

Evaluation of the Privileged Shareholders Special Committee within the Scope of Protection of Privileged Shares

I. Introduction

Article 478 of the Turkish Commercial Code No. 6102 ("TCC") regulates privileged shares by granting privileges over shares through the allocation of priority or special rights to certain shares. Particularly, concerning the dynamics of joint-stock companies and shareholder rights, it should be envisaged how privileged shares will be exercised and protection mechanisms against decisions that may violate these rights should be established. This article examines the specific regulation of the privileged shareholders' special committee as outlined in the TCC.

II. Issuance of Privileged Shares

Article 478 of the TCC sets out the principles on how privilege may be granted. The first paragraph of the relevant article indicates that the privilege will be granted to the "shares" through the articles of association, without providing a clear definition of the privilege itself. In other words, the privilege is a right granted to the shares themselves, rather than to a specific individual.

In the second paragraph of the same article, the legislator defines the privilege as a superior right granted to the share or as a new shareholder right not foreseen by law and provides various examples. The phrase "(...) such rights" in the article text indicates that the examples of privileged rights are not exhaustively listed. Among the examples given in the article are rights such as dividend rights, liquidation rights, pre-emptive rights, and voting rights. In addition to the types of privileges listed in Article 478 of the TCC, it is also possible to issue other forms of privileged shares that are not explicitly stated in the law.

In terms of the issuance of the privilege, it is stated that the privilege may be granted either through the company's initial articles of association or by subsequently amending the existing articles of association. The subject matter and limits of the privilege must be clearly stipulated in the articles of association, in other words, "the privilege must be specific".

In practice, a separate shareholders' agreement is often signed, introducing arrangements that differentiate between shareholders and grant superiority to certain shares compared to others. It is important that these provisions, to the extent permitted by the TCC, are reflected in the company's articles of association. Unless the special terms and conditions agreed upon among shareholders are incorporated into the articles of association, they will not be recognized as "privileges" under the TCC and they will be considered relative rights that can only be asserted among shareholders within the framework of contractual freedom.

If a privilege is to be granted through a provision added to an existing article of association, the amendment must be made in accordance with the provisions in the TCC that regulate changes to the articles of association. Unless a higher quorum is stipulated in the articles of association, such an amendment must be approved by the affirmative votes of shareholders or their representatives holding at least seventy-five percent of the capital, as explicitly stated in the third paragraph (b) of Article 421 of the TCC. If the required quorum is not met in the first meeting, the same quorum will be required in subsequent meetings. The first paragraph of Article 421 of the TCC provides that any provision in the articles of association lowering the required quorum or stipulating a relative majority shall be deemed invalid. In this context, the relevant article sets a minimum threshold for the quorum, and while the quorum cannot be reduced below this threshold, it may be increased by making the requirements more stringent through an amendment to the articles of association.

III. Protection of Privileged Shares under Article 454 of the TCC

When certain shares in a company are granted privileges through the articles of association, the holders of these shares become privileged shareholders. Within the dynamics of joint-stock companies, it is possible for majority shareholders to independently make various decisions by meeting the relevant quorums, which may impact the interests of the privileged shareholders.

To protect privileged shares in cases where their rights are violated by other shareholders, the legislator has introduced various mechanisms under Article 454 of the TCC and has set out the principles of the Privileged Shareholders Special Committee ("**Committee**" or "**PSSC**").

According to Article 454 of the TCC, decisions made by the general assembly or board of directors that violate the rights of privileged shareholders cannot be implemented

unless they are approved by a resolution adopted in a special meeting of the privileged shareholders.

First and foremost, for the Committee to convene, the conditions specified in Article 454 of the TCC must be met:

- The first and most important condition for the convening of the Committee is the existence of a privilege under the TCC, meaning that the privilege must be stipulated in the company's articles of association.
- The second condition is that the decision in question must be one of the following listed in the article: a resolution by the general assembly to amend the company's articles of association, a resolution granting the board of directors the authority to increase capital, or a resolution regarding a capital increase.
- The final condition is that the aforementioned decisions must be of a nature that would violate the rights of the privileged shareholders.

The Committee can only convene and make decisions if the above-mentioned conditions are met. Particularly, since the decisions listed as the second condition in the article are stated exhaustively, even if a decision is made that violates the rights of the privileged shareholders but does not fall under these specified decisions, the privileged shareholders cannot convene under Article 454 of the TCC. Instead, they will need to resort to other legal mechanisms, such as filing a annulment lawsuit, to protect their rights. The term “violation” in the article should be interpreted, when considering the article, as decisions that eliminate or significantly restrict the rights of the privileged shareholders.

IV. Meeting of the Privileged Shareholders' Special Committee

Although the details of how the Committee should be convened are provided in Article 454 of the TCC, for the provisions that are not explicitly addressed regarding the procedures and principles of the meeting, the doctrine accepts that the provisions related to the general assembly meeting process for joint-stock companies under the TCC can be applied.

The authority to convene the Committee is granted to both the board of directors and the privileged shareholders. However, the article establishes a priority order regarding

who can make the call and when it should be done. First, the board of directors may call the Committee to a meeting within one month from the date the general assembly decision is announced. If the board of directors fails to fulfil its obligation to make the call, the legislator has granted the privileged shareholders the right to call the meeting in all circumstances. Specifically, starting from the last day of the board of directors' calling period, each privileged shareholder may call the Committee to a meeting within an additional fifteen-day period, by applying to the commercial court of first instance where the company's headquarters is located. If the Committee cannot be convened within the stipulated time despite the call, the legislator provides that the decision will be deemed automatically approved.

The quorum for a meeting of the Committee is the majority of the privileged shares representing at least sixty percent of the capital and the quorum for a decision is the majority of the shares represented at the meeting. According to the fourth paragraph of Article 454 of the TCC, if the privileged shareholders have cast favourable votes for the amendment of the articles of association in the general assembly, in accordance with the meeting and decision quorum of the Committee, a separate meeting cannot be held.

As previously mentioned, the decision-making authority of the Committee is limited solely to the approval or disapproval of a decision that constitutes a violation. Depending on the decision made by Committee, it will be determined whether the decision will be implemented; therefore, in legal doctrine, the Committee is considered to be a statutory suspensive condition regarding the effectiveness of the relevant decisions.

If a decision is made to convene the Committee, the participation of a representative from the Ministry of Trade is also mandatory. If, as a result of the review, it is concluded that the rights of the privileged shareholders have been violated, the decision will be recorded with reasons in the minutes, bearing the signature of the Ministry of Trade representative as well.

The third paragraph of Article 454 of the TCC also includes various procedural requirements for the Committee's decision, and it is regulated that failure to comply with these requirements will result in the decision being considered as not taken. In this context, the minutes must be delivered to the board of directors of the company within ten days.

Along with the delivery of the minutes, the following must also be provided to the board of directors: (i) a list containing the signatures of those who cast a negative vote on the general assembly decision submitted for the Committee's approval, representing at least the minimum quorum, and (ii) the common notification address that may be used for the annulment lawsuit, which will be discussed in Section V below.

The minutes and related documents must be registered with the trade registry and published in the Turkish Trade Registry Gazette. Although the article does not provide any specific regulation regarding the registration and publication period, there are various opinions in the doctrine regarding the duration. Considering the effect of publicity of the registration, it would be appropriate to ensure that the minutes are registered as soon as possible (in any case, considering the general fifteen-day period specified in the Trade Registry Regulation).

V. Annulment Lawsuit Against the Committee's Decision to Withhold Approval

If the Committee decides not to approve the general assembly decision on the grounds of a violation of the privileged shareholders' rights, the seventh paragraph of Article 454 of the TCC specifically grants the board of directors the right to request the annulment of the Committee's decision.

The board of directors is entitled to request the annulment of the Committee's decision on the grounds that the general assembly decision does not violate the rights of the shareholders. In this provision, the legislator has explicitly left open the possibility of legal recourse within the scope of preventing any misuse of authority by the Committee.

An annulment lawsuit for the Committee's decision and registration of the general assembly decision may be filed within one month from the date of the decision to the commercial court of first instance where the company's headquarters is located. According to the eighth paragraph of Article 454 of the TCC, this lawsuit can be directed against those who cast a negative vote on the approval of the general assembly decision.

VI. Conclusion

The Privileged Shareholders' Special Committee has a critical role, particularly as a mechanism for overseeing and approving general assembly or board of directors

decisions that could potentially violate the privileged rights. In this regard, the Committee provides an effective tool for protecting the rights of privileged shareholders, preventing the implementation of decisions that would violate these privileges.

The legislator, while safeguarding the rights of privileged shareholders against majority shareholders, has established a balance within Article 454 of the TCC to prevent abuse of the Committee's authority. However, given that the Committee will only be activated upon the fulfilment of certain conditions outlined in the article and will be competent only for specific types of decisions, there may be situations where the rights of privileged shareholders cannot be protected in matters falling outside the scope of the article. Nevertheless, considering the provisions within the relevant article, particularly regarding capital increases, the article provides several safeguards for privileged shareholders whose rights may be infringed.

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Disclaimer: This article aims to provide the reader with a general overview of the subject matter. Each specific case should be evaluated based on its own circumstances.