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CONSTITUTIVE ELEMENTS OF THE COMPANY CONCEPT ACCORDING TO TURKISH LAW: RULES, EXCEPTIONS AND TRENDS

Abstract.

One of the distinctions made for companies under Turkish law, and perhaps the most preferred, is the distinction made between commercial companies and ordinary partnerships. According to this distinction, while commercial companies have legal personality, ordinary partnerships constitute a general scope for corporate relations without legal personality. The elements that are valid for the concept of company are the elements that exist for all companies, regardless of their type, and are constitutive. Differences in the details of these elements and the different appearances they present create rules and exceptions. The compulsory elements for all types of companies can be listed as person, asset, common goal, contract and active effort. These elements are present in all companies, although their impact is felt in different ways. Otherwise, there may be a possibility of termination of the company relationship for just cause. The elements of the company concept should be re-evaluated within the framework of digitalization and technological developments in law. For this reason, efforts should be made to adapt to artificial intelligence technology in the establishment, management and supervision of companies.

Key words: Turkish company law, elements of company concept, affection societatis, Turkish Code of Commerce, Turkish Code of Obligations.

Introduction.

Turkish company law is considered a sub-branch of commercial law. Chapter 2 of the Turkish Code of Commerce, which is the main source of commercial law, is specific to commercial companies. The characteristic feature of commercial companies is that they have legal personality. The commercial companies regulated in the Turkish Commercial Code are listed as collective companies, ordinary limited partnerships, limited partnerships with capital divided into shares, joint stock companies and limited liability companies. The only companies that are qualified as commercial companies but not regulated in the TCC are cooperatives. Companies that do not have a legal entity are identified as ordinary partnerships. Ordinary partnerships are essentially regulated in the Turkish Code of Obligations. On the other hand, there are provisions regarding ordinary partnerships in other relevant specific legislative sources. There are 5 founding elements that are valid in all company relations. These can be listed as person, asset, common purpose, contract and active effort. In this study, we will focus on the elements of the company concept according to Turkish law. By including the rules and exceptions regarding the elements of the company concept, a general framework of comparative law on the fundamentals of Turkish company law will be presented to the readers.

Materials and methods of research.

What is meant by the person element is the partner or partners. According to the definition in Article 620 of the Turkish Code of Obligations, the existence of at least two partners is required for a partnership relationship's existence. However, there are exceptions to this rule. According to the system that became valid with the Turkish Commercial Code No. 6102, joint stock companies and limited liability companies can be established with a single partner. These companies can turn into a multi-partner structure after being established with a single partner, or they can turn into a single-partner structure after being established with multiple partners [1]. When a joint stock company or limited liability company transforms into a single shareholder structure, the person

who becomes the sole shareholder must notify the company's board of directors (managers in limited liability companies) in writing within seven days. The board of directors of the company that receives this notification (managers in limited liability companies) must register the conversion to a single-shareholder structure in the trade registry within seven days. Failure to fulfill these requirements does not invalidate the conversion to a single-shareholder structure. On the other hand, if a loss occurs due to failure to fulfill the notification or registration obligation, the shareholder or the board of directors (managers in a limited liability company) who do not fulfill the obligation will compensate this damage. The restriction imposed on the single-partner structure in joint stock companies and limited liability companies is that the legal personality of these company types are prohibited from acquiring their own shares, with the sole partner being themselves [2].

Another special situation in terms of the number of partners is for limited partnerships whose capital is divided into shares. As a matter of fact, the presence of at least five partners in a limited partnership with divided capital shares is required [3]. A similar exceptional situation occurs in the cooperatives. Because, in order to establish a cooperative, the presence of at least seven people is required.

As a rule, there is no upper limit condition in terms of the number of partners constituting the person element. The exception to this rule occurs in limited liability companies. As a matter of fact, the number of partners in a limited liability company cannot exceed 50. If the number of partners exceeds 50, the legal consequences of this situation are not regulated by the legislator [4]. It is a deficiency that the Law does not specify what the legal consequences will be if the number of partners exceeds 50 in limited liability companies. The legislator deliberately left this gap. They thought that this gap should be filled with doctrine and court decisions. There are no court decisions on this issue. The reason for this is that in commercial life, it is impossible for the number of partners in limited liability companies to exceed 50. Because in commercial life, the number of partners in limited companies does not exceed 2 or 3. In fact, single-partner limited companies are now the most popular limited companies. However, different opinions have been put forward on this issue in the doctrine. The most accepted of these views is that the limited liability company is given a certain period of time by the trade registry office, and if the number of partners is not reduced to 50 at the end of this period, this will constitute a reason for the termination of the limited liability company.

Another company in which an upper limit condition is stipulated in terms of the number of partners is a joint stock company. According to the Capital Markets Law (CML), if the number of share holders in a joint stock company exceeds 500, the joint stock company automatically transforms from a closed type to a public joint stock company, as required by Law). In this case, the type of joint stock company does not change into another type of company. In other words, this transformation is not one of the reasons for the type change in trading companies. This transformation consists of a transformation that causes a change in the legislative sources to which the joint stock company is subject.

In terms of the personality of the partners, the only condition required for the title of partner is to have a real or legal personality [5]. It is not possible for an ordinary partnership without personality to become a partner in another company. As a rule, in order to gain the title of partner, it is necessary and sufficient to have legal personality. In other words, both real persons and legal entities can constitute the person element (partner) in companies.

There are some exceptions to this rule. Examples of these exceptions include the fact that partners in collective companies can only be real persons, and in limited partnerships, the obligation for comandite partners to be real persons can be given as examples of these exceptions. On the other hand, in joint stock and limited liability companies and cooperatives, it is possible for legal entities as well as real persons to become partners [6]. It is even possible for legal entities to become board members in joint stock companies and cooperatives, and managers in limited

liability companies. However, in this case, the title of board member or manager does not occur for the real person representative appointed by legal entities. The title of board member or manager belongs to the legal entity. Legal responsibilities, rights and debts arising from the title of board member or manager apply to the legal entity. However, the real person representative may be subject to criminal liability.

In the face of technological developments and the reality of artificial intelligence, it is discussed whether partners or shareholders can also take part in companies. According to these discussions, artificial intelligence can be a shareholder or partner in companies, and it is also possible to benefit from artificial intelligence in the management mechanisms of companies. Turkish law is excluded from these discussions for now. In my opinion, although it is inevitable to use artificial intelligence in the management of companies, one should keep a distance from artificial intelligence creating the personal element of companies.

In Turkish law, people who are prohibited from engaging in trade are identified in their private laws in a non-systematic manner. Civil servants, military personnel, lawyers and notaries are among those prohibited from engaging in business. For example, civil servants cannot be partners in collective companies or comandite partners in limited partnerships. On the other hand, while it is possible for civil servants to become partners in joint stock and limited liability companies, and comanditer partners in limited partnerships, and even to be founding partners, they can't become board members, managers, etc. in these company types [7]. Being appointed or elected as such is prohibited (Civil Servants Law Art. 28). Civil servants can become partners in cooperatives. On the other hand, civil servants cannot take part in the boards of directors of cooperatives of which they are partners, except for consumption, housing and development cooperatives (Civil Servants Law article 28).

What is meant by the asset element of the company is capital. Assets are needed to achieve the purpose of the companies. The most important item of assets is capital. Therefore, the assets of the companies do not consist only of capital, but the capital of the company has a special importance as the main item of its assets. For this reason, it is seen that special measures are taken to protect capital in the regime that constitutes the company law [8]. For the same reason, the obligation to contribute capital is regulated as a primary debt that is valid in all types of companies [5. – 2].

What can be capital? Article 620 of the Turkish Code of Commerce regulates that labour and goods can be brought as capital. However, no criteria have been determined for the economic values that can be brought as capital [9]. In Article 127 f.1 of the Turkish Code of Commerce, the values that can be brought as capital are listed, and in addition to this list, it is accepted that any asset value that can be evaluated economically and transferred can be brought to trade commercial companies as capital [4. – 43].

Capital can be classified under three headings. These are cash capital, capital in kind and labour capital. By cash capital we mean both money and, arguably receivables. Receivables arising from negotiable instruments should also be evaluated in this context. Capital in kind is any asset that can be evaluated economically and transferred. Physical strength, workforce, technical knowledge, professional experience and commercial reputation also constitute labour capital [10].

Any type of capital can be brought into collective companies and ordinary partnerships. In limited partnerships, while the general partner can bring any kind of capital, it is not possible for the limited partner to bring labour capital. In joint stock companies and limited liability companies, it is possible to bring in capital types other than labour capital. In cooperatives, there must be a clear provision in the articles of association so that capital in kind, in addition to cash capital, can be brought.

However, at this point, other question marks may arise. Can the products created by artificial intelligence be brought as capital? Even if it is possible to bring the products created by artificial intelligence as capital, who will own these products? Can artificial intelligence itself qualify as a

rights holder? Another question mark is about whether artificial intelligence itself can be brought to companies as capital. Undoubtedly, the elimination of these question marks will also affect the shaping of new working areas of corporate law.

There are also restrictions in terms of asset values that can be brought as capital in joint stock companies and limited liability companies. Accordingly, asset values on which a lien, measure or limited real right has been established cannot be brought as capital in kind to joint stock companies and limited liability companies. Another restriction applies to receivables [7. – 79]. Accordingly, it is prohibited to bring undue receivables as capital to joint stock companies and limited liability companies.

In Turkish law, the minimum capital rule for joint stock companies and limited liability companies still remains valid. A mandatory rule stipulates that the minimum capital in joint stock companies is 250,000 Turkish Liras, and in limited liability companies the minimum capital amount is 50,000 Turkish Liras. Although the minimum capital rule is accepted as a necessity for the preservation of capital and the protection of the interests of creditors and investors, the idea that the minimum capital rule is no longer necessary, especially for limited liability companies, gains importance in the academic circles. As a matter of fact, although the minimum capital rule in limited liability companies has been abolished in almost all comparative law systems and the establishment of limited liability companies with symbolic capital such as 1 Euro or 1 Pound has been allowed, a conservative approach has been adopted in Turkish law on this issue, just like in Swiss law. For this reason, the minimum capital rule is still valid in Turkish law in joint stock companies and limited liability companies.

The purpose element in companies reveals the difference between companies, association and foundation. While an association, which is a group of people, and a foundation, which is a group of property, can be established to achieve non-material purposes, the purpose of establishing companies, which are both a group of people and property, can only be economic in character [11].

The purpose of an economic character can occur in two ways. The first of these is to earn and share profits. The second is to obtain benefits through mutual aid and solidarity. In all types of companies except cooperatives (collective companies, limited partnerships, joint stock companies, and limited liability companies), the economic purpose is to earn and share profits. Reducing costs and thus providing benefits through mutual aid and solidarity is valid for the cooperative (Cooperative Law Article 1).

There are some areas of activity that can be carried out by certain types of companies. Banking and insurance activities can be given as examples. As a matter of fact, in Turkish law, a company that wants to engage in banking must be established as a joint stock company. This is a mandatory rule. A company that wants to engage in insurance must be established as either a joint stock company or a cooperative.

At the core of the company relationship, a contract exists. Company contract is different from classical contracts. While the wills are mutual in classical contracts, the wills emerge in the same direction in the company contract. While in classical contracts the aims of the parties conflict, even if they are compatible with each other, in the company contract the aims of the partners are common [12]. Partners share the same goal.

The company agreement is called the articles of association in joint stock companies and in cooperatives, and the company (partnership) agreement in other company types [13]. The company agreement is not subject to the form requirement of validity in ordinary partnerships. On the other hand, in commercial partnerships, in addition to being subject to the condition of validity in terms of form, it is also subject to the condition of validity in terms of content [6. – 22].

In the provisions specific to commercial companies, the validity form conditions to which the company agreement is subject are also regulated. The validity conditions that company contracts are subject to are not only formal. The records that must be included in the company contracts in commercial companies, although not in ordinary partnerships, are specifically shown

in the provisions regarding each commercial companies. Deficiency in these mandatory records leads to the invalidity of the company contract and the failure to establish the commercial companies. For example, it is mandatory to indicate the company managers in the limited liability company contract. If this obligation is not fulfilled, the limited liability company agreement is invalid due to deficiency in content, even if it is made in accordance with the form requirement. This invalidity causes the request for registration of the establishment of the limited liability company to be rejected by the trade registry office.

The contract element has a different appearance in single-partner joint stock companies and limited liability companies. Because technically, for the existence of a contract, there must be at least two parties. In single-partner joint stock companies and limited liability companies, the two-party condition cannot be met. For this reason, it is not possible to mention about a contract in the technical sense in such company types. So, in this case, what is the establishment status document in single-partner joint stock companies and limited liability companies? In this case, the establishment status document can be named as "establishment undertaking". This undertaking is prepared and signed by the single partner.

Is it possible to prepare company contracts with artificial intelligence in the form of smart contracts? The answer to this question is yes. However, in terms of Turkish law, there is no preparatory work for the preparation of company contracts with artificial intelligence. In Turkish law, the only digitalization in the preparation of company contracts consists of preparing the company contracts in the internet database, uploading them to the system, and signing this contract uploaded to the system in the presence of the authorized personnel of the trade registry directorate.

Since there is a common purpose that they come together to achieve, the partners cannot be completely relieved of their obligations arising from the company relationship by merely fulfilling the obligation to contribute capital in order to achieve this purpose. Partners must also make an active effort to achieve this purpose. Therefore, partners should stay away from behaviors and activities that prevent the purpose from being achieved [12. – 7].

We can point to the prohibition of competition valid in companies as a concrete reflection of the element of active effort. The unlimited legal responsibilities of the partners towards third parties due to the debts of the ordinary partnership and the additional payment and side performance obligations that become valid in the limited liability companies can be considered as other concrete reflections of the element of active effort [14]. If we rank companies in terms of the element of active effort, the partnerships in which the element of active effort emerges most clearly are personal companies, in particular ordinary partnerships. The companies in which the element of active effort appears most faintly are capital companies, and according to the rating among capital companies, joint stock company is the type of company in which the element of active effort manifests itself weakest.

Results and its discussion.

The elements of the company concept can be examined under five headings. The elements included in these headings are more or less similar to all comparative law systems. However, especially the developments since the beginning of the new millennium, the need to reconsider the legal relations arising from the Pandemic that affected the whole world after 2019, and the power of artificial intelligence and digitalization in shaping the rules of law, cause the founding elements of the company concept to be subject to a new evaluation.

It was stated that legal entities can also be partners or shareholders in joint stock companies and limited liability companies. At this point a question mark arises. Can economic and legal entities without legal personality gain the title of partner in these companies? For example, ordinary partnerships are partnerships that do not have legal personality and therefore lack of legal capacity. In Turkish law, ordinary partnerships are not allowed to take place as partners or shareholders because they do not have legal personality and lack legal capacity. On the other hand, in the German and Swiss legal systems, which are considered as source legal systems in terms of

Turkish law, the legal capacity of ordinary partnerships is adopted and therefore they are allowed to take part in the company relationship as a partner or shareholder. There is a need to carry out a reform in this direction in terms of Turkish law and to make it possible for ordinary partnerships to gain legal capacity and to take part in companies as partners or shareholders.

It should not be overlooked that artificial intelligence is shaping company law. As a matter of fact, smart contracts prepared by artificial intelligence in the establishment of companies, the use of artificial intelligence and robotic mechanisms in the audit of companies and especially in the audit against fraud or abuse, the use of artificial intelligence in decision-making mechanisms in the management of companies, the acceptance of products and intellectual and industrial property rights created by artificial intelligence as one of the types of capital that can be brought to companies, the characterization of artificial intelligence as labour force, one of the types of capital in companies, emerge as new discussion topics in Turkish law, as well as in comparative law systems in corporate law. The legislator should not remain indifferent to these discussions and should adopt the codification frameworks carried out in the European Union legislation on artificial intelligence to the domestic legal system, as a requirement of the European Union candidate country status.

Developments regarding digitalization in company law cause radical changes in the founding elements of companies. These changes have begun to make their impact felt in terms of Turkish law as well. In the establishment of companies, the contract is prepared by the founders and uploaded to the database of the Ministry of Commerce. It is regulated as an opportunity for companies to hold their general assembly and board of directors' meetings electronically, provided that there is a clear provision in the articles of association. However, digitalization is a much more versatile concept, and the fact that the impact of digitalization in corporate law is limited to these two headings is a handicap for Turkish law.

Conclusion.

In the classical sense, the concept of company has five elements. It is a constitutive condition that all five elements be present within the company relationship. Therefore, even if their effects are different and their applications occur in different ways, not including even one of these elements will result in a company relationship not being established. We see that the classical elements of companies continue to exist in terms of Turkish law. However, the impact of technological developments and artificial intelligence on the company concept and its elements should not be ignored. Possibilities such as establishing companies in a digital environment, preparing contracts by artificial intelligence, giving artificial intelligence a role in decision, consultation and control mechanisms in the management of companies are developments that should be experienced in the future in terms of Turkish law, as in other modern legal systems.

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ТҮРІК ЗАҢНАМАСЫНА СӘЙКЕС КОМПАНИЯ ТҰЖЫРЫМДАМАСЫНЫҢ ҚҰРЫЛТАЙ ЭЛЕМЕНТТЕРІ: ЕРЕЖЕЛЕР МЕН ЕРЕКШЕЛІКТЕР

Аңдатпа.

Түрік заңнамасына сәйкес компаниялар үшін жасалған айырмашылықтардың бірі және ең қолайлысы – коммерциялық компаниялар мен қарапайым серіктестіктер арасындағы айырмашылық. Осы айырмашылыққа сәйкес, коммерциялық компаниялардың заңды тұлғасы болғанымен, қарапайым серіктестіктер заңды тұлғасыз корпоративтік қатынастардың жалпы аясын құрайды. Компания ұғымы үшін жарамды элементтер – бұл барлық компаниялар үшін, олардың түріне қарамастан, бар және құрылтай болып табылатын элементтер. Осы элементтердің егжей-тегжейлеріндегі айырмашылықтар және олардың әртүрлі көріністері ережелер мен ерекшеліктерді тудырады. Компаниялардың барлық түрлері үшін міндетті элементтер тұлға, актив, ортақ мақсат, келісімшарт және белсенді күш ретінде тізімделуі мүмкін. Бұл элементтер барлық компанияларда бар, бірақ олардың әсері әртүрлі жолдармен сезіледі. Әйтпесе, компанияның қарым-қатынасын дәлелді себептермен тоқтату мүмкіндігі болуы мүмкін. Компания тұжырымдамасының элементтері цифрландыру және заңдағы технологиялық әзірлемелер аясында қайта бағалануы керек. Осы себепті компанияларды құруда, басқаруда және қадағалауда жасанды интеллект технологиясына бейімделуге күш салу керек.

Негізгі сөздер: түрік компаниялары туралы заң, компания тұжырымдамасының элементтері, қоғамға деген жақындық, түрік Сауда Кодексі, Түрік Міндеттемелер Кодексі.

СОСТАВЛЯЮЩИЕ ЭЛЕМЕНТЫ КОНЦЕПЦИИ КОМПАНИИ В СООТВЕТСТВИИ С ЗАКОНОДАТЕЛЬСТВОМ ТУРЦИИ: ПРАВИЛА И ИСКЛЮЧЕНИЯ

Аннотация.

Одним из различий, проводимых для компаний в соответствии с турецким законодательством, и наиболее предпочтительным, является различие, проводимое между коммерческими компаниями и обычными товариществами. Согласно этому различию, в то время как коммерческие компании обладают правосубъектностью, обычные товарищества представляют собой общую сферу корпоративных отношений без правосубъектности. Элементы, которые применимы к концепции компании - это то, что существуют для всех компаний, независимо от их типа, и являются определяющими. Различия в деталях этих элементов и различный внешний вид, который они представляют, создают правила и исключения. Обязательными элементами для компаний всех типов могут быть такие, как личность, актив, общая цель, контракт и активные усилия. Эти элементы присутствуют во всех компаниях, хотя их влияние ощущается по-разному. В противном случае может возникнуть вероятность прекращения отношений с компанией по уважительной причине. Элементы концепции компании должны быть пересмотрены в рамках цифровизации и технологических изменений в законодательстве. По этой причине следует приложить усилия для адаптации технологии искусственного интеллекта при создании компаний, управлении ими и надзоре за ними.

Ключевые слова: Турецкое корпоративное право, элементы концепции компании, привязанность к обществу, Торговый кодекс Турции, Кодекс обязательств Турции.

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