institute (ECGI) - Law Working Paper 268/2014) 5 < https://ssrn.com/abstract=2509968 >, accessed 10 April 2023.

29 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, Brussels, 9.4.2014 COM (2014) 213 final., https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014PC0213.

30 Jeffrey Gordon, 'What Enron Means for the Management and Control of the Modern Business Commission's Proposal

Besides the legal restraints to achieve a legal and honest management of the company, the main duty of the directors of a company is to serve the corporate interest by way of diligently making corporate decisions[31]. However, the issue of the determination of corporate pay is an important factor for directors honouring their employment contracts. As was revealed in the Enron scandal[32], and in the latest financial crisis, the alignment of the interests alone did not work out, as it led to excessive risk taking on the part of the directors, when the long-term interests of the company are not taken into consideration.

With regard to this consideration, The Commission introduces the notion of enhanced shareholder oversight as a solution to undercut the tendency of short-termism. Furthermore, this approach of focusing on the long-term interests and sustainability of the company introduces itself as the natural outcome of current corporate circumstances. It has become all too apparent that the alignment of the interests of the company with those of the managers does not suffice to regulate executive remuneration, and nor does it serve the objective to prevent corporate fraud.

II. EU Legal Framework of Executive Compensation

A. The Regime After the Company Law Plan 2003

After the Enron incident, the Commission came up with the 2003 Company Law Plan on "*Modernizing Company Law and Enhancing Corporate Governance in the EU*", which describes a more solid role for the shareholders[33] and where the first steps to regulate this area of corporate pay were taken[34]. The plan states that the Commission is considering the regulation of corporate remuneration as an urgent initiative. Following the Action Plan, the Commission adopted three different Directives with regards to this very area of corporate remuneration:

1. Commission Recommendation 2004/913/EC[35]

The 2004 Recommendation requires that the shareholders must be sufficiently informed about the remuneration policy at a general meeting. In particular it details a disclosure regime for the company's remuneration policy and individual

Corporation: Some Initial Reflections' (2002) 69 University of Chicago Law Review 1233-1250, 1246.

31 Armour and Enriques (n 5) 74.

32 Gordon (n 34) 1247.

33 For a detailed analysis of the shareholders' position in European company law, see: Pavlos E. Masouros 'Is the EU Taking Shareholder Rights Seriously? An Essay on the Impotence of Shareholdership in Corporate Europe' (2010) 7(5) European Company Law 196.

34 < http://europa.eu/rapid/press-release_IP-03-716_en.htm?locale=en > accessed 10 April 2023.

35 COMMISSION RECOMMENDATION of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC) [2004] OJ 2 385/01.

pay arrangements. The disclosure of the company's policies can either be realized through the annual remuneration report, or a separate report as stated in Art. 3.1 of the Recommendation. The remuneration policy of the company is called the "Remuneration Statement" and according to Art. 3.3, it should at minimum contain an explanation of the director's remuneration components, sufficient information on the performance criteria, a link between performance and pay, information on the main parameters for the annual bonus scheme, and supplementary pension schemes.

Art. 4.1 dictates that this statement must be an explicit item on the agenda of the annual general meeting and pursuant to Art. 4.2, the statement should be submitted for shareholders' vote at the general meeting. The vote can be binding or of an advisory nature.

Art. 5.1 stipulates that "*The total remuneration and other benefits granted to individual directors over the relevant financial year should be disclosed in detail in the annual accounts or in the notes to the annual accounts, or where applicable, in the remuneration report*.".

And pursuant to Art. 6.1, share-based remuneration schemes need the prior approval of shareholders by way of a resolution at the annual general meeting prior to their adoption, in order to be implemented.

However according to the Commission's 2007 Remuneration Report[36], only 60 % of member states implemented the recommendation with regard to remuneration policy disclosure. Only about a third of the Member States have legislated shareholders vote on the policies. Moreover, the recommendation related to the disclosure of individual board members' remuneration has been adopted by more than two thirds of member states and prior shareholder approval of share-based remuneration schemes has been adopted by more than the majority of the member states.

2. Commission Recommendation 2005/162/EC

The Commission's 2005 Recommendation[37] stipulates board governance with two main tools: the endorsement of independent directors and board committees in listed companies. With regard to remuneration, the 2005 Recommendation stipulates an independent remuneration committee to be set up in order to decide in an area of corporate law, where particular conflicts of interest are present.

36 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the application by Member States of the EU of the Commission 2009/385/EC Recommendation (2009 Recommendation on directors´ remuneration) complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies {COM(2010) 284 final} {COM(2010) 286 final} {SEC(2010) 670}.

37 COMMISSION RECOMMENDATION of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC) [2005] OJ 2 52/01.

In the preamble (para. 10) of the Recommendation it is stated that the audit, nomination, and remuneration committees should make recommendations to the board of directors in order to prepare for the decisions to be taken by them. Paragraph 13 of the preamble explains the situation of the Remuneration Committee in more detail[38].

Art. 4 of the Recommendation states that an independent director must be appointed to the board of directors or to the supervisory boards of companies. Art. 13.1 states: "*A director should be considered to be independent only if he is free of any business, family or other relationship, with the company, its controlling shareholder or the management of either, that creates a conflict of interest such as to impair his judgement*."[39].

However, the Recommendation does not set a definitive number or ratio to the number of independent directors to be elected as board members. It only stipulates that a sufficient number of independent or non-executive directors must be elected to the supervisory board. As discussed earlier, the management of a company can be designed in different ways. As to national regulation, it can come forward in a one or two-tier model. In a one-tier board system the management of the company can be delegated to executive directors, whereas in a two-tier system, the board of directors are placed as the supervisory board.

In this sense, Art. 5 stipulates that independent directors are to be placed in sufficient number in board committees to prevent these conflicts of interest. The key areas for a potential conflict of interest are defined as audit, nomination, and remuneration. Therefore, to avoid such conflicts, the recommendation requires the constitution of committees.

As stated in the "Objective" of the "Report on the application by the Member States of the EU of the Commission Recommendation on the role of non-executive or supervisory directors of listed companies, and on the committees of the (supervisory) board,[40] "*Member States were invited to take the necessary measures to promote the application of the Commission Recommendation by 30 June 2006, either through legislation or through best practice rules based on the "comply or explain" principle*."

In other words, compliance with the recommendations was not binding on member states. They were free to decide whether or not to legislate certain areas of law. They

38 The remuneration committee should consist of only non-executive and independent members, according to Annex I Art. 3.1 subparagraph 2: "*The remuneration committee should be composed exclusively of non-executive or supervisory directors. At least a majority of its members should be independent*."

39 The criteria for being independent are described in much further detail in Art. 13.

40 European Commission, Report on the Application by the Member States of the EU of the Commission Recommendation on the Role of Non-executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board (COM SEC (2007) 1021) (2007).

were also free to choose the type of legislation[41] in the event they decided to legislate this very area. However, if they choose not to apply these principles at all, then they have to explain the reasons thereof.

2. Commission Recommendation 2009/385/EC

The Commission's 2009 Recommendation[42] is, as stated in the literature, mostly focused on the design of executive remuneration[43]. In the preamble of the Recommendation, it is stated that in the previous Commission Recommendations, namely 2005/162/EC and 2004/913/EC, the focus was on the introduction of a disclosure regime and transparency of remuneration practices, by way of regulating shareholders' say on pay, or by the appointment of independent directors in listed companies. The preamble continues to explain that the focus of the 2009 Recommendation is on the regulation method of remuneration legislation[44].

In other words, the Commission suggests that the remuneration criteria need to be precise and based on performance. In particular it is also stipulated that the remuneration should consist of variable and non-variable components[45]. The non-variable components of the remuneration must be determined on measurable criteria.

In Paragraph 7, the Commission suggests limiting "golden parachutes"[46], the compensation packages to be paid to directors, in the event of early termination of their employment contracts[47]. However, these compensation packages are mostly subject to abuse. It is clearly stated that these payments must not be designed in a way that they result in "a *reward for failure*", but that they only constitute a "*safety net*" for the directors. In addition to this, termination payments should not exceed a fixed amount, and should not be higher than the sum of the two years of non-

41 Member states choose to regulate this area through legislation or, in the most frequently used method, through soft law, and generally provisions prescribed in national Corporate Governance Codes.

42 COMMISSION RECOMMENDATION of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies (2009/385/EC) [2009] OJ 2 120/01.

43 Ferrarini, Moloney and Ungureanu (n 5) 28.

44 Paragraph 6 of the Preamble states that: "*The structure of directors' remuneration should promote the long-term sustainability of the company and ensure that remuneration is based on performance. Variable components of remuneration should therefore be linked to predetermined and measurable performance criteria, including criteria of a non-financial nature. Limits should be set on the variable components of remuneration. Significant variable components of remuneration should be deferred for a certain period, for example, three to five years, subject to performance conditions. Furthermore, companies should be able to reclaim variable components of remuneration that were paid on the basis of data, which proved to be manifestly misstated."*

45 According to Article 2.1 of the 2009 Recommendation: "*Variable components of remuneration' means components of directors' remuneration entitlement which are awarded on the basis of performance criteria, including bonuses*."

46 Golden parachutes are contractual clauses designed to get effective in the event of an early termination of directors' employment contracts. However, in most of the cases, where contractual golden parachutes are invoked, big amounts of money are payable, therefore the Commission felt the need to limit the amount of such payments. For a detailed information on golden parachutes with regards to *Mannesmann* Case: Armour and Enriques (n 5) 221; Ventoruzzo and Conac (n 12) 524.

47 2009 Recommendation entails a definition of *golden parachutes* in Article 2.2: "Termination payments' means any payment linked to early termination of contracts for executive or managing directors, including payments related to the duration of a notice period or a non-competition clause included in the contract."

variable components of remuneration. Share remuneration schemes must be better linked to performance and consider the long-term interests of the company by way of introducing a vesting period, a minimum of three years, for these shares[48].

The Recommendation also suggests that at least one member of the remuneration committee be an expert on remuneration practices. Art. 9.3 stipulates that the remuneration committee *should ensure that the remuneration of individual executive or managing directors is proportionate to the remuneration of other executive or managing directors and other staff members of the company*. This suggestion is criticized in the literature on the grounds that it constitutes an unjust intervention to corporate autonomy[49].

Section II of the 2009 Recommendation entails recommendations with regard to the remuneration policy: Article 3 puts down the rules with regard to the structure of the remuneration policy. According to that, the remuneration policy includes variable components of remuneration and companies should set limits on the variable component(s). The non-variable component of remuneration should be sufficient to allow the company to withhold variable components of remuneration when performance criteria are not met. Award of variable components of remuneration should be subject to predetermined and measurable performance criteria. Performance criteria should promote the long-term sustainability of the company and include non-financial criteria that are relevant to the company's long-term value creation, such as compliance with applicable rules and procedures.

The Commission also recommends including claw-back provisions under Article 3.4 which states that, "*contractual arrangements with executive or managing directors should include provisions that permit the company to reclaim variable components of remuneration that were awarded on the basis of data which subsequently proved to be manifestly misstated*."

Under Article 3.5 the regime is designed with regards to golden parachutes: "*Termination payments should not exceed a fixed amount or fixed number of years of annual remuneration, which should, in general, not be higher than two years of the non-variable component of remuneration or the equivalent thereof. Termination payments should not be paid if the termination is due to inadequate performance".*

Section II of the 2009 Recommendation also covers issues with regard to the disclosure of the policy on directors' remuneration under Article 5. Shareholders' votes are also covered, according to Article 6 "*Shareholders, in particular institutional shareholders, should be encouraged to attend general meetings where appropriate*

48 This system is criticized to be intrusive: Ferrarini and Ungureanu (n 32) 23.

49 Ferrarini and Ungureanu (n 32) 23.

and make considered use of their votes regarding directors' remuneration, while taking into account the principles included in this Recommendation, Recommendation 2004/913/EC and Recommendation 2005/162/EC."

Section III is about the creation, operation and role of the remuneration committee. With regard to the creation of the committee, it is important to point out that at least one member is recommended to have knowledge and experience with regard to remuneration policy. According to Article 9.3 *the remuneration committee should ensure that the remuneration of individual executive or managing directors is proportionate to the remuneration of other executive or managing directors and other staff members of the company*. Article 9.4. foresees the remuneration committee to report on the exercise of its functions to the shareholders and be present at the annual general meeting.

B. The Regime under the Directive (EU) 2017/828 and the General Framework (New Shareholders Rights Directive)

In 2014 the European Commission proposed a revision of the Shareholder Rights Directive[50], focused on five main goals[51]:*"1) Increase the level and quality of engagement of asset owners and asset managers with their investee companies; 2) Create a better link between pay and performance of company directors; 3) Enhance transparency and shareholder oversight on related party transactions; 4) Ensure reliability and quality of advice of proxy advisors; 5) Facilitate transmission of cross-border information (including voting) across the investment chain in particular through shareholder identification."*

The Commission's 2014 proposal was also in line with its previous recommendations of 2004, 2005 and 2009[52]. On 14 March 2017**[53]**, the European Parliament voted on the proposed alteration of the Shareholders Right Directive and the Council adopted the amended Directive on 22 March 2017. Within this regard, Article 1 of Directive 2007/36/EC is amended to emphasize the long-term approach of the new Directive[54].

50 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement Brussels, 9.4.2014, 2014/0121 (COD) COM (2014) 213 final.

51 The Shareholders Directive 2007/36/EC before the current amendment did not entail any provisions with regards to corporate remuneration.

52 See also: Mathias Habersack 'Vorstands und Aufsichtsratsvergütung – Grundsatz und Anwendungsfragen im Lichte der Aktionärsrechterichtlinie' (2018) 127 NZG 132.

53 DIRECTIVE (EU) 2017/828 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ 2 132/01.

54 J. Nijland and T.C.A. Dijkhuizen 'Say on Pay and Focus on Sustainability of Companies: A Revised Shareholders' Rights Directive' (2017) 14 (5) European Company Law Journal 188–189, 188.

The aim of the Directive 2007/36/EC was to promote the attendance of shareholders in general assembly meetings in order to eliminate shareholder apathy[55] in order to contribute to shareholder democracy in European public corporations. The 2017 amendment contributed in terms of establishing a long terminist approach of the shareholders towards the corporation by way of considering the external stakeholders.

The highlight of the 2017 amendment is the right granted to shareholders with regard to the approval of remuneration policy in the general meeting, i.e. say on pay. Chapter II of the revised Directive is dedicated to shareholder rights in general meetings. Article 9a specifically regulates the right of shareholders to vote on remuneration policies.

The explanatory memorandum of the proposal states that the recent deficiencies in the area of European Corporate Governance are due to *insufficient shareholder engagement* and the *lack of adequate transparency*. Within this regard, the Commission's 2014 Proposal aims to solve these problems by way of amending the Shareholders Rights Directive[56] and promoting transparency and engagement of the shareholders. The proposal states that the overarching aim thereof is to contribute to the long-term sustainability of EU companies.

According to paragraph 29 of the preamble, "*In order to ensure that shareholders have an effective say on remuneration policy, they should be granted the right to hold a binding or advisory vote on the remuneration policy, on the basis of a clear, understandable and comprehensive overview of the company's remuneration policy. The remuneration policy should contribute to the business strategy, long-term interests and sustainability of the company and should not be linked entirely or mainly to short-term objectives. Directors' performance should be assessed using both financial and non-financial performance criteria, including, where appropriate, environmental, social and governance factors. The remuneration policy should describe the different components of directors' pay and the range of their relative proportions. It can be designed as a frame within which the pay of directors is to be held. The remuneration policy should be publicly disclosed, without delay, after the vote by the shareholders at the general meeting*".

It is further mentioned that the rules of the proposal are only aimed at addressing listed companies and aim to increase transparency and promote shareholders say on

55 For a detailed explanation of the concept of *shareholder apathy* see: Ventoruzzo and Conac (n 5) 520.

56 An amendment of the Shareholders Rights Directive was also required under the 2012 European Company Law and Corporate Governance Action Plan of the Commission (Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies). COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies Strasbourg, 12.12.2012 COM (2012) 740 final.

pay, namely by way of the granting of voting rights[57] at the general meeting with regard to remuneration policy and remuneration report[58]. It is argued that the new directive introduces a minimum standard for the participation, access to information and voting rights of shareholders at the European level[59].

1. Remuneration Policy

a. Insights and Characteristics of the Policy

With regard to remuneration, Art 9a "Right to Vote on the Remuneration Policy" and Article 9b "Information to be Provided in and Right to Vote on the Remuneration Report" were added to the Shareholders Rights Directive. With regard to the remuneration policy, Article 9a sets forth detailed provisions in subparagraphs 6[60] and 7.

According to these rules, the remuneration policy shall contribute to the company's business strategy and long-term interests and sustainability. It must be clear and understandable. When remuneration is based on different factors such as a fixed part and a variable part, it must define all parts of the remuneration and their ratio to the whole remuneration amount. Variable components of the remuneration are parts of the executive compensation amount which are not fixed, such as salary, but fluctuate depending on several different factors such as performance, or any other criteria thereof. Furthermore, the reasons for the company to claim the remuneration back (Claw-back provision) must be indicated. The aim here is to enhance the transparency

57 It is argued that this enhanced position of shareholders is weakened by a possible derogation of these rules, as Member States may opt out from a binding shareholders' vote. See: Nijland and Dijkhuizen (n 58) 189.

58 Commission's Proposal, p.3. This approach of the Commission with regards to granting shareholders a binding vote on the remuneration policy is considered to be a reaction to the executive pay arrangements not related to the performance of the individual directors: Ferrarini and Ungureanu (n 32) 28.

59 Miroslav Georgiev and Marko Kolev 'Die überarbeitete Aktionärsrechterichtlinie (RL 2017/828/EU): Mehr Rechte und erhöhte Transparenz für die Aktionäre' (2018) GWR 107.

60 "*6. The remuneration policy shall contribute to the company's business strategy and long-term interests and sustainability and shall explain how it does so. It shall be clear and understandable and describe the different components of fixed and variable remuneration, including all bonuses and other benefits in whatever form, which can be awarded to directors and indicate their relative proportion. The remuneration policy shall explain how the pay and employment conditions of employees of the company were taken into account when establishing the remuneration policy. Where a company awards variable remuneration, the remuneration policy shall set clear, comprehensive and varied criteria for the award of the variable remuneration. It shall indicate the financial and non-financial performance criteria, including, where appropriate, criteria relating to corporate social responsibility, and explain how they contribute to the objectives set out in the first subparagraph, and the methods to be applied to determine to which extent the performance criteria have been fulfilled. It shall specify information on any deferral periods and on the possibility for the company to reclaim variable remuneration. Where the company awards share-based remuneration, the policy shall specify vesting periods and where applicable retention of shares after vesting and explain how the share based remuneration contributes to the objectives set out in the first subparagraph. The remuneration policy shall indicate the duration of the contracts or arrangements with directors and the applicable notice periods, the main characteristics of supplementary pension or early retirement schemes and the terms of the termination and payments linked to termination. The remuneration policy shall explain the decision-making process followed for its determination, review and implementation, including, measures to avoid or manage conflicts of interests and, where applicable, the role of the remuneration committee or other committees concerned. Where the policy is revised, it shall describe and explain all significant changes and how it takes into account the votes and views of shareholders on the policy and reports since the most recent vote on the remuneration policy by the general meeting of shareholders."*

of the remuneration. As the variable parts of executive compensation are those most open to being misused, it is stipulated that the criteria to determine the variable parts is to be clear and precise, as it is not a fixed amount, and the entitlement is subject to discretion.

Furthermore, in line with the proposal's focus point, in the event that the remuneration policy is share-based, Article 9a requires a vesting period of such shares to be legally obtained by the directors. Similarly, the provisions aim to keep the shares for a set period of time.

The remuneration policy must also entail explanations with regard to the managerial decision processes, its revision and implementation. It must also contain information with regard to the committee and its approach towards the shareholders' vote. In the event that the policy is subject to amendment, all important changes need to be addressed following the last vote of the shareholders at the general meeting.

Moreover, according to subparagraph 7, the remuneration policy must be made public and stay available on the website of the company as long as it is applicable.

b. Shareholders' Approval

Article 9a also details provisions with regard to the shareholders' supervision of the remuneration. Within this regard, subparagraphs 1 to 5 target the shareholders' vote and its effects. According to the provisions, shareholders must have binding votes with regard to the remuneration policy. In other words, in the event shareholders do not approve a certain remuneration policy at the general meeting, the company has to continue to apply the previous policy, until the revised policy is submitted to the annual general meeting, having obtained the shareholders' approval. However, Member States are not bound by the Directive, as to their discretion, they can decide on an advisory vote of the shareholders. This option of the Directive is interpreted as undermining the position of the shareholders[61]. Even in the case of an advisory vote, companies still cannot implement a remuneration policy not voted for by their shareholders. Also, all substantial changes to the remuneration policy must be submitted to a shareholders' vote, according to subparagraph 5.

According to 4. Subparagraph of Art 9a, a temporary derogation from the remuneration policy is possible under exceptional circumstances. These circumstances need to serve the long-term interests and sustainability of the company, in order to justify a temporary derogation.

61 Nijland and Dijkhuizen (n 58) 188.

The policy must also be subject to a shareholders' vote after every material change, and every four years[62].

2. Remuneration Report

a. Features of the Report

Besides the remuneration policy, a clear and understandable remuneration report is also mandatory for listed companies to be drafted, according to Art. 9b "Information to be provided and right to vote on the remuneration report". This report shall entail a detailed analysis of the remuneration with all benefits. The report must also contain information about the last year's amounts, as well as that of due payments, including all managerial remuneration. The report must be drafted in line with the remuneration policy.

Article 9b also clearly stipulates the information required to be present in each of the individual director's remuneration reports. The first subparagraph of the provision stipulates these components for each remuneration report:

The report must show the total remuneration amount divided into components. As discussed previously, remuneration can consist of fixed and variable components. The report must also indicate its compliance with the remuneration policy, by way of proving its contribution to the long-term performance of the company. The report shall also contain explanations with regards to the performance criteria and its application.

In addition, the report also must provide information with regard to the annual change of remuneration and *of average remuneration on a full- time equivalent basis of employees of the company other than directors over at least the five most recent financial years, presented together in a manner which permits comparison.* This provision is very forward-looking and serves the transparency goals of the new Directive.

Furthermore, with regard to groups of companies, any remuneration within the same group must be indicated in the report.

In the event a share option plan is required, as or part of remuneration, the number of shares and the conditions attached must be explained in detail.

The report must also entail information with regard to an existing claw-back provision and its use and conditions. For a temporary derogation from the remuneration policy, the exceptional circumstances must be defined[63].

62 Christoph Van der Elst 'Shareholders: Holding the Reins of Remuneration: The European Say on Pay' (2017) 14 (3) European Company Law Journal 118.

63 According to Article 9.4. "*... Exceptional circumstances... shall cover only situations in which the derogation from the*

The directive also requires the protection of the data to be disclosed in order to meet transparency requirements.

Although not binding, according to subparagraph 4, member states shall include the shareholder vote in the remuneration report. This vote, however, is by its very nature advisory. The company must also provide an explanation in the following year's report and describe how it made use of the last year's advisory vote. According to the same subparagraph, in the event that the company is a small or medium-sized company, as defined in Articles 3(2) and (3) of Directive 2013/34/EU, the advisory vote of the shareholders at the annual meeting can be substituted with a discussion about the report in the annual general meeting. In such cases, the company must explain in the next year's report how it made use of such negotiations at the annual general meeting.

Pursuant to subparagraph 5, after the general meeting, companies must make the remuneration report publicly available on their website, free of charge, for a period of 10 years, and may choose to keep it available for a longer period provided it no longer contains the personal data of the directors.

The drafting of the remuneration report is one of the duties of the board of directors. In the event they fail to draft it, it will result in their collective responsibility. In order to comply with the provisions of the directive, member states have to enforce a responsibility regime for non-compliance with the provisions of drafting the remuneration report.

b. Shareholders' Role

As discussed, and explained above in more detail, the Directive vests the shareholders with supervision rights. Both the remuneration policy and the remuneration report need to be submitted for shareholders' vote at the annual general meeting. The shareholders' vote can be either binding or advisory and serves to fulfil both the transparency aim of the provisions and to enhance the clarity of the whole remuneration system. Even in the case of an advisory vote scheme, the company must explain how the advisory vote was taken into consideration.

A binding vote, on the other hand, vests real power to shareholders to supervise remuneration policies.

c. Related Party Transactions

According to Article 9c *Transparency and approval of related party transactions,* each member state has to define material transactions between a listed company and

remuneration policy is necessary to serve the long-term interests and sustainability of the company as a whole or to assure its viability."

its related third parties. Following that, there is a regime foreseen for every undergone transaction with related parties. According to that, *(i)*the transaction must be publicly announced; *(ii)*an independent report may have to be published assessing whether the transaction is fair and reasonable from the company's perspective and for the other shareholders (optional for member states); *(iii)* the transaction must be approved by shareholders or the board. Member states may require additional shareholder approval in case of approval by the board.

According to Art. 9c/6/c, Directive remuneration payments are excluded from the related party transactions regime, if these were realized in line with Art. 9a, as previously discussed. Within this structure of the directive, it can be argued that the shareholders are dually protected. In other words, the breach of remuneration policy regime will result in the remuneration payment falling under the related party transaction control regime[64].

III. Turkish Executive Compensation System

A. Introduction and Characteristics of the TCC system

According to Article 394 TCC, board members can be paid an attendance fee, honorarium, salary, bonus, a premium, and a portion of the annual profit provided that respected amounts are stipulated in the articles of association or determined by a general assembly resolution As it is easily understandable from the wording, there is, however no specific provision which prescribes the obligation of the company to pay remuneration to its directors; Art. 394 TCC only requires that these components are payable to the directors[65]. In other words, the wording of the provision is clear: there is no statutory obligation vested in the company to make payments to board members[66]. However; on the basis of the current standpoint of economies and the corporate world, companies do pay considerable amounts to their board members and directors. As a result, we might argue that in the modern world, paying executive compensation to board members has evolved into a (commercial) usage and became another tool to balance the interests of all stakeholders[67]. However, according to the corporate governance principles, remuneration must be paid to the independent directors in a listed company in order to assure their independence[68].

64 For a detailed analysis of the Directive's provisions with regards to related party transactions: Andreas Tarde 'Die verschleierte Konzernrichtlinie, zu den neuen EU-Vorgaben für related party transactions und ihren Auswirkungen auf das deutsche Recht' (2017) 46 (3) Zeitschrift für Unternehmens- und Gesellschaftsrecht 371.

65 Veliye Yanlı 'Yönetim Kurulu Üyelerinin Kazanç Payı ile İlgili Bazı Sorunlar' (2019) 8 (32) Banka ve Finans Hukuku Dergisi 1155-1176, 1158.

66 *Birsel* argues that an articles of association provision stipulating that no remuneration shall be paid to board members, can only be considered as a theoretical assumption. For a detailed examination on the grounds of the former TCC please see: Mahmut T. Birsel, *Anonim Şirketler Hukukunda Kâr Kavramı Cilt1* (Ege Üniversitesi Matbaası 1973) 89.

67 Damla Songur, in Kemal Şenocak (eds) *Şirketler Hukuku Şerhi C.II*, (Seçkin Yayıncılık, 2023) Art. 394, 2131.

68 For a detailed analysis please see below: "H.Regulations with regards to Public Companies".

B. Numerus Clausus or Enumeration; the Nature of Art. 394 TCC

Items mentioned in Article 394 TCC, with regard to the pecuniary rights of the board of directors, can be paid separately or by way of an aggregate order to the director[69]. The preamble of Article 394 states that these components of a directors' remuneration are of a *numerus clausus* nature. However, on the basis of the wording of Article 516/2 stipulating the minimum content of annual activity report and of the Article 394, it is argued that payments under other names and indeed, by other means can be disbursed to board members, i.e. the provision is not of *numerus clausus* nature[70]. However, this interpretation shall only be valid in the event that the overarching principle of corporate asset protection is considered[71]. Explanations made in the preamble of Art. 516/2/c concerning the annual report of the directors states that benefits provided to the directors, other than those mentioned in Article 394 TCC, must also be covered in the annual activity report. Benefits provided to board members on the grounds of Article 394 TCC are mandatory content of the annual activity report[72]. However, the wording and preamble of Article 516/2 TCC provide that there might be other instruments with regard to corporate remuneration, in the event they are present, they also have to be mentioned in the annual activity report[73].

C. Scope of Application with Regard to Persons: Are Directors Also Awarded Pecuniary Rights Stipulated under Art. 394 TCC?

In the event that the management of the company is delegated to executive members of the BoD, or to third persons pursuant to Art. 367 TCC, these third persons are thus executive officers, while the board members are executive members. As it is obvious that executive officers are not part of the BoD, they are still, under Art. 553 ff. TCC, liable to the company, to its shareholders and creditors. Although these executive officers are treated as BoD members with regard to the responsibility regime, they are not deemed to be entitled to attendance fees and shares from the profits, as these are specifically designed for the members[74]. In other words, attendance fees and shares in profit may not be granted to directors who are not part of the board of directors (BoD), namely to the executive officers of the company.

69 Işık Özer, *Anonim Şirket Yöneticilerinin Mali Hakları*, (Yetkin Yayınları 2013) 219.

70 Hasan Pulaşlı, *Şirketler Hukuku Şerhi, C.II*, (4th edn, Adalet Yayınevi 2022) 1512 N.47.

71 Çağlar Manavgat, İsmail Kırca and F. H. Şehirali Çelik, *Anonim Şirketler Hukuku, C. 1*, (BTHAE 2013) 731, Özer (n 73) 221; Yanlı (n 69) 44, Songur (n 71) 2137.

72 Güven Sayılgan and Kemal Şenocak, in Kemal Şenocak (eds) *Şirketler Hukuku Şerhi C.III*, (Seçkin Yayıncılık 2023) Art.516, 3406. With regards to minimum content of joint stock companies annual reports, please the Regulation: <https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuatNo=16547 &mevzuatTur=KurumVeKurulusYonetmeligi&mevzuatTertip=5.> accessed 10 April 2023. Also in the wording of Article 9/1/a, pecuniary rights of board members are enumarated, they are not of a numerus clausus nature.

73 Özer (n 73) 271; Songur (n 71) 2137.

74 Özer (n 73) 220.

On the other hand, *Manavgat* states that directors also might be entitled to shares from profits on the basis of Article 339/2/f TCC. This article foresees that pecuniary rights granted to members of the board of directors and executive officers as shares in profit shall be stipulated in the articles of association of the company. As a result, pecuniary rights excluding shares from profit to be granted to executive officers other than the members of the board of directors can be regulated in a separate agreement between the company and executive officers[75].

Executive officers and the members of the board of directors shall be subject to the same executive payment opportunities on the grounds of the overarching principle of equality in corporate law. As they are subject to the same responsibility regime on the basis of Article 553 TCC, they shall have access to similar financial benefits. Besides these fundamental rules with regard to the legal position of board members and executive officers, the origin of their pecuniary rights is common. *Manavgat* states that their rights to executive payment stems from the agreement they have with the company. The author further explains that although the regimes have mutual legal ground, the method of allocation of rights is different[76].

D. Types of Pecuniary Rights enumerated in Art. 394 TCC

1. Attendance Fee

An attendance fee is the fee to be paid to directors, for the reason they attend the board of directors 'meetings. This type of remuneration payment is not based on performance. The mere reason for the payment is the effort of being present and the mental effort they are putting in. It also has a role to encourage the attendance of board members at meetings[77].

However, in the event that the meeting is held via correspondence as enabled on the grounds of Art. 390/4 TCC, i.e. without convening a meeting, unless one of the board members requests so. In this method the board of directors meeting resolutions can be taken on a proposal regarding a certain matter proposed by one of the members by obtaining the written approval of the majority of all members. In such cases, an attendance fee must still be paid to the board members, as the payment is the remuneration for their mental work, the same interpretation shall also be valid with regard to online-held board meetings[78].

75 Manavgat Kırca and Şehirali Çelik (n 75) 742.

76 Manavgat, Kırca and Şehirali Çelik (n 75) 727.

77 Pulaşlı, (n 74) 1513 N. 51; Manavgat Kırca and Şehirali Çelik, (n 75) 731; Özer (n 73) 249.

78 For a detailed analysis of the subject matter please see: Özer (n 73) 250.

2. Salary

Salary is one of the pecuniary rights stipulated under Article 394 TCC. It is a periodical payment made in remuneration for the labour of managing the corporation. The periods can be determined as one, three or six months long. Again salary is not a performance-based corporate remuneration like an attendance fee[79].

3. Premium

Premium is an extra payment on top of other pecuniary rights of board members[80]. Premiums are not necessarily determined on the basis of success; they are merely an additional payment to be made in certain periods[81]. However, premiums can also be designed as performance-based instruments[82]. A similar payment type to premiums might be bonuses. A bonus is a performance-based payment which can be determined upon the number of annual sales, new customers, provided services etc, any factor other than annual profit. There is not a clear distinction between these two instruments, however, they might be differentiated based on the components subject to evaluation[83].

4. Shares from Profit Payments

If the remuneration entails a share in profits, pursuant to Art. 511 TCC, this share may only be deducted from the net earnings of the company and only after the legal reserves are allocated, and after the minimum amount of dividend payments are made to the shareholders.

However, according to Art. 523 TCC on the relation between shares from profit and reserves, shares from profit can only be distributed to shareholders provided that statutory and legal reserves are allocated.

As the provision of Article 511 TCC stipulates that shares from profit payment have to be realized before the remuneration payments, there is discrepancy with regards to the Articles 511 and 523 on the basis of statutory reserves, i.e. reserves that were generated on the basis of the articles of association. In doctrine, there are different approaches towards that contradiction. The majority of authors are in favour of the interpretation on the grounds of Art. 523 TCC, i.e. that also statutory reserves have to be allocated before the remuneration payments, as the legislator prioritizes shareholders before board members, with regard to shares from profit payments[84].

79 Manavgat Kırca and Şehirali Çelik (n 75) 730, Pulaşlı, , (n 74) 1516, N.53.

80 Pulaşlı (n 74) 1523 N.70.

81 Manavgat, Kırca and Şehirali Çelik (n 75) 730.

82 Özer (n 73) 354.

83 Manavgat Kırca and Şehirali Çelik (n 75) 731.

84 Halil Arslanlı, *Anonim Şirketler C.II-III*, (Fakülteler Matbaası 1960) 164; Birsel (n 70) 93, Zehra Badak, *Türk Ticaret Kanunu'na Göre Anonim Şirkette Pay Sahibinin Kar Payı Hakkı*, (On İki Levha 2018) 233, Özer (n 73) 238; Sinan

The dissenting opinion stipulates that the allocation of statutory reserves is not mandatory for the share from profit payments of board members[85].

This article is designed with regard to the capital maintenance principle governing Turkish companies' law. The reasoning behind this ruling is to prevent the misuse of corporate assets, by way of granting unjust shares in profits to the directors of the company.

However, unlike other remuneration instruments as stipulated in Article 394, directors are only entitled to shares in profits, in the event they are stipulated in the articles of association of the company according to Art. 339/2/f TCC[86]. In other words, it is not possible to pay a share in profits to directors based only on a general meeting decision[87]. The general meeting decision can only decide to initiate the payment and designate the payable amount of the share in profits. With regard to the voting of this agenda item, the directors are deprived of their voting rights[88].

F. Determination Methods of Executive Remuneration

The amount payable as executive remuneration must be determined by the articles of association or by an annual general meeting resolution. The amount of salary can be determined in the articles of association of the company or via a general meeting resolution. However, there is no criteria set for the determination of the amount of the salary in TCC. In Turkish law, only the corporate governance principles require a criterion for the remuneration amount of the independent directors; the criteria only prescribes that the amount of the remuneration shall be set in a manner that does not affect the independence of the said director.

G. Claw-Back Provisions

Article 512 TCC foresees a claw-back provision, provided that the board of directors will receive the share in profits in bad faith. As the article only mentions payment with regard to shares in profit, it does not regulate the claw-back of other payment types which may be part of the remuneration[89]. Shares in profits are considered to be received in bad faith if they were granted based on misleading financial statements, where a fictional profit is indicated.

Sarıkaya, in Kemal Şenpolat (eds) *Şirketler Hukuku Şerhi C.III* (Seçkin Yayıncılık 2023) Art.511, 3308. With regards to the meaning of "allocation of statutory reserves" please see: Ünal Tekinalp, *Anonim Ortaklığın Bilançosu ve Yedek Akçeleri*, (Fakülteler Matbaası 1979) 313.

85 Hayri Domaniç, *Anonim Şirketler* (Eğitim Yayınları 1978) 472.

86 Oğuz İmregün, *Kara Ticareti Hukuku Dersleri*, (Filiz Kitabevi1996) 350; Pulaşlı (n 74) 1518 N.56; Abuzer Kendigelen, *Yeni Türk Ticaret Kanunu, Değişiklikler Yenilikler ve İlk Tespitler*, (3rd edn., On İki Levha 2016) 282; Badak (n 88) 231; Sarıkaya (n 88) 3305.

87 Ünal Tekinalp, Reha Poroy and Ersin, Çamoğlu, *Ortaklıklar Hukuku- C.I* (15th edn, Vedat Kitapçılık 2021) N. 561; Badak (n 88) 232; Arslanlı (n 88).162; Özer (n 73) 230; Pulaşlı (n 74) 1518 N.56.

88 Yanlı (n 69) 51.

89 Manavgat, Kırca and Şehirali Çelik (n 75) 746; Özer (n 73) 391.

The initiated payment can also be interpreted as a "shares in profits" payment if the balance sheet was not taken into consideration[90] and as a result this payment can be subject to clawback provisions. *Manavgat* argues that according to Art. 555 TCC, remuneration granted on the basis of performance criteria can be reclaimed in the event that the performance-based assessment criteria were misleading[91].

Article 513 TCC stipulates the conditions under a bankruptcy regime. According to the provision, the board of directors are obliged to return any remuneration payments, exceeding a reasonable amount, which were received under any name within the last three years prior to the company becoming bankrupt. While directors must return the payments to the creditors of the company[92], payments exceeding a reasonable amount are different than shares in profit received in bad faith[93].

Article 408 TCC stipulates powers and obligations of the general meeting which cannot be delegated to any other body of the company. According to subparagraph b of the first paragraph, it is within these non-delegable powers of the general meeting to decide on the remuneration of the board of directors.

However, according to Article 394 TCC, the type and amount of remuneration can be decided in the articles of association of the company. If the incorporators of the company have opted to regulate this concern in the articles of association (AoA), it will result in the by-passing of the annual general meeting's approval of this policy. In other words, the shareholders' supervision will be alienated. However, the TCC system is open to such regulation. However, it is still viable to amend the articles of association according to Article 421 TCC, which requires shareholders representing at least 50% of the company's capital to be present as a quorum[94]. This decision will be taken with the majority of the votes present at the meeting. As a result, it is not likely that a decision regarding the remuneration policy to be rendered against the wishes of the majority of the company. As in most of the cases, where the management represents the interests of the majority in the company, an oversight of the remuneration decision will not be realized through shareholder voting.

Article 516/2/c TCC further stipulates that the annual report of the board of directors must entail the payments made to the board of directors as part of their executive remuneration.

90 Tekinalp, Poroy and Çamoğlu (n 91) N. 918.

91 Manavgat, Kırca and Şehirali Çelik (n 75) 746.

92 However as a bankruptcy proceeding is initiated, the bankrupt's assets are managed by a trustee; in this event the payment has to be reached to this authorithy. Also the authorithy to manage bankrupt's assets has the right to sue the directors for the reimbursement of the payments exceeding a reasonable amount. For a detailed analysis please see: Özer (n 73) 399.

93 Manavgat, Kırca and Şehirali Çelik (n 75) 747.

94 This requirement of a 50% majority will decline to the majority of shares representing at least 1/3 of share capital in the second meeting, in the event that the quorum was not summoned in the first meeting.

H. Regulations with regards to Public Companies

Besides the provisions set forth in TCC, there are also provisions in the Turkish Capital Markets Law (CML) with regard to directors' remuneration payments.

Article 19 CML stipulates the conditions under which directors can receive a portion of the annual profit as or part of their remuneration. A distribution decision with regard to directors' profit shares cannot be taken unless the statutory reserves are allocated, and dividend payments to the shareholders are substantiated. Unless there are dividends paid to the shareholders, directors cannot receive any shares from the profit.

There are also provisions with regard to the remuneration policy, board committees, and independent directors in the Corporate Governance Principles, which are annexed to the CMB's Communique Series: II, Number:17.1.

According to Art. 4.5.1 of the Corporate Governance Principles, listed companies must have board committees, of which the remuneration committee is mandatory. All of the committees must consist of non-executive members and must be chaired by an independent director. In accordance with Art. 4.5.4. the CEO or the chairman of the executive board cannot participate in these committees.

Article 4.5.13 regulates the formation and rules of conduct of the Remuneration Committee. Within this regard, it shall, in line with the long-term goals of the company, determine the principles and criteria for the remuneration of the executive managers and the board of directors. The committee shall also observe compliance with these rules. Another responsibility of the committee, having considered the degree of compliance with the aforementioned criteria, is to share its recommendations with regard to the remuneration policy of the executive managers and the board of directors.

The remuneration provided to the executive managers and the board of directors is regulated under Art. 4.6 of the principles. Art.4.6.1 stipulates that the board of directors is responsible for the attainment of the operational and financial goals of the company, which were previously determined and disclosed to the public. The assessment thereof shall be included in the annual report. The board of directors shall also assess and evaluate the performance of the board as a whole, as well as the performance of the executive managers and the board of directors. The board of directors and executive managers are to be either rewarded or dismissed based on these assessments. According to the principles the amount of remuneration shall be determined in line with three factors: transparency, impartiality and performance-based evaluation[95].

95 Manavgat, Kırca and Şehirali Çelik (n 75) 740.

According to Article 4.6.2 Remuneration principles of the executive managers and the board of directors shall be put in writing to comply with the transparency principle, and must be included in the agenda of the annual general meeting as a separate agenda topic, and submitted to the shareholders for their evaluation and comments. To serve this purpose the remuneration policy must be placed on the official web-site of the company.

Article 4.6.3 prohibits share profits, share options and performance-based remuneration principles to be adopted for the remuneration of the independent directors. The Article also sets forth the remuneration of the independent directors to be above a certain threshold in order to serve to maintain their independent character.

According to Article 4.6.5, remuneration, and all the other benefits provided to the executive managers and the board of directors are to be disclosed by way of an annual activity report, and the disclosure is to be performed on a personal basis.

With regard to share options, while there are not any explicit provisions, Art 4.6 of the corporate governance principles does contain the explanation that share options can be a part of a director's remuneration[96]. In the event that a share option is allocated as a remuneration payment for directors, it constitutes "inside information" and must be disclosed according to Art. 14 of Serial II, Number: 15.1a Communique of the CMB.

Turkish law does not entail any provisions with regard to "golden-parachutes". Art. 364 TCC necessitates that compensation be paid to the directors in the event of unlawful termination of their employment contracts, however, this provision cannot be interpreted in a way to contain a golden-parachute payment[97]. The system in general does not forbid such payments, but directors can only be entitled to them if there is a general meeting decision with regard to their grant.

Turkish law entails provisions regarding directors' liability insurance. In accordance with Art. 361 TCC, a listed company must disclose its liability insurance if its directors are insured against damages resulting from breach of their fiduciary duties for an amount exceeding 25% of the company's capital. Although there is no clarity with regard to the debtor of such insurance premiums, it is assumed that the company must pay the premiums[98]. Furthermore, as it covers an amount which otherwise will be paid by the directors themselves, liability insurance is also to be considered part of the remuneration package allocated to directors[99].

96 For further details concerning the application of the share-options in Turkish law see, Özer (n 73) 278 ff.

97 Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (5th edn., Vedat Kitapçılık 2020) N.12-113.

98 Özer (n 73) 289.

99 Özer (n 73) 290.

Although the CML does not require an explicit claw-back provision, Art. 21 CML may be construed as an implicit claw-back provision. If the remuneration paid to the directors exceeds the reasonable amount "value of equal", it can violate the transfer pricing prohibition as stipulated in Art. 21 CML. According to Art. 21/4 CML, the company may reclaim the transferred amount with interest, and the party benefiting from this transfer shall return the payments. The Capital Markets Board is entitled to determine the amount and the decision to reclaim. Additionally, in accordance with Art.94/1 CML, the CMB is also entitled to file a suit concerning the transferred amount to be paid back to the company. The CMB is even entitled to file an annulment suit with regard to the transfer pricing transaction pursuant to Art. 94/2 CML.

IV. Evaluation of the Turkish System and Setbacks to be Addressed

For closed companies, i.e. companies subject only to TCC provisions, Art. 394 TCC designs the main structure of the remuneration system. As mentioned previously, the remuneration payments can be made based on a provision of the articles of association of the company, or on a general meeting decision. A general meeting decision in this regard is binding. To initiate payments based on a remuneration schedule, this schedule must be approved, or a decision must be taken at the general meeting to ratify it. Pursuant to Art. 418 TCC, the quorum for this decision is a simple majority. Besides Art. 394 TCC, TCC also contains other provisions with regard to companies' accounts, and the procedure for a profit share to be allocated as part of remuneration.

Article 394 TCC enumerates the types of executive remuneration payments; although there is a discussion in the literature, the majority of authors interpret it as not of a *numerus clausus* nature. Moreover, besides these types of remuneration, directors might also sign an employment contract with the company. In other words, the members of the board of directors can also have a permanent employment contract with the company as a regular worker. In this case the power to enter into a contract is vested to the board of directors itself. Article 374 TCC stipulates that the board of directors vests the power to manage the company to achieve its aims of operation within the subjects and powers not vested to the general meeting[100]. Within this scope, the board of directors' power to decide on the individual remuneration packages is not supervised by any other authority or by the shareholders[101].

This can result in the tunnelling of assets of a particular company. In the event that this power is misused and, eventually, the company sustains damage, the board of

100 According to this Article, if the competence to decide in a particular corporate issue is in question, unless it is not within the powers of the general assembly according to Art. 408, the competence is of the board of directors. In other words, the floating competence belongs to the board of directors.

101 It is argued that the board of directors shall not sign up any contracts incumbent with provisions of high remuneration payments which are not in line with the remuneration policy. Özer (n 73) 215-217.

directors can be exposed to personal responsibility claims. Under Art. 21 CML, the tunneling of assets in listed companies constitutes transfer pricing.

Remneration payments can be initiated based on a general meeting decision. Remuneration packages exceeding a reasonable threshold can be subject to annulment suits pursuant to Art. 445 TCC, on the grounds that they are not in line with the principle of good faith.

Furthermore, it is criticized that disclosure via the annual activity report serves only the purpose of aggregate disclosure. Unlike Art. 4.6.5 Corporate Governance Principles, TCC does not contain a provision that the disclosure shall be made on a personal basis.

Conclusion

While the TCC system does not contain any detailed provisions with regard to a remuneration policy or report, remuneration can only be paid to board members on the grounds of a general meeting decision or by articles of association provision.

However, the system for the listed companies stipulated in CML and Corporate Governance Principles entails parallel provisions with regards to the Shareholders Rights Directive and the Commission's Recommendations.

Each system requires both transparency and shareholder supervision in different degrees. As stipulated in Corporate Governance Principles, the amount of remuneration shall be determined by way of considering the long-term financial interests of the company.

The Turkish system requires a binding shareholder vote in order for remuneration to be payable to the board members unless there is an article of association provision already drafted with regards to remuneration. This indicates that the legislator did not aim to vest any powers to the BoD with regard to the determination of the remuneration policy. As a result, the BoD is not entitled to implement any remuneration policies which have not been approved by the shareholders. According to Art. 375 TCC, the BoD is entitled to, and indeed obligated to enforce the annual general meeting decisions, exactly as they were taken[102].

Within this regard, as stated above, drafting of the rules or principles related to the remuneration in the first articles of association of the company may result in the circumvention of the shareholder oversight.

102 Özer (n 73) 216.

Furthermore, the problem with Turkish practice is that individual employment agreements are not supervised by third parties. As *Özer* argues, the individual employment agreements of directors should not be in breach of general meeting decisions regulating this issue or against the related provisions set forth in the AoA of the company. As a result, individual employment agreements cannot be used as a tool for the circumvention of the company's remuneration policy.

EU legislation only recommends a binding shareholder vote on the remuneration policy and report; however, member states are free to choose between a binding or advisory vote of the shareholders. The provisions require that in the event that the Member State did not opt in for a binding shareholder vote, as it is designed to be voluntary, the company has to report in what way it made use of the shareholders voting results. The Commission designed the new directive in a voluntary approach by not prescribing to a binding shareholders' vote. In this design of the new directive, a company cannot entirely ignore shareholders' response to remuneration discussions.

With regard to transparency, Turkish capital market legislation contains detailed provisions, stipulating disclosure on personal basis. As mentioned previously however, TCC provisions require disclosure only by means of the annual activity report, which happens to be an aggregate disclosure, not serving the very principle of transparency.

EU rules contain provisions that data protection, that of information related to directors and their remuneration schemes, will be disclosed and the information will be present on the company's web-site for a certain period of time.

Despite having come a long way since the EU Commission's first recommendations, directors' remuneration is still a controversial area of corporate law. It is, however, also a dynamic area of law.

The remuneration system itself evolved from a perspective focusing on the alignment of corporate interest with that of shareholders, and promoting shareholders' oversight of the remuneration policy. The natural state of the debate resulted in the suggestion that contributing to a company's business strategy, long-term interests and sustainability contributes to the best interests of all stakeholders. It came out however, that remuneration legislation cannot be designed by only aligning the interests of managers with those of the company, and in order to avoid short-termism, and better ensure the sustainability of the company, shareholder oversight proved its need to be mandatory.

However, individual remuneration agreements are the soft underbelly of the current system. As discussed previously, another method of supervision must be constituted in order to deal with this issue in both systems.

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Corr v IBC Vehicles Ltd [2008] UKHL 13, [2008] 1 AC 884.

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Callery v Gray [2001] EWCA Civ 1117, [2001] 1 WLR 2112 [42], [45].

Bunt v Tilley [2006] EWHC 407 (QB), [2006] 3 All ER 336 [1]–[37].

R v Leeds County Court, ex p Morris [1990] QB 523 (QB) 530–31.

If citing a particular judge:

Arscott v The Coal Authority [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ).

Statutes and statutory instruments

Act of Supremacy 1558.

Human Rights Act 1998, s 15(1)(b).

Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166.

EU legislation and cases

Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 5.

Case C–176/03 *Commission v Council* [2005] ECR I–7879, paras 47–48.

European Court of Human Rights

Omojudi v UK (2009) 51 EHRR 10.

Osman v UK ECHR 1998–VIII 3124.

Balogh v Hungary App no 47940/99 (ECHR, 20 July 2004).

Simpson v UK (1989) 64 DR 188.

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Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 268.

Gareth Jones, *Goff and Jones: The Law of Restitution* (1st supp, 7th edn, Sweet & Maxwell 2009).

K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

Contributions to edited books

Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks (OUP 2006).*

Encyclopedias

Halsbury's Laws (5th edn, 2010) vol 57, para 53.

Journal articles

Paul Craig, 'Theory, "Pure Theory" and Values in Public Law' [2005] PL 440.

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Online journals

Graham Greenleaf, 'The Global Development of Free Access to Legal Information' (2010) 1(1) EJLT < http://ejlt.org//article/view/17 > accessed 27 July 2010.

Command papers and Law Commission reports

Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5.

Law Commission, *Reforming Bribery* (Law Com No 313, 2008) paras 3.12–3.17.

Websites and blogs

Sarah Cole, 'Virtual Friend Fires Employee' (*Naked Law*, 1 May 2009)

<www.nakedlaw.com/2009/05/index.html> accessed 19 November 2009.

Newspaper articles

Jane Croft, 'Supreme Court Warns on Quality' *Financial Times* (London, 1 July 2010) 3.

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