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Delegation of management authority of the board of directors in joint-stock companies in Turkey

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Abstract
Under Turkish corporate law, the board of directors is the authorized corporate body for the management of a joint-stock company. Nevertheless, delegation of such management authority may be a significant need for the board of directors at some point due to a number of reasons. Considering the foregoing practical need, the Turkish Commercial Code No. 6102, which is currently in force, allows delegation of the management authority to certain board member(s) and/or third person(s) under the certain conditions. In this regard, this paper delves into legal bases of the management and delegation concepts starting with structure of the board of directors besides opposing opinions under the Turkish corporate law doctrine and controversial issues in practice. The paper also aims to provide the professionals with the information as to implementation of the delegation concept.

Keywords: Turkish commercial code, Turkish corporate law, joint-stock company, board of directors, management authority, delegation

1. Introduction
Management, as a concept, can generally be defined as *"the act or art of managing: the conducting or supervising of something (such as a business)* [1]*."* If this concept is adapted to the realm of corporate law, it refers, briefly speaking, to the management of a company by an authorized corporate body. Under the Turkish corporate law rules, the authorized corporate body for the management of a joint-stock company is the board of directors.

From a corporate perspective, it is quite clear that good and effective management shapes the economic path of a company and greatly influences its commercial success. Good management, on the other hand, depends to a large extent on the successful composition and organization of a company. Consequently, if necessary and appropriate, management authority should be partially or wholly delegated to certain members of the board of directors, or to third persons, executive boards and committees in order to duly establish and run a successful corporate organization [2].

In addition, the delegation of management authority may be essentially necessary for the board of directors of joint-stock companies due to a variety of reasons, such as the broad scope of business, the need for professional managers who possess sufficient knowledge and experience to conduct the company's activities, etc [3].

2. Board of Directors
As stated in Section (I) above, the board of directors is the authorized corporate body under Turkish corporate law that is responsible for the representation and management of a joint-stock company [4]. With regard to the foregoing, Article 365/1 of the Turkish Commercial Code No. 6102 ("TCC") stipulates that *"A joint-stock company is managed and represented by the board of directors."* This being the case, it will be appropriate to begin our analysis by delving deeper into the concept of "board of directors," including its formation and its functions.

As per Article 339/3 of the TCC, during the incorporation of a joint-stock company, the initial (*i.e.* original) members of the board of directors are appointed through the Articles of Association. As the registration of joint-stock companies with the relevant trade registry confers legal personality on such companies, the board of directors should be in existence as of the incorporation phase [5]. Nevertheless, after the incorporation of the company, the subsequent members of the board of directors will be appointed through a general assembly resolution, pursuant to Article 408 of the TCC. In this regard, appointing board members is one of the fundamental and non-transferable duties of the general assembly.

According to Article 362/1 of the TCC, board members can be appointed for a maximum period of three years. Unless otherwise stipulated in the Articles of Association, the same board members may be re-elected at the end of their terms. In light of the above, it can be deduced that the TCC obliges general assemblies of joint-stock companies to evaluate the competencies of board members at least every three years (*i.e.* at three-year intervals at the latest).

In addition, as per Article 359/1 of the TCC, the board of directors may consist of at least (*i.e.* as few as) one board member. The one-member board structure for the board of directors was introduced into Turkish legislation for the first time with the current TCC. On the other hand, the TCC does not stipulate any upper limit as to the number of board members. Therefore, the general assembly of a joint-stock company is entitled to determine the number of board members at its own discretion, unless the Articles of Association of the company stipulates a specific, minimum, or maximum number of members for the board of directors [6].

In practice, many trade registries allow the inclusion of a simple and straightforward provision in the Articles of Association, as follows: "*The board of directors consists of at least one member.*" We believe that the inclusion of such an article (merely repeating the relevant provision in Article

359 of the TCC) is undertaken simply for the sake of formality. On the other hand, it is also possible to determine the minimum and maximum number of members for the board of directors by including a relevant provision in the Articles of Association, such as: "*The board of directors consists of at least three and at most five board members.*"

Furthermore, the board members of a joint-stock company are not required to be shareholders of the relevant company. In this regard, the TCC enables general assemblies to freely establish their own management structures in accordance with the specific needs and requirements of the company.

Article 359 of the TCC also permits board members to be either real persons and/or legal entities. In the event that a legal entity is appointed as a board member to a joint-stock company, such legal entity must also appoint and assign a real-person representative to attend the board meetings and to vote on behalf of the board member legal entity. In other words, third parties are not entitled to attend board meetings and vote by proxy on behalf of the legal entity that is the board member.

Given the foregoing features and rules introduced by the TCC with respect to the board of directors, it could be reasonably concluded that the TCC displays a rather liberal perspective toward the board of directors compared to the previously applicable (now abolished) Turkish Commercial Code No. 6762 ("Abolished TCC").

3. Legal background and scope of management authority

There are a number of reasons for vesting management authority in the board of directors, rather than granting it to the general assembly, including the following: (i) the general assembly is structurally a provisional assembly, and it cannot convene, operate or carry out activities consistently to meet the company's needs and requirements, (ii) the number of shareholders may complicate and impair the effective management of the company and (iii) even if the number of shareholders is not too high, such shareholders may not be willing to manage the company or possess sufficient management skills and abilities to do so. [7] Therefore, the management authority in a joint-stock company is vested in the board of directors, pursuant to the aim (and assumption) that this body has the necessary management skills and ability, and that it will be capable of continuously orchestrating, coordinating and carrying out the business activities of the company.

In general, "management" has two different meanings in relation to joint-stock companies and the board of directors [8]. Firstly, management is a duty that is assigned to the board of directors [9]. In this respect, the relevant legislation in force and the Articles of Association of a company outline part of the duties assigned to the board of directors. Moreover, the board of directors may have certain further duties due to the nature of the business, even though such duties are not explicitly defined or enumerated under either the relevant laws or in the Articles of Association of the company. On this matter, Article 374 of the TCC stipulates that: "*The board of directors is authorized to adopt decisions regarding any matter or transaction that is required to be carried out in the company's field of activity; excluding the decisions that are assigned to the general assembly in accordance with the law and the articles of association.*" Secondly, the term "management" also refers to the name of the organization executing the management function (*i.e.* the board of directors itself) [10]. Thus, we can conclude that the scope of the management authority of the board of directors is quite comprehensive, as the same term is used to cover both the board of directors itself and its duties relating to the company.

4. Non-transferable Duties and Authorities of the Board of Directors

Article 367 of the TCC entitles the board of directors to delegate its management authority; however, there are certain "non-transferable duties and authorities of the board of directors" stipulated under Article 375, which are not subject to or encompassed by this delegation authority.

At this point, it should be noted that there was no provision as to the non-transferable duties and authorities of the board of directors in the Abolished TCC. By introducing Article 375 of the TCC, a distinction has clearly been made by the legislators between the functions of a joint-stock company's two fundamental organs (*i.e.* the general assembly and the board of directors), and the "equality principle" has been introduced with respect to the balance of power between the two essential organs. Therefore, the absolute dominance of the general assembly over the board of directors has been explicitly rejected by the lawmakers in the current version of the TCC [11].

According to the Turkish corporate law doctrine, it is commonly accepted that the non-transferable duties and authorities of the board of directors put forth in Article 375 of the TCC are not listed on a numerus clausus (*i.*e. "limited in number") basis, and that there are further duties and authorities that the board of directors is not entitled to delegate [12]. For instance, preparing annual activity reports under Articles 516 and 518 of the TCC, and drafting internal directives under Articles 367/1 and 419/2 of the TCC, are also among the non-transferable duties and authorities of the board of directors, even though they are not listed in Article 375 [13]. These types of additional non-transferable duties and authorities, which are not stipulated in Article 375, are generally detected and inferred from the spirit of the relevant legislation and identified through their implementation by public and/or private institutions.

Although some of the duties and authorities of the board of directors cannot be delegated to any other person within the scope of Article 375, the board of directors may nevertheless receive support and assistance from third persons while fulfilling such duties and exercising the authorities in question. In this regard, Article 366/2 of the TCC also stipulates that "*The board of directors may establish committees and commissions, in which the board members may also participate, for the purposes of monitoring the business, preparing reports to be submitted to the attention of the board of directors, implementing the decisions of the board of directors or for internal auditing purposes.*" However, the foregoing article should not be interpreted or construed as an alternative method for the delegation of management authority of the board of directors. When such committees or commissions are established, the board of directors still acts as the final decision-making body, bearing all liability arising under the law as well [14].

According to Article 375 of the TCC, the non-transferable duties and authorities of the board of directors are as follows:

a) *Top-level management of the company and providing*

instructions regarding those functions: Top-level management means taking and adopting decisions regarding the general management policy of the company, including investment, financing and dividend policies related to business aims and targets, the determination of the methods by which to pursue such aims/targets and whether the targets have been achieved, as well as the supervision of budget implementation and the formulation and designation of strategies [15].

b) *Determination of the management organization of the company:* Management organization indicates the hierarchical relationship between the persons who are in charge of the management of the company, and the determination of the duties and authorities thereof [16].
c) *Establishment of the necessary organizations and structures for the fields of accounting, financial auditing and, to the extent required for the management of company, financial planning:* In a joint-stock company, the board of directors is the highest responsible corporate body for issues related to financing, and it is therefore obligated to establish and organize the necessary structures for the fields of accounting, financial auditing and financial planning within the company [17].

   The establishment of an accounting organization refers to the determination of an accounting system, setting up a consolidated accounting system, determining respective rules for keeping books and records in accordance with the relevant laws and generally accepted accounting principles, and making accounting plans. Although the establishment of an accounting organization is a non-transferable duty of the board of directors, the duty of keeping accounting records may, in fact, be delegated [18].

   The establishment of a financial auditing organization refers to the implementation of an internal auditing system for audit activities and for overseeing the financial resources of the company. Even if a joint-stock company is only a small-scale undertaking, it will be required to establish an independent internal audit organization. In this regard, the TCC also indicates that the audit function that is fulfilled by independent auditing firms is not sufficient and that an effective internal control mechanism must be established in all circumstances, regardless of the size or activities of the joint-stock company [19].

   Although financial planning is also listed among the non-transferable duties and authorities of the board of directors, establishing or maintaining a financial planning organization is not, in fact, obligatory for all joint-stock companies [20]. Therefore, it could be said that financial planning is generally optional for joint-stock companies. However, if it is required for the management of a particular joint-stock company, then the establishment of a financial planning organization cannot be delegated to any person and must be fulfilled directly by the board of directors.
d) *Appointment and removal of managers, other persons having the same function, and those having signature authority:* Such authority may not be transferred even to the executives of the company and it must be exercised only by the board of directors itself [21].
e) *High-level supervision of the persons responsible for the management of the company, especially as to whether they are acting in accordance with the law, the Articles of Association, the company's internal regulations and the written instructions of the board of directors:* Indeed, the board of directors is not a supervisory or auditing body under the Turkish legal system. However, in this provision, the supervision duty is related to the workflow from a theoretical perspective and in terms of business economics, according to the meaning assigned to "high-level supervision" by the lawmakers [22].
f) *Keeping the share ledger, the board of directors' minutes book and the general assembly's meeting and discussion books, preparing the annual activity reports and the corporate governance declarations of the company and submitting them to the general assembly, convening general assembly meetings, and executing and implementing general assembly resolutions:* This provision is related to the most basic and fundamental corporate law duties of the board of directors, which should be conducted on a daily and/or annual basis, as the case may be.
g) *Notifying the court as to the indebted position (i.e. technical bankruptcy) of the company:* This provision refers and relates to the procedure that should be followed when the company becomes indebted, as per Article 376 of the TCC.

5. Delegation of management authority

5.1 General overview

As per Article 367/2 of the TCC, "*Unless delegated, management authority is exercised by all members of the board of directors.*" The principle of the exercise of management authority by all members of the board of directors may easily be applied with respect to small-scale joint-stock companies and family companies, as the case may be. However, in medium- and large-scale companies (*e.g.* group companies, holdings, publicly listed companies, etc.), the exercise of management authority by all members of the board of directors may not be preferable (or even feasible) in practice. Therefore, in such cases, the exercise of management authority by different persons and/or groups may be required. In this regard, the board of directors may either establish committees and commissions to distribute and allocate some of its authorities in accordance with Article 366 of the TCC, or delegate its management authorities fully or partially pursuant to the conditions stated in Article 367 [23].

"Delegation of management authority" may be defined simply as the delegation of the management authority of the board of directors fully or partially to one or more board member (s) and/or to third person (s), in accordance with the rules stated in Article 367/1 of the TCC, except for the non-transferable duties and authorities listed in Article 375 [24]. In general, it could be said that, when certain management authorities are delegated to specific board member(s) and/or third person (s), board members who no longer have any management authority in those fields are discharged from their liabilities with regard to the same [25].

5.2 Conditions for the delegation of management authority

In accordance with the TCC, the delegation of management authority is subject to certain conditions. In order for the board of directors to delegate its management authority, (i) the Articles of Association of the company must include a

provision allowing the delegation of management authority, (ii) the board of directors must prepare an internal directive showing the delegated management structure of the company and (iii) the board must also adopt a resolution regarding the delegation of management authority [26].

5.2.1 Inclusion of a Provision in the Articles of Association Allowing for the Delegation of Management Authority

As per Article 367, the initial condition for the delegation of management authority by the board of directors is the inclusion and presence of a provision in the Articles of Association that allows the board of directors to delegate its management authority [27]. This provision may be included in the Articles of Association during the incorporation of the company or by amending the Articles of Association at a later stage [28]. Moreover, such provision may also be amended or removed from the Articles of Association at a future date. Even if the provision allowing for the delegation of management authority is subsequently removed from the Articles of Association, this does not affect the current delegations already duly realized, unless such delegations are themselves explicitly cancelled or revoked [29].

The TCC and its secondary legislation do not explicitly indicate the scope of the provision that should be included in the Articles of Association as to the delegation of management authority of the board of directors. Therefore, it can be reasonably concluded that a simple provision stipulating that the board of directors is entitled to delegate its management authority in accordance with Article 367 of the TCC would be legally sufficient [30]. However, it should be noted that the provision that allows for the delegation of management authority must be clear and precise [31]. Such provision may also establish whether the management authority is to be delegated to one or more board member(s) or to third person(s) [32].

In accordance with Article 367/2 of the TCC, since delegation of the management authority is optional, it could be inferred that the founders or the general assembly of a joint-stock company are not required to include a provision as to the delegation of management authority in the Articles of Association. Similarly, the board of directors cannot be forced by the general assembly to delegate its management authority [33]. The board of directors may, at its own discretion, choose to exercise this authority, provided that all other necessary conditions are also met [34].

Lastly, the provision to be included in the Articles of Association cannot designate or determine any specific person to whom management authority is to be delegated, and it cannot authorize the general assembly to delegate the board of director's management authority, as the determination of the management structure of the organization is a non-transferable duty and authority of the board of directors under Article 375/1(d) of the TCC [35].

In light of the above, including such a provision in the Articles of Association is usually deemed sufficient in practice; "*the board of directors is entitled to fully or partially delegate its management authority to one or more board member(s) or to third parties by way of drafting an internal directive as per Article 367 of the TCC*" to fulfill the first condition. The internal directive of the board of directors regarding the delegation of management authority is discussed in the following section.

5.2.2 Internal Directive

5.2.2.1 General Overview

Under Article 367 of the TCC, the second condition for the delegation of management authority of the board of directors is the preparation and issuance of an "internal directive." The concept of an internal directive originates in Swiss law and was introduced into Turkish law with the latest TCC [36].

Simply put, an internal directive is a document that governs the internal operations of a joint-stock company [37]. Although there are different types of internal directives prepared for particular purposes under the relevant articles of the TCC [38] (*e.g.* for the working principles of the general assembly, or to delineate the scope of the limited signature authority, etc.), we will focus on and explain the details of the internal directive that is prepared in accordance with Article 367 of the TCC.

Internal directives that are prepared pursuant to Article 367 specify the management of joint-stock companies and the duties thereof, as well as setting forth and addressing the hierarchical relationships within the company [39].

As per Article 375/1(b), determining the management organization of a company is a non-transferable authority of the board of directors in joint-stock companies, and this authority also includes the preparation of an internal directive for the delegation of the board's management authority. Accordingly, the board of directors is the sole authorized corporate body for preparing the internal directive under Article 367 [40].

As stated above, if the board of directors decides to delegate its management authority, it is required to prepare an internal directive. However, the board of directors is not obliged to prepare an internal directive within the scope of Article 367 if it does not aim to delegate its management authority [41].

5.2.2.2 Preparation and approval of an internal directive

The TCC does not require or set forth a specific form for internal directives. However, as the term "directive" refers to a document in written format by nature, there is no doubt that the internal directive should be provided in writing as well [42]. Since the resolutions of the board of directors are required to be in written format under Article 390/5 of the TCC, some commentators have argued that internal directives must be in written format under the Turkish corporate law doctrine as well, considering that internal directives can be adopted through board resolutions [43].

The internal directive may be inserted into and included with the resolution of the board of directors regarding the approval of the internal directive, or it may be prepared as a separate document [44]. The internal directive is not required to be notarized [45]. However, for evidentiary purposes, it may be notarized at the board of directors' discretion.

Although the internal directive should be in written format, the TCC does not require it to be registered and/or announced. The underlying reason for this rule is to prevent third parties from obtaining information regarding the company's management structure, if the company is not willing to make such information publicly available. However, as we will explain in detail under Section (D) below ("Informing the Shareholders and Creditors of the Company Regarding an Internal Directive"), as per Article 367/1 of the TCC, the board of directors should inform the

company's (i) shareholders upon the request, and (ii) creditors, provided that they convincingly demonstrate their interests which are worthy of being preserved, regarding the internal directive.

An internal directive cannot be contrary to the compulsory provisions of the law or to the Articles of Association of the company. The relevant provisions of an internal directive that are contrary to the law or to the Articles of Association will be deemed null and void [46]. However, the other provisions will be deemed valid and remain in legal force.

Furthermore, as also stated under Section (i) above, the board of directors may prepare an internal directive if it is duly authorized by the Articles of Association of the company. Otherwise, the delegation of management authority of the board of directors would be contrary to the law and to the Articles of Association of the company. In that case, all the provisions of the internal directive as to the delegation of authority will be deemed invalid [47].

5.2.2.3 Content of internal directive

Article 367 of the TCC specifies the minimum content that must be included in an internal directive. In this regard, an internal directive shall: (i) regulate the management of the company, (ii) define the necessary duties, (iii) determine the levels and relationships of authorized persons within the company and (iv) indicate the rules with respect to the reporting procedures among those persons. Generally speaking, an internal directive establishes the duties and working principles of the board of directors and defines its committees and commissions (if any), as well as the duties of the chairman and other members of the board of directors, and the top management of the company and the duties thereof [48]. The foregoing matters comprise the minimum content of an internal directive. In case an internal directive fails to contain this information or address these matters in some way, this would be regarded as a breach of the law and the delegation of management authority realized or implemented in accordance with such an internal directive may be deemed invalid [49].

In light of the above, internal directives may also include certain job titles, such as manager, general manager, chief executive officer (CEO) and chief financial officer (CFO), and should also define, at the very least, the principal duties of the holders of said titles [50].

On the other hand, the determination of the content of an internal directive is at the sole discretion of the board of directors, on the condition that the internal directive consists of and covers the minimum content set forth in Article 367 [51]. Therefore, the board of directors may freely determine the content of an internal directive, depending on the size of the company [52].

For the purposes of keeping up with the developments in global commerce and effectively reacting to rapid market changes, the board of directors should regularly assess the organizational structure of the company and update its internal directive from time to time according to the changing business needs and strategies of the company [53].

5.2.2.4 Informing the shareholders and creditors of the company regarding an internal directive

Although an internal directive is not required by law to be registered or announced, the board of directors must nevertheless inform the shareholders and creditors of the company regarding an internal directive in certain situations. To that end, as per Article 367/1 of the TCC, the board of directors is under an obligation to inform the company's shareholders upon request and the creditors (provided they can convincingly demonstrate their interests that are deemed worthy of being preserved) regarding the internal directive.

As it may be seen from the letter and spirit of Article 367/1, this provision makes a distinction between the shareholders and the creditors of a company. While the creditors must prove that their interests are worthy of preservation in order to obtain information regarding the internal directive of a joint-stock company, it is sufficient for the shareholders to merely request such information regarding the internal directive, unless they are acting in bad faith. [54] Accordingly, the creditors of a joint-stock company must specify the matter about which they request to be informed. Furthermore, the creditors are neither allowed to make a request to obtain general information regarding the internal directive of the company, nor to take copies of the internal directive. The board of directors may also deny the request of the creditors for obtaining information about the internal directive if they have a valid or justifiable reason for doing so. However, the shareholders of the company have the right to receive information regarding the internal directive upon request and they also have the right to take copies thereof [55].

On the other hand, the announcement of the internal directive may provide transparency with respect to the management of the company, and thereby advance the corporate governance objectives of the company. For instance, this is quite a common practice in Swiss corporate law [56]. Consequently, a joint-stock company may sometimes prefer to voluntarily publish its internal directive on its website, depending on the circumstances.

It should also be mentioned that informing the company's shareholders and creditors is not among the non-transferable duties and authorities of the board of directors under Article 375 of the TCC. Therefore, the board of directors may delegate such duty to one or more board member(s) or to third person(s) [57].

5.2.3 The Board of Directors' Resolution Regarding the Delegation of Management Authority

The board of directors must adopt a resolution in order to delegate its management authority to one or more board member(s) and/or to third person(s) [58].

Since the TCC does not require a specific meeting and/or decision quorum to adopt such a resolution, Article 390 of the TCC will be applicable to these resolutions, unless the Articles of Association of the company stipulate otherwise and require a specific quorum [59].

With regard to the meeting and decision quorum, Article 390/1 of the TCC stipulates that "*the board of directors convenes with a majority of the total number of board members and adopts such resolution with a majority of the board members who are present at the meeting, unless a higher quorum is stipulated by the Articles of Association of the company.*" In addition, Article 390/4 specifies the following rule with respect to the circulation resolution: "*Upon the written suggestion of any board member that is prepared in the form of a resolution, the resolution of the board may be adopted by way of obtaining the written approvals of the other board members corresponding to a majority of the total number of board members, unless any*

board member requests a physical board meeting."
Therefore, the board resolution regarding the delegation of management authority should be adopted in line with the foregoing rules for meeting and/or decision quorum. Otherwise, the board resolution (and consequently, the delegation of management authority) would be invalid. [60]
These resolutions should also refer to the internal directive and specify the persons to whom the management authority is to be delegated [61].

5.3 Persons to Whom Management Authority May Be Transferred (Delegatees)

The board of directors has the exclusive authority to select the persons to whom the management authority of the board of directors is to be transferred. In this regard, the board of directors may transfer its management authority to board members, to shareholders, or to any other third parties (*e.g.* an employee or a person who has not had any prior relationship with the company) [62], and such delegatees can be real persons or legal entities [63]. For instance, CEOs and CFOs are the most common types of third-person delegatees. In any case, the persons to whom management authority is transferred should be trustworthy and professional, and they should have sufficient knowledge and experience in their fields. In other words, they should be capable and competent with respect to the duties and responsibilities associated with managing a company [64].
In case the management authority is transferred to certain members of the board of directors, such members are thereafter known as "executive members." Accordingly, they carry out and fulfil the duties which have been delegated to them as executive members [65]. On the other hand, third parties to whom management authority is delegated are subsequently called "executive managers [66].
Executive members may contribute to the communication and information flow between the board of directors and executive managers [67]. However, each executive manager retains the right to independently exercise the management authorities that have been vested in that executive manager. Executive managers may also be restricted to exercising their management authorities jointly [68].
Moreover, executive members remain responsible for fulfilling and exercising the non-transferable duties and authorities of the board, together with the non-executive members of the board of directors [69]. As a result, both non-executive members and executive members attend the board meetings regarding the management of the company [70]. In principle, there is no hierarchical relationship between executive members. However, if the board of directors of the company desires to create a hierarchical relationship between executive members, this may be stipulated and implemented through the internal directive [71].
There are a number of crucial similarities and differences between executive members and executive managers. First of all, the conditions as to the delegation of management authority to the executive members and to the executive managers are identical [72]. Secondly, there is no distinction between the authorities that may be delegated to the executive members and to the executive managers [73]. However, in practice, the authorities that are delegated to the executive members are often more comprehensive than those delegated to the executive managers. Moreover, there is no hierarchical relationship between the executive members and the executive managers; therefore, the executive members may not instruct or give orders to the executive managers of the company [74]. Since they are members of the board of directors, the executive members may attend the board meetings and exercise their own voting rights. Unlike the executive members, the executive managers do not have the right to attend board meetings [75]. However, if necessary, the board of directors may invite the executive managers to the board meetings in order to obtain relevant information and reports about the management of the company [76]. Thirdly, the executive members have supervisory responsibility to the company, whereas the executive managers do not share the same responsibility [77]. Lastly, the responsibilities of the executive members differ from the responsibilities of the executive managers. The executive members are responsible for exercising both the management authorities that have been delegated to them and the non-transferable authorities of the board of directors. However, the executive managers are only responsible for duly exercising the management authorities delegated to them [78].
Furthermore, the differences between executive managers and other managers warrant highlighting, since these two positions appear to be similar and may be confused at first sight. While the term "executive manager" refers to third parties, as stipulated in Article 367 of the TCC, the term "manager" refers to the persons specified under Articles 368 and 375/1(d). The managers may be appointed by the board of directors even if there is no provision included in the Articles of Association allowing for such appointment. However, in order to appoint an executive manager, there must be a related provision included in the Articles of Association, in accordance with Article 367.
Another important difference between executive managers and other (*i.e.* non-executive) managers concerns the authorities that are vested in them. Managers are not authorized to adopt decisions for management-related matters. However, they are under an obligation to carry out the decisions adopted by the management of the company. Executive managers, on the other hand, may take or adopt decisions for management-related matters and they may also implement them. Moreover, the relationship between the company and the executive managers may differ from the relationship between the company and its managers. In general, the company and its managers enter into service agreements; however, the contractual relationship between the company and the executive managers is usually sui generis. Additionally, executive managers may only be appointed from amongst non-board members, while there is no such obligation or restriction for other managers. Therefore, managers may also be appointed as members of the board of directors [79].

5.4 Discussions on the Re-delegation of Management Authority

The board of directors may determine the persons to whom its management authority is to be delegated. The board of directors is also authorized to revoke the delegation with a board resolution. However, under Turkish corporate law doctrine, some commentators have also discussed and argued over the question of whether the persons to whom management authority has been delegated may re-delegate such management authority to others [80].
In the existing literature on Turkish corporate law doctrine, there are two divergent opinions on this matter. The first

view essentially contends that, in case the board of directors authorizes the persons to whom management authority has been delegated for re-delegation, such persons may re-delegate the management authority. According to this view, for the re-delegation to be valid, the internal directive should state how such re-delegation authority will be exercised and specify the persons to whom management authority may be re-delegated [81]. With regard to this opinion, it has also sometimes been argued that management authority can be re-delegated by its very nature, even if there is no explicit consent given by the board of directors, unless the Articles of Association or the internal directive of the company forbid such re-delegation [82]. Another (contrasting) view states that the board of directors has exclusive authority with respect to the delegation, and therefore, the persons to whom management authority has already been delegated may not re-delegate such authority to others [83].

Our position on this issue is closer to the second view. We are of the opinion that the delegation of management authority is among the non-transferable authorities of the board of directors under the Turkish corporate law system, [84] bearing in mind not just the letter but also the spirit of Articles 367/1 and 375/1(b)-(d) of the TCC. Therefore, we believe that such authority should only be exercised by the board of directors and that the persons to whom management authority has been delegated should not re-delegate the same authority to others. Moreover, "the principle of the separation of functions" should apply to the relationship between the board of directors and the persons to whom management authority has been delegated. Otherwise, especially when management authority is delegated as a whole, this may cause significant ambiguity and uncertainty with respect to the management of the company and each party's legal responsibility [85]. However, it should also be noted that the person to whom management authority has been delegated may authorize its subordinates and receive assistance, as long as such assistance is limited to the delegated area of management authority.

5.5 Relationship and differences between delegation of management authority and delegation of representation authority

The board of directors is the authorized corporate body to represent a joint-stock company before the shareholders with respect to the internal relationships of the company and before third persons with respect to the external relationships of the company [86]. As per Article 370/1 of the TCC, "*Unless otherwise stipulated in the Articles of Association or unless the board of directors consists of only one member, the representation authority of the company resides with the board of directors and must be exercised with joint signature authority*." Accordingly, Article 370/2 stipulates that the board of directors may delegate its representation authority to one or more board member(s) or to third person(s). However, in case of the delegation of the representation authority, at least one board member must retain and have representation authority.

It is intensely debated under Turkish corporate law doctrine whether it is required for a joint-stock company to include a provision in its Articles of Association allowing for the delegation of representation authority [87]. According to the commonly accepted view, and in practice, it is not obligatory to include a provision in the Articles of Association permitting the delegation of representation authority under Article 370/2 of the TCC.

As discussed in the previous sections, one of the non-transferable duties and authorities of the board of directors concerns the appointment and removal of managers, other persons having the same functions, and those persons having signature authority, pursuant to Article 375/1(d) of the TCC. Similarly, Article 368 states that "*The board of directors may appoint commercial representatives and commercial agents.*" Accordingly, under the preamble to Article 368, the lawmaker has emphasized that "*Such authority of the board of directors is non-transferable. The delegation of management authority does not eliminate the authority to appoint commercial representatives and commercial agents* [88]. Therefore, the power to grant representation authority must be exercised by the board of directors itself under all circumstances. In other words, this also constitutes a non-transferable authority of the board of directors [89].

Indeed, as per Article 367/1 of the TCC, the delegation of management authority does not include the delegation of representation authority [90]. The board of directors may delegate its representation authority in accordance with Article 370/2. However, technically speaking, it is still possible to delegate management and representation authorities to the same board members and/or third persons [91]. Indeed, in practice, representation authority is often delegated together with management authority [92]. In other words, management and representation authorities are, practically speaking, delegated to the same person (s), although it is possible to delegate them to different person(s).

Under Article 370/2 of the TCC, it is also not obligatory to prepare an internal directive for the delegation of representation authority. However, considering the requirements for the delegation of management authority and the prevailing practice in real-world situations, where delegations of management authority and representation authority are usually conducted simultaneously, it may be useful (i) to include a provision in the Articles of Association that allows for the delegation of both management and representation authorities, and (ii) to issue an internal directive in case of the delegation of both authorities [93].

5.6 Consequences of the delegation of management authority

In accordance with Article 553/2 of the TCC, if the board of directors duly delegates any of its duties or authorities to any person(s) on a legal basis (*i.e.* through a valid delegation), then the board shall not be held liable for the actions and decisions of such person(s), unless it is proven that the delegation was not exercised with reasonable diligence. Therefore, the delegation should always be duly exercised in accordance with the relevant laws and the Articles of Association of the company, in order to be able to hold the delegatees liable for their decisions and actions, rather than creating a situation in which the board of directors faces continuing liabilities regarding the same [94].

As explained under the previous sections, for a valid delegation of management authority, the following (briefly summarized) conditions should be duly met: (i) inclusion/presence of a provision in the Articles of Association that permits the delegation of such authority to

board members or to third persons, (ii) preparation of an internal directive, (iii) adoption of a board of directors' resolution for the delegation [95]. In case the delegation is carried out without fulfilling one or more of the foregoing conditions, the delegation will be invalid and it should be considered that the board of directors has actually established a number of committees or commissions consisting of board members and/or third persons under Article 366/2 of the TCC. In that case, the board of directors will remain liable for the actions and decisions taken by such committees and/or commissions in accordance with Article 553 [96]. Furthermore, if any of the non-transferable duties or authorities of the board of directors are delegated, the liability of the board of directors continues as is, since the delegation would be contrary to the law [97].

It is also debated among commentators whether the board of directors bears a supervisory obligation toward the delegatees under Turkish corporate law doctrine in order not to be held liable, as per Article 553/2 of the TCC. Although the wording of Article 553/2 does not explicitly stipulate that such an obligation exists, the preamble of said article specifically states that the board of directors is also responsible for the supervision of delegatees [98]. Finally, it should be mentioned that the foregoing obligation also covers and applies to giving instructions to the delegatees.

To summarize briefly, in the event of a duly executed delegation of management authority, the board of directors must also supervise and give instructions to the delegatees with reasonable diligence in order not to be held liable for their actions and decisions. Furthermore, in case of any dispute arising from the delegation of management authority, the burden of proof will not fall on the board of directors that has delegated its management authority. In other words, in case of any dispute, the claimant will be required to prove that the delegation was not duly exercised with reasonable diligence [99].

6. Conclusion

In principle, the board of directors manages and represents a joint-stock company under the Turkish corporate law system. However, Turkish corporate law doctrine also allows the board of directors to delegate its management authority under certain conditions, as set forth in the relevant articles of the TCC. The non-transferable duties and authorities of the board of directors must be exclusively fulfilled and exercised by all the board members collectively. Those duties and authorities cannot be delegated in any manner or under any circumstances.

Furthermore, the board of directors must be authorized with a provision to be included in the Articles of Association of the company in order to duly delegate its management authority to certain board members and/or third persons. Those delegatees may be either real persons or legal entities. Subsequently, an internal directive should be duly prepared and adopted by the board of directors. An internal directive is a document regulating the internal operations, organization and management of the company.

The board of directors also has the authority to dismiss the persons to whom the management authority has been delegated at any time, and thereby revoke their management authority.

In terms of Turkish corporate law doctrine, the possible re-delegation of management authority is a highly debated matter. We are of the opinion that, since the delegation of management authority is among the non-transferable authorities of the board of directors under the TCC, and considering the text and the spirit of Articles 367/1 and 375/1(b)-(d), such authority and its extensions may only be exercised by the board of directors. Accordingly, we conclude that delegatees cannot re-delegate the same authority to others.

Management authority and representation authority are regulated separately under Turkish law, and, at least in principle, the delegation of management authority does not include the delegation of representation authority. The conditions and requirements of the delegation of representation authority are as yet unsettled and highly debated under Turkish corporate law doctrine. It is not obligatory to meet the conditions that have been introduced for the delegation of management authority in order to delegate representation authority. However, in practice, representation authority is usually delegated concurrently with management authority. This is to say, management and representation authorities are generally delegated to the same person(s), although this is not always the case, and they may also be delegated to separate person(s).

To conclude, we believe that most of the ongoing discussions related to the delegation of management authority (and consequently, the delegation of representation authority) will gradually subside and that the debate will finally be settled to a large extent once the Turkish Court of Cassation delivers its rulings on these matters and those rulings serve as precedents for other courts and practitioners. It seems that the divergent views discussed in this article will only be reconciled in some way at that time, according to the definitive approach taken by the Court of Cassation to these issues, and the position adopted by the Court in its reasoned decisions.

7. References

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