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ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

EU Legal Landscape and EMCA on Mitigating Abuse by Majority Shareholder(s) in Public Companies: Any Inspiration for Minority Protection in Independent and Privately Held Turkish *Anonim Ortaklık*?

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Abstract

In EU legislation, a general provision regulating abuse by the majority does not exist. Two approaches have been adopted in Member States. One requires both damage to the minority and to the company, named in this work as double-threshold approach, is implemented by eg France; the other deems the damage to the minority sufficient to conclude on the existence of abuse by the majority; this single-threshold approach is implemented by eg Germany and the Nordic countries. The latter approach, which is also set out by the European Model Companies Act (EMCA), provides better protection to minority shareholders, especially those that are locked in an independent and private anonim ortaklık (Turkish public company – briefly AO). Under EU legislation, as stated by the European Court of Justice in the Audiolux ruling, there does not exist an immanent principle of equal treatment of shareholders. Like EMCA, TCC art 357 imposes on company organs the duty of equal treatment of shareholders who are in the same position. With this provision, it can be argued that the single-threshold approach is the prevalent approach in Turkish law to determine whether the majority has abused its powers. As for the effective remedies to protect the minority against abuse by majority in independent and privately held AO, a sell-out provision, a remedy implemented by the Directive (EU) 2017/1132 for cross-border conversions, mergers, and divisions of limited liability companies, should be introduced, and a modification to Article 531 of TCC on dissolution by just cause should be made, allowing minority shareholders to request directly from the court to exit the company via sale of their shares. EMCA provisions on Sections 11.35 and 11.37 regarding, respectively, the right to sell-out and redemption, and buy-out may serve as an inspiration for TCC.

Keywords

Public company, independent and privately held company, abuse by majority, EU legislation, European Model Companies Act (EMCA), Turkish Commercial Code, CJEU's Audiolux decision

AB Hukuk Düzeni ve EMCA'da Anonim Ortaklıklarda Çoğunluğun Kötüye Kullanımının Etkilerinin Azaltılması: İzole ve Halka Kapalı Türk Anonim Ortaklıklarında Azınlığın Korunması İçin Esinlenmek Mümkün Mü?

Öz

AB mevzuatında, çoğunluğun kötüye kullanılması hususunu düzenleyen genel bir hüküm bulunmamaktadır. Üye devletlerde ise konuya dair iki ayrı yaklaşım bulunmaktadır. Bunlardan Fransa'da kabul gören çift eşikli yaklaşım olarak adlandırılabilecek ilki hem azınlığın hem de ortaklığın çıkarının zedelenmesini aramaktadır. Almanya ve İskandinav ülkeleri gibi bazı ülkelerde kabul gören tek aşamalı yaklaşım olarak adlandırılabilecek diğer yaklaşımda yalnızca azınlığın çıkarının zedelenmesi yeterli görülmektedir. AB düzenlemeleri de dikkate alınarak akademisyenler tarafından hazırlanan

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bir model yasa çalışması olan EMCA'da da kendisine yer bulan ikinci yaklaşım azınlık pay sahipleri için daha iyi bir koruma sunmaktadır; özellikle izole ve halka kapalı anonim ortaklıkların azınlık pay sahipleri yönünden. Adalet Divanı'nın Audiolux kararıyla da ortaya konduğu üzere AB Hukuku'nda pay sahipleri yönünden uygulama alanı bulacak genel geçer bir eşit işlem ilkesi söz konusu değildir. EMCA'da olduğuna benzer şekilde TTK m.357'de ise eşit şartlardaki pay sahiplerinin eşit işleme tabi tutulması gerekliliğini öngören hüküm uyarınca, Türk hukukunda da ortaklıkta çoğunluğun kötüye kullanılmasının tartışma konusu olduğu hallerde, kötüye kullanmayı tespit için tek eşikli yaklaşım yeterli olmalıdır. İzole ve halka açık olmayan anonim ortaklıklarda azınlık pay sahiplerinin etkin bir şekilde korunması için uygulanabilecek yöntemler bakımından ise, sınır aşan tür değiştirme, birleşme ve bölünmeler yönünden 2017/1132 sayılı Yönerge seviyesinde de öngörülen azınlığa ortaklıktan çıkma hakkı tanıyan bir düzenlemenin getirilmesi yerinde olacaktır. Haklı nedenle feshi düzenleyen TTK m.531'in değiştirilmesi suretiyle azınlık pay sahiplerine, paylarını satarak ortaklıktan çıkmayı doğrudan mahkemeden talep edebilecekleri bir düzenleme getirilmesi de düşünülmelidir. EMCA Bölüm 11.35 ve Bölüm 11.37'deki pay sahiplerinin paylarını satarak ortaklıktan çıkması ile payların satın alınmasını talep etme veya paylarını satmaya zorlama hususlarında öngörülen hükümlerden TTK için de esinlenilebilir.

Anahtar Kelimeler
İzole ve halka kapalı anonim ortaklık, çoğunluğun kötüye kullanılması, AB mevzuatı, Avrupa Model Ortaklıklar Yasası (EMCA), Türk Ticaret Kanunu, Adalet Divanı'nın Audiolux kararı

Extended Summary

The majority rule is one of the fundamental principles governing the limited companies. This means that the decisions taken, and the management followed by the majority affect other stakeholders who may have different interests other than those of the majority shareholder. As any power, the powers vested in the majority shareholder of a public company (in Turkish case, *anonim ortaklık* – briefly AO) thanks to majority rule may be abused by such shareholder.

Against an abusive majority, the position of shareholders of a privately held AO is rather challenging and their options limited, due to lack of a viable access to liquid markets for their shares. This paper focuses on abuse by majority and how to mitigate this issue in an independent and privately held public company with an examination of the Turkish public company law on the matter regulated under Turkish Commercial Code numbered 6102 (briefly TCC).

TCC art 202 governs unlawful use of the control for group of companies (conglomerate/ *konzern*). However, general provisions of limited companies lack any articles that directly regulate the issue of potentially or materially abusive behaviours by a majority (in broader terms, controlling) shareholder. Furthermore, TCC art 202 cannot be directly applied to the independent companies. Yet, an independent AO, either publicly or privately held, may well be the arena for an abuse by majority similar to the cases governed by TCC art 202. Current protections provided by TCC seems to fail to prevent chronic/systematic cases of abuse by majority in an independent and privately held AO; in return judicial and/or legislative intervention may be required. But how?

This article examines the EU legal landscape with Member States' approaches and European Model Companies Act while comparing them to Turkish perspective for finding effective ways to mitigate abusive majority behaviour in an independent and privately held AO.

In order to provide such a perspective and to understand where the Turkish law stands, the following topics are discussed: differing legal approaches concerning abuse by the majority, equal treatment of shareholders, and exit rights as an effective remedy to mitigate the abuse by the majority.

The EU legislation does not contain a general provision on how to prevent abuse by majority. In Member States, two approaches prevailed without a harmonising EU legislation. One approach seeks both a damage to company and to minority (eg France), the other finds it sufficient just damage to the minority in order to classify the action as an abuse by majority. For the minority, proving that company's interest is also violated is a rather difficult task and as a result hinders the sought minority protection in most of the cases. Therefore, a single-threshold approach which

requires minorities to prove only the damage to their interests should be the approach upheld. In independent and privately held AO, the options for a locked in minority are limited and a further minority protection is required. Single-threshold approach helps providing the sorely needed protection in a more efficient and global way.

According to ECJ's Audiolux ruling, no immanent principle of equal treatment of shareholders exists under EU law and the EU legislation does not force Member States the implementation of a blanket equal treatment principle of shareholders. Certain Member States tend to provide one. EMCA also regulates the issue directly. This is also the case in Turkish law via TCC art 357. With a provision explicitly imposing the company organs to uphold the principle of equal treatment of shareholders in the same position, single-threshold approach seems to be the prevailing approach in Turkish public company law, and thus Turkish law is positioned to provide an effective protection for minorities in an independent and privately held AO.

With the Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 Amending Directive (EU) 2017/1132, for cross-border conversions, mergers, and divisions of limited liability companies, Member States are under the obligation to provide a right to dispose of their shares for an adequate cash compensation, ie an exit right, to the company's members who voted against the resolutions concerning the related transactions in the general assembly. These provisions may be used by the minority to protect itself from abuses, potential ones included in the aforementioned transactions.

EMCA provides a more comprehensive protection by regulating the liquidation due to fraud on the minority in Section 11.33, the right to sell out provided to minority stipulated in Section 11.35. Furthermore, according to Section 11.37, shareholders who incurred a loss have a right to be redeemed if the company, individual shareholders, the company's creditors or other third parties incur a loss due to a shareholder's intentional or grossly negligent action, and there exists a risk of continued abuse.

Concerning the remedies to save the minority from the abuses committed by majority in independent and privately held AOs, a sell-out provision forcing the majority to buy the minority's shares should also be introduced to TCC. In order to provide the minority with better options, and legal clarity and to protect it from judicial surprises, TCC art 531 on dissolution by just cause should also be modified in a way that it provides minority to directly request from the court to exit the company, if possible, at the majority's expense. This type of mechanism would significantly ameliorate the minority's position in companies, since the risk of paying the relevant cost would create a better incentive for majority to refrain from abusing its power. Furthermore, for the minorities, especially in an independent and privately held AO where they are deprived of an access to liquid markets, it would create the opportunity to be fairly compensated for their shares.

Introduction

One of the fundamental principles governing limited companies is the majority rule. The majority's will runs the company. This means that the decisions taken and the management followed by the majority affect other stakeholders who may have different interests other than those of the majority.

The different interest groups, ie stakeholders, emerging from the complex structure of the corporation create conflict of interests in limited companies. These conflicts can primarily be summarised as i) among the shareholders, ii) between the majority and the minority (these two latter conflicts can be classified as inner horizontal conflicts), iii) among the shareholders and the company itself and/or management of the company (ie inner vertical conflicts), and iv) among those 'outside' the 'partnership' (eg workers of the company, creditors, society) and the company. Outer horizontal conflicts may arise as well; for example, this is the case when there are competing suppliers to a company.

Inner horizontal conflicts may become visible as a result of abuse of the majority rule. This can happen in a group of companies as well as in an independent company.

With the Turkish Commercial Code numbered 6102[1] (TCC), articles specifically regulating a group of companies (conglomerate/*konzern*) have been introduced in Turkish company law. This is a trend that can be found in Continental European legal systems. TCC art 202 governs the unlawful use of the control for a group of companies, and there does not exist a general provision directly regulating the issue in limited companies, and TCC art 202 cannot be directly applied to independent companies. However, after examining the issues surrounding the groups of companies and independent companies, one would argue that the need for regulating abuse by majority is also present for independent public companies. The Turkish public company *anonim ortaklık*[2], (hereinafter, briefly AO) is not free of this need.

[1] Türk Ticaret Kanunu, Kanun Numarası: 6102, Kabul Tarihi: 13.1.2011, RG: 14.2.2011/27846.

[2] *Anonim ortaklık* (abbreviated as AO or *anonim şirket*, abbreviated as AŞ - as stated by the TCC art 1531, *ortaklık* and *şirket* are synonyms within the confines of TCC, but also in general Turkish usage and therefore interchangeable) is the closest Turkish company form to Belgian, French, Luxembourgish *la société anonyme*, Dutch *de naamloze vennootschap*, Greek *ανώνυμη εταιρία*, Italian *società per azioni*, Portuguese *sociedade anónima*, Romanian *societate pe acţiuni*, Spanish *la sociedad anónima*, and Austrian and German *Aktiengesellschaft*.
Turkish AO is a type of company in which capital is divided into shares, and the liability of the shareholders is limited by shares; therefore, it is a type of 'limited company'.
Only shares of an AO may be offered to the public and may be publicly traded in a regulated market. Such a listed or quoted AO falls in the sub-category of '*halka açık anonim ortaklık*' (*halka açık* – verbatim 'open to public', ie publicly held).
However, an AO can also be publicly held without being publicly traded in a regulated market. This is the case if the shares of an AO are held by more than five hundred shareholders. The shares of such a company are considered shares 'offered to the public' according to Turkish Capital Market Law numbered 6362 (TCML – Sermaye Piyasası Kanunu, Kanun Numarası: 6362, Kabul Tarihi: 6.12.2011, RG: 30.12.2012/28513) art 16 and therefore become publicly held.
If the conditions stipulated in TCML are not met, an AO is considered to be privately held (*halka kapalı*, verbatim close to public).
AOs may also be formed with a single shareholder. Unipersonal limited companies are not a separate type in Turkish company law.
TCC governs both publicly and privately held AOs. However, for publicly held AOs, special and detailed provisions are brought in TCML.

Independent AOs, whether publicly or privately held, may well be the victim of or the arena for such an abuse.

The situation for shareholders of a privately held AO is exacerbated since they are generally deprived of a viable access to liquid markets. Where the current protections provided by the TCC fail to prevent chronic cases of abuse by majority in such companies, judicial and/or legislative intervention may be called for.

This paper examines the EU legal landscape with Member States' approaches and the European Model Companies Act (hereinafter EMCA) while comparing them with the Turkish perspective in hopes of drawing inspiration for finding effective ways to mitigate abusive majority shareholder behaviour to better protect the minority in an independent and privately held AO.

In order to provide such a perspective and to understand where Turkish law stands, the following topics are discussed: differing legal approaches to abuse by majority, equal treatment of shareholders, and exit rights as an effective remedy to mitigate abuse by majority.

Since EMCA is widely referenced in this article, the first chapter is dedicated to shedding light on EMCA and its importance in the field.

I. A Brief Introduction to EMCA

EMCA[3], a model act on company law inspired by the US Revised Model Business Corporation Act (MBCA)[4], was the result of a cooperative work by a college of prominent scholars from then 22 Member States of the EU (UK was still a member when EMCA was published).[5]

The EMCA Group is an independent group from the governments of the Member States, the European Commission and business organisations.[6] The EMCA can be described as a coherent and dynamic tool for European integration in company law.[7]

In short, Turkish AO is a limited company whose shares can be offered to the public. The AO may be privately or publicly held.

3 Paul Krüger Andersen and others, 'European Model Companies Act (EMCA)' (2017), Nordic & European Company Law Working Paper No. 16-26, <https://ssrn.com/abstract=2929348> accessed 14 March 2024, 1 ff.

4 A major revision to the MBCA was made in 2016. For the latest version, see American Bar Association, *Model Business Corporation Act (updated through September 2021)* (American Bar Association 2021) <https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2020_mbca.pdf> accessed 14 March 2024.

5 Krüger Andersen and others, 'EMCA' (n 3) 1.

6 ibid 2.

7 For a general introduction to the EMCA, see Paul Krüger Andersen, 'The European Model Company Act (EMCA)—a tool for European integration' (2018) 19 (1) ERA Forum 77, 77 ff.

EMCA encompasses both private and public companies that are limited by shares.[8] In the EMCA system, the main distinction between a public and private company is based on whether its shares can be offered to the public. As per Section 1.03 of EMCA, only a public company may offer its shares to the public.[9] If EMCA were to be implemented in Turkish law, it would comprise the following companies: AO, *limited ortaklık* (hereinafter LO – main Turkish private company type similar to eg French *la société à responsabilité limitée* and German *die Gesellschaft mit beschränkter Haftung*) and *sermayesi paylara bölünmüş komandit ortaklık* (an almost extinct type of company in Turkish practice, similar to eg French *la société en commandite par actions* and German *die Kommanditgesellschaft auf Aktien*).

EMCA also provides a general commentary and contains a detailed commentary for each provision while generally explaining different European legal traditions and reasons why certain approaches are upheld.

Therefore, EMCA represents an excellent collective effort providing invaluable insight into the European legal landscape and will be referred to in this paper.

II Approaches to Abuse by Majority

A. Lack of a Harmonised EU Approach

Thanks to the majority rule, a shareholder or a group of shareholders holding most shares and votes in a public company can decide the fate of the company and its fellow shareholders.[10] As with any power vested in shareholders, the power obtained by majority shareholder(s) can also be abused.

However, no EU level legislation exists on shareholder's duty not to abuse rights, and the legal concepts on the issue are established by Member States and their case law.[11] It can be argued that the preoccupation of the EU legislature is towards increasing shareholders' rights and not preventing the possibility of abuses; therefore, this choice might have caused the relevant lack of general legislation.[12] Nevertheless, specific provisions to prevent certain aspects of abuse by majority can be found in EU legislation.[13]

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[8] See Krüger Andersen and others, 'EMCA' (n 3) 14 and 25-27.

[9] ibid 25.

[10] See Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku I* (15th edn, Vedat Kitapçılık 2021) No 465.

[11] Pierre-Henri Conac, 'The Shareholders' Duty Not to Abuse Rights', in Hanne S. Birkmose (ed), *Shareholders' Duties* (Kluwer Law 2017) 363, 364.

[12] ibid.

[13] See eg Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46 art 72 on pre-emptive rights of shareholders in proportion to their capital contributions.

Due to the lack of harmonisation of theoretical concepts and terminology regarding abuse of majority power at EU level, Member States developed their own concepts and approaches. Some countries use a literal translation of abuse by majority, like France, Belgium (*abus de majorité*[14]) and Italy (*abuso della maggioranza*), some other States base their concept on the duty of loyalty/fiduciary duty of the majority shareholder, and some on equal treatment of shareholders.[15] Although these seem to be separate legal concepts, they have the same purpose, namely, to limit majority's potential abuses. They also share similar traits. Therefore, they can be examined within the blanket term of 'abuse by majority'.

Conditions for these concepts revolve around two approaches that can be classified as follows: i) the double-threshold approach, which requires damage to both the company's and minority shareholder's interests for an act to be considered and sanctioned as abuse by majority, and ii) the single-threshold approach, which deems damage to minority shareholder's interest sufficient to consider an act to be abuse by majority.[16]

B. Is Damage to Both the Company's Interest and the Minority Shareholder's Interest Necessary?

Certain Member States have a double-threshold approach to sanction abuse by majority and require damage to both the company's and minority shareholders' interests.[17]

France[18], Belgium, Italy, and Portugal are given as examples to this cumulative approach.[19] Spain follows the same approach. However, since 2014, the first condition has been softened. For a decision to be considered an abuse by majority, damaging the interest of the company with the decision is no longer required; it is now sufficient

[14] The concept of *abus de majorité* has a long history in French and Belgian company laws. As early works in French language dedicated to subject, see Jean Bergier, *L'Abus de Majorité dans les Sociétés Anonymes – Etude de Droit Commercial Comparé – Droits Allemand, Français et Suisse* (Säuberlin&Pfeiffer 1933) 1 ff.; Pierre Coppens, *L'Abus de Majorité dans les Sociétés Anonymes* (Librarie René Fonteyn 1947) 1 ff. In France, the theoretical concept finds its roots not only in private law, but also in public law, to be more precise in administrative law, from the concept of *détournement du pouvoir*, see Anne-Laure Champetier de Ribes-Justeau, *Les Abus de Majorité, de Minorité et d'Egalité : Etude Comparative des Droits Français et Américain des Sociétés* (Dalloz 2010) 19-20.

[15] See Conac, 'Shareholders' Duty' (n 11) 365 ff. See also Holger Fleischer, 'Shareholder Conflicts in Closed Corporations', in Gregor Bachmann and others, *Regulating the Closed Corporation* (2014) ECFR Special Volume 4 28, 53-54.

[16] For the proposed classification of these approaches, see Onur Görmez, Topluluk Dışı Anonim Ortaklıklarda Çoğunluk Gücünün Kötüye Kullanılması (PhD thesis, Istanbul University 2023) 169 ff.

[17] Krüger Andersen and others, 'EMCA' (n 3) 262; Conac, 'Shareholders' Duty' (n 11) 366.

[18] The French Court of Cassation delivered the first ruling acknowledging that an abuse by majority (*abus de majorité*) had been committed in 1961. According to the Court, the general assembly resolution taken with the votes of the majority was contrary to the 'social interest' of the company and was based solely on an intent to favour the majority shareholder's interest to the detriment of all the shareholders. See Cassation Commerciale, 18 Avril 1961, Les Grands Arrêts de la Jurisprudence Commerciale 1962 225-228. The approach of the French Court did not go unnoticed in Turkish scholarship. See Mahmut T. Birsel, 'Anonim Şirketlerde Azınlık Hakları', *İmran Öktem'e Armağan* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1970) 620, 629.

[19] Conac, 'Shareholders' Duty' (n 11) 366.

that the decision has been approved by the majority *without there being a reasonable company need.* The decision must also be taken for the majority's own benefit to the unjustifiable detriment of the remaining shareholders.[20]

Other Member States follow a single-threshold approach in which the damage to minority shareholders is sufficient for abuse by majority. This is the case in Germany, the Nordic countries, Ireland and, in the UK which is not a Member State anymore.

Denmark departs from breach of the principle of equality between shareholders; under Irish law, majority is expected to adopt sound control[21].[22] The UK relies on the concept of unfair prejudice.[23] Germany recognises that majority shareholders are bound by a *duty of loyalty* both towards the company and its fellow shareholders.[24]

In Section 1.10, EMCA sets the majority principle as one of the general principles of companies and shareholder democracy as one in Section 1.12.[25] With these principles in mind, EMCA prefers a single-threshold approach, as Section 11.31 stipulates that 'The General Meeting may not pass a resolution which obviously is likely to give certain shareholders or others an undue advantage over other shareholders of the company'. The EMCA Group considers the double-threshold approach to be too restrictive to protect minority shareholders compared to the single-threshold approach.[26]

[20] Krüger Andersen and others, 'EMCA' (n 3) 262.

[21] Under Irish company law, majority shareholder has the duty towards the other shareholders not to exercise its control over the company in a way that could go against or fail to take account of their interests. See Conac, 'Shareholders' Duty' (n 11) 369.

[22] For further information on these examples, see Krüger Andersen and others, 'EMCA' (n 3) 262; Conac, 'Shareholders' Duty' (n 11) 368-369.

[23] Section 994 of the UK's Companies Act 2006 reads: "A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself)".

[24] For further information, see Andreas Cahn, 'The Shareholders' Fiduciary Duty in German Company Law', in Hanne S. Birkmose (ed), *Shareholders' Duties* (Kluwer Law 2017) 347, 347 ff. For the landmark decision of the German High Federal Court on majority shareholder, see BGH, 01.02.1988, II ZR 75/87, DNotZ 1989, 14. In Germany, minority shareholder also is bound with fiduciary duties. Famous Girmes decision (see BGH NJW 1995, 1739) sets this principle. See Cahn (n 23) 359-361. For a detailed examination of this decision in Turkish scholarship see Argun Karamanlıoğlu, *Anonim Ortaklıkta Pay Sahibinin Genel Kurul Toplantısında Temsili* (Vedat Kitapçılık 2016) 542-548.

[25] Krüger Andersen and others, 'EMCA' (n 3) 32-33.

[26] ibid 262.

The reason for the requirement of a damage to company's interest may be found in the institutional approach[27] towards the company.[28] This requirement draws justified criticism because it prevents effective protection for the minority, since in many cases it is rather difficult for the minority to prove that the company's interest was violated. It also produced a reactive approach to interpret the company's interest in light of a contractual understanding so that minority protection can be improved.[29]

C. Position of the Turkish Law

In the Turkish Commercial Code, a direct use of 'abuse by majority' as a legal terminology does not exist[30]. However, the duty of loyalty has a broad implementation and long history. In TCC art 369, it is explicitly stated that managers of an AO are bound by the duty of loyalty (and care).[31] In LO, members of the company are bound by the duty of loyalty, as per TCC art 613. However, the Code is silent whether

27 The company can be understood in the light of different approaches, such as contractual and institutional approaches. According to the contractual approach, a company is based on a contract and can be described as a nexus of contracts/web of contracts, and its relationship with other parties (including its shareholder) should be interpreted through the lens of its creators, ie its shareholders, since it is the shareholders' will to enter into a contract created the company and also the risk undertaken by the shareholders is greater than that of other parties. See Mehmet Bahtiyar, *Anonim Ortaklık Sözleşmesi* (Beta 2001) 22; Isabelle Corbisier, *La Société: Contrat ou Institution ?: Droits Etasunien, Français, Belge, Néerlandais, Allemand et Luxembourgeois* (Larcier 2011) 257 ff; İsmail Kırca, Feyzan Hayal Şehirali Çelik and Çağlar Manavgat, *Anonim Şirketler Hukuku*, vol 2 (BTHAE 2013) 248; Cem Veziroğlu, *Anonim Ortaklıklar Hukukunda Esas Sözleşme Özgürlüğü ve Sınırları* (On İki Levha 2021) 102 ff. According to institutional approach, creation of a company results in an autonomous institution with a distinct personality than that of its shareholders in cases where the company possesses a legal personality and therefore has its own purpose, will and objectives which is or can be distinct from the ones that its shareholders or other stakeholders have. See Emile Gaillard, *La société anonyme de demain: la théorie institutionelle et le fonctionnement de la société anonyme* (Sirey 1933) 39; Birsel (n 17) 628; Champetier de Ribes-Justeau (n 14) 223; cf Oğuz İmregün, *Anonim Şirketlerde Pay Sahipleri Arasında Umumî Heyet Kararlarından Doğan Menfaat İhtilâfları ve Bunları Telif Çareleri* (İsmail Akgün Matbaası 1962) 106. The institutional approach can also be linked to stakeholder theory. See Şehirali Çelik (Kırca/Manavgat) (n 26) 249. For the differing approaches to company theory, see also Esra Hamamcıoğlu, *Anonim Ortaklıklarda Anasözleşme Değişikliği* (PhD thesis, Marmara University 2011) 9-26; Görmez, 'Kötüye Kullanma' (n 16) 79 ff. For a comparative study of French and United States' approaches and their implications on the understanding of company's interest and their effect on abuse by the majority, see Champetier de Ribes-Justeau (n 14) 220 ff.

28 For the French case, this is the reasoning given by the scholarship. See Conac, 'Shareholders' Duty' (n 11) 366.

29 In his seminal work, Professor Schmidt presents a great case for this approach to French law: Dominique Schmidt, *Les Conflits d'Intérêts dans la Société Anonyme* (Joly 2004) 312-349. See also Pierre-Henri Conac, 'La Société et l'Intérêt Collectif: la France Seule au Monde?' (2018) 10 Revue des Sociétés 558, 558 ff.; Pierre-Henri Conac, 'La Loi du 24 Juillet 1966 sur les Sociétés Commerciales et le Juge : la Cour de Cassation Prisonnière d'un Fantôme ?', *Regards sur l'Evolution du Droit des Sociétés depuis la Loi du 24 Juillet 1966* (Dalloz 2018) 97, 111-113; Conac, 'Shareholders' Duty' (n 11) 366.

30 Many provisions of the TCC can be linked with the concept of abuse by majority, and Turkish doctrine rightfully views certain provisions through the prism of abuse by majority. For example, TCC art 445 stipulates that general meeting resolutions in violation of, among others, the principle of good faith are voidable, and Turkish doctrine rightfully sees this provision as a means to prevent abusive behaviour of the majority shareholder. See eg Erdoğan Moroğlu, *Anonim Ortaklıkta Genel Kurul Kararlarının Hükümsüzlüğü* (On İki Levha 2020) 232-233; İsmail Kırca, *Anonim Şirket Genel Kurul Kararlarının Hükümsüzlüğü* (On İki Levha 2022) 77; Görmez, 'Kötüye Kullanma' (n 16) 237. On action for the voidability under TCC art 445, in this work see Chapter IV.

31 EMCA Section 9.04 also foresees the duty of loyalty for managers of the company by taking some inspiration from the Section 172 UK's Companies Act 2006. The commentary of the Section 9.04 provides valuable insight for the '*interest of the company*'. See Krüger Andersen and others, 'EMCA' (n 3) 212-214. In French company law, although accepted as an implicit notion, the explicit implementation of the duty of loyalty is relatively new, dating back to the 1990s and has been limitedly implemented. For a brief history and examination of the duty of loyalty in French company law, see Martin Gelter and Genevieve Helleringer, 'Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law' (2018) 15 Berkeley Business Law Journal 92, 134 ff. In Turkish company law, the duty of loyalty is not understood to be limited to a non-competition duty but a broader one, similar to German understanding.

shareholders of an AO are subject to the duty of loyalty.[32] Turkish scholarship has presented differing views on whether such a duty should be imposed on shareholders.[33]

On the other hand, one such duty can be found for majority shareholders in the provisions for group of companies.[34] TCC art 202[35] regulates the unlawful use of control in subsidiaries and creates a liability regime[36] for shareholders who have

[32] Mehmet Bahtiyar, *Ortaklıklar Hukuku*, (16th edn, Beta 2022) 247.

[33] The 'classical' Turkish scholarship refuses the imposition of such a duty on shareholders. See Ömer Teoman, *Anonim Ortaklıkta Pay Sahibinin Oy Hakkından Yoksunluğu* (BTHAE 1983) 12; Hayri Domaniç, *Anonim Şirketler Hukuku ve Uygulaması, TTK. Şerhi II* (Temel Yayınları 1988) 1115-1116; Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku II* (14th edn, Vedat Kitapçılık 2019) No 1091 (cf No 1091a). However, the authors of the two main monographies on this subject in Turkish doctrine profess that shareholders have such a duty. See N. Füsun Nomer, *Anonim Ortaklıkta Pay Sahibinin Sadakat Yükümlülüğü* (Beta 1999) 29-30; Murat Yusuf Akın, *Şirketler Hukukunda ve Özellikle Anonim Şirketlerde Pay Sahibinin Sadakat Borcu* (Istanbul Menkul Kıymetler Borsası 2002) 144 ff. For an analysis of the position of the Turkish scholarship on the imposition of the duty of loyalty on shareholders, see Fatma Beril Özcanlı, *Şirketler Topluluğunda Hakimiyetin Hukuka Aykırı Kullanılması* (On İki Levha 2021) 23-26. The same author also holds the latter opinion. See ibid 26-27.

[34] Among the Member States, there are four major approaches to a group of companies: i) comprehensive regulation, ii) partial regulation, iii) case law recognition of the interest of the group, and iv) lack of treatment. See Krüger Andersen and others, 'EMCA' (n 3) 371. With the entry into force of the TCC, Turkey falls into the first category. For an English review on Turkish law of group of companies, see Gül Okutan Nilsson, 'The Law of Group of Companies Under the Draft Turkish Commercial Code', in Roland von Büren, Susan Emmenegger and Thomas Koller (eds), *Rezeption und Autonomie: 80 Jahre Türkisches ZGB, Journées Turco-Suisses 2006*, (Stämpfli Verlag 2007) 179, 179 ff.

[35] The translation of the relevant parts of TCC art 202 is as follows:
'(l) a) The controlling company may not exercise its control in a manner that would cause a loss to the controlled company. The controlling company may not direct the controlled company, in particular, to carry out legal transactions such as transfer of business, asset, funds, personnel, receivables, and debt; to reduce or transfer its profits; to encumber its assets with rights in rem or in personam; to undertake liabilities such as standing surety, guarantee or aval; to make payments; without a just cause, to avoid taking measures ensuring its development or to take decisions or measures negatively affecting its productivity or operation such as not renewing its facilities, restricting or ceasing its investments; unless the loss is actually offset within that operating year or a right of claim of equivalent value is granted, with specific information as to how and when the loss would be offset, to the controlled company no later than the end of that operating year.
b) If offsetting is not actually realised within the operating year or a right of an equivalent claim is not granted in due time, each shareholder of the controlled company may request compensation for the damage caused to the controlled company by the controlling company and the members of its board of directors who caused the loss. Upon request or ex officio, instead of compensation, if deemed equitable for the relevant case, the judge may order the purchase of the shares of the plaintiff shareholders by the controlling company, as per the second paragraph of this article or any other appropriate and acceptable solution.
c) The creditors may also request that the company's losses be paid to the company, as per subparagraph (b), even if the company has not gone bankrupt.
d) If it is proved that under the same or similar circumstances the transaction causing the loss would have been undertaken or avoided being undertaken by the board members of an independent company, acting diligently as a prudent director and protecting the interests of the company in accordance with the good faith principle, no compensation shall be awarded.
(…)
(2) Regarding transactions such as merger, division, conversion, dissolution, issuance of securities, and important amendments to the articles of association undertaken by the use of control and without any clearly comprehensible just cause for the subsidiary company; shareholders who have voted against the general meeting resolution and had it recorded in the minutes or who have raised a written objection to the resolutions of the board of directors on such or similar matters, may request from the court the compensation of their losses be paid or the purchase of their shares at least with the stock market value or, if such value does not exist or is not equitable, with the real value or at a value to be determined according to a generally accepted method, by the controlling enterprise. While determining the value, data on the date closest to the court ruling shall be taken as the basis. The claim for compensation or share purchase shall be prescribed after two years, starting from the date on which the general meeting resolution is taken or of the announcement of the resolution of the board of directors.'
For an alternative translation see Fatih Aydoğan and Gizem Melike Emirler, *Türk Şirketler Hukuku – Turkish Company Law* (On İki Levha 2016) 100-105.

[36] Section 15.16 of the EMCA follows the Rozenblum doctrine of France and, with Section 15.17, proposes a regime that is less rigid than the Turkish provision. See Krüger Andersen and others, 'EMCA' (n 3) 385-388. In the existence of a specified and concrete group policy, interest of the group is recognised for the cases of direct or indirect full (100%) control in TCC art 203. According to the Explanatory Notes (a non-binding document provided with the draft law putting forward explanations as to why such legal amendments/changes/additions were made, similar to Swiss 'messages' accompanying and dedicated for legal modifications) to the TCC Articles, said article's approach to the matter that instruction should be a

control. Certain obligations of the controlling shareholder can be interpreted as a manifestation of the duty of loyalty imposed on the controlling/dominant shareholder.[37] However, Turkish scholarship is divided on the theoretical legal basis for liability established by the relevant article.[38]

In light of the position of Turkish company regulation mentioned above, one concludes that the controlling majority shareholder[39] in a subsidiary AO might be considered to be bound by a duty of loyalty; however, in the ideal AO which seems to be the independent one in the eyes of Turkish legislator, there does not exist an explicit imposition of such a duty of loyalty on the majority.[40]

Without going into the debate on how to legally classify the regime created by TCC art 202, one deduction can be made easily, which is that the legislator created a directly applied protection regime for the subsidiary company and its minority shareholders via the offset mechanism and liability regime for controlling shareholders in a setting of group of companies; while refraining from establishing the same or similar level of protection to an independent company and its minority shareholders and abstaining from imposing the same or similar liability regime on the controlling/majority shareholder of an independent company, even if it is obvious that the same type of risks exists in an independent company, eg independent AO.[41]

Furthermore, TCC follows a very rigid institutional approach to the regime created by art 340. Said article restricts the provisions that may be incorporated in an AO's articles of association.[42] According to TCC art 340, inspired by German Aktiengesetz §23(5), provisions in the articles of association may only deviate from the TCC, only if the Code explicitly so permits. This significantly curtails the contractual aspect

requirement of concrete policies set by the group follows the Rozenblum doctrine. See Explanatory Notes to TCC Articles, <https://cdn.tbmm.gov.tr/KKBSPublicFile/D23/Y2/T1/WebOnergeMetni/70f5fa31-0a3f-4910-bec9-77e0f8ba0bdf.pdf> accessed 14 March 2024, 79. In cases of full control, the legislator seems to have accepted the Rozenblum doctrine and allowed the group interest to be pursued. See Özcanlı (n 32) 124.

[37] According to Okutan Nilsson, the second paragraph of the article imposes the duty of loyalty on the controlling shareholder both towards the controlled company and its shareholders. See Gül Okutan Nilsson, *Türk Ticaret Kanunu Tasarısı'na Göre Şirketler Topluluğu Hukuku* (On İki Levha 2009) 312; cf Özcanlı (n 33) 450-451.

[38] For a detailed critique of differing opinions see Özcanlı (n 33) 313-327 and 449-452.

[39] For the concept of control in AO see Ali Paslı, *Anonim Ortaklığın Devralınması* (Vedat Kitapçılık 2009) 35 ff.

[40] See Esra Hamamcıoğlu, 'Anonim Ortaklıklarda Tek Borç İlkesine İlişkin Gelişmeler', *Prof. Dr. Mustafa Dural Anısına – Özel Sayı III* (2018) 6 (1) Kadir Has Üniversitesi Hukuk Fakültesi Dergisi 125, 136.

[41] See Ali Paslı, 'Anonim Ortaklıkta Kontrol Sahibinin Özel Durumu' (2008) 66 (2) İstanbul Hukuk Mecmuası 357, fn 47; Görmez, 'Kötüye Kullanma' (n 16) 180. Whether the majority might be considered as a *de facto* organ and be liable under the liability regime for the members of the board of directors and managers and whether this approach provides an effective protection, in this work see Chapter IV.

[42] For the limits of freedom to contract applied to the articles of association of an AO and the effects of TCC art 340 see Veziroğlu, 'Esas Sözleşme' (n 27) 343 ff.

of the company significantly[43], [44] and the possibility of minority protection through articles of association.[45]

For an independent AO's minority shareholders who are greatly stripped of contractual protections via articles of association and lack, in most cases, access to liquid markets, upholding a single-threshold approach would provide better protection. Of course, this should be done without completely hindering the majority rule. In a setting where the idea of an independent company interest from its shareholders[46] is voiced more strongly, with a rigid institutional approach to the AO and a lack of explicit duty of loyalty of the majority shareholder towards its fellow shareholders, how can one prove that the single-threshold approach is upheld in Turkish law? As will be discussed below, the principle of equal treatment of shareholders may serve as a tool to prove that this approach is the prevalent one under Turkish law.

III. Equal Treatment of Shareholders: Is This the Tool We Are Looking for?

A. Equal Treatment of Shareholders According to EU Legislation

In the EU company law landscape, references to the equal treatment of shareholders are easily found.

Paragraph 11C of the Commission's Recommendation 77/534/EEC[47] from 1977, which applies to listed companies, though non-binding in nature, lays out equal treatment as a 'general principle'. The European Code of Conduct, annexed to Recommendation 77/534/EEC, provides in its General Principle 3 that

[43] For a detailed examination of the effects of this article on the freedom to contract, see Rauf Karasu, *Anonim Şirketlerde Emredici Hükümler İlkesi* (2nd edn, Yetkin Yayınları 2015) 45 ff.

[44] EMCA prefers a regime which leaves more room for shareholders' will. According to Section 1.12(2) inspired by Finnish Law, the manner in which a company operates can be established via the inclusion of provisions in the articles of association by shareholders; however, these provisions are deemed void if they are contrary to a mandatory provision of EMCA or some other Act or to the rules of appropriate conduct. The principle set forth in this provision can be seen as a supplement to the majority rule stipulated in Section 1.10, as it reinforces shareholders' final say in the company. See Krüger Andersen and others, 'EMCA' (n 3) 33.

[45] It is stated that imposing a duty of loyalty on shareholders via articles of association is not in line with the fundamental structure of the AO; therefore, such a provision should be considered invalid. See Bahtiyar, 'Ortaklıklar' (n 32) 191.

[46] See Mehmet Helvacı and Rifat Cankat, 'Karşılaştırmalı Hukukta Şirket Menfaati Kavramı', *Prof. Dr. Sabih Arkan'a Armağan* (On İki Levha 2019) 521, 548; Muhammed Sulu, *Anonim Ortaklıkta Şirket Menfaati Kavramı* (On İki Levha 2019) 22-24. For Turkish law, see also Mehmet Helvacı, Emin Çamurcu and İsmail Türkyılmaz, 'Özellikle Anonim Şirket Açısından Şirket Menfaati Kavramı', in H. Ercüment Erdem and others (eds), *Prof. Dr. Hamdi YASAMAN'a Armağan* (On İki Levha 2017) 309, 310 ff. This approach regarding a company's interest focuses more on a company's sustainability and stakeholders. For the EU Commission's effort to reconcile sustainability of the company and better engagement of shareholders, see Commission, 'Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies' (Communication) COM (2012) 740 final. Regarding the sustainability of the company, see also José Engrácia Antunes and others, *Report of the Reflection Group on the Future of EU Company Law* (European Commission Internal Market and Services 2011) 36-38. According to EMCA Section 1.06, the *purpose of the company* is to increase its value, unless otherwise stated in the articles of association. See Krüger Andersen and others, 'EMCA' (n 3) 29.

[47] Commission Recommendation of 25 July 1977 Concerning a European Code of Conduct Relating to Transactions in Transferable Securities (77/534/EEC) (1977) OJ L 212/37.

> '*Equality of treatment should be guaranteed to all holders of securities of the same type issued by the same company*; in particular, any act resulting directly or indirectly in the transfer of a holding conferring de jure or de facto control of a company whose securities are dealt in on the market, should have regard to the right of all shareholders to be treated in the same fashion.'[48]

In Supplementary Principles 17 and 18[49], direct references are made to the equal treatment principle in cases where a transfer of control occurs. The Recommendation also states in its General Principle 1 that 'The objective of this code and *the general principles should be observed even in cases not expressly covered by supplementary principles*[50]'[51] and therefore stresses the importance of the equal treatment principle.

Recital 46 of the preamble of the Directive (EU) 2017/1132 on company law, applicable to listed and non-listed (limited liability commercial) companies, sets the goal of observation and harmonisation of Member States' laws related to the increase or reduction of capital so that they ensure the principle of equal treatment of shareholders in the same position. Art 60 on acquisition of own shares by the company makes a direct reference to the principle as well. The most important reference to this principle is art 85 of the Directive. This article, titled 'equal treatment of all shareholders who are in the same position', states that *for the purposes of the implementation of the Chapter on capital maintenance and alteration*, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position and creates a responsibility on Member States to ensure this principle only for the implementation of the said Chapter.

Apart from this direct reference, through proportionality, one can find that the idea of equal treatment is widely spread in the Directive. This is the case in art 72 regulating the pre-emption rights of shareholders[52] and in arts 139 and 156 regarding divisions.

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48 Emphasis added by the author.

49 '17. Any transaction resulting in the transfer of a holding conferring control in the sense referred to in general principle 3 should not be carried out in a surreptitious fashion without informing the other shareholders and the market control authorities.
It is desirable that all the shareholders of the company whose control has changed hands should be offered the opportunity of disposing of their securities on identical conditions, unless they have the benefit of alternative safeguards which can be regarded as equivalent.
18. Any acquisition, or attempted acquisition on the market, separately or by concerted action, of a holding conferring control in the sense referred to in general principle 3, without informing the public, is against the objective of this code.'

50 Emphasis added by the author.

51 General principle 1 continues as follows:
'Every transaction carried out on the securities markets should be in conformity with not only the letter but also the spirit of the laws and regulations in force in each Member State, and also the principles of good conduct already applying to these markets, or recommended by this code.'

52 Note that the pre-emption rights of the shareholders are not absolute. According to art 72 paras 4 and 5, Member States may set provisions giving the possibility of restricting the pre-emption rights of shareholders by the company. TCC provisions conform to this Directive. According to TCC art 461, shareholders have a pre-emption right based on their participation in capital; however, this right can be restricted in the event of a *just motive*. For further information, see Onur Görmez, *6102 Sayılı Türk Ticaret Kanununa Göre Rüçhan Hakkının Kısıtlanması* (Beta 2017) 192 ff. EMCA Section 6.07 also stipulates that shareholders have pre-emption rights, which can be restricted under certain conditions. In the commentary of the provision it is stated that it follows the same approach presented by Directive art 72 (though the reference is to the previous Second Company Directive - Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on

Art 4 of Directive 2007/36/EC[53], as amended by Directive 2014/59/EU[54] and Directive (EU) 2017/828[55] on shareholder rights in *listed companies*, states that a listed company shall ensure *equal treatment for all shareholders who are in the same position* with regard to participation and the exercise of voting rights in the general meeting. Another implementation of the principle can be found in Directive 2004/25/EC on takeover bids.[56] In art 3 of the said Directive, for the purpose of implementing this Directive, Member States are under the obligation to ensure that all holders of the securities of an offeree company of the same class must be *afforded equivalent treatment*.[57]

From these provisions stated above, one can easily deduce that the mentality towards equal treatment of shareholders is not absolute equality but a relative one that can be understood with the emphasis on equal treatment of shareholders in the same position.[58] It should also be noted that, apart from the rule in the Directive on takeover bids, it is the company and its organs that are under the obligation to treat equally the shareholders in the same position.[59]

Considering the above-mentioned provisions, since this principle is so prevalent in EU legislation, is it possible to say that there is a general principle of equal treatment of shareholders under EU law?

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coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [2012] OJ L 315/74 - art 33 since the new directive hadn't been entered into force at the date of EMCA's publication). See Krüger Andersen and others, 'EMCA' (n 3) 117-118. However, it should be noted that the EMCA provision is not as clear as the provision laid down in the Directive. The Directive's provision (and also TCC art 461) explicitly states how pre-emption rights shall be calculated (ie in proportion to the capital represented by shareholders' shares), but the EMCA provision lacks this clarity. The general American approach, as embodied in MBCA, is completely different from the European one. According to MBCA §6.30 on Shareholders' Preemptive Rights, 'the shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide'.

53 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L184, 17.

54 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L173/190.

55 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 L132/1.

56 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L142/12.

57 For other references, in directives regarding company law, to the equality, proportionality, equivalence and reasonability, notions that are related to the concept of equality, see Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC [2006] OJ L157/87, and Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L182/19.

58 See Krüger Andersen and others, 'EMCA' (n 3) 80 ff. See also Andrea Vicari, *European Company Law* (De Gruyter 2021) 109. For detailed information on the concept of equality among shareholders, see the seminal work of De Cordt: Yves De Cordt, *L'Égailité entre Actionnaires* (Bruylant 2004) 1 ff.

59 See also Federico Mucciarelli, 'Equal Treatment of Shareholders and European Union Law - Case Note on the Decision "Audiolux" of the European Court of Justice' (2010) 7 (1) ECFR 158, 162-163.

B. ECJ's 'Audiolux' Ruling: No General Principle of Equal Treatment of Shareholders under EU Law

The ECJ has given a negative answer to this question[60] in its landmark decision Audiolux[61] where the Court examined whether there is a 'general principle of equal treatment' of minority shareholders upon transfer of control. However, as will be explained below, the Court's approach has broader implications for how the principle of equal treatment of shareholders should be understood in EU law.

Although Directives 77/91/EEC[62] and 79/279/EEC[63], which were in question in this decision, are no longer in force[64], the treated aspects of these directives are still applicable to the directives that replaced them.

Particularly, the Court's remarks regarding the Directive 77/91/EEC are important for the subject of this article. According to the Court, the fact that Directive 77/91/EEC laying down certain provisions relating to the protection of minority shareholders is not enough to establish the existence of a general principle of EU law, in particular if the scope of those provisions is limited to rights which are well defined and certain.[65] As in the case of Directive (EU) 2017/1132, Directive 77/91/EEC sets the principle of equal treatment only for the implementation of the relevant provisions of the Directive.

The Court also dismissed the long-standing Recommendation 77/534/EEC as a source of general and free-standing principle of equal treatment of shareholders in EU company law, claiming that General Principle 3 and Supplementary Principle 17 of the Code of Conduct do not set out the obligation of equal treatment *in absolute and binding terms*.[66]

Following the jurisprudence of the Court[67], one must conclude that in EU legislation, there isn't an immanent and blanket principle of equal treatment of shareholders imposed not only on the shareholders but also on the company and its organs.

60 See also Vicari (n 58) 285.

61 Case C-101/08 *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [2009] ECR 2009 I-09823.

62 Second Council Directive 77/91/EEC of 13 December 1976 on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L26/1.

63 Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing [1979] OJ L66/21.

64 Directive 77/91/EEC was replaced by Directive 2012/30/EU, which was replaced by Directive (EU) 2017/1132. Directive 79/279/EEC was replaced by Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities [2001] OJ L184/1.

65 See also *Audiolux* (n 61) paras 35-37-38-39-40.

66 See *Audiolux* (n 61) para 45.

67 For further analysis of this decision, see Mucciarelli (n 59) 159 ff; cf Isabelle Corbisier, 'Arrêt «Audiolux»: inexistence d'un principe général de droit communautaire protégeant les actionnaires minoritaires en cas de cession d'une participation de contrôle' (2010) 165 Journal de Droit Européen 9, 12.

C. Approach in the EMCA

EMCA, on the other hand, provides a more comprehensive approach and protection for the minority.

According to Section 1.09, all shareholders who are in the same position must be afforded equal treatment by the company.[68] The approach of setting a general principle in company law legislation can also be found in The German Stock Corporation Act (§ 53a), Greek Law numbered 4548/2018 (art 36/2), and Polish Commercial Companies Code (art 20).[69]

A separate but in-the-same-manner provision is stated for general assembly meetings. Section 11.31, titled general provisions on minority protection, stipulates that the general meeting may not pass a resolution which obviously is likely to give certain shareholders or others an undue advantage over other shareholders of the company.[70] The first sentence of Section 8.25 sets the same principle for the board of management of the company.[71]

These provisions are similar to those adopted by Nordic countries. The Danish, Finish and Swedish Companies Acts have provisions regulating that the general assembly meeting, the board of directors and the managing body shall not make decisions or take other measures that are conducive to *conferring an undue benefit to a shareholder or another person at the expense of the company or another shareholder*.[72] The Swiss Code of Obligations also imposes company organs to uphold the principle of equal treatment without a general provision on the matter by stipulating that general assembly resolutions that give rise to an 'unequal treatment' of shareholders or create a disadvantage on the shareholders in a manner not justified by the company's objects are voidable (art 706/2/3) and the board of directors should 'treat in the same manner' shareholders whose circumstances are the same (art 717/2).[73]

[68] Krüger Andersen and others, 'EMCA' (n 3) 32.

[69] ibid.

[70] ibid 262.

[71] The first sentence of Section 8.25 is as follows: 'Members of the board shall not enter into any transaction that is clearly capable of providing certain shareholders or others with an undue advantage over other shareholders or the company.' See Krüger Andersen and others, 'EMCA' (n 3) 195.

[72] ibid 32 and 195.

[73] See Nicolas Rouiller, Marc Bauen, Robert Bernet and Colette Lassere Rouiller, *La Société Anonyme Suisse* (3rd edn, Schultess Editions romandes 2022) 251; Christophe Wilhelm, Océane Varrin, *L' "exercice mesuré des droits" et l'abus de majorité en droit suisse de la société anonyme* (Schulthess Editions 2022) 19.

These three provisions create a blanket principle of equal treatment of shareholders who are in the same position and a broad protection for minority shareholders. At the same time, the possibility of treating shareholders unequally is explicitly accepted when the shareholders are not in the same position and/or it is fair to provide an advantage[74] to a certain shareholder.

D. TCC on Equal Treatment of Shareholders

Article 357 of the TCC, titled the equal treatment principle, stipulates that shareholders are treated equally under equal circumstances and sets a clear governing principle for the AO.[75] With this provision, it can be deduced that Turkish public company legislation follows the same approach as German, Greek and Polish legislation. With such a blanket provision, the TCC system on AO is also in line with EU legislation regarding the parts where reference to the principle is made.[76]

This principle is set forth under the section titled 'fundamental principles' in the Code; therefore, is a criterion to be followed by the company's organs.[77], [78] If the decisions taken by the majority in the general assembly and/or resolutions of the board of directors give an undue advantage to the majority shareholder, these decisions shall be considered in violation of the principle of equal treatment of shareholders.

An explicit general provision on this principle may have positive implications for minority protection against abuses committed by the majority via the company organs. This removes any doubt that the single-threshold approach that deems

[74] It is stated in the commentary that the 'undue advantage' requires existence of unfairness. See Krüger Andersen and others, 'EMCA' (n 3) 263.

[75] It should be noted that although concerning AOs, this principle was not explicitly stipulated in the former Turkish Commercial Code (Türk Ticaret Kanunu, Kanun Numarası: 6762, Kabul Tarihi: 29.6.1956, RG: 9.7.1956/9353); however, its implementation to AOs was accepted by the doctrine. See Merih Kemal Omağ, 'Anonim Şirketler Hukukunda Eşit İşlem İlkesi' (1986) 1 (1) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 2; N. Füsun Nomer, 'Anonim Ortaklıkta Eşit Davranma (Eşit İşlem) İlkesi', *Prof. Dr. Oğuz İmregün'e Armağan* (Beta Yayıncılık 1998) 470 ff; Şükrü Yıldız, *Anonim Ortaklıkta Pay Sahipleri Açısından Eşit İşlem İlkesi* (Seçkin Yayıncılık 2004) 47-48 and 99 ff; Ali Paslı, *Anonim Ortaklık Kurumsal Yönetimi – Corporate Governance*, (2nd edn, Çağa Hukuk Vakfı Yayınları 2005) 184.

[76] Turkish legislation appropriately fulfils the requirements for the equal treatment of shareholders set out in Directive 2007/36/EC. See Ali Paslı, 'Anonim Ortaklık Kurumsal Yönetimi', in Arslan Kaya and others (eds), *Türk Hukukunun Avrupa Birliği Hukukuna Uyumu Özel Hukuk - Acquis Communautaire'in Alınması - Açıklamalar, Değerlendirmeler, Öneriler* (İstanbul Üniversitesi Yayınevi 2020) 421.
Turkish legislation is also in line with Directive (EU) 2017/1132 art 85. See İsmail Cem Soykan, 'Sermaye Yeterliliği, Kanuni Sermayeye İlişkin Korumalar, Dağıtıma İlişkin Kurallar, Uygulama ve Yürürlük Hükümleri', in Arslan Kaya and others (eds), *Türk Hukukunun Avrupa Birliği Hukukuna Uyumu Özel Hukuk - Acquis Communautaire'in Alınması - Açıklamalar, Değerlendirmeler, Öneriler* (İstanbul Üniversitesi Yayınevi 2020) 129.

[77] See Setenay Yağmur, *Anonim Şirketlerde Eşit İşlem İlkesi* (On İki Levha 2020) 70 ff.

[78] Turkish legislator went for a slightly different direction for the LOs. TCC art 627 stipulates that managers shall, under equal circumstances, treat shareholders equally. Therefore, only the management organ or body is explicitly obliged to follow such a principle. Turkish scholarship criticises this approach and states that it would be more appropriate to place the general assembly of the LO under the same obligation. See Bahtiyar, 'Ortaklıklar' (n 32) 374. For a similar criticism but with the emphasis that even without an explicit provision, the general assembly of the LO is also bound by this principle, see Abuzer Kendigelen, *Yeni Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler* (3rd edn, On İki Levha 2016) 542. In the same direction that the general assembly of the LO is also subject to the equal treatment principle, see Fatih Bilgili and Ertan Demirkapı, *Şirketler Hukuku* (9th edn, Dora 2013) 694; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (5th edn, Vedat Kitapçılık 2020) No 21-04.

sufficient only a damage to minority in order to sanction the abuse by majority is the prevailing approach for AO. It should also be noted that, in terms of equal treatment, through this provision, by creating a blanket principle, Turkish public company legislation provides better protection for shareholders than the protection provided in EU legislation.

Even if the decision taken does not harm the interests of the company, the violation of the principle of equal treatment of shareholders in an AO, single-handedly, may constitute an abuse by majority.

However, the author of this paper is of the opinion that there is still a role to be played by the company's interest. An advantage only provided to certain shareholders, such as the majority, may be deemed lawful if the company's interest requires so. Such interest may serve as a justification for the relevant action. However, when there is a conflict of interest between the minority and the company[79], a case-by-case approach is necessary.

It must be noted that the principle of equal treatment of shareholders governed by TCC art 357 can be utilised as a tool to mitigate the risk of abuse by majority in cases where only certain shareholders bear certain losses or damages to their interests due to the company's actions; therefore, it is of significant importance to minorities in an independent and privately held AO, especially if one keeps in mind the strict institutional approach followed by the TCC towards the AO.[80]

Now that it has been established that, without a doubt, the single-threshold approach is the prevailing approach for the AO, a final issue that should be addressed remains: What might be an effective remedy to be implemented in case of an abuse by majority?

IV. Exit Right, Might It Be the Effective Remedy Just Around the Corner?

If a resolution taken by the general assembly is a manifestation of an abuse by majority (eg violation of the equal treatment principle), an action for the voidability[81]

[79] A classic example of conflicting interests between a company and a minority revolves around the non-distribution of dividends. Interest of the company may prove to be useful for the majority against any allegations of dividend drought coming from the minority. For an in-depth examination of the shareholders' right to dividend and conflict of interests arising from the said right in the AO see Kerem Çelikboya, *Anonim Şirketlerde Pay Sahibinin Kâr Payı Hakkı* (On İki Levha 2021) 43 ff.

[80] Turkish scholarship understands, rightly so, the equal treatment principle as a tool that limits majority power for the benefit of the minority. See Omağ (n 75) 2; Nomer, 'Eşit İşlem' (n 75) 471; Yıldız (n 75) 59-60; Ercüment Erdem, 'Türk ve İsviçre Hukuklarında Eşit İşlem İlkesi', *İsviçre Borçlar Kanunu'nun İktibasının 80. Yılında İsviçre Borçlar Hukuku'nun Türk Ticaret Hukuku'na Etkileri* (Vedat Kitapçılık 2009) 394; Şehirali Çelik (Kırca/Manavgat) (n 27) 133; Cafer Eminoğlu, 'Anonim Şirket Pay Sahipleri Açısından "Eşit Şartlarda Eşit İşlem" İlkesi', Ticaret ve Fikri Mülkiyet Hukuku Dergisi (2015) 1 (1) 80; Necla Akdağ Güney, 'Anonim Şirketlerde Eşit İşlem İlkesi' (2014) 18 (3-4) Gazi Üniversitesi Hukuk Fakültesi Dergisi 121. On how this principle can be utilised against abuse by the majority and its shortcomings in minority protection, see Görmez, 'Kötüye Kullanma' (n 16) 124-133.

[81] For a brief examination of differing European approaches regarding voidability (Turkish: *iptal edilebilirlik*) and nullity

of said resolution can be launched before the courts. The TCC governs this possibility for the resolutions of the general assembly meetings in its arts 445-446. TCC art 445 stipulates that general assembly resolutions that contravene the law, articles of association, or the principle of good faith are voidable. As explained above, with the help of the equal treatment principle explicitly stipulated in TCC art 357, the single-threshold approach is the prevalent approach for AOs; therefore, an abusive general assembly resolution damaging only the minority's interests might be deemed in contravention of TCC art 357, and hence the law and be annulled. Relying on TCC art 357, thus 'the law', makes it easier for minorities to bring forward the voidability of a general assembly decision compared to relying on the principle of good faith, a principle that brings broader room for interpretation (which in turn might serve against the minority, since the company might make a case that the resolution is needed even if it damages the minority interest).[82]

TCC art 447 governs the nullity of general assembly resolutions.[83] Resolutions that are, among others, against the AOs 'fundamental structure' shall be deemed null. Thus, general assembly resolutions that might be deemed severe abuses by majority because of the damage they cause to the minority interest may be nullified.[84], [85]

A similar approach exists in EMCA. According to the Model Act, in the event of a violation of the general provision on minority protection in Section 11.31, shareholders can apply to the provision in Section 11.28 governing void resolutions at general meetings.[86]

However, these solutions do not deter the majority from repeating the same behaviour; hence, ineffective against systematic abuses by majority in company organs.[87] Without appropriate protections[88], this is especially the case for privately held and independent companies because minority shareholders are locked in the

(Turkish: *butlan*/*kesin hükümsüzlük*) see Vicari (n 58) 152-155.

82 See also Görmez, 'Kötüye Kullanma' (n 16) 342-343.

83 One of the main differences between voidability and nullity is that an action for the voidability of a general assembly resolution must be brought forward within three months after such resolution is decided upon (TCC art 445); however, an action for the nullity of a general assembly resolution may be launched at any time, apart from the cases where it might be deemed against the principle of good faith due to the amount of time that has passed. Regarding the differences between the voidability and nullity of general assembly resolutions see Ömer Korkut, *Anonim Şirket Genel Kurul Kararlarının Butlanı* (Karahan Kitabevi 2012) 44-47.

84 See Görmez, 'Kötüye Kullanma' (n 16) 233 ff.

85 An action for the nullity of board resolutions may also be launched against abusive board resolutions as well, if the resolution is, among others, against the principle of equal treatment, AO's fundamental structure, or in violation of shareholders' rights, especially those that are inalienable (Turkish: *vazgeçilmez*), or restricting or making it difficult to exercise these rights (TCC art 391).

86 See also Krüger Andersen and others, 'EMCA' (n 3) 259 and 263.

87 Regarding the ineffectiveness of these remedies, see Görmez, 'Kötüye Kullanma' (n 16) 240 ff.

88 For a comprehensive and comparative approach see Pierre-Henri Conac, Luca Enriques and Martin Gelter, 'Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy' (2007) 4 (4) ECFR 491, 492 ff.

company with no access to liquid markets.[89]

In its provisions governing AOs, TCC does not provide an explicit liability regime for the abusive majority. TCC art 553 stipulates that 'Founders, board members, managers and liquidators are responsible for the damage they cause to both the company, its shareholders and the company's creditors if they negligently breach their obligations arising from the law and the articles of association.' This article may be used to hold directly liable the abusive majority whose actions damaged the minority's interest without there being a need to prove that the company's interest is also damaged.[90] If the majority uses its power over the board of directors in a way that might define it as a *de facto* organ[91] and with a broad interpretation of the letter of the article, the abusive majority might be considered within the confines of 'board members and managers' and as a result its liability towards an aggrieved minority might be established in line with TCC art 553.[92] However, this approach creates the possibility of a liability regime only in cases where the majority may be considered as a *de facto* organ, which is, in itself, difficult to prove.[93] Furthermore, it provides limited protection against abusive majorities.[94]

An adequate protection against abuse by majority within the scope of company law is to provide an exit right to (minority) shareholders.

[89] See also Cem Veziroğlu, 'Buy-Out of the Oppressed Minority's Shares in Joint Stock Companies: A Comparative Analysis of Turkish, Swiss and English Law' (2018) 19 (3) European Business Organization Law Review 527, 529; Krüger Andersen and others, 'EMCA' (n 3) 234.

[90] This would be in line with the single-threshold approach.

[91] If the majority makes fundamental decisions in the management of a company or exerts influence by taking them due to its position in the company, it can be described as a *de facto* organ in accordance with its function, even if it is not a member of the board of directors. See Mehmet Helvacı, *Anonim Ortaklıkta Yönetim Kurulu Üyesinin Hukuki Sorumluluğu* (2nd edn, Beta Yayıncılık 2001) 9; Necla Akdağ Güney, *Anonim Şirketlerde Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu: Türk Ticaret Kanunu, Bankacılık Kanunu ve Türk Ticaret Kanunu Tasarısında Yer Alan Sorumluluk Hükümlerinin İncelenmesi* (2nd edn, Vedat Kitapçılık 2010) 148; Kırca/Şehirali Çelik/Manavgat (n 27) 389; Necla Akdağ Güney, *Anonim Şirket Yönetim Kurulu* (2nd edn, Vedat Kitapçılık, 2016) 356 ff; Aydın Alber Yüce, 'Anonim Şirketlerde Pay Sahiplerinin Fiili Yönetim Organı Anlamındaki Sorumluluğu' (2022) 9 (1) İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi 249-250; Tekinalp (n 78) No 11-12; Görmez, 'Kötüye Kullanma' (n 16) 253.

[92] Hamdi Yasaman, 'Yönetim Kurulu Üyelerine Karşı Açılabilecek Sorumluluk Davaları', *Prof. Dr. Oğuz İmregün'e Saygı Sempozyumu* (2013) 2 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 99-100. For the view that managers as in the sense of TCC art 553, encompass *de facto* organs, and therefore, these shall be liable in line with TCC art 553 see Özcanlı (n 32) 325. For the view that '*de facto* board members' shall be liable according to TCC art 553, since the 'managers' encompass these persons see Ömer Korkut, 'Anonim Şirketlerde Fiili Yönetim Kurulu Üyeliği', *Prof. Dr. Fırat Öztan'a Armağan,* vol 1 (Turhan Kitabevi 2010) 1368 ff. Pulaşlı suggests that *de facto* organ should be understood within the meaning of 'managers'. See Hasan Pulaşlı, *Şirketler Hukuku Şerhi*, vol 4 (4th edn, Adalet Yayınevi 2022) 2824-2825, No 60. cf Ali Paslı, 'Anonim Ortaklıklarda Yönetim Kurulu Üyeleri Dışında Sorumluluk Sistemine Tabi Olan Kişiler', in Ayşegül Altınbaş and Yurdal Özatlan (eds), *Yeni Türk Ticaret Kanunu'nun İş Dünyasına Etkileri* (Seçkin Yayınevi 2014) 130-131. Paslı is of the opinion that manager is a technical term and does not cover *de facto* organs.

[93] See Helvacı, 'Yönetim Kurulu' (n 91) 10; Görmez 'Kötüye Kullanma' (n 16) 255.

[94] Regarding the possible shortcomings of a liability lawsuit against an abusive majority, see Görmez, 'Kötüye Kullanma' (n 16) 255 ff.

A. Renewed Interest in EU Legislation over Exit Rights

EU legislation does not provide shareholders with such a right for the purposes referred to above.[95]

It can be argued that a new type of approach is gaining traction in EU legislation and that a sort of exit right has been implemented by the provisions of the Directive (EU) 2017/1132 as amended by the Directive (EU) 2019/2121[96].

In arts 86i, 126a and 160i, respectively, regulating cross-border conversions, mergers and divisions of limited liability companies, Member States are under the obligation to provide a *right to dispose of their shares* for adequate cash compensation, ie an exit right, to the company's members who voted against the resolutions concerning the related transactions in the general meeting.[97] Member States may also grant this right to other company members other than the dissenting members.

According to the said Directive, in this exit right mechanism, the company buys the shares of the dissenting members. This gives shareholders the right of withdrawal from the company at a fair value.[98]

This exit right creates a safeguard for minorities against abuses or potential abuses by the majority by the undertaking the aforementioned transactions. If the minority suspects that there is a case of abuse, whether it is really the case or just a potential one, the said minority may trigger this mechanism just by voting against the relevant resolution and for her shares, get a cash compensation whose adequacy is examined by an independent examiner, without going through the difficult path of proving an abuse by majority be present.

[95] In the same direction for the right of withdrawal see Vicari (n 58) 158.

[96] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 Amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions [2019] OJ L321/1.

[97] A similar exit right, more specifically an appraisal right/right of withdrawal, is provided for publicly held AOs in TCML art 24. According to this provision, shareholders who have attended the general assembly meeting regarding the 'significant transactions' mentioned in TCML art 23 and who cast a negative vote and had their dissention recorded in the minutes shall have an 'appraisal right' through the sale of their shares to the publicly held AO. TCML art 23 stipulates that fundamental transactions of publicly held AOs, pertaining to the structure of the corporation, that will alter the investment decisions of investors, such as being party to merger or demerger transactions, conversion, establishment of privileges or amendment of the scope or subject of existing privileges shall be deemed significant transactions in the implementation of TCML. For the informal translation provided by the Turkish Capital Market Board see <https://cmb.gov.tr/data/628161041b41c617eced0fb2/35501a16ea1501aeb2ba04106c407c4b.pdf > accessed 14 March 2024. Taking into account that the current protections in the legislation may be insufficient, TCML art 24 provides a separate protection to shareholders who are outside the control mechanism by giving shareholders an 'exit' opportunity to escape the majority hegemony, which may manifest itself in the form of abuse by majority or making important decisions that will affect the fate of the company. See Ali Paslı and Hasan Onur Akay, 'Halka Açık Anonim Ortaklıklarda Ayrılma Hakkını Kullanan Pay Sahibinin, Şirketler Topluluğu Düzenlemelerinden Yararlanma Olanağı (TTK m. 202/2 ve SerPK m. 24 Hükümlerinin Karşılıklı Uygulama Alanı' (2019) 77 (1) İstanbul Hukuk Mecmuası 54-55; Tuğba Semerci Vuraloğlu, 'Halka Açık Ortaklıkların Önemli Nitelikteki İşlemleri ve Ayrılma Hakkına İlişkin Yeni Düzenlemelerin Değerlendirilmesi' (2021) 16 (197-198) Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 297. Because this provision applies only to publicly held AOs, shareholders of privately held AOs cannot rely on this protection provided by the TCML art 24.

[98] Vicari (n 58) 268.

If the company is moving to a Member State with more lenient legislation for the majority and lower levels of minority protection, the minority may also choose to trigger this mechanism to avoid dealing with a more potent majority and its potential abuses.[99]

B. Approach in the EMCA

EMCA, on the other hand, offers, among others, three solutions that will be briefly examined in this chapter. These three solutions are applicable to both public and private companies.[100]

Section 11.33 deals with liquidation due to fraud on the minority. This provision gives the minority which has at least one-tenth of the share capital to file for dissolution of the company in the case that any shareholders have wilfully contributed to passing a resolution of the general meeting that is in contravention of Section 11.31 regulating general provisions on minority protection, or have otherwise abused their influence over the company, or contributed to a contravention of the EMCA or the company's articles of association.[101], [102] This provides minority with the *nuclear option* and increases its bargaining powers. Against a minority equipped with such a tool, the majority must consider the minority interest more carefully.

The other protection that EMCA offers to the minority is the right to sell out.[103] Section 11.35 of the EMCA states that each minority shareholder of the company may demand a redemption by a shareholder who holds more than 90% of the shares in the company and a corresponding share of the votes.[104] Section 15.15 provides

[99] To be triggered by a minority, this tool does not necessitate any change in the shareholding structure, eg a shareholder passing a certain threshold concerning voting rights and/or capital in the company; a resolution on cross-border conversion, mergers, or divisions and voting against such resolutions are enough. On this right, see Vicari (n 58) 268. On the application of this right under art 86i see Karsten Kühnle, 'Title II Conversions, Mergers and Divisions of Limited Liability Companies' in Peter Kindler and Jan Lieder (eds), *European Corporate Law* (Nomos Beck Hart 2021) 434 ff; on the application of this right under art 126a see Tobias de Raet, 'Mergers of Public Limited Liability Companies' in Peter Kindler and Jan Lieder (eds), *European Corporate Law* (Nomos Beck Hart 2021) 648 ff; on the application of this right under art 160i see Klaus Bader and Andreas Bröner, 'Chapter III Divisions of Public Limited Liability Companies' in Peter Kindler and Jan Lieder (eds), *European Corporate Law* (Nomos Beck Hart 2021) 773 ff. Regarding takeovers, a threshold is established for the shareholders' right to sell out (to the offeror of the takeover bid) to be triggered in Directive 2004/25/EC (ie Takeover Directive - Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L142/12) art 16 para 2. See Silja Maul and Larissa Furtwengler, 'Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids', in Peter Kindler and Jan Lieder (eds), *European Corporate Law* (Nomos Beck Hart 2021) 1022-1023.

[100] EMCA Section 1.02 defines 'company' as a 'limited liability company formed and registered under the EMCA'; EMCA Section 1.03 para 3 states that 'Unless otherwise prescribed, this Act shall apply to private as well as public companies'; since there are no exceptions made in the relevant sections, these three solutions are applicable to both public and private companies.

[101] See Krüger Andersen and others, 'EMCA' (n 3) 234.

[102] Similar provisions exist under Nordic law. For these examples, see Vicari (n 58) 162-163, fn 41.

[103] The Takeover Directive requires Member States to provide majority shareholders with a right to squeeze-out and minority shareholders with a right to sell-out for companies whose securities are admitted to trading on a regulated market (art 1). In Turkish law, TCML art 27 provides these rights to the respective shareholders of publicly AOs. EMCA, on the other hand, foresees this right for the shareholders of both public and private companies.

[104] Similar provisions exist under eg Swedish and Polish laws. See Vicari (n 58) 162.

the same right to minority shareholders of a subsidiary in a group of companies in which a parent company directly or indirectly owns more than 90% of the shares and voting rights of the subsidiary.[105] These provisions do not require a case of abuse to be triggered. Yet, even though these provisions are not specifically designed to do so, the right to sell-out may serve as protection for the minority against abuses by majority, potential abuses included, by making it easier to leave the company for the said minority shareholders unwilling to stay.[106]

Another powerful tool is also provided to the minority to fend off an abusive majority. Inspired by the Nordic law[107], Section 11.37[108] titled 'Redemption and Buy-out' stipulates that if the company, individual shareholders, the company's creditors or other third parties incur a loss due to a shareholder's intentional or grossly negligent action and there exists a risk of continued abuse, the court may order the latter shareholder to redeem the shares belonging to the shareholder who suffers a loss or sell her shares to the other shareholders. The redemption or sale shall be made at a reasonable price, which is to be fixed in respect of the company's financial position and the circumstances of the case.

According to the letter of the provision, any shareholder, whether a majority or a minority, who causes a loss to either one laid out in the provision, may be challenged by this Section. However, in most scenarios, the loss and risk of continued abuse would be caused by the majority due to its stronger position within the company. Therefore, in most cases, this section would serve the interests of the minority.

With the protection provided by the provision, not the company but the shareholder, in our case, the majority who causes the damage becomes directly liable for said damage and may be put under the obligation to buy the shares of the shareholders who incurred the loss. In other words, protection is provided at the cost of the shareholder who caused the damage and not that of the company. If the court deems this solution appropriate, it directly 'touches the pocket' of the liable shareholder. Instead of the company buying the shares, the risk of direct cash payment by the majority creates a better incentive for her to refrain from abusive behaviours. Furthermore, the possibility of being forced to sell her shares to other shareholders creates an additional incentive for the majority to abstain from any abusive behaviour, as the majority risks losing the company.

[105] See Krüger Andersen and others, 'EMCA' (n 3) 384. Turkish legislation on group of companies does not provide such a sell-out right to minority shareholders. However, TCC art 208 provides the majority, which holds the nine-tenth of the share capital and the votes of the company, with the right to squeeze-out the minority that abuses its rights. See Muharrem Tütüncü, *Hakim Şirketin Azınlığın Paylarını Satın Alma Hakkı* (On İki Levha, 2017) 1 ff.

[106] The commentary in both provisions refers to the concept of abuse by majority while explaining why this right is granted to minority shareholders. Section 11.35 refers to the comments of Section 11.34; therefore, for Section 11.35, see Krüger Andersen and others, 'EMCA' (n 3) 265 and then 264. For Section 15.15, see Krüger Andersen and others, 'EMCA' (n 3) 385.

[107] A similar provision also exists under Dutch law. See Vicari (n 58) 161.

[108] Krüger Andersen and others, 'EMCA' (n 3) 267.

C. Approach in TCC

In Turkish law, one appropriate measure to protect a minority against an abusive majority is found in TCC art 531. Said provision gives the minority the opportunity to file for dissolution of the AO due to the just cause. According to this provision, if there is a just cause (eg abuse by majority[109]), the shareholders representing at least one-tenth of the capital in privately held AO, at least one-twentieth of the capital in publicly held AO[110], may apply to the commercial court of the district where the company's registered office is located, for dissolution of the company. However, the court may decide on a more suitable remedy to eliminate the problem causing the just cause and order, instead of dissolution, the payment of the real value of respective shares of the plaintiff shareholders, the real value closest to the date of the ruling, and the removal of the plaintiff shareholders from the company, *or any other solution* that it deems *appropriate and acceptable* for the specific case.

This provision differs from the approach proposed in the EMCA on certain levels.

Compared to Section 11.33 of the EMCA, the court has the discretion to choose any solution that it deems appropriate instead of dissolution (in EMCA's terminology *liquidation*).

Furthermore, TCC does not have a similar provision to Section 11.35 of the EMCA and does not provide a general right to sell-out to minority.[111]

The TCC art 531 provision also creates a toss-up situation for remedy-seeking minority because of the great discretion awarded to the court, which has the liberty to decide on an appropriate solution of its choosing[112] even if the plaintiff has not demanded such a solution.[113] For example, a minority subject to dividend starvation who seeks only the distribution of the profit may end up bought out, a remedy that it is not demanding. This uncertainty might limit the incentive for a minority to use this provision, especially if it prefers to stay in the company for any reason.

[109] For a detailed analysis of the role of abuse by majority for triggering TCC art 531 see Özlem İlbasmış Hızlısoy, *Anonim Şirketin Haklı Sebeple Feshi* (Adalet Yayınevi 2016) 84 ff; Görmez, 'Kötüye Kullanma' (n 16) 288 ff.

[110] See Ayşe Şahin, *Anonim Ortaklığın Haklı Sebeple Feshi* (Vedat Kitapçılık 2013) 284 ff. For an analysis on the use of this right provided by the TCC art 531 in publicly held AO, see Onur Görmez, 'HAAO'da TTK'daki Azınlık Haklarının Kullanılması Üzerine Bir İnceleme', *Prof. Dr. Mustafa Dural Anısına – Özel Sayı II* (2017) 7 (2) Kadir Has Üniversitesi Hukuk Fakültesi Dergisi 117, 137 ff.

[111] For a minority in a publicly held AO, a limited sell-out right can be used in line with the TCML art 27.

[112] Dissolution is described as *ultima ratio*. The court should evaluate whether any other solution might be deemed appropriate, before ruling for company's dissolution. See Şahin (n 110) 324 ff; Tolga Ayoğlu, 'Anonim Ortaklıkların Haklı Nedenle Feshi', *Prof. Dr. Oğuz İmregün'e Saygı Sempozyumu* (2013) 2 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 219, 225; N. Füsun Nomer Ertan, 'Anonim Ortaklığın Haklı Sebeple Feshi Davası -TTK m.531 Üzerine Düşünceler-' (2015) LXXIII (1) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 421, 429; Sinan H. Yüksel, 'Anonim Ortaklığın Haklı Sebeple Feshi Davasında Davalı Sıfatı Üzerine Düşünceler', in Ercüment Erdem and others (eds), *Prof. Dr. Hamdi YASAMAN'a Armağan* (On İki Levha 2017) 863, 874; Nuri Erdem, *Anonim Ortaklığın Haklı Sebeple Feshi* (2nd edn, Vedat Kitapçılık 2019) 228, 239-240; Bahtiyar, 'Ortaklıklar' (n 32) 324. cf Tekinalp (n 76) No 14-10 and 14-12c. For the opinion that to emphasise the nature of dissolution as a final remedy within the confines of TCC art 531, *ultimum remedium* shall be used instead of *ultima ratio* see Görmez, 'Kötüye Kullanma' (n 16) 316, fn 312.

[113] See also Veziroğlu, 'Oppressed Minority' (n 89) 534.

One final but significant difference is that in EMCA provisions, the right to sell-out is directed towards the majority, which creates a better incentive for the majority to respect the minority's interests, since it is at the cost of the majority and not the company. Regarding TCC art 531, the buy-out[114] will be imposed on the company, if the judge deems it appropriate, since this lawsuit is primarily an action taken for the dissolution of the company and directed solely to the company and not to the majority shareholder.[115]

The data suggest that TCC art 531's remedy enjoys strong popularity among minority shareholders.[116] Without any examination of whether the Turkish Court of Cassation found merit in the plaintiffs' cases, the number of cases brought before the Court suggests that in Turkish law, the minorities of AOs do not hesitate to use their right provided under TCC art 531. It can be argued that a highly probable explanation for this trend is the potential access to an exit from the company with a fair price for their shares. This possibility is an invaluable opportunity for minority shareholders of private and independent AOs since they do not have access to a liquid market for their shares.

[114] The letter of the provision refers to the 'removal' (Turkish: *çıkarılma*) upon court decision. Whether TCC art 531 can be seen as a possibility to 'exit' for the minority in its technical sense is debated in Turkish scholarship. Certain scholars do not consider this provision to be technically governing an 'exit' provided to the minority. See Ayşe Sumer, 'Anonim Ortaklıkların Haklı Nedenle Feshi', *6102 Sayılı Türk Ticaret Kanununu Beklerken Sempozyumu*, (2012) 18 (2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi Special Volume 845; Aytekin Çelik, *Anonim Şirketlerde Ortaklıktan Çıkarılma* (4th edn, Seçkin Yayıncılık 2016) 283, fn 19; Tuğba Semerci Vuraloğlu, *Sermaye Piyasası Kanunu'na Göre Anonim Ortaklıkta Ayrılma Hakkı* (On İki Levha 2018) 110. On the view that there is neither removal nor exit (Turkish: *çıkma*) but withdrawal (Turkish: *ayrılma*) see İlbasmış Hızlısoy (n 109) 286-290. On the view that the provision grants an 'exit' for the minority, see Hamdi Yasaman, 'Anonim Ortaklıkların Haklı Nedenle Feshi', *İsviçre Borçlar Kanunu'nun İktibasının 80. Yılında İsviçre Borçlar Hukuku'nun Türk Ticaret Hukuku'na Etkileri* (Vedat Kitapçılık 2009) 716; Şahin (n 110) 395. For an examination of TCC art 531 under the category of 'safe exit right' see Abdurrahman Kayıklık, 'Anonim Şirkette Azınlığın Korunması: Kim İçin, Neden ve Nasıl Bir Koruma?' (2022) 80 (2) İstanbul Hukuk Mecmuası 436-437.

[115] However, in the Turkish scholarship, it is also voiced that in privately held and family-owned AOs, the minority shall be able to direct this lawsuit to shareholders other than the plaintiff. See Yüksel (n 109) 881. For an analysis of whether this lawsuit can and should be directed towards other shareholders, especially towards the majority shareholder, see Görmez, 'Kötüye Kullanma' (n 16) 269-286.

[116] For the years of 2015-2016, 11 decisions by the 11th Chamber of Turkish Court of Cassation have been catalogued and summarised under TCC art 531 by the Istanbul University Faculty of Law Commercial Law Department; therefore, it can be deduced that on those years at least 11 cases were adjudicated by the Turkish High Court. See Mehmet Helvacı and others, 'İkinci Kitap, Ticaret Şirketleri' in Abuzer Kendigelen and others (eds), *Yargıtay 11. Hukuk Dairesinin Türk Ticaret Kanununa İlişkin Kararları 2015-2016* (On İki Levha 2018) 357-364. In 2019, 11th Chamber of the Turkish Court of Cassation adjudicated 15 cases on TCC art 531 (compared to 88 decisions on TCC art 445-446 – lawsuit on voidability). See Arslan Kaya and Nurgül Yıldız, 'Yargıtay 11. Hukuk Dairesinin 2019 Yılı Kararları İstatistiği', in Arslan Kaya and others (eds), *Yürürlüğünün 8. Yılında ve Yargıtay Kararları Işığında Türk Ticaret Kanunu Sempozyumu -IV-, (Tebliğler Tartışmalar)* (On İki Levha 2021) 13. In 2021, 11th Chamber of the Turkish Court of Cassation has adjudicated 7 cases on TCC art 531 (compared to 15 decisions on TCC art 445 and 10 decisions on TCC art 446 – lawsuits on voidability). See Arslan Kaya and Nurgül Yıldız, 'Yargıtay 11. Hukuk Dairesinin 2021 Yılı Kararları İstatistiği', in Abuzer Kendigelen, Esra Teymen and Kardelen Yüğütbaşı (eds), *Yürürlüğünün 10. Yılında ve Yargıtay kararları Işığında Türk Ticaret Kanunu Sempozyumu -VI-, (Tebliğler Tartışmalar)* (On İki Levha 2023) 20. For the year of 2022, 5 decisions by the 11th Chamber of Turkish Court of Cassation have been catalogued and summarised under TCC art 531 by the Istanbul University Faculty of Law Commercial Law Department; therefore, it can be deduced that on this matter at least 5 cases were adjudicated by the Turkish High Court. See Buğra Kesici and others, 'İkinci Kitap, Ticaret Şirketleri' in Abuzer Kendigelen and others (eds), *Yargıtay Hukuk ve Ceza Dairelerinin Türk Ticaret Kanununa İlişkin Kararları 2022* (On İki Levha 2023) 253-255. A brief search on court decision cataloguing website Lexpera also gives an idea how popular this remedy has become in Turkish law. See <https://www.lexpera.com.tr/mevzuat/kanunlar/turk-ticaret-kanunu-6102> and decisions listed under TCC arts 445 and 531 (accessed 20 March 2024). According to Lexpera's catalogue, since 2012, the year of entry into force of the TCC and of the introduction of this remedy to Turkish law, compared to 156 voidability of general assembly resolution lawsuits (catalogued under TCC art 445), one of the most filed shareholder lawsuits, adjudicated by the Turkish Court of Cassation, 83 cases are catalogued under dissolution due to just cause (TCC art 531) as adjudicated by the Turkish Court of Cassation.

The author of this work is of the opinion that, following the example in EMCA Section 11.37, TCC should be amended in a way that gives minority shareholders the right to request from the court to sell their shares to the majority abusing its power in AO. Such a possibility would create an extra incentive for the majority to refrain from abusing its power in the company, since the majority's abusive behaviour would risk to directly affect its own 'pocket' by making it pay for shares that it does not need to control the company.[117] Furthermore, TCC art 531 should be modified so that shareholders can directly request from the court to exit the company[118], a change which would limit judicial surprises and create better legal clarity.

Conclusion

In EU legislation, there is no general regulation on how to prevent abuse by majority. Without a harmonising EU legislation, two approaches have prevailed in Member States. One group of States demand both a damage to company and to minority (eg France); the other group finds it sufficient just a damage to minority in order to deem an action as an abuse by majority. Requesting from the minority to prove that the company's interest is also violated proves to be difficult and hinders the sought minority protection. Therefore, a single-threshold approach which requires minorities to prove only the damage to their interests should be the approach upheld. In independent and privately held AOs, the options for a locked in minority are limited, and further minority protection is required. The single-threshold approach provides the desperately needed protection in a more efficient manner.

Although the EU legislation does not enforce upon Member States the implementation of a blanket equal treatment principle of shareholders as expressed by the CJEU's Audiolux decision, certain Member States tend to provide one. The EMCA also regulates the issue directly. This is also the case in Turkey via TCC art 357. With a provision explicitly imposing the principle of equal treatment of shareholders in the same position at an AO, a single-threshold approach shall be considered the prevailing approach in Turkish law on AOs, providing better protection for minorities in an independent AO.

With Directive (EU) 2019/2121, concerning cross-border conversions, mergers, and divisions of limited liability companies, Member States are obliged to provide a right to dispose of their shares for adequate cash compensation, ie an exit right, to the

[117] As explained above, TCC art 202 para 2 grants a similar right to the dissenting shareholders of a subsidiary. Therefore, this type of protection for minority shareholders is familiar to the TCC regime. Compared with abuses that may arise in a subsidiary company, analogous abuses by majority may also arise in an independent (and privately held) company; thus, analogous minority protections shall also be provided. See Paslı, 'Kontrol Sahibi' (n 41) 357, fn 47; Görmez, 'Kötüye Kullanma' (n 16) 180.

[118] See and cf Şahin (n 110) 395-397. Şahin is of the opinion that TCC art 531 provides, though indirectly, an 'exit' right to minority shareholders and argues that the wording of the article should be amended to better reflect this right. Furthermore, she suggests that the plaintiff should be granted the right to demand the purchase of its shares.

company's members who voted against resolutions concerning the related transactions in the general assembly. In the aforementioned transactions, these provisions may be used by the minority to protect itself from abuses, including potential abuses.

EMCA provides a more comprehensive protection by regulating liquidation due to fraud on the minority in Section 11.33; the right to sell out of the minority shareholder stipulated in Section 11.35 in cases where a shareholder holds more than nine-tenths of the shares in a company and a corresponding share of the votes. The latter gives the minority the opportunity to withdraw from the company without the existence of an actual abuse by majority; thus for that specific shareholding structure broadens the protection to the possibility of an abuse. Furthermore, according to Section 11.37, the court may order that the shares belonging to the shareholder who incurred a loss shall be redeemed by the shareholder whose intentional or grossly negligent action caused a loss on the company, individual shareholders, the company's creditors, or other third parties, and in the existence of a risk of continued abuse; as an alternative, the court may also order the sale of the shares of the shareholder who caused the loss. This provision provides a safeguard against concrete abuses by majority and the continued risk of such abuses.

Concerning remedies to relieve the minority from the abuses committed by the majority in independent and privately held AOs, a buy-out provision enforcing the majority to buy the minority's shares should be introduced to TCC. EMCA Section 11.37 might serve as an example.

In order to provide the minority with better options and legal clarity and to protect it from judicial surprises, TCC art 531 on dissolution by just cause should also be modified in a way that it provides the minority with the right to directly request from the court to exit the company, if possible, at the majority's expense. This mechanism would significantly ameliorate minority's position in the company because putting the cost on the majority's shoulders creates a better incentive for the majority to refrain from abusing its power. Furthermore, for minorities, especially in independent and privately held AOs where they are deprived of access to liquid markets, this would create a legal lifeline which would give them the opportunity to be fairly compensated for their shares.

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