**T.R.**

**ISTANBUL MEDENIYET UNIVERSITY**

**INSTITUTE OF GRADUTE EDUCATION**

**DISCIPLINE OF PRIVATE LAW**

# CIVIL LIABILITIES OF BANKS' BOARD MEMBERS

**MASTER'S THESIS**

**ONUR BERKAY VURAL**

**APRIL 2021**

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THESIS SUPERVISOR

PROF. DR. ÜMİT GEZDER

APRIL 2021

**BİLDİRİM**

**DECLARATION**

Hazırladığım tezin tamamen kendi çalışmam olduğunu, akademik ve etik kuralları gözeterek çalıştığımı ve her alıntıya kaynak gösterdiğimi taahhüt ederim.

I hereby declare that this thesis prepared by me is completely my work, that I have prepared it in pursuance of the academic rules and ethical conduct and that all the quotations cited and referenced.

Onur Berkay VURAL

Danışmanlığını yaptığım işbu tezin tamamen öğrencinin çalışması olduğunu, akademik ve etik kuralları gözeterek çalıştığını taahhüt ederim.

I hereby declare that this thesis, for which I am the supervisor, is completely the work of my student, that he worked in pursuance of the academic rules and ethical conduct.

Prof. Dr. Ümit GEZDER

**İMZA SAYFASI**

**APPORVAL PAGE**

Onur Berkay Vural tarafından hazırlanan "Civil Liabilities of Banks' Board Members" başlıklı bu yüksek lisans, Özel Hukuk Anabilim Dalında hazırlanmış ve jürimiz tarafından kabul edilmiştir.

This master's thesis prepared by Onur Berkay Vural with the title "Civil Liabilities of Banks' Board Members", has been prepared at the Discipline of Private Law and accepted by our jury.

| **JÜRİ ÜYELERİ – JURY MEMBERS** | **İMZA - SIGNATURE** |
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## PREFACE

Due to banks' significant position in financial markets, legislators of our country have given particular importance to banks that are operating in our country to execute their activities in an uninterrupted and reliable manner. Therefore, provisions concerning liability of those people who are in charge of management of the funds that collected by banks are regulated more extensively in comparison to those persons who are in charge of ordinary joint-stock companies. In this sense, in this study, provisions of our country's legislations -the Turkish Commercial Code numbered 6102, the Turkish Banking Code numbered 5411, and Capital Markets Code numbered 6362 in particular- concerning civil liabilities of banks' board members have been observed and discussed.

I would like to express my most sincere gratitude to my esteemed thesis advisor Prof. Dr. Ümit GEZDER, who guided me during the course of my master's study. I would also like to take this occasion to thank Prof. Dr. İbrahim Subaşı and Prof. Dr. Mehmet Deniz Yener, as they have honored me with their presence in the thesis defense jury. Moreover, I owe my colleagues, particularly Mr. Feyzullah Orman, who personally encouraged me to pursue academic studies, a great debt of gratitude. Finally, to my family and to my lovely spouse whose heartwarming support I have always felt over the course of preparation of this study, I would like to convey my most heartfelt thanks and gratefulness.

Onur Berkay Vural

İstanbul, 2021.

# ÖZET

## BANKA YÖNETİM KURULU ÜYELERİNİN HUKUKİ SORUMLULUĞU

Vural, Onur Berkay

Yüksek Lisans Tezi, Özel Hukuk Anabilim Dalı

Danışman: Prof. Dr. Ümit Gezder

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Bankalar, finansal piyasalarda sahip oldukları konum nedeniyle ülke ekonomileri üzerinde önemli derecede etki sahibi olan kurumlardır. Bu nedenledir ki; kanun koyucumuz, ülkemizde faaliyet gösteren bankaların faaliyetlerini kesintisiz ve güvenilir bir şekilde yürütmelerine büyük önem vermiş, böylece bankaların topladıkları fonların yönetiminden sorumlu olan kişilerin görev ve sorumluluklarını ayrıntılı bir biçimde düzenlemiştir. Öyle ki bir bankanın en üst seviyede yönetimi ve temsili ile görevli organ olan yönetim kurulunun üyeleri, bankalar ve bankacılık faaliyetleri bakımından özel kanun hükmündeki Bankacılık Kanunu'nda belirlenen sorumluluk hükümleri ile bağlıdırlar. Bunun yanında, ülkemizde kurulacak olan bankaların anonim şirket olarak kurulması gerektiğinden Türk Ticaret Kanunu'nda anonim şirket yönetim kurulu üyelerinin sorumluluklarına ilişkin hükümler, banka yönetim kurulu üyeleri açısından da uygulama alanı bulmaktadır. Ayrıca bankalar yürüttükleri sermaye piyasası faaliyetlerinden dolayı bu konudaki Sermaye Piyasası Kanunu hükümlerine tabi bulunmaktadır. Bu nedenle Sermaye Piyasası Kanunu'ndaki hukuki sorumluluğa ilişkin hükümler banka yönetim kurulu üyeleri için de önem arz etmektedir. Bu noktada "Banka Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu" isimli çalışma ile amacımız, yukarıda zikredilen kanunlarda konuyla alakalı hükümleri konsolide etmek ve konumuzla alakalı doktrindeki tartışmalara ilişkin hukuki yorumları ortaya koymaktır.

**Anahtar Kelimeler:** Hukuki Sorumluluk, Banka, Anonim Şirket, Yönetim Kurulu, Sorumluluk Davası.

## ABSTRACT

## CIVIL LIABILITIES OF BANKS' BOARD MEMBERS

Vural, Onur Berkay

Master's Thesis, Discipline of Private Law

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Due to their position in financial markets, banks have significant importance in terms of effecting a country's overall economic conditions. Therefore, legislators of our country have given particular importance to banks that are operating in our country to execute their activities in an uninterrupted and reliable manner, hence regulated duties and responsibilities of those persons who are in charge of the collected funds of banks. In fact, the members of the board of directors, which is the body in charge of the management and representation of a bank at the highest level, are bound by the provisions concerning liability that have been indicated in the Turkish Banking Code, which is the special code in terms of banks and banking activities. Additionally, provisions concerning board members' liabilities in the Turkish Commercial Code shall still be valid for the banks' board members since it is compulsory for banks to be established in Turkey to be incorporated as joint-stock companies. Moreover, due to their capital market activities, banks are subject to the provisions of the Capital Markets Code on the subject matter. Therefore, provisions concerning liability that are indicated in the Capital Markets Code shall be important for banks' board members. At this point, as comprehensive as it is the subject, our goal with the study named "Civil Liabilities of Banks' Board Members", is to consolidate provisions which are set forth in above codes all of which concern civil liabilities of banks' board members, and display the legal interpretations in the doctrine on certain disputed matters.



**Keywords:** Civil Liability, Bank, Joint-Stock Company, Board of Directors, Liability Claim.

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**CLAIMS & TERMINATION OF LIABILITY**

## ABBREVATIONS

| | |
|---|---|
| AoA | : Articles of Association |
| BAT | : Banks Association of Turkey |
| BoD | : Board of Directors |
| Board Member | : Board of Directors Member |
| Board Resolution | : Board of Directors Resolution |
| BRSA | : Banking Regulation and Supervision Agency |
| BRSB | : Banking Regulation and Supervision Board |
| CBE | : Code of Bankruptcy and Enforcement numbered 2004 |
| CD | : Civil Department |
| CEO | : Chief Executive Officer |
| CMB | : Capital Markets Board |
| CMC | : Capital Markets Code numbered 6362 |
| CPCI | : Communique on Principals and Procedures Concerning Implementation of the $376^{th}$ Article of the TCC |
| CPCPR | : Code on the Procedure for the Collection of Public Receivables numbered 6183 |
| CSSGHI | : Code on Social Security and General Health Insurance numbered 5510 |
| D | : Decision Number |
| Fund | : Savings Deposit Insurance Fund |
| fTCC | : Former Turkish Commercial Code numbered 6762 |

| | |
|---|---|
| M | : Merits Number |
| GA | : General Assembly |
| HQ | : Headquarter |
| TBC | : Turkish Banking Code numbered 5411 |
| TCC | : Turkish Commercial Code numbered 6102 |
| TPC | : Tax Procedure Code numbered 213 |
| TR | : Turkish Republic |
| PDP | : Public Disclosure Platform |
| PBAT | : Participation Banks Association of Turkey |
| RABKD | : Regulation on the Procedures and Principles for the Accounting Applications of the Banks and the Keeping of Documents |
| RARB | : Regulation on the Procedures and Principles for the Preparation and Publishing of Annual Report of the Banks |
| RBLT | : Regulation on Banks' Loan Transactions |
| RBSMA | : Regulation on Procedures and Principles for Banks' Senior Management Appointments' Notification, Oath Taking and Property Declaration and Keeping of Decision Book |
| RCGPB | : Regulation on Corporate Governance Principles of Banks |
| RISB | : Regulation on Internal Systems and Process of Internal Capital Adequacy Assessment of Banks |

## INTRODUCTION

### 1. Introduction to the Subject

Banks are institutions which are established based on special regulations and they are under the obligation of protecting the funds that they collect against possible forgeries. Thus, banks are considered as institutes of trust and they are in the position of trustee in terms of their relations with their clients.[1] Additionally, due to their position in financial markets, banks have significant importance in terms of effecting a country's overall economic conditions. Therefore, well-structured codes and regulations concerning banking industry are vital in the sense of preserving the trust of the public and the markets in banks. In order to preserve such relationship of trust and to protect overall financial markets, banks are subordinate to various regulations, and under the constant supervision of related authorities.

As of 24.12.2020, within the Turkish Banking Industry, there are 32 deposit banks, 14 development and investment banks and lastly, 6 participation banks.[2] The total size of assets of the Turkish Banking Industry have been 6,108,595 million Turkish Liras as of February 2021 period.[3] As the statistics show, the banking industry constitutes a significant part in the financial sector in Turkey. Therefore, in order to protect the reliability of the market along with interest of shareholders and stakeholders, our banking regulations encumber those who are in control of the collected funds of banks with many different duties and obligations. Indeed, in cases where such duties and obligations are not fulfilled, such board members' liability may arise. Since it is the BoD of a bank which is the body to manage and represent the bank at the highest level, regulations concerning liabilities of the banks' board members bear a crucial importance. With all these reasons in mind, in the study, provisions concerning civil liabilities of banks' board members shall be evaluated.

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[1] Ahmet Battal, *Güven Kurumu Nitelendirmesi Işığında Bankaların Hukuki Sorumluluğu*. (Ankara: Bankacılık Enstitüsü Yayınları, 2001), p. 106.

[2] Bankacılık Düzenleme ve Denetleme Kurumu Web Sitesi, "Kuruluşlar". see: https://www.bddk.org.tr/Institutions-Category/Banks/22 (Access Date: 24.12.2020).

[3] Bankacılık Düzenleme ve Denetleme Kurumu Haber Bülteni, "Türk Bankacılık Sektörünün Konsolide Olmayan Ana Göstergeleri", p. 1. see: https://www.bddk.org.tr/BultenAylik/tr/Home/HaberBulteni (Access Date: 07.04.2021).

## 2. Limitation of the Subject and Evaluation Methods

Board of directors of banks are under certain liabilities set by the Turkish Banking Code numbered 5411[4] (TBC), which is the special code and the current code in force for banking operations. Still, provisions concerning board members' liabilities in the Turkish Commercial Code numbered 6102[5] (TCC) shall be valid for banks' board members, due to nature of banks that are established in Turkey, as joint-stock companies.[6] Additionally, Capital Markets Code numbered 6362[7] (CMC) and regulations enacted based on the CMC contain certain provisions concerning publicly held companies, thus board members of publicly held banks shall be subject to such provisions. As comprehensive as it is the subject, our goal with the study is to consolidate provisions which have been set forth in above codes and regulations in terms of civil liabilities of banks' board members and display the legal interpretations in the doctrine on certain legal problems. However, criminal liabilities of banks' board members shall be outside the scope of our study.

Our study is composed of three sections. In the first one of these three sections, management structure of banks shall be evaluated to comprehend main duties and responsibilities of bodies of banks and distribution of power among them. The second section shall consist of basis of liabilities for board members of banks, meaning that different provisions of regulations shall be evaluated all of which encumber certain duties and obligations on relevant persons. In the last section, right to file a liability claim and termination of liability shall be evaluated.

[4] Official Gazette 1.11.2005, 25983.

[5] Official Gazette 14.2.2011, 27846.

[6] According to the 7th Article of the TBC, any bank to be established in Turkey should be established as a joint stock company. Besides the banks that are established in Turkey, banks established abroad may operate in Turkey by opening branches. With regards to such banks, it is stated that banks established abroad and operating in Turkey through branches must form aboard of managers which shall have the authority and responsibilities of a board of directors. For the purposes of the implementation of the TBC, board of managers shall be equivalent to board of directors.

[7] Official Gazette 30.12.2012, 28513.

## SECTION I
## ORGANIZATION STRUCTURE OF BANKS

In line with the 2nd Article of the TBC, banks that are established in Turkey and banks that are established in foreign countries yet operating in Turkey via their branches shall be subject to the TBC. Additionally, according to the Article, banks that have been established as per their special laws shall be subject to the TBC, provided that the provisions of their special laws are preserved. The 2nd Article of the TBC shows the TBC is the special code for the institutions above. Meaning that, in terms of these institutions, provisions of the TBC shall be applied primarily. The 2nd Article of the TBC also states that in cases where any provisions have not been set by the TBC, general provisions shall be applied. However, in the TBC, it is not clearly specified that which code's general provisions shall be applied. Considering commercial qualification of banks' operations along with the 7th Article of the TBC which indicates that banks to be established in Turkey shall be founded as joint-stock companies, it is clear that "general provisions" of the TCC shall be implemented.[8]

As joint-stock companies, which bear legal personality, banks must have bodies to be entitled rights and incur debts. These bodies shall manage the bank, make decisions on behalf of the bank, and represent the bank against third parties. In this regard, in the first section of our study, we shall present a general outlook on banks' bodies namely as the general assembly and the board of directors, within the scope of provisions set forth both in the TCC and the TBC.

### 1. General Assembly

As the decision-making body of a joint-stock company, general assembly is defined as a council which consist of a joint-stock company's shareholders or their representatives who convene upon a duly served summons and confer issues determined in line with an agenda, receive information and exercise certain rights regarding business of the company.[9] In terms of general assembly's authorities, in the 408th Article of the TCC, non-delegable and indispensable authorities of the general

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[8] Neşe Caymaz, *Banka Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu*. 2. Bası (İstanbul: Vedat, 2018), p. 4.

[9] Hasan Pulaşlı, *Şirketler Hukuku Genel Esaslar*. 6. Baskı (Ankara: Adalet, 2020), p. 330.

assembly have been listed, such as making amendments on the AoA, election of the members of the BoD and the auditors, determination of their remuneration, deciding their release and dismissing them of their duty, etc.

General assembly convenes in two ways, namely as “ordinary general assembly”, and “extraordinary general assembly”. This separation is solely made based upon the time when general assembly meetings are held. The agenda of general assembly meetings would not differ in terms of the meeting is being ordinary or extraordinary. Before the convention of general assembly, an agenda is formed from items to be discussed at the meeting. In principle, matters which are not included in the agenda cannot be discussed at the meeting which is called “principle of adherence to the agenda”. Yet, under exceptional circumstances, even if there is not a related item on the agenda, certain matters could be discussed at the meeting.[10]

In terms of general assembly of banks, the TBC does not contain any specific provisions on topics such as structure of general assembly, its decision-making processes or annulment of its decisions. Thus, previously stated provisions of the TCC shall be valid for general assembly of banks as well. However, the TBC contains provisions on regulating the processes of certain actions to be taken by general assemblies of banks. For instance, in line with the 16$^{th}$ Article of the TBC, each bank is under the obligation of obtaining the approval of the BRSA for amendments to be made on the bank’s AoA, by the general assembly of shareholders.

### 2. Board of Directors

Joint-stock companies need a separate body in order to be managed and represented against third parties. Different from general assembly, which is a temporarily working body, the body to represent the company and manage the company’s business must be a consistently working body and must consist of component persons. Hence, in line with Article 365 of the TCC, BoD has been assigned the duties of representation and management of a joint-stock company.

[10] For exceptions to “Principle of Adherence to the Agenda” see also Articles 364, 420/1, 438 and 559 of the TCC.

In consideration of banks to be established in Turkey shall be established as joint-stock companies, BoD of banks shall be subject to the provisions in the TCC, unless there is a specific provision on related matter in the TBC. In fact, the TBC has several provisions concerning BoD of banks; such as qualifications and minimum number of board members, obligation of notification of the members to the BRSA, etc.. Thus, in cases where both the TCC and the TBC contain provisions on the same matter, in terms of banks, the provisions of the TBC shall be implemented.

### 2.1. Authorizations of Board of Directors

The authorities of the BoD arise from the law and the AoA of the company. Indeed, certain duties and responsibilities of BoD are stipulated in the TCC. Beside the ones stipulated in the TCC or other relevant codes, each company may assign duties and responsibilities on its BoD by putting provisions in the AoA. In any case, such provisions which assign one or more non-delegable and indispensable rights of general assembly on board of directors shall be invalid.

In the 375$^{th}$ Article of the TCC, non-delegable and indispensable duties and authorities of BoD has been indicated. As can be seen, the TCC has made a strict separation concerning board of directors' and general assembly's authorities by defining exclusive authorities for both bodies. Thus, with regards to the relationship between BoD and general assembly, it is considered that the TCC adopts "equality principle" and neglects "absolute control theory" which adopts supremacy of general assembly over BoD.[11] Nevertheless, non-delegable and indispensable authorities of BoD are listed in the 375$^{th}$ Article of the TCC as;

- Top-level management of the company and giving instructions in this regard.
- Determination of the company's management organization.
- Establishment of the necessary system for financial planning to the extent required, and for accounting and finance audit.
- Appointment and dismissal of managers and persons performing the same function and authorized signatories.

[11] Pulaşlı, p. 394.

- High-level supervision of whether the persons in charge of management act in accordance with the law, AoA, internal regulations and written instructions of the BoD.
- Keeping the share book, resolution book of the board and the general assembly meeting and discussion register, preparation of the annual report and corporate governance disclosure and submission thereof to the general assembly, organization of general assembly meetings, and enforcement of general assembly resolutions.
- Notifying the court regarding the company's state of overindebtedness.[12]

In terms of banks' BoD, above listed authorities shall be valid just as they are valid for all joint stock companies' BoD. However, certain provisions of the TBC assign specific duties and responsibilities for BoD of banks, such as establishing internal control, risk management and internal audit systems; securing financial reporting systems; specifying the authorities and responsibilities within the bank; keeping the decision book; establishing and monitoring credit policies and fulfilling requests of supervision authority. [13] (Articles 23/3, 24, 30, 31, 32, 41, 51, 68, 69 of the TBC)

### 2.2. Election and Term of Duty of Board Members

As stated in the 408th Article of the TCC, electing members of the BoD is one of non-delegable and indispensable authorities of the general assembly. Ordinary quorums indicated in the 418th Article of the TCC shall be sufficient for election of board members by the general assembly. Yet, for board members' election, such quorum may be aggravated by a provision in the AoA, yet, cannot be commuted.[14] Additionally, as a joint-stock company is being founded, board members of the company are stated in the company's AoA. (Article 339/3 of the TCC) It should be noted that although election of board members is one of the exclusive authorities of general assembly, certain exceptions have been indicated in the TCC and in the CMC, such as appointment of board members by a public legal person (Article 334 of the

[12] Translation of the Article has been retrieved from PWC Turkey, "New Turkish Commercial Code - A blueprint for the future", p. 102. see: https://www.pwc.com.tr/en/publications/ttk-assets/pages/ttk-a_blueprint_for_the_future.pdf (Access Date: 27.09.2020).

[13] Kürşat Göktürk, *Banka Yönetici ve Ortaklarının Hukuki Sorumluluğu*. (Ankara: Adalet, 2013), p. 75.

[14] **İsmail Kırca**, Feyzan Hayal Şehirali Çelik, and Çağlar Manavgat. *Anonim Şirketler Hukuku*. Cilt I. (Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2013), p. 415.

TCC), election of board members by board of directors (Article 363 of the TCC) and appointment of board members by Capital Markets Agency (Article 128 of the CMC).

With regards to election of board members, in line with the 362nd Article of the TCC, in a single term, board members can be elected for three years, maximum. Yet, for a board member, it is possible to be reelected for consecutive terms, if there is not a provision against such implementation in the companies' AoA. Therefore, a board member could serve more than three years if he/she is reelected. In terms of banks' board members' term of duty, above provisions are implemented as are.

In terms of election of banks' board members, general provisions of the TCC shall be valid. However, differently than the general provisions above, banks are under the obligation of informing the BRSA on elected/appointed board members, within seven working days, along with the documents showing that the board member-elect/appointed bear the necessary qualifications. (Article 23 of the TBC)

#### 2.2.1. Obligation of Taking an Oath and Submitting Statement of Wealth

According to the 27th Article of the TBC, in order for banks' board members to inaugurate their duty as board members, they must take an oath before the local commercial court. In addition to the board members' obligation of oath-taking, general managers and deputy general managers are also under the same obligation. It should be noted that if a person who has already took an oath is elected/appointed to a different position within the same bank which is subject to oath taking, such person shall not be required to take an oath. (Article 9/4 of the RBSMA)

In line with the same Article of the TBC, it is compulsory for board members of banks to give a statement of wealth within the first month starting with the date of inauguration and within the first month of starting with the date of leaving the duty. Additionally, they are under obligation to renew or make additional statement of wealth in line with "*Code on Statement of Wealth, Fighting Against Bribery Corruption numbered 3628*"[15] and "*Regulation on Statement of Wealth*"[16]. Obligation of giving a statement of wealth is also valid for general managers and assistant general

[15] Official Gazette 04.05.1990, 20508.
[16] Official Gazette 15.11.1990, 20696.

managers of banks, board of managers' members and the managers with signing authority (such as department managers within the general management and/or managers of a bank's branches, etc.)

### 2.3. Number of Board Members

As a novelty of the TCC, joint-stock companies are allowed to constitute their BoD only with just one member. However, in terms of banks, according to the 23rd Article of the TBC, banks' BoD cannot have less than five board members, including the general manager. With the Article, minimum number of board members required for banks are increased as oppose to ordinary joint-stock companies, since management and representation of a bank necessitates more board members.[17]

Since no maximum number of board members have been set forth in the TCC, it is possible for joint-stock companies to determine as many board members as they deem necessary in their AoA. However, it should be noted that it is compulsory for joint-stock companies to determine the number of their board members in the AoA. (Article 339/2-g of the TCC) In practice, instead of indicating an exact number of board members, most joint-stock companies put a provision which indicates a maximum and minimum number of board members such as "*number of board members are determined by general assembly between 8 to 13 members*", in their AoA and leave the discretion to determine exact number of board members to general assembly.[18]

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[17] Necla Akdağ Güney, *Anonim Şirket Yönetim Kurulu*. Genişletilip Güncellenmiş 2. Baskı (İstanbul: Vedat, 2016), p. 27.

[18] With regards to such practice, Akdağ Güney argues that unlike legislations and implementation of German and Swiss law, the language of Article 339/2-g, is not written in a way to openly allow such implementation. She argues that when Article 339 evaluated within the scope of "imperative provisions principle" stipulated in Article 340, determining a range, instead of an exact number would not be a deviation in the AoA which is openly allowed in the TCC. Thus, according to Akdağ Güney, joint-stock companies have to determine an exact number of board members and make amendments on their AoA, if such number is desired to be amended. Akdağ Güney, p. 26. On the other hand, according to Reisoğlu, Alıcı and Pulaşlı, it is valid for joint-stock companies to determine maximum and minimum number of board members in their AoA and leave it to the discretion of general assembly to determine exact number of board members within such range. In their argument, which we agree, both formal and substantive interpretation of Article 339/2-g which states that "*The following shall be written in the AoA:* (…) *g)* ***numbers*** *of board member;* (…)." allows joint-stock companies to determine a scale of numbers. Reisoğlu, p.608; Alıcı, p. 354; Pulaşlı, p.392. Thus, it should be agreed that instead of indicating an exact number of board members, a provision which indicates a maximum and minimum number of board members such as "number of board members are determined by general assembly between 8 to 13 members" would be a valid provision in the AoA.

### 2.4. Qualifications of Banks' Board Members

With regards to qualifications of banks' board members, firstly we must indicate the general provisions of the TCC on board members of joint-stock companies, since banks' board members must comply with these qualifications. Article 359/3 of the TCC states that "*The members of the BoD and the real persons to be registered on behalf of the legal person must be fully competent.*" Additionally, Article 359/4 of the TCC indicates that reasons that terminate membership shall prevent election. Since, in line with Article 363/2, going bankrupt or under interdiction, or losing the qualifications required to be a member stated the in law or in the AoA, automatically terminates the person's membership, having gone bankrupt or under interdiction, or not having the qualifications required to be a member stated the in law or in the AoA shall prevent such person to become a board member at a joint-stock company. Additionally, joint-stock companies can determine specific qualifications for their board members by putting provisions in their AoA. (Having at least bachelor's degree, being over or under certain age, expertise on certain subject, etc.)

In terms of banks' board members, since undertaking the responsibility of representing and managing a bank necessitates a special type of competence, in addition to the above requirements, special qualifications are required for banks' board members by Article 23 of the TBC. In line with the Article, firstly, board members of banks must have the qualifications stipulated in the sub-articles a, b, c, and d of Article 8/1 of the TBC. Secondly, the qualifications indicated in the TBC, in order to be appointed as a general manager[19], shall be required for the majority of the board members of a bank, and the same qualifications shall be required for each managing board member.

As indicated in the above paragraph, becoming a member of the body which represents and manages a bank necessitates a special type of competence. Although stricter qualifications are required for banks' board members by the TBC; in our opinion, these qualifications do not ensure for each board member to have the required competence for the job, which is the board membership of a bank. To further explain,

[19] For required qualifications, which are listed in Article 25 of the TBC, to be appointed as a general manager, see also "Section I, 3.2."

qualifications indicated in the sub-articles a, b, c, and d of Article 8/1 of the TBC, basically require a person to have a clear civil and criminal background, in terms of banking. Yet, having a clear civil and criminal background, would not mean for a person to have enough experience and competency to fulfill his/her duties and obligations as a bank's board member. On the other hand, qualifications concerning educational background and professional experience that are sought in banks' general managers are required only for the majority of a bank's board members, as well as each managing board member. Therefore, it is possible for those persons who have a clear civil and criminal background in terms of banking, yet, lack the educational and professional experience, to become a bank's board member. In order to prevent the risk of such incompetent persons to become a board member at banks, we believe that at least a certain level of education and/or professional experience must be sought for each board member whether they are managing member or not.

In addition to the above stated issues, despite joint-stock companies are openly allowed to elect legal person board members to their BoD (Article 359 of the TCC), there is an implementation among banks as electing only real person board members and refraining from electing legal person board members. This implementation arises from the instructions of the BRSB in two letters[20] (date 25/09/2012, number 19304 and 19305), addressed to the PBAT and the BAT, as transitioning[21] from the fTCC to the TCC. With the letters, the BRSB instructed the joint-stock companies which are under its supervision to "*maintain the current implementation which is forming board of directors only from real persons*". Consequently, although the instructions of the BRSB, are criticized[22] in terms of the authority of the BRSB and the content of the instructions, in practice banks are abstaining to have legal persons board members due to the instructions of the BRSB.

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[20] Relevant parts of these letters are included in Mehmet Çelebi Can, "Banka Yönetim Kurulu Üyesi Olarak Tüzel Kişi." *Gazi Üniversitesi Hukuk Fakültesi Dergisi* XX, no. 1 (2016), pp. 50-51.

[21] With regards to the joint-stock companies who had legal person representatives at their BoD in line with the fTCC, in the Code on the TCC's Enforcement and Manner of Application, numbered 6103 (Official Gazette 14.02.2011, 27846), it has been indicated that "*The natural person who has been elected as the representative of the legal person must resign within 3 months as of the TCC enter into effect, and the legal person or someone else must be elected instead.*"

[22] For criticizations directed to the BRSB's instructions and problems due to implementation of these instructions see also. Can, *Banka Yönetim Kurulu Üyesi Olarak Tüzel Kişi*, pp. 51-58; in the same direction, Caymaz, pp. 19, 20; averse, Soner Altaş, "TTK Açısından Banka Yönetim Kurulunun Devredilemez Görev ve Yetkileri İle Yönetim ve Temsil Yetkilerinin Devri." *Bankacılar Dergisi* XXVIII, no. 102 (2017), p. 136.

## 2.5. Termination of Title of Board Member

Termination of a board member's membership could be categorized under three headings namely as "automatically termination", "resignation", "dismissal of the board member". Since there are not any specific provisions in the TBC in terms of termination of title of board members, provisions of the TCC shall be implemented for board members of banks as well.

### 2.5.1. Automatically Termination

In line with Article 363/2 of the TCC, in cases where a board member goes bankrupt or under interdiction his/her membership at the board shall be terminated without any further proceedings such as a resolution of general assembly or etc. Besides, as a novelty of the TCC, if a board member loses any of required qualifications which are stipulated in the company's AoA, then his/her membership would be terminated automatically. Additionally, if any "legal conditions" are lost by the board member, the board member's membership would be terminated. Apart from the ones indicated in the TCC, certain "legal conditions" have been stipulated in the TBC for banks' board members. (Article 8/1-a, b, c, d) Hence, in case of an event which causes a board member not to fulfill one of these requirements, his/her membership at the bank's BoD would be terminated.[23] Additionally, if a board member's term of duty expires his/her membership is terminated automatically.[24]

### 2.5.2. Resignation

Even though there are discussions[25] on whether the relationship between the BoD and the joint-stock company is based on a contract of employment or is a mandate contract or is a "sui generis contractus" (distinctive form of contract), it is agreed that this relationship could be ended by resignation of the board member.[26] In terms of its legal characteristics, resignation is a unilateral declaration of intention which must reach its addressee to bear legal consequences. Board members' resignation should be

[23] Göktürk, *Banka*, p. 70

[24] Akdağ Güney, p. 58; **Kırca**, Şehirali Çelik & Manavgat, p. 470.

[25] For discussions on the matter see, İbrahim Kaplan, "6102 Sayılı YTTK Hükümlerine Göre Anonim Şirket Yönetim Kurulu Üyeleri ve Diğer Üst Yöneticilerin, Şirkete, Ortaklara ve Şirket Alacaklılarına Karşı Hukuki Sorumluluğu." *Ankara Üniversitesi Hukuk Fakültesi Dergisi* IV, no. 65 (2016), p. 3503.

[26] **Kırca**, Şehirali Çelik & Manavgat, p. 464.

addressed either to the BoD or to the chairman of the BoD.[27] Even though there is not a requirement as to form resignation declaration, resignation ought to be in written form in terms of provableness. Since resignation is a disruptive formative right, provisions and conclusions of the resignation are come to fruition as the declaration of resignation have reached to the addressee. However, in order for the resignation bear legal consequences for bona fide third parties, the resignation must be registered and announced.[28] It should also be considered that the board member who resigns from his duty ill-timely, could be demanded compensation by the joint-stock company.[29]

### 2.5.3. Dismissal of the Board Member

Dismissal of board members is one of the exclusive authorities of the general assembly, which cannot be restricted by the AoA. Since, board membership is a duty which is based on trust, it is accepted that in cases where such trust is loss or decreased or when dismissal deemed required, such board member could be dismissed by the general assembly.[30] In line with Article 364/1 of the TCC, in cases where there is a related item in the agenda of the general assembly meeting, if not, in cases where there is good cause, board members (including those who have been appointed via AoA) could be dismissed by general assembly at any time.[31] Although there are not any provisions in the TCC describing the content of "*good cause*", few examples have been indicated for "*good cause*" in the TCC's preamble, such as malpractice, insufficiency, not being committed with the company, difficulty in performing due to membership in many different companies, lack of harmony, fraud of power.[32] Yet, as deciding what could be deemed as good cause or not, characteristics of each event should be taken into consideration. Mainly, it could be deemed that there is "*good*

[27] Akdağ Güney, p. 59.
[28] Pulaşlı, p. 388.
[29] **Kırca**, Şehirali Çelik & Manavgat, p. 465.
[30] Akdağ Güney, p. 61.
[31] Pulaşlı, pp. 389, 390.
[32] Levent Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 109. see: http://www.ticaretkanunu.net/wp-content/uploads/2010/04/Turk-Ticaret-Kanunu-Madde-Gerekceleri.pdf (Access Date: 12.11.2020); Özge Karaege, "Anonim Şirketlerde Genel Kurulun Yönetim Kurulu Üyelerini Görevden Alma (Azil) Yetkisi (TTK 364)." *Ankara Barosu Dergisi*, 2014, p. 85.

*cause*", if it is not possible to expect general assembly to maintain current relationship with the board member.[33]

Lastly, according to Article 364/2 of the TCC, the board member who have been dismissed could demand compensation from the company. It is agreed that right to demand compensation of the dismissed board member, would put into use in cases where the dismissal is unjust.[34]

### 3. Managers within Banks' Board of Directors

In the 3rd Article of the TBC, "Managers" of a bank has been described as; "*Banks' board of directors, audit committee and credit committee chairmen and members as well as general managers, assistant general managers and officials that have a signing authority on behalf of the bank, including regional managers, branch managers and the managers of the units within the general management central organization such as departments, sections, groups, etc.*"[35] One of the most significant provisions of the TBC in terms of liability is the 110th Article which regulates personal bankruptcy of banks' managers. As defining banks' managers, the definition in the 3rd Article is used thus, banks' board members, audit committee members, credit committee members, general manager along with above-mentioned signing authority holders shall be subject to personal bankruptcy.

We believe that it would be beneficial to go over the definitions and duties of the persons who are members of the BoD and considered as "managers" in line with the 3rd Article of the TBC, such as chairman of the BoD, general manager and lastly, chairman and members of audit and credit committees. However, assistant general managers[36] and "other officials with signing authority" will not be led in since these groups would fall outside the scope of our study.

[33] Karaege, p. 87.
[34] Pulaşlı, p. 390.
[35] Translation of the Article has been retrieved from Türkiye Bankalar Birliği, "*Banking Law No. 5411*", p. 18. see: https://www.tbb.org.tr/en/Content/Upload/Dokuman/1/Banking%20Law.pdf (Access Date: 22.07.2020).
[36] On prevention of banks' assistant general managers to become board members see also, Seza Reisoğlu, *Bankacılık Kanunu Şerhi*. II Cilt. (Ankara: Yaklaşım, 2015), p. 609.

### 3.1. Chairman of the BoD

In line with Article 366/1 of the TCC, the chairman and the vice-chairman of the BoD is elected by the BoD, among its members. According to the Article, joint-stock companies shall elect one chairman, and it is possible for joint-stock companies to elect more than one vice-chairman. According to the Article, it is also possible to put a provision in the AoA, stipulating that the chairman and the vice chairman, or one of them, are elected by the general assembly. Election of the chairman and/or vice chairman by the general assembly is a novelty of the TCC and in the preamble of the TCC, it is stated that this novelty has been introduced to strengthen the positions of the chairman and the vice chairman.[37] Regulations of the TCC concerning the chairman and the vice-chairman of the BoD shall also be applicable for the banks. Yet, as stated in the 23rd Article of the TBC, it is not possible for the chairman of the BoD, and the general manager of the bank to be the same person.

With regards to duties of the chairman of the BoD, the TCC does not include any particular provision which lists such duties. Yet, the duties of the chairman are regulated sometimes explicitly, sometimes implicitly, and sometimes these duties are inferred from the nature of the subject. Still, determining the BoD meetings' agenda, calling the board members to the meeting and chairing the BoD meetings, making necessary preparations and works for the general assembly meeting upon the BoD's resolution on general assembly convention are among the duties of the chairman.[38] Additionally, duties such as submitting the information and documents relating to the agenda of the BoD meeting for revision to provide equal information flow in a reasonable time before the meeting[39] and using his/her best effort to ensure the efficient attendance of the non-executive members for the agenda items to be discussed clearly and comprehensively[40] are encumbered on the chairman of the BoD by the CMB's Corporate Governance Principles.

In line with Article 392/7 of the TCC, board members could ask in writing the chairman of the BoD for the BoD to convene. Additionally, as stated in Article 392/3 of the TCC, board members can utilize their right to information and inspect, outside

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[37] Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 110.
[38] **Kırca**, Şehirali Çelik & Manavgat, p. 477.
[39] The CMB's Corporate Governance Principles no. 4.4.2.
[40] The CMB's Corporate Governance Principles no. 4.4.6.

of the BoD meetings with the permit of the chairman of the BoD. However, in line with Article 392/5, the chairman of the BoD has been prohibited to utilize right to information and inspect, outside of the board meetings without permission of the BoD. *Kendigelen*[41] rightfully criticizes the logical contradiction in the provision by stating that the chairman, who is in the position to give this permit to the board members, has been deprived of the same right without the permission of the BoD.

### 3.2. General Manager

The TBC sets forth a compulsory general management office for banks to carry out daily business of banks within the policies which are determined by the BoD. Thus, each bank must employ a general manager which would be the head and the top authorized person in the general management of a bank.[42] In other words, general manager is considered as a compulsory body for banks.[43] The TBC states that general manager (deputy general manager in cases general manager's absence) shall be a natural member of the BoD. Therefore, general manager's relationship with the bank is considered as a mixture of mandate and employment contract[44] which is different than the typical relationship between the bank and board members which is a mandate contract.[45]

Appointment and resignation processes of general manager, deputy general manager and assistant general managers are regulated in the RBSMA[46]. According to Article 6/1 of the RBSMA, before the general manager is appointed, the documents showing that the legal qualifications are fulfilled by the general manager to be appointed, must be sent to the BRSA. If the BRSA does not adversely response to the application within seven business days, starting from the day the documents are received by the BRSA, the appointment can be made.[47] It is accepted that general manager could be either elected by the general assembly or appointed by the BoD among board members

41 Abuzer Kendigelen, *Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler*. (İstanbul: On İki Levha, 2016), 280.
42 Yaşar Alıcı, *Bankacılık Kanunu Şerhi*. 2 Cilt. (İstanbul: On İki Levha, 2017), p. 403.
43 Reisoğlu, p. 665; averse Ünal Tekinalp, *Banka Hukukunun Esasları*. (İstanbul: Vedat, 2009), 177.
44 Alıcı, p. 404.
45 Reisoğlu, p. 663.
46 Regulation on Procedures and Principles for Banks' Senior Management Appointments' Notification, Oath Taking and Property Declaration and Keeping of Decision Book (Official Gazette 01.11.2006, 26333)
47 Alıcı, p. 407.

or non-board member persons.[48] As the bank is being founded, the general manager of the bank can also be indicated in the bank's AoA.[49]

In terms of dismissal of general manager, in cases where general manager is appointed by the BoD, the BoD shall be the authorized body to dismiss the general manager, unless otherwise is indicated in the AoA. However, in such cases where the general manager is appointed by the general assembly, general assembly would be authorized to dismiss the general manager.[50] In case of resignation of the general manager, both the bank and the general manager are separately under the obligation of notifying the BRSA on the resignation (by clearly indicating the reason behind the resignation) within seven business days starting from the day of resignation. (Article 6/4 of the RBSMA)

In terms of qualifications of general manager, according to the 25th Article of the TBC as "*The general manager of a bank must have at least undergraduate degrees in the disciplines of law, economics, finance, banking, business administration, public administration and related fields and those that have undergraduate degrees in engineering fields must have a graduate degree in the aforementioned fields, and they must have at least ten years of professional experience in the field of banking or business administration.*"[51] In cases where educational and/or professional background of the person to be appointed, is not one of the fields that clearly specified above, as evaluating the application, the BRSA determines whether the educational and/or professional background is within "*related fields*" or not.[52] In addition to the educational and professional requirements, the general manager must have the qualifications indicated in the 8/1-a, b, c, d of the TBC. (Article 26 of the TBC) According to Article 6/5 of the RBSMA, deputy general manager must fulfill same requirements as the general manager and is appointed by the BoD.

[48] Göktürk, *Banka*, p. 77.
[49] Alıcı, p. 405.
[50] Reisoğlu, p. 664.
[51] Translation of the Article has been retrieved from Türkiye Bankalar Birliği, "*Banking Law No. 5411*", p. 41.
[52] Alıcı, p. 410; Reisoğlu, p. 662

### 3.3. Managing Board Members

According to Article 365 of the TCC, joint-stock companies are managed and represented by their BoD. However, it is possible for the BoD of joint-stock companies to delegate management (Article 367 of the TCC) and representation (Article 370/2 of the TCC) to one or more board members or to third persons. As a term, "managing board member", is defined as the board member who has been delegated both representation and management.[53] It is possible for banks to appoint managing board members, provided that board members to be appointed as managing board members, bear the qualifications sought in the general manager. (Article 23 of the TBC) Lastly, despite general managers' broad duties and responsibilities concerning banks' daily business, it should be accepted that the general managers shall not be considered as a managing board member, since there is no delegation of management and representation to the general manager in accordance with the relevant provisions of the TCC.[54]

### 3.4. Independent Board Members

According to the CMB's Corporate Governance Principles which is a regulation implemented on companies whose shares are traded on the stock exchange, among the non-executive board members of the BoD, there shall be independent members who have the ability to fulfill their duties impartially.[55] It is considered that main role of independent board members in the BoD, is to monitor the activities (executive activities) of the members responsible for execution and contribute to the development of the company strategy.[56] Hence, independent board members serve for the purpose of increasing the accountability of the management against minority and other stakeholders by making independent and objective evaluations on issues that create conflict of interest.[57]

In order for independent board members to fulfill above duties and expectations, they must possess certain qualifications. These qualifications have been indicated in detail

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[53] Alıcı, p. 389; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku*. (İstanbul: Vedat, 2015), p. 255.
[54] In the same direction, Göktürk, *Banka*, p. 76; Alıcı, p. 404.
[55] The CMB's Corporate Governance Principles no. 4.3.3.
[56] Hatice Kübra Kandemir, "Kurumsal Yönetim Aracı Olarak Bağımsız Yönetim Kurulu Üyeliği: Tam Bağımsızlık Mümkün Mü?" *Yıldırım Beyazıt Hukuk Dergisi*, no. 2 (2020), p. 449.
[57] Kandemir, p. 451

in Principle no. 4.3.6 of the CMB's Corporate Governance Principles, and the loss of even one of these qualifications during the term of duty as independent board member, causes the membership to be terminated automatically.[58] Just like other members of the BoD, independent board members could be elected up to three years and it is possible for independent board members to be reelected after the end of their term, yet, in line with Principle no. 4.3.6.(g), a board member who conducted board membership at a certain company's BoD more than a term of six years in the last ten years, cannot be appointed as independent board member at the same company. Lastly, it should be noted that independent board members are subject to the same regulations as the other board members in terms of their liability.[59]

Consequently, banks whose shares are traded in the stock exchange shall be under the obligation of having enough number of independent board members in their BoD. In line with Article 6/3-a of the CCG[60], number of independent board members in a bank's BoD cannot be less than three. Lastly, in the same Article, it is stated that duly elected audit committee members of banks, shall be considered as independent board members within the framework of the CCG.

### 3.5. Audit Committee Members

In joint-stock companies, the BoD is under the obligation to monitor and audit the transactions carried out within the company in terms of their compliance with the law, the AoA and the company's interests.[61] The BoD of banks are under the same obligations since banks to be established in Turkey shall be formed as joint-stock companies. To assist the BoD to fulfill above-mentioned obligations, the 24th Article of the TBC states that banks are obliged to establish an audit committee.

Duties and responsibilities of audit committee are listed both in the 24th Article of the TBC and in the RISB. Primary duties of audit committee could be listed as;

- Supervising the external audit in terms of its efficiency and independency,

[58] Gülşen Pazarbaşı, *Bağımsız Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu*. (Ankara: Seçkin, 2018), p. 28.
[59] Caymaz, p. 83.
[60] Communique on Corporate Governance numbered II-17.1, (Official Gazette 03.01.2014, 28871)
[61] Mustafa İsmail Kaya, "Anonim Şirket Yönetim Kurulunun Denetim ve Gözetim Görevi." *9 Eylül Üniversitesi Hukuk Fakültesi Dergisi* XVI, no. Özel Sayı 2014 (2015), p. 3261.

- Supervising the internal control systems and evaluate balance sheets and financial statements and control the data contained in them,
- Monitoring internal systems, accounting and reporting systems of the bank,
- Making necessary researches in terms of appointment of external auditor and monitor its activities,
- Maintain the coordination of internal audit for organizations subject to consolidated audit.[62]

The preamble of the 24th Article of the TBC states that it is significant that supervision function of the BoD is carried out by persons who have adequate professional experience and persons who are able to make unbiased assessments[63]. Thus, the TBC and the RISB set forth certain qualifications for audit committee members. For instance, the 24th Article of the TBC states that "*Audit committee shall consist of minimum two members."* and "*Audit committee members shall be appointed among the members of the BoD who do not have executive duties.*". "Non-executive board member" has been defined in the RISB[64] as "*A board member who is not in charge of any unit engaged in activities of an executive nature*", and a "*unit engaged in activities of an executive nature",* in other words "executive unit" has been defined in the RISB as "*A unit where activities that directly generate income are executed*". Consequently, audit committee members cannot be in charge of any unit that has a direct impact on the bank's profit and loss, such as operational units, credit allocation units and marketing units.[65] As can be seen, Article 24 of the TBC aims to specify board members who are assigned to the audit committee, only to the activities of the audit committee.[66] Therefore, general managers and executive board members cannot be audit committee members due to their executive duties, yet if he/she does not have

62 Göktürk, *Banka*, p. 82.
63 Reisoğlu, p. 644.
64 Regulation on Internal Systems and Process of Internal Capital Adequacy Assessment of Banks (Official Gazette 11.07.2014, 29057)
65 Alıcı, p. 414.
66 Göktürk, *Banka*, p. 71.

any executive duties, chairman or vice-chairman[67] of the BoD, can be a member of the audit committee.[68]

In terms of qualifications to be sought in the audit committee members, the BRSB has been authorized to set such qualifications, and the audit committee members of each bank have been obliged to bear these qualifications to be determined by the BRSB. (Article 24/2 of the TBC) Accordingly, the qualifications to be sought in the audit committee members have been listed in the 6th Article of the RISB. In the Article, strict conditions have been stipulated in order for audit committee, which shall carry out audit and supervision activities on behalf of the BoD, to consist of the board members who bear enough competency and independence necessary to fulfill their duties. Hence, in line with Article 6/3-a of the CCG a board member who is appointed as an audit committee member, shall be considered as an independent board member in line with the CCG.

With regards to the authorized body to elect audit committee members, according to Article 24/1 of the TBC and Article 5/1 of the RBSMA, the BoD shall be the authorized body to determine audit committee members. Yet, Article 18/2 of the TBC indirectly indicates that audit committee members could be determined by general assembly. Thus, *Reisoğlu* states that both bodies (general assembly and the BoD) are authorized to determine audit committee members, provided that such members bear legal qualifications, and the body that made the appointment in the first place, shall be authorized for dismissal of the members.[69] Despite averse opinions[70] to *Reisoğlu*, *Göktürk* states that *Reisoğlu*'s argument should be valid since it is solely based on the TBC. In other words, even though it is in an indirect manner, the TBC states that audit committee members may be determined by general assembly. However, *Göktürk*[71] also states that accepting board of directors' sole authority to determine audit committee members would fit for purpose of the TBC, since audit committee is an

[67] *Reisoğlu* does not directly state that vice-chairman could be appointed as audit committee member if he/she does not have executive duties, yet, he states that since there is not any separation between chairman and other board members, chairman could be appointed as audit committee member. In our opinion, same principle would be valid for vice-chairman.
[68] Reisoğlu, p. 647; averse in terms of position of the chairman Akdağ Güney, p. 77.
[69] Reisoğlu, p. 646.
[70] According to *Alıcı* and *Tekinalp*, the BoD shall have the authority to determine audit committee members. Alıcı, p. 387; Tekinalp, *Banka Hukuku*, pp. 178, 179.
[71] Göktürk, *Banka*, p. 82.

auxiliary committee which serves on behalf of the BoD. We agree with the arguments put forward by *Göktürk*.

### 3.6. Credit Committee Members

Credit committee is considered as a non-compulsory body of banks[72] which could be formed by banks, if desired. Main function of the credit committee is to perform duties related to extending loans. The 51st Article of the TBC states that "*The power to extend loans shall be held by the BoD.*" However, the BoD could delegate the power to extend loans to credit committee or general management within principles regulated by the RBLT[73]. Even if the BoD delegates its power to extend loans, the BoD shall still be responsible for ensuring the establishment, implementation and monitoring of policies for extending and approving loans and other administrative matters and for taking the necessary measures. (Article 51 of the TBC)

In principle, board of directors' committees are auxiliary units, which are established to assist the BoD. Thus, in principle, resolutions of the committees which are established in line with Article 366/2 of the TCC, would be non-binding. However, Article 7/2 of the RBLT distinguishes certain credit committee resolutions from other board committees' in terms of bindingness. The Article states that unanimously approved resolutions of credit committee shall be implemented directly, and resolutions taken by majority votes are implemented following the BoD's approval. As can be seen, unanimously approved resolutions of credit committee shall be binding even without the need of the BoD's approval. Hence, in terms of liability which may arise from these resolutions, credit committee members' role would be significant.[74]

In line with the 6th Article of the RBLT, the credit committee consists of the bank's general manager or his/her deputy and at least two board members who bear qualifications required for general managers (except 10 years of professional experience). Additionally, two board members [who bear qualifications required for

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[72] Sefer Oğuz, "Bankacılık Kanunu Kapsamında Banka Yöneticilerinin Şahsi Sorumlulukları." *İnönü Üniversitesi Hukuk Fakültesi Dergisi* VIII, no. 1 (2017), p. 260.

[73] Regulation on Banks' Loan Transactions (Official Gazette 01.11.2006, 26333)

[74] Evin Emine Demir, *Anonim Şirket Yönetim Kurulu Bünyesinde Oluşturulan Komiteler*. (Ankara: Adalet, 2016), p. 161.

general managers (except 10 years of professional experience)] shall be determined as substitute-members. The same Article states that the BoD shall be authorized to determine credit committee members. As determining the credit committee members (including substitutes), at least three-quarter positive votes of board members shall be required.

Credit committee convenes with the attendance of all members, meaning that, either all permanent members should attend the meeting, or permanent members who could not attend the meeting should be substituted.[75] Agenda of the credit committee meeting is determined by the general manager (in case of his/her absence by the deputy general manager) and announced to the committee members. For the credit committee to extent a loan, there must be a written proposal of the general management. In Article 5/2 of the RBLT, a limit has been set in terms of delegation of power to credit committee in terms of extending a loan. Accordingly, credit committee may be delegated power to extend loans to a natural or a legal person, ten percent of the bank's equity, at most. As previously mentioned, unanimously approved resolutions of credit committee shall be implemented directly, and resolutions taken by majority votes are implemented following the BoD's approval. Each resolution of credit committee is kept under a resolution book which is kept within the same principles as board of directors' resolution book. The RLBT also states that the BoD is under the obligation of auditing the actions of credit committee and each board member is authorized to demand information on the committee's actions and exercise required controls.

[75] Himmet Koç, "TTK m. 367 Kapsamında Banka Kredi Komitesinin Konumu ve Hukuki Niteliği." *Gazi Üniversitesi Hukuk Fakültesi Dergisi* XXI, no. 3 (2017), p. 251.

## SECTION II
## LIABILITY REGIME OF BANKS' BOARD MEMBERS

In accordance with Article 125 of the TCC, joint-stock companies are competent to benefit all rights and undertake debts, except for those that temperamentally depend on human qualities. Still, since legal persons gain capacity to act by having imperative bodies[76], a joint-stock company would not have capacity to act until necessary bodies are established. In terms of joint-stock companies, the BoD is the body, which manages and represents the company. Thus, board members would not personally be liable due to the transactions and contracts that they made on behalf of the company as they are performing their duties as board members.[77] Meaning that, legal consequences to be occurred due to above transactions and contracts would belong to the legal personality of the joint-stock company, not to each board member as real persons.[78] In fact, legal personality of the joint-stock company shall be held liable due to torts made by board members as they are performing their duties as board members.[79] (Article 371/5 of the TCC) However, in terms of torts, the TCC states that the joint-stock company shall have the right to recourse. Additionally, in terms of transactions and contracts made by board members, the joint-stock company shall also have the right to recourse if the transactions are against the law or the AoA. (Article 371/1 of the TCC)

As can be seen, even though the legal personality of the joint-stock company assumes the rights and debts to be occurred due to above-mentioned actions of board members, under certain circumstances, liability of each board member as a real person, may come to the fore. However, for a board member to be held liable, liability to compensate a damage must be attributed to such board member.[80] Meaning that, either the damage must be occurred solely due to actions/lack of actions of the board member, or the board member has to somehow contribute to the damage occurred along with other board members. Therefore, a board member who dissents to a board

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[76] Ümit Gezder, *Türk Medenî Hukuku Başlangıç-Kişiler-Aile Hukuku Soruları ve Cevapları*. Cilt 1. (İstanbul: Beta, 2014), p. 50.
[77] Pulaşlı, p. 643.
[78] Ersin Çamoğlu, *Anonim Ortaklık Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu*. Genişletilip Güncellenmiş 3. Bası (İstanbul: Vedat, 2010), p. 40.
[79] Pulaşlı, p. 643; Çamoğlu, *Anonim Ortaklık,* pp. 41, 42.
[80] Çamoğlu, *Hukuki Sorumluluk*, p. 13; Akdağ Güney, p. 271.

resolution, enregisters his objection and notify auditors, would not be liable in case of a liability litigation with regards to such board resolution.

With regards to liability of banks' board members, in this section, we shall firstly evaluate essential terms concerning liability in the TCC and in the TBC. Later, we are going to go over provisions of the TCC, TBC, CMC and other relevant regulations, all of which regulates cases of liability for banks' board members.

## 1. Elements of Liability

Liability is defined as set of norms which show who is responsible for the damage occurred and regulate the right to demand compensation for the aggrieved party, against the person who is responsible for the damage.[81] Liability as a legal principle has been described as the obligation of compensation for a person due to the damages caused either by unlawful actions or by not fulfilling execution properly or at all as a debtor.[82] In the previous section, we have briefly gone through certain duties and responsibilities of banks' board members. Indeed, in cases where such duties and responsibilities are not fulfilled properly or at all, board members would be liable to compensate the damage occurred due to their failure to perform. Both in Article 553/1 of the TCC and Article 110 of the TBC which are two main provisions which concern liability of banks' board members, fault is sought as a constituent element. Therefore, in terms of both provisions above, liability of banks' board members shall be "fault liability" of which elements are damage, unlawfulness, causal link, and fault.

### 1.1. Damage

Damage is considered as a precondition for compensation claims due to liability. Hence, even in cases where other three elements for liability (unlawfulness, causal link and fault) exist, if the event does not conclude with a damage, then related persons shall not be held liable for compensation.

Damage is defined as an involuntary decrease in a person's assets. In other words, damage is the difference between a person's assets before the damaging event and the

[81] Akdağ Güney, p. 269.
[82] Akdağ Güney, p. 270.

condition of the assets if the damaging event had not occurred.[83] The same definition would be valid both for joint-stock companies and banks.[84] Extent of the damage is determined within the scope of each transaction or resolution. Thus, a loss in the financial statements would not always mean that there is a damage to be compensated, on the other hand, there could be a damage to be compensated even if financial statements show profit.[85] Consequently, the liability of board members may come to the fore for each transaction or decision made, if other elements for liability exist.

In principle, right to claim compensation belongs to the persons who have proximately (directly) suffered the damages. Inherently, the company would be the first person to be affected from the transactions or resolutions of board members. On the other hand, creditors and shareholders may also be proximately affected from above transactions. In cases where any of above persons suffer proximately from a damage, such persons shall be able file a claim for compensation to be paid to themselves. Additionally, damages which are suffered proximately by the company would constitute remote damages of the company's creditors and shareholders. However, within general provisions of liability law, it is not possible for creditors and shareholders of a company to file a claim for the damage they have suffered remotely.[86] Yet, as an exception, creditors and shareholders of joint-stock companies are granted the right to file a claim for their remote losses. (Articles 555 and 556 of the TCC)

### 1.2. Causal Link

Just like the damage, causal link is another constitutive element for liability. In order for the causal link to exist, there must be a cause-and-effect relation between the action and the damage. In other words, if it is certain that the damage cannot exist without the unlawful action, then it could be said that there is causal link between the damage and the unlawfulness.[87]

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[83] Mustafa Kemal Oğuzman & Maya Turgut Öz, *Borçlar Hukuku Genel Hükümler* (İstanbul: Vedat, 2018), p. 39.
[84] Göktürk, *Banka*, p. 155.
[85] Göktürk, *Banka*, p. 156.
[86] Göktürk, *Banka*, p. 155; Akdağ Güney, p. 297.
[87] Turgut Akıntürk & Derya Ateş, *Borçlar Hukuku Genel Hükümler Özel Borç İlişkileri* (İstanbul: Beta, 2018), p. 92.

Causal link between events is determined within rules of logic.[88] However, once a causal link cycle among events is started, such cycle could be extended forever due to cause-and-effect relation between each event within rules of logic. Thus, in terms of existence of liability, among all the events in a causal link cycle, events that are adequate to cause the damage must be sorted. In order to accept that there is an adequate causal link between an action and a damage, the action has to be eligible enough to cause the damage occurred in accordance with experiences and natural flow of life.[89]

In terms of board members' liability, there must be adequate causal link between the damage and the unlawful actions/lack of actions. Thus, if it is proven that the damage could not be prevented even if the board members had not violated their obligations, then absence of causal link must be accepted.[90]

### 1.3. Unlawfulness

Unlawfulness is an element of "fault liability" that pertains to behavior. In fact, even in cases where there is adequate causal link between the behavior/action and the damage, if the behavior is not unlawful, there would be no liability.[91] This shows that just because a behavior causes damage, does not mean that the behavior is always unlawful. In terms of its definition as an element of "fault liability", "unlawfulness" could be defined as violation of behavioral rules which has been set forth by legal order to prevent potential damages.[92]

Board members are assigned certain tasks by law and by the AoA. In line with the 553rd Article of the TCC, board members who faultily fail to fulfil their obligations arising from the law and AoA, shall be liable against the company, the shareholders, and the creditors. Thus, for board members of joint-stock companies, element of unlawfulness could be interpreted as "*violation of law and AoA*" which is a wider term

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88 Akıntürk & Ateş, p. 92.
89 Oğuzman & Öz, p. 46; Dinç, *Anonim Şirketlerde Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu*. (Ankara: Seçkin, 2021), p. 69.
90 Göktürk, *Banka*, p. 163.
91 Fikret Eren, *Sorumluluk Hukuku Açısından Uygun İlliyet Bağı Teorisi*. (Ankara: Ankara Üniversitesi Hukuk Fakültesi Yayınları, 1975), p. 131.
92 Göktürk, *Banka*, p. 100.

than "*violation of law".* In other words, *"violation of law and AoA"* would also cover violation of contractional relationships.[93]

In terms of banking law, the 110th Article of the TBC which regulates personal bankruptcy of banks' board members, indicates that banks' managers[94] could be held liable due to their decisions and actions that are in violation of the applicable laws. As can be seen, differently than board members' liability pursuant to Article 553 of the TCC, the lawmaker decided to limit causes for personal bankruptcy with "violation of the applicable laws" and excluded "*violation of contract*".[95] However, there are different opinions in the doctrine in terms of violation of which codes or regulations would result in the banks' managers to be held liable in line with Article 110 of the TBC. It should be noted that violation of both the TBC and the TCC are considered to be within the scope of "unlawfulness" in terms of Article 110 of the TBC. However, the main discussion in the doctrine concerns whether other laws/codes and non-law regulations shall be evaluated within the scope of Article 110, or not. In the continuation of our study[96], we shall refer to the discussions in the doctrine in detail.

### 1.4. Fault

Faulty behavior is defined as a type of behavior, which is condemned and disapproved by the legal order. In terms of "fault liability", fault shall be sought as a constitutive element. In fact, in cases where the behavior/action is not faulty, even if a damaging result has occurred, there would be no liability.[97]

In terms of board members' liability, in principle, the TCC adopts "fault liability" regime.[98] For banks' board members' liability, despite it is indicated in any specific provision, "fault" is sought as an element for liability, and element of "fault" would cover intent, severe and slight negligence.[99] Yet, the degree of fault would not matter

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93 Akdağ Güney, p. 303.

94 For the definition of "Managers" as a term in the TBC, see also "Section I, 3."

95 Cansu Sözen, "Banka Yönetim Kurulu Üyelerinin ve Hakim Ortaklarının Hukuki Sorumluluğu." (Unpublished master's dissertation, Galatasaray University, 2011), p. 28.

96 For the discussions on the subject matter see also "Section II, 5.7.2.".

97 Eren, p. 131.

98 Çamoğlu, *Hukuki Sorumluluk*, p. 17; Beşir Fatih Doğan, *6102 Sayılı Yeni Türk Ticaret Kanununa Göre Anonim Şirket Yönetim Kurulunun Organizasyonu ve Yönetim Yetkisinin Devri*. 2. Baskı (İstanbul: Vedat, 2011), pp. 253, 254.

99 Göktürk, *Banka*, p. 118; Alıcı, p. 363.

for board members to be held liable.[100] Meaning that, even existence of slight negligence would be sufficient for the fault to exist. However, degree of fault shall come into play in terms of determining the degree of liability of each board member. In other words, the degree of fault is taken into consideration as determining the degree of each board member's obligation to compensate the damage occurred.

Existence of board members' fault is determined based on *objective criteria* which coincide with *care criteria*. Meaning that, existence of fault is determined based on the care that a similar board member ought to show as carrying out his/her duty. Hence, as to determine whether the necessary attention and care is shown or not, each present event should be evaluated on an individual basis, and the behavior expected from a decent cautious person to be shown in the same event and circumstances should be taken into consideration as a measure.[101] In order for the comprehension of the criteria to be used as determining existence of fault element, we shall go over the duty of care for board members.

### 1.4.1. Board Members' Duty of Care

The 369th Article of the TCC states that "*Board of directors members and third parties in charge of management are under the obligation of carrying out their duties within the care of a prudent director and looking after the interest of the company in good faith.*" The Article sets the standard for duty of care of board members and third parties in charge of management. It should be noted that the main function of the duty of care is that it is the main criteria to be used in determining whether the persons indicated in the Article have acted in fault, or not. As priorly indicated, in principle, liability of board members is "fault liability". Hence, determining whether board members have acted within duty of care, or not, would play a significant role in terms of determining their liability.

### 1.4.2. Care of a Prudent Director and Business Judgement Rule

Indeed, board members are under the obligation of carrying out their duties with certain level of care. With Article 369 of the TCC, such level is determined as "the

[100] Çamoğlu, *Hukuki Sorumluluk*, p. 17.
[101] Dinç, p. 58.

care of a prudent director". In the preamble of the TCC, "the care of a prudent director" is defined as a term which is based on board members being able to take "business judgement rules" (BJR) in line with the corporate governance principles and not being held liable for risk occurred due to a decision made within "BJR".[102] In accordance with the generally accepted rules of business, in cases where a decision is made after the appropriate observations are made, and necessary information is received from relevant persons, even if the results are contrary to expectations and the company suffers a loss, board members would not be regarded as they have acted negligent. Eventually, board members who act in line with the "BJR" are regarded as they have acted within the care of a prudent director. Thus, they would be deemed that they have fulfilled their obligation of "duty of care", and they cannot be encumbered a fault or cannot be held liable.[103]

For a decision to be in line with "business judgement rule", the decision must:

- Not be contrary to imperative provisions,
- Be in line with the aims and interest of the company,
- Be taken in a meeting which is held in accordance with the law,
- Be agreed by independent and impartial members,
- Be justifiable in terms of its content.[104]

With the "business judgement rule", board members' discretion of power in terms of management of the company is put under a legal protection, therefore, failures of board members despite acting in accordance with the "BJR" shall not be subject to liability. However, board members' torts and actions, which contradict with the law, the AoA and internal directive shall not be in the scope of protection of "BJR".[105]

### 1.4.3. Acting in Good Faith and Objective Assessment in Terms of Duty of Care

In Article 369 of the TCC, along with "*carrying out their duties within the care of a prudent director"* board members and third parties in charge of management are also under the obligation of "*looking after the interest of the company in good faith."* The term "*good faith*" in the Article, refers to "*bona fide*" as it has been set forth by the

[102] Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 112.
[103] Akdağ Güney, p. 189.
[104] Akdağ Güney, p. 190.
[105] Pulaşlı, p. 434.

2nd Article of the Turkish Civil Code[106].[107] Acting in good faith (bona fide) is described as a fundamental principle that must be complied with not only when exercising civil rights and fulfilling obligations, but also when exercising all rights arising from private and even public law and when fulfilling all debts.[108] Hence, in a possible liability claim against a board member, the board member has to be able to defend that the resolution taken concerning the company is economically consistent with the interest of the company and serves for protection of the interest of the company.[109]

According to the preamble of the TCC, the term "*care of a prudent director*" covers "*the care required by the job*" and it is also stated in the preamble that "*the care required by the job*" is determined objectively.[110] Meaning that, as defining duty of care for a board member, instead of considering subjective criteria based on each individual board member's qualifications (educational or professional background, field of expertise etc.), qualifications required for the position/job (competency required for the position or necessary educational or professional background) shall be taken into consideration. Furthermore, duty of care required for a board member shall be the duty of care expected from a board member who serves at a company which is the same in terms of type and size.[111]

As assessing whether a board member is fulfilled his/her duty of care or not, a duty of care which is expected from a prudent board member who is at the same position with the board member subject to the assessment, shall be taken into consideration. Since the TCC seeks for "*the care required by the job*" and looks for "*to be competent to perform the task, to evaluate the relevant information, to have the skills and education required to monitor and control the implementation and developments*"[112], it is clear that the care to be taken with regards to a bank's management shall be stricter. In fact, special qualifications sought by the TBC, to become a board member or a general manager or an assistant general manager at a bank, proves the managing a bank

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[106] Official Gazette 8.12.2001, 24607.
[107] Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 111; Pulaşlı, p. 437
[108] Gezder, p. 6.
[109] Pulaşlı, p. 438.
[110] Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 112.
[111] **Kırca**, Şehirali Çelik & Manavgat, p. 657.
[112] Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 112.

requires a special experience, expertise and educational background due to the complexity and size of the job. Thus, as determining the extent of duty of care for a banks' board members, it should be taken into consideration that banking is a profession which requires a higher level of expertise. Hereby, in parallel with the special qualifications required for banks' board members, a higher level of duty of care shall be expected from them.[113]

## 2. Liability Regimes for Banks' Board Members

Since it has been set forth that banks to be established in Turkey, shall be structured as joint-stock companies, banks' board members are subject to two different liability regimes. One of these liability regimes has been set forth by the 553rd Article and following provisions of the TCC. The other liability regime for banks' board members has been set forth by Article 110 of the TBC, which regulates banks' managers (including board members) personal bankruptcy.[114]

### 2.1. Personal Bankruptcy

In line with the Turkish legislations, in principle, only merchants are subject to bankruptcy. However, this rule has certain exceptions, both the rule and its these exceptions are indicated in the 43rd Article of the Code of Bankruptcy and Enforcement numbered 2004[115] (CBE).[116] In line with the 43rd Article of the CBE, in addition to the persons who are deemed as merchants in line with the TCC or those who are subjected to the provisions concerning merchants, real or legal persons who are indicated to be subjected to bankruptcy in line with their special laws -even though they are not merchants- shall be subject to enforcement by bankruptcy. As indicated in the 110th Article of the TBC, it is possible for banks' managers (including board members) to be declared as bankrupt and personally be held liable to the extent of the damage they have caused to the bank. However, in order for banks' managers to be held liable in line with the Article, the bank must have been subjected to the sanctions

[113] Akdağ Güney, p. 203.
[114] Akdağ Güney, p. 371.
[115] Official Gazette 19.06.1932, 2128.
[116] Baki Kuru, *İstinaf Sistemine Göre Yazılmış İcra ve İflâs Hukuku Ders Kitabı* (Ankara: Vedat, 2019), p. 371.

indicated in Article 71 of the TBC, as a result of such managers' decisions or actions that violate the applicable laws.

### 2.2. Differentiated Solidarity

In terms of liability claims arising from relevant provisions of the TCC, in cases where more than one person is liable for the same damage, the extent of each board members' liability is determined within the principle of differentiated solidarity. Differentiated solidarity has been set forth by the 557th Article of the TCC which states, "*In cases where more than one person is liable to compensate the same damage, each person shall be jointly liable in accordance with his/her fault and as the requirements of the circumstance, to the extent that the damage can be personally saddled on to him/her.*" In line with the Article, essential principles regarding the differentiated solidarity could be listed as;

- No person can be held liable for any damage which is not caused by him/her in accordance with the adequate causal link,
- Liability depends on personal fault in external relationship,
- The extent of fault is taken into consideration in solidarity.[117]

In the 336th Article of the fTCC, solidarity among board members had been set forth as "full solidarity". Meaning that, it was possible for persons to be compensated, to take action to enforce each board member for all the damage without taken into consideration such board member's degree of fault.[118] As stated above, the TCC adopts differentiated solidarity. Thus, still, in cases where more than one person is liable for the same damage, solidarity shall arise among these persons. However, as a result of the liability case, the court shall make a discount on each related person's extent of liability by taking into account their extent of fault, effect of causal link and other reasons of discount.[119] Thus, liable persons shall be jointly liable for the damage, yet, each liable person could only be enforced being limited by his/her extent of liability which will be determined by the court.

[117] Pulaşlı, p. 668.
[118] Pulaşlı, p. 666.
[119] Göktürk, *Banka*, p. 226.

To simply exemplify the determination of liability within the scope of differentiated solidarity principles, a plaintiff sues a company's board members and the court decides on 100 Turkish Liras to be paid to the plaintiff and determines the extent of each board members' liability as follows; for the board member (A), 100%; for (B), 80%; for (C), 60% and for (D) and (E), 30%. Consequently, since (A)'s liability has been determined as 100%, the plaintiff shall be able to claim all of his receivable from (A). On the other hand, the plaintiff could only enforce his/her receivable from other board members in accordance with their extent of liability. For instance, maximum amount to be claimed from (B) shall be 80 Turkish Liras.

It should be noted that above determination made by the court shall only concern the external relationship among liable persons. Thus, a separate determination has to be made by the court in terms of internal recourse relation among liable persons.[120] Depending on each particular case, extent of liability in terms of internal relation and external relations could be the same or different. In accordance with the internal recourse relation, liable persons who made excessive payments in proportion to their extent of liability, shall be able to recourse to other liable persons.

As the extent of liability of each board member is determined by the court within the principles of differentiated solidarity, in cases where there are extenuating circumstances which are stated in Article 52 of the Code of Obligations numbered 6098[121], the liability of concerned board member could be reduced or even vanished completely.[122] For instance; consent of the aggrieved party, actions of the aggrieved party with regards to occurrence or increase of the damage, aggravation of the liable person's condition by the aggrieved party are some of the extenuating circumstances indicated in Article 52 of the Code of Obligations.

### 3. Provisions Concerning Board Members' Liability in the TCC

Due to "general code-special code" relationship between the TCC and the TBC, board members of banks shall be subject to general provisions set by the TCC in terms of

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[120] Göktürk, *Banka*, p. 228.
[121] Official Gazette 04.02.2011, 27836.
[122] Himmet Koç, "Anonim Şirket Yönetim Kurulu Üyelerinin Farklılaştırılmış Teselsül İlkesi Uyarınca Sorumluluklarına Genel Bir Bakış." *Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi* 3, no. 1 (2020), p. 73.

liability.[123] In terms of the TCC's provisions on liability, under certain Articles, the lawmaker has indicated special cases and regulated persons to be held liable depending on occurrence of each case. Beside these provisions which regulate liability on each special case, with the 553rd Article of the TCC, a general provision of liability has been established concerning founders, board members, managers and liquidators.

With regards to liability of banks' board members, it would be possible for them to be held liable in accordance with each Article which regulates special cases of liability, in cases where they contribute to the occurrence of each case. On the other hand, in cases where banks' board members faultily fail to fulfil their obligations arising from the law and AoA, it would be possible for them to be held liable in line with Article 553 of the TCC.

In this part of our study, firstly we shall go over the provisions of the TCC which regulate special cases of liability, later, we shall evaluate Article 553 of the TCC, along with certain obligations and prohibitions all of which may cause liability of banks' board members in cases where they are not fulfilled or violated.

## 3.1. Special Cases of Civil Liability as Indicated in the TCC

### 3.1.1. Liability for Documents and Declarations Contradicting with the Law

In Article 549 of the TCC, liability for damages occurred due to law-contradicting documents and declarations has been regulated. The Article covers damages occurred concerning proceedings such as incorporation, capital increase/decrease, merger, demerge, company type change and issuance of securities. It should be noted that proceedings above are not listed as numerus clausus, hence, content of the Article shall not be limited to above proceedings.

In the Article, possible contradictions to law concerning above-indicated proceedings have been listed as "*false, fraudulent, forged, fact contrary documents, prospectuses, commitments, declarations and guarantees, hiding the truth and other contradictions with law*". As can be seen, contradictions which may cause liability have been covered extensively. With regards to persons to be held liable in line with the Article has been divided into two groups as; a) persons who issue or make declarations and b) persons

[123] Reha Poroy, Ünal Tekinalp, and **Ersin Çamoğlu**. *Ortaklıklar Hukuku I*. Yeniden Yazılmış 13. Bası (İstanbul: Vedat, 2014) p. 419.

who participate in them with fault. It should be noted that the persons who prepare documents and make declarations shall be subject to liability without fault. On the other hand, their participants must be in fault to be held liable.[124] With respect to board members' liability, it would possible for the board members to be held liable in line with the Article as a participant.[125]

Persons who suffer the damages as a result of the actions stated in the Article, would have right to file a liability claim against above persons. To exemplify; the company, individual shareholders, persons who lose their title as shareholders due to these proceedings, purchasers of the securities would be considered as the persons who suffer the damages in line with the Article.[126]

### 3.1.2. Liability for False Capital Declarations and Awareness of Payment Deficiency

Since joint-stock companies are liable due to their debts only with their assets[127], creditors of a joint-stock company could only receive their claims from these assets of the company. Thus, in order for the protection of creditors' rights, it is important for the assets of the company to be compromised in accordance with the amounts truthfully committed by the shareholders. Hence, there is a close relationship between the capital's maintenance principle and protection of creditors' rights.

As an implementation of the capital's maintenance principle, the 550th Article of the TCC regulates the liability of certain persons, in cases where false declarations are made in terms of capital commitment and in cases where a capital commitment is made despite payment deficiency.[128] In accordance with Article 550/1 of the TCC, "*Even though the capital commitment is not fully made or the committed amount is not paid in line with the AoA or the law, persons who make it seems as if the commitment is made or the amount is paid along with company officials with fault shall be jointly liable to take over such shares by paying their price and compensate the damage along with its interest, if any.*" In line with the Article, persons who make

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[124] Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 206.
[125] Akdağ Güney, p. 412.
[126] Pulaşlı, p. 640.
[127] Pulaşlı, p. 641.
[128] Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 206.

false declarations by *"making it seems as if the commitment is made or the amount is paid"* shall be subject to liability without fault.[129] On the other hand, liability of "company officials" would arise only if they are in fault. It is possible for the board members to be held liable in line with the Article as a "company official".[130] As the sanction of the Article for above persons, it has been stated that persons who made false capital declarations and faulty company officials shall be jointly liable to take over shares in question by paying the shares' worth, and to compensate the damage with interest, in cases where a damage is occurred due to false declarations.

Lastly, in line with Article 550/2, persons who knowingly consent capital commitment of those persons who are in payment deficiency, shall be liable to compensate the damage occurred due to non-payment of the commitments made. In such cases, although the capital commitment is truthful, persons who commit certain capital, despite their payment deficiency are most likely not to fulfill their commitment, therefore, damage the creditors of the company.[131] In line with the Article, persons who consent such capital commitments, despite knowing payment deficiency, shall be liable to compensate the damage occurred. It should be noted that this liability in terms of Article 550/2 has been set forth as fault liability.[132]

### 3.1.3. Liability for Corruption in Valuation

Maintenance of capital principle covers forming a joint-stock company's capital in its true value.[133] Thus, in line with Article 343/1 of the TCC, capitals in kind or businesses and realities to be taken over during establishment of a company are subject to expert appraisal. In order to ensure that the capitals of joint-stock companies are formed in a way which reflects its true value, Article 551 of the TCC regulates the liability in cases of corruption in valuation.[134]

According to the Article, "*Those who estimate higher prices in valuation of capitals in kind or businesses and realities to be taken over in compared to their precedent values, who show the nature or status of businesses and realties differently or who*

129 Caymaz, p. 48.
130 Akdağ Güney, p. 412.
131 Pulaşlı, p. 641.
132 Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 206.
133 Pulaşlı, p. 641.
134 Pulaşlı, p. 641.

*engage in corruption in any other way shall be liable for the damage due to their actions."* As can be seen, actions which may cause liability are not indicated in the Article as numerus clausus, thus along with actions indicated in the Article, actions such as taking the estimation report from a private expert, instead of the expert appointed by the court, shall cause liability.[135] Additionally, in order persons to be liable in line with the Article, such persons have to act with intent or be in fault.[136]

In line with the Article, founders (for corruptions during incorporation), board member (for corruptions after incorporation), executives (managing directors, managers, commercial representatives and agents), persons whom are appointed as experts and consultants who have constructive effects could be held liable due to corruption in valuation.[137]

### 3.1.4. Liability for Collecting Money from Public

The terms, conditions and persons to be allowed to collect money from public with the aim of establishment of a company or capital increase, are regulated by the CMC. In line with the 16th Article of the CMC, companies whose shares are traded on the stock exchange and joint-stock companies with more than five hundred shareholders (excluding partnerships that collect money from the public through crowdfunding) are deemed to be publicly held. These companies are subject to the audit of the Capital Markets Board along with certain specific provisions in terms of public disclosure, dividend distribution, external independent audit.[138] Similarly, with the 12th Article of the CMC, sale of capital markets instruments have been strictly regulated.[139]

Article 552 of the TCC prohibits collecting money from public with the promise or aim of establishment or capital increase of a company. The Article excludes activities of collecting money which are made by licensed persons, and in allowed ways which are indicated in the CMC. The liability regime for above actions shall be liability

[135] Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 206.
[136] Caymaz, p. 48.
[137] Pulaşlı, p. 642.
[138] Pulaşlı, p. 642.
[139] Pulaşlı, p. 642.

without fault and since any certain way to collect money is not specified in the Article, the prohibition would cover actions of collecting money made in various ways.[140]

### 3.1.5. Maliciously Filing a Claim for Voidance or Nullity of General Assembly Resolutions

In line with Article 445 of the TCC, BoD as a whole and each individual board member (if the implementation of the general assembly resolution shall cause the member's personal liability) have been entitled the right to file a claim for nullity of those general assembly resolutions that are in violation of law or AoA and especially good faith. However, just as it is for each right, above right must be exercised within the principle of good faith as it has been set forth by the 2nd Article of the Turkish Civil Code. If not, such exercises shall not be protected by the legal order. In fact, pursuant to Article 451, persons who maliciously file a claim for voidance or nullity of a general assembly resolution shall be jointly liable for the damages suffered by the company due to the claim. As can be seen, the Article covers claims for nullity along with claims for voidance of a general assembly resolution. Voidance reasons for a general assembly resolution have been indicated in Article 447, yet these reasons are not indicated as numerus clausus.

Consequently, in cases where one or more board member or the BoD as a whole file a claim for voidance or nullity of a general assembly resolution, maliciously, the company/bank shall have the right to file a liability claim against the plaintiff board members for the damages suffered due to the malicious claim.

### 3.1.6. Liability for the Damages within the Processes of Mergers and Demergers

In line with Article 193 of the TCC, any person who has in anyway involved in processes of mergers, demerges and change of type/kind, shall be liable against companies, shareholders and creditors due to the damages that he/she caused as a result of his/her fault. Inherently; in terms of banks, banks' board members who have involved in processes of mergers and demergers in anyway, shall liable against the

140 Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 207.

bank, the shareholders and the creditors, due to the damages caused as a result of their fault.

### 3.1.7. Liability for Abuse of Control in Group of Companies

In the 195th Article of the TCC, terms of group of companies, “controlling company” and “dependent company” have been defined, and in the 202nd Article of the TCC, the shareholders and creditors of the dependent company have been entitled the right to file for a liability claim in cases where controlling company abuses its power over the dependent company.[141] In terms of banks, although the TBC does not contain any provisions concerning group of companies, the provisions of the TCC on the subject matter, shall be valid for banks.[142]

According to the 195th Article, relationship of control between companies could be established in two ways. Firstly, a company could establish direct or indirect control over another company by one of below ways;

- Holding majority of the voting rights,
- In accordance with AoA, having the right to ensure the election of members forming a resolution quorum in the management body,
- In addition to its own votes, having the majority of the voting right, alone or with other shareholders or partners based on a contract.

In cases where at least one of above cases exist, it is deemed that a company has the control over another company. As can be seen, holding the majority of the capital would not solely be enough for establishment of relationship of control. Yet, according to Article 195/2, apart from above cases, if a company holds the majority of the shares in another company, or holds the adequate shares to make the decisions enabling the company to manage the other company, it is presumed that the first company has the control over the second company.[143]

Secondly, rather than merging/participating the company, a company could have the control of another company based on a contract of obligations law. Either by the first way (de facto/actual control) or by the second way (contractual control), the company

[141] Poroy, Tekinalp and **Çamoğlu**, p. 432.
[142] Caymaz, p. 41.
[143] Kendigelen, p. 174.

which has the control would be named as “controlling company” and the controlled company would be named as “dependent company”. In cases where at least one of these companies’ HQ is located in Turkey, provision of the TCC, concerning group of companies shall be applied. (Article 195/1 of the TCC)

The TCC’s Articles between 202 and 206, regulate the liability in cases of abuse of control within group of companies. In Article 202, liability with regards to abuse of control (in the absence of full control) has been regulated, and in the Articles between 203 and 206, the issues regarding full control of a company over another company, have been regulated.

In the first and second sub-articles of Article 202, two different implementations of control have been regulated. In Article 202/1, liability of the controlling company and its BoD, due to the loss of the dependent company as a result of directive transactions, has been set forth. On the other hand, in Article 202/2, liability of the controlling company due to critical transactions or resolutions (with no clear reasonable grounds) taken by the dependent company due to abuse of control, has been regulated.

#### 3.1.7.1. Liability for Directive Transactions

Within group of companies, controlling companies are prohibited from abusing their position of control, in a way that making the dependent company incur a loss. In cases where this prohibition is violated, the shareholders and creditors of the company shall have the right to file a liability claim against the controlling company and its BoD.[144]

In Article 202/1 certain transactions[145], all of which are primary examples for a controlling company’s abuse of power on a dependent company, have been listed.[146]

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[144] Poroy, Tekinalp and **Çamoğlu**, p. 432.
[145] Directing the dependent company;

- to carry out legal transactions such as the transfer of business, asset, fund, staff, receivables, and debt,
- to decrease or transfer its profit,
- to restrict its assets with real or personal rights,
- to undertake liabilities such as providing surety, guarantee and bill guarantee,
- to make payments,
- to adopt decisions or take measures which negatively affect the dependent company’s efficiency and activity such as not renovating its facilities, limiting, suspending its investments without reasonable grounds,
- to refrain from taking measures that will ensure the dependent company’s development.

[146] Poroy, Tekinalp and **Çamoğlu**, p. 433.

It should be noted that since these transactions have been listed as examples, any directive transactions which cause a loss for the dependent company via abuse of control would be within the scope of this provision.[147] However, in cases where the dependent company has suffered a loss due to above listed or similar transactions, the lawmaker has primarily encumbered the controlling company with the obligation of compensating the loss[148], instead of directly indicating that the controlling company and its BoD shall be held liable. Hence, if the loss occurred due to abuse of control (via the transactions indicated in the Article or similar directive transactions), is compensated within that activity year, or a right to claim of equivalent value is granted to the dependent company, neither the shareholders nor the creditors of the dependent company would have the right to file a liability claim against the controlling company or its BoD. (Article 202/1 of the TCC) Still, if the controlling company desires to grant a right to claim of equivalent value to the dependent company, such right must be granted no later than the end of that financial year, with a specific explanation of how and when this loss will be recovered.

In cases where the loss of the dependent company is not compensated or above right is not granted, both the controlling company and its BoD shall be held liable for the loss of the dependent company due to abuse of control of the controlling company. The right to file a claim for the dependent company's loss has been granted to the shareholders and the creditors of the company.[149] Additionally, an exclusive provision has been set forth for the claims of the shareholders. Accordingly, if it would be equitable, either upon the request or ex officio, the judge would be able to decide for controlling company to acquire the shares of the plaintiff shareholders or decide on another solution which is acceptable and appropriate to the situation. (Article 202/1-b of the TCC)

Liability regime to be implemented on the controlling company's board members for the claims in line with the TCC's Article 202/1, shall be liability with fault. Thus, each board member's liability shall be determined in proportion to his/her degree of fault.

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[147] Poroy, Tekinalp and **Çamoğlu**, p. 433.
[148] Kendigelen, p. 184.
[149] Poroy, Tekinalp and **Çamoğlu**, p. 434; Additionally, in order for creditors of the dependent company to file a claim for the dependent company's loss in line with Article 202/1-c, the dependent company does not need to be declared bankruptcy.

Meaning that, differentiated solidarity shall be applied among board members. However, the controlling company shall be liable for the whole loss.[150]

Burden of proof in terms of proving the loss and the fault of the defendants, shall be on the plaintiff. Additionally, the way for board members to get clear from liability has been particularly indicated. Accordingly, in cases where it is proven that board members of an independent company who look out for the interests of the company in good faith and act with the care of a prudent manager, would have carried out or avoided the transaction that have caused the loss, under the same or similar condition, any compensations would not be ruled. It should be noted if board members of the controlling company prove above event, the controlling company shall get clear from the compensation as well.[151]

#### 3.1.7.2. Liability for Critical Transactions/Resolutions Without Any Clear Reasonable Grounds

In line with Article 202/2 of the TCC, certain shareholders of the dependent company have been granted the right to demand to be compensated or demand their shares to be purchased by the controlling company, for the damages they have suffered due to critical transactions or resolutions (with no clear reasons) of the dependent company, as a result of the controlling company's exercise of control.

In the Article, critical transactions or resolutions for the dependent company have been indicated as "*termination, conversion, division, merger, issuing securities and important amendments to AoA*". It should be noted that these are listed as examples, hence, either they are decided by the general assembly or by the BoD (on subject matters permitted by legislation such as capital increase in registered capital system), similar transactions or resolutions which bear vital importance for the existence of the dependent company and concern interests of the shareholders, would be within the scope of the Article.[152] Still, for these transactions or resolutions to be subject to Article 202/2, they must not have "*any clear reasonable ground*" for the dependent company. If a transaction will not bring any benefit, yet most likely harm the

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[150] Poroy, Tekinalp and **Çamoğlu**, p. 435.
[151] Poroy, Tekinalp and **Çamoğlu**, pp. 435, 436.
[152] Ersin Çamoğlu, "Şirketler Topluluğunda Hakimiyetin Kötüye Kullanılmasından Doğan Sorumluluk Davaları." *Galatasaray Üniversitesi Hukuk Fakültesi Dergisi*, no. 2 (2013), p. 28.

dependent company and if the transaction that is not required to be performed, it is considered that such transaction has not *"any clear reasonable ground*".[153]

Lastly, in order for the shareholders to be granted the rights indicated in the Article, the shareholders must have proximately suffered the damages due to the resolution or transaction in question.[154] Under these circumstances, the shareholders who have casted their negative votes against the general assembly resolution and had them recorded in the minutes, or who have objected to the board resolution in writing, shall have the right to demand to be compensated or demand their shares to be purchased by the controlling company. This claim of the shareholders shall be against the controlling company. Yet, if the claim against the controlling company was caused by a board resolution, it is possible for the board members of the controlling company to be held liable against the shareholders (and its creditors, in case of bankruptcy) of the controlling company.[155]

With regards to their claims in line with Article 202/2, the shareholders may elect either right to be compensated or purchase of their shares by the controlling company. In cases where purchase of the shares is decided, purchase value of the shares would be stock exchange value of the shares, at the very least. If the stock exchange value does not exist or such value is not equitable, the purchase value of the shares would be the shares' actual value which is the market value of the shares to be determined according to the data most recent to the court's decision.[156]

#### 3.1.7.3. Issues with Regards to Full Control

Event of full control is defined as the state that a company directly or indirectly owns all the shares and voting rights of another company.[157] As previously stated, in the Articles between 203 and 206, the issues concerning full control of a company over another company, have been regulated.

As indicated in Article 203, in cases of full control, the BoD of the controlling company has been granted the right to give instructions concerning the direction and

[153] Çamoğlu, *Sorumluluk Davaları*, p. 28.
[154] Çamoğlu, *Sorumluluk Davaları*, p. 29.
[155] Çamoğlu, *Sorumluluk Davaları*, pp. 29, 30.
[156] Çamoğlu, *Sorumluluk Davaları*, p. 30.
[157] Kendigelen, p. 187.

the management of the dependent company, and the BoD of the dependent company has been encumbered with the obligation of complying with these instructions. It should be noted that, provided that the instructions are required by the determined and concrete policies of the group of companies, the dependent company is under the obligation of complying with the instructions, even if the instructions may cause a loss for the dependent company in terms of their results. [158] However, with the 204th Article, an exception has been set forth to this provision. Accordingly, controlling company cannot give instructions which (1) clearly exceeds the dependent company's solvency, (2) may endanger the dependent company's existence, or (3) may cause loss of significant assets.[159] Hence, it is considered that the BoD of the dependent company is not obliged to comply with the instructions within the scope of Article 204.[160] Still, according to Article 205 of the TCC, bodies of the dependent company which implement either legal or illegal (Article 204) instructions of the controlling company, shall not be held liable against the shareholders or the dependent company.[161]

Lastly, with the 206th Article, the creditors of the dependent company, who suffer a loss due to the controlling company's instructions in line with the 203rd Article, have been granted the right to file a claim for compensation from the controlling company and its BoD. In order for this claim to come to the fore, firstly, a loss must be occurred, and such loss must have not been compensated within that financial year or the dependent company must have not been granted a right in line with Article 202/1. Against the claim of the creditors, it is possible for the defendants to get clear from liability by proving the event indicated in Article 202/1-d.[162] Additionally, in terms of claims arising from loan or similar transactions; it is possible for the defendants to get clear from liability by proving that the plaintiff has entered the relationship which caused the claim, by knowing or should have known that the compensation has not been made.[163]

[158] Poroy, Tekinalp and **Çamoğlu**, p. 437.
[159] Kendigelen, p. 187.
[160] Poroy, Tekinalp and **Çamoğlu**, p. 437.
[161] Poroy, Tekinalp and **Çamoğlu**, p. 437.
[162] Board members of an independent company who look out for the interests of the company in good faith and act with the care of a prudent manager, would have carried out or avoided the transaction that have caused the loss, under the same or similar condition.
[163] Kendigelen, p. 189.

### 3.2. Liability of Board Members the in line with Article 553 of the TCC

With the 553rd Article, liability of founders, board members, managers and liquidators has been regulated. Article 553/1 states that "*Founders, board members, managers and liquidators who faultily fail to fulfill their obligations arising from the law and AoA, shall be liable against the company, the shareholders and the creditors of the company.*" When we evaluate the Article particularly for the liability of board members, it is understood that a board member shall be held liable if he/she faultily fails to fulfill one or more obligations of him/her, which arise from either the law or the AoA. Since the element of fault has been particularly indicated in the 553rd Article, the liability regime for board members within the Article shall be "fault liability".

In terms of board members' obligations arising from law, the first provision to come to mind would be the 375th Article of the TCC which indicates non-delegable and indispensable duties of BoD.[164] Additionally, in cases where a duty which arises from AoA or even from the contractual relationship between the company and the board member, is failed with fault, the board member could be held liable for the damage occurred in line with the 553rd Article.

Article 553/2 of the TCC states that "*Bodies or persons who lawfully delegate a duty or an authority arising from law or AoA to another person, shall not be liable for the actions and decisions of these persons, unless it is proven that they have not shown reasonable care in the selection of those who have taken over these duties and authorities.*" In line with the TCC, the BoD can delegate management (Article 367/2 of the TCC) and representation (Article 370/2 of the TCC) to one or more board members or third persons. According to Article 553/2, in cases where board of directors does not act within reasonable care (the duty of care as defined in the 369/1 of the TCC) in the selection of these delegated persons, board members could be held liable for the damages occurred due to faulty actions of the persons whom have been delegated such duties and authorities.[165] Additionally, even after the delegation is made, non-delegable and indispensable duties and authorities within the TCC's 375th

[164] For the list of non-delegable and indispensable duties of the BoD see also "Section I, 2.1.".
[165] Pulaşlı, p. 661.

Article shall remain on the BoD. Meaning that, liability of the BoD may come to the fore in cases where the BoD acts with fault in terms of;

- Appointment of the company's executives (Article 375/1-d),
- Giving instructions concerning top-level management of the company (Article 375/1-a),
- High-level supervision of the persons in charge of management (Article 375/1-e),

Thus, in cases where the BoD is not in fault in terms of the aspects-above and such situation is proved, it would not be possible for the BoD to be held liable.[166]

According to Article 553/3 of the TCC, "*No persons shall be held liable due to violations of law or AoA or corruption which are beyond their control; this condition of non-liability cannot be nullified with justifications of duty of supervision and care.*" In line with the Article, it has been set forth that no person shall be held liable due to violation of law or AoA, or corruption which are not under his/her control. With regards to the subject matter, *Kendigelen*[167] states that with the provision, the liability regime which justifies violation of a completely abstract duty of supervision and care, has been abandoned. Meaning that, with Article 553/3 board members are protected against liability claims based on a completely abstract duty of supervision and care. However, this provision has been criticized due to couple aspects. Firstly, it is considered that the provision of non-liability (Article 553/3 of the TCC), contradicts with certain indispensable duties of the board [the TCC's 375/1-(a), (b) and (e)].[168] Secondly, it has been stated that there is an uncertainty in terms of which cases to be considered as "*beyond control*" of the BoD.[169] Eventually, as *Pulaşlı*[170] states and we agree, despite Article 553/3 of the TCC, it would be possible for the BoD to be held

[166] Pulaşlı, p. 662.
[167] Kendigelen, p. 461.
[168] Caymaz, p. 37; According to *Pulaşlı*, the BoD's authority of high-level supervision is non-delegable and indispensable and the restriction of the authority's functional framework may lead the dangers of dysfunction. Additionally, the BoD is under the obligation of carefully selecting the persons to be assigned to the management of the company, to give instructions and to supervise all their works and transactions. Hence, the problem is how to reconcile the TCC's Article 375/1-(a) and (e) with Article 553/3. Pulaşlı, pp. 664, 665.
[169] Pulaşlı, p. 664, 665; Caymaz, p. 37; Kürşat Göktürk, "Anonim Şirket Yönetim Kurulunun Özellikle Yetki Devri Halinde Gözetim Sorumluluğu ve Hukuki Belirlilik Sorunu." *Türkiye Barolar Birliği Dergisi*, no. 114 (2014), p. 188.
[170] Pulaşlı, p. 665.

liable due to the damages caused by the transactions that are beyond its control, which violate the law or the AoA, provided that the BoD is in fault and there is the element of causal link. Additionally, the BoD would also be held liable in cases where not acting in line with the duty of care in terms of its duty of high-level supervision concerning delegated duties and authorities.

As previously stated, in order for board members to be held liable in line with Article 553, an obligation arising either from law or the AoA or the contractual relation between the company and the board member, has to be failed with fault. Indeed, there are several provisions in the TCC and in other relevant codes which encumber certain obligations on board members. Some of these obligations requires board members to do or to act in a certain way, and some other obligations requires board members to avoid acting in a certain way. In cases where a board member faultily violates any of above-mentioned group of obligations, he/she could be held liable for the damage occurred. Hence, in this part, we shall go over several obligations of board members which may cause their liability, in cases where they are violated.

### 3.2.1. Prohibition of Participation in Discussion

The 393rd Article of the TCC prohibits certain board members to participate in discussion at the BoD meetings under certain circumstances. In line with the Article, in cases where the company's interest conflicts with;

- Personal interest of a board member,
- Interest of those persons who are a board member's lineal consanguinity or his/her spouse or one of his/her blood and in-law relatives up to and including the third degree,

it is prohibited for such board member to participate in the discussion and the voting concerning related matter.[171] According to the preamble of the Article, by the word "*personal*", it is meant an interest that is personally related to the board member or his/her relative. Otherwise, an earning, an advantage, a prevention of a loss etc. all of which essentially concern a group, would not be considered as personal. Additionally, the interest must be non-related to the company. Thus, according to the preamble, a

[171] Pulaşlı, p. 447.

board member shall be able to participate in the discussions concerning appointment, dismissal etc. regarding himself/herself or his relatives indicated in the Article.[172] Hence, prohibition of participation to discussion shall come to fore in case a significant conflict of interest exists, such as a controlling shareholder who is also a board member seeking to buy a high value property of the company.[173]

The prohibition of participation is also applied in cases where non-participation of a board member to the discussion is required due to good faith as it is set forth in the 2nd Article of the Turkish Civil Code.[174] If there is a hesitation in terms of participation of the board member, the BoD shall decide on the situation and the concerned member shall not participate in the voting. Even in cases where the BoD has no knowledge on the conflict of interest, the member in question is under the obligation of disclosing the situation to the BoD, and comply with the prohibition.

In terms of liability, in cases where a damage occurs due to violation of the prohibition, the violating board member shall be held liable. In addition to the violating board member/s, despite objectively existing and known conflict of interest, those board members who do not oppose to the concerned member's presence at the meeting and those board members who approve the board member's participation to the meeting shall be liable for the damage occurred. (Article 393/2 of the TCC) According to Article 393/3, the reason for non-participation in the discussion due to the prohibition, and related transactions are written in the board resolution.

Similar provision to Article 393 of the TCC, has been set forth in Article 51/3 of the TBC. According to Article 51/3, it is prohibited for persons who are authorized to extend loans to participate in the assessment and decision-making processes of the loan transactions concerning themselves, their spouses and children under their guardianship and the real and legal persons that constitute a risk group with them. In line with the Article, such persons are obliged to inform the relevant authorities of the above fact in writing. As previously stated in the study, banks' board of directors has the power to extend loan. Yet, the BoD is authorized to delegate this power to the credit committee or general management within the principles determined by the

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172 Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 131.
173 Akdağ Güney, p. 210.
174 Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 131.

BRSB. Thus, differently than the TCC's Article 393, which is a prohibition concerns only board members' liability, prohibition set forth by the TBC concerns liability of each person who bear the power to extend loans.[175] (Board members, credit committee members, authorized persons to extent loan within general management)

### 3.2.2. Prohibition of Conducting Transaction with Company

As the body of representation and management, board of directors makes transactions not only with third persons but also with the persons who are close to the company. In fact, the persons whom the company makes transactions with, could be one or more members of the BoD.[176] In such cases, the board member would be in the position of both the offeror and the acceptor which is considered as a vulnerable circumstance for the company to be exposed to possible damages. In order to eliminate risks of such transactions, in line with Article 365 of the TCC, board members are prohibited to conduct any transaction with the company, either in their own names, or any other person's name, without the general assembly's permission. The prohibition of transaction which is valid for all the board members whether they have the authority to represent the company or not,[177] covers following cases;

- A board member making a transaction with the company by representing him/herself on one side and representing the company on the other side,
- A board member making a transaction with the company by representing a third person on one side and representing the company on the other side,
- A representative of the board member is making transaction with the company which is represented by the board member. (In this case, even there are two separate parties, in the essence, still, the board member is making transaction with the company).[178]

It is accepted that without considering whether the transaction is of a commercial nature or whether the transaction is within the company's field of activity, any transaction could be subject to the prohibition, if other conditions are met.[179] However,

[175] Caymaz, p. 38.
[176] Akdağ Güney, p. 212.
[177] Pulaşlı, p. 443; averse Akdağ Güney, p. 222.
[178] Akdağ Güney, p. 218.
[179] Pulaşlı, p. 443.

considering the "ratio legis" of the provision, which is to protect interest of the company in cases of conflict of interest between the company and the board member; cases in which the company would not suffer any damages would be outside the scope of the prohibition, such as gift agreements in which a board member undertakes a disposition without consideration in benefit of the company.[180]

In line with the Article, transactions subject to the prohibition could only be made with the permission of general assembly and permission of general assembly could be given prior to the transaction or after the transaction is made. It is also possible for companies to abrogate this prohibition by a provision in their AoA. The 395th Article states that in cases where the provision is violated, the company shall be able to claim that the transaction is null and void. The counterparty shall not be able to make such a claim.

With regards to the authorized body to decide on the faith of the transactions which violate the prohibition; in one of its recent decisions, the Civil Department no. 11 of the Supreme Court has stated that the general assembly shall have the authority to validate or invalidate the transaction, and the BoD cannot claim for the invalidity of the transaction prior to the general assembly's decision on the matter. In the same decision, with regards to the legal characteristic of the transaction of a board member violating the prohibition, the Court stated that the transaction shall not be void, rather be pending void, because of the fact that the general assembly is authorized to validate the transaction, after it has been made.[181] Thus, until the transaction is ratified by the general assembly, the transaction shall be in abeyance for the company and if the general assembly does not ratified the transaction, the transaction shall not be valid from the very beginning.

Lastly, in addition to not ratifying the transaction, it is possible for board members who violate the prohibition to be held liable for the damages occur due to the violation.[182]

180 **Kırca**, Şehirali Çelik & Manavgat, p. 669.
181 Pulaşlı, p. 443; 11.CD.5.3.2019, M.2017/2886, D.2019/1818
182 Akdağ Güney, p. 233.

### 3.2.3. Prohibition to be Indebted to the Company

In order to protect joint-stock companies' assets and to prevent possible abuses by becoming indebted to the company, with Article 395/2 of the TCC; non-shareholder board members, their non-shareholder relatives specified in Article 393, have been prohibited to be indebted in cash to the company. Additionally, the company has been prohibited to provide security, guarantee or surety for the persons above, take over their debts or undertake liability. As can be seen, for non-shareholder board members and their non-shareholder lineal consanguinity or spouses or blood and in-law relatives up to and including the third degree, it is prohibited to be become indebted cash to the company. For persons whose legal status is not within the scope of the provision at the time of the transaction (becoming indebted), if legal status of these persons changes in a way that violating the provision, it should be accepted that the provision has been violated.[183] On the other hand, regardless of changes occurred on legal status of those persons who become indebted to the company by violating the provision, it should be accepted that the violation still exists.[184] Otherwise, it would not be possible for board members who leave their duty after becoming indebted to the company, to be held liable.

In line with the Article, prohibited actions are; for persons indicated in the Article to be indebted cash to the company, the company to provide security, guarantee or surety for these persons, and the company to take over their debts or undertake liability. Therefore, it is considered that these persons are not prohibited to become indebted in kind to the company.[185]

In cases where the prohibition is violated, the transaction between the persons who violate the provision and the company shall be valid, thus have effect and bear consequence. Yet, in line with Article 395/2 of the TCC, it is possible for the creditors of the company to directly demand the company's claims arising from the violating transaction, from the violating persons.[186] However, for creditors to be able to make

[183] Mehmet Özdamar & İlker Doğan, "Banka Anonim Şirketi Yönetim Kurulu Üyelerinin Borçlanma Yasağı." *Bankacılar Dergisi*, no. 86 (2013), pp. 6, 7.
[184] Özdamar & Doğan, p. 7.
[185] Akdağ Güney, p. 234.
[186] Özdamar & Doğan, p. 10.

the demand above, their claim from the company must have become due.[187] On the other hand, it would not be required for the debt which is incurred as a violation of the provision, to become due.[188]

In line with Article 395/3, provided the provision in Article 202 remains valid, companies within a group of companies shall be able to provide guarantee and surety for each other. However, this possibility could only be implemented if a company in a group of companies is a board member of another company within the same group of companies. In such cases, these companies could be able to provide surety and guarantee for each other. Still, board member company cannot become indebted to the other company and the other company cannot take over the board member company's debt or take over liability on behalf of the board member company other than surety and guarantee.[189]

Lastly, Article 395/4 states that "*Special provisions of the TBC remain valid.*" Indeed, banks' board members and their certain relatives are able to receive loans from the bank and open accounts at the bank within the limitations indicated in the TBC.[190] However, under certain cases which we are going to go over in the relevant section of the study, Article 395 of the TCC shall still be applicable for banks' board members.

### 3.2.4. Prohibition of Competition

As a reflection of board members' duty of loyalty, in line with Article 396 of the TCC, without obtaining permission from the general assembly, board members of joint-stock companies are prohibited from;

- Conducting any transaction of a commercial nature falling under the scope of activity of the company in their account or any other person's account,
- Participating in a company involved in the same kind of commercial business as a partner with unlimited liability.

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187 Özen Atlıhan, "Türk Ticaret Kanunu'na ve Türk Ticaret Kanunu Tasarısı'na Göre Yönetim Kurulu Üyesinin Şirketle İşlem Yapma ve Şirkete Borçlanma Yasağı." *İstanbul Barosu Dergisi* 4, no. 83 (2009), p. 1977.
188 Özdamar & Doğan, p. 10.
189 Özdamar & Doğan, p. 9.
190 Caymaz, p. 39.

It should be noted that the prohibition of competition can be abrogated by the general assembly. It is also possible to abrogate the prohibition by setting forth a provision in the AoA[191] or ratifying the board members' violating actions by general assembly after the actions have been done.[192] As clearly indicated in the Article, board members shall be subject to the prohibition of competition, still, it is accepted that persons whom have been delegated the authorities and duties of the BoD, shall be subject to the prohibition also.[193] In fact, in such cases, the authorized body to abrogate the prohibition shall be the BoD, instead of general assembly.[194]

Scope of the prohibition can be listed under two categories. Firstly, conducting commercial transactions within the company's scope of activity is prohibited. Thus, board members cannot make these activities with commercial purposes on behalf of themselves or on behalf of third persons. Secondly, board members shall not be able to participate in; a collective partnership as a partner, a commandite company as a partner with unlimited liability, an ordinary partnership as a partner, a joint-stock company as a board member or a limited partnership as a manager; all of which are involved in the same kind of commercial business as the company. Additionally, a board member cannot be a commercial representative or a commercial agent at a commercial undertake which involved in the same kind of commercial business as the company.[195]

In line with Article 396, in cases where the prohibition is violated the company shall have the rights below;

- To claim compensation for the damage,
- To claim any benefits arising from the contract, to be transferred to the company, in cases where a contract is made on behalf of a third person,
- To claim the transaction conducted, to be considered as if it has been made in the name of the company,

[191] **Kırca**, Şehirali Çelik & Manavgat, p. 694.
[192] Pınar Aşık, "Anonim Şirketlerde Rekabet Yasağı (TTK M. 396)." *Ankara Barosu Dergisi*, no. 4 (2017), p. 189.
[193] **Kırca**, Şehirali Çelik & Manavgat, p. 688.
[194] Akdağ Güney, p. 240.
[195] Akdağ Güney, p. 240.

- To claim from board member to leave the participated company or to claim any benefits acquired from the participated company, to be transferred to the company, in cases where the board member has participated in a company involved in the same kind of commercial business, as a partner with unlimited liability.[196]

Board members other than the ones who have acted contrary to the provision shall have the right to exercise one of the above stated rights. In cases where the number of board members are too many in a way that preventing the BoD to reach a quorum to take a decision on the subject matter, the right is used by the general assembly.[197] Statute of limitation for the right, is 3 months, starting from the date on which the other board members learned the commercial transactions or participation of the board member in another company, and in any case, 1 year after the transaction/participation.

Lastly, in line with Article 396/4, in cases where a claim is not filed or cannot be filed against board members who violate the prohibition, such board members can be held liable due to violation of duty of loyalty in line with Article 553 of the TCC.[198]

### 3.2.5. Obligation of Notification In Cases of Capital Loss and Overindebtedness

The last non-delegable and indispensable duty of the BoD as stated in the 375th Article of the TCC, is the "*Notifying the court regarding the company's state of overindebtedness.*". With regards to the said duty, the BoD's liability to "*convoke and notify*" in cases of capital loss or overindebtedness, has been regulated in Article 376. Additionally, regarding the Article, on September 14th, 2018, the Ministry of Commerce has issued a communique named "*Communique on Principles and Procedures Concerning Implementation of Article 376 of the TCC*"[199] (CPCI), which regulates convoking of general assembly in cases of capital loss and overindebtedness, and the measures to be taken by the company.

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196 Pulaşlı, p. 445.
197 Pulaşlı, p. 446; Poroy, Tekinalp and **Çamoğlu**, p. 376.
198 Akdağ Güney, p. 244.
199 Official Gazette 14.09.2018, 30536, (Amended by Official Gazette 26.12.2020, 31346)

The main reason behind issuance of the CPCI was many companies with foreign currency debt to lose capital or become overindebted due to significant decrease in the value of Turkish Lira in August 2018. Hence, according to the 1st Provisional Article of the CPCI, until 01.01.2023, whole sum of losses regarding exchange rates arising from executory foreign currency encumbrances (along with certain other expenses indicated in the Article) may not be taken into consideration in the calculations related to the loss of capital or overindebtedness. With regards to the BoD's liability arising from Article 376, we shall evaluate the Article, along with the provisions of the CPCI.

In line with the 1st and the 2nd sub-articles of the 376th Article of the TCC, in cases where the last annual balance sheet shows that half or two thirds of the capital and legal reserves are unsecured due to loss, the BoD[200] is obliged to convoke the general assembly. In the meeting agenda, it is stated that the capital and legal reserves are unsecured. (Article 5/1 of the CPCI) However, in the presence of any of above circumstances, even if the meeting is called with a different agenda, this issue is discussed in the general assembly. (Article 5/2 of the CPCI) Meaning that, the subject matter is an exception to the principle of adherence to the agenda.[201]

According to Article 6/1 of the CPCI, the case of at least half of the capital and legal reserves being unsecured, refers to the case of the loss is either equal to the half of the capital and legal reserves, or more than this amount but less that its two thirds. In such cases, the BoD submits the general assembly its remedial actions which the BoD seems appropriate. The BoD explicitly explains the financial situation by submitting the last balance sheet to the general assembly in a manner to be understood by each shareholder. A report regarding this matter can be submitted to the general assembly. (Article 6/2 of the CPCI) In order to eliminate or at least to reduce the effects of the deterioration of the financial situation of the company, the BoD alternatively and comparatively submits and explains remedial measures to the general assembly, such as the completion of the capital, capital increase, shutting down or reduction of certain production units or departments, sale of subsidiaries, altering the marketing system.

[200] In the 5th Article of the CPCI, instead of "board of directors" the lawmaker has used the term "body of management", according to the CPCI, this term would mean "board of directors" in terms of joint-stock companies. Thus, we shall use the term "board of directors" since we evaluate the provisions in terms of banks.

[201] Pulaşlı, p. 450.

(Article 6/3 of the CPCI) The general assembly may approve these remedial measures or approve such after some modifications, or decide to implement an alternative measure other than the measures submitted.[202] (Article 6/4 of the CPCI)

In line with Article 7 of the CPCI, in cases where the loss is equal to two thirds of the capital and legal reserves or more than this amount, the convened general assembly may decide to act in following ways:

- To decrease the capital in line with Articles 473 to 475 of the TCC,
- To complete the capital,
- To increase the capital.

If the general assembly decides to settle with the remaining capital, the capital is decreased in line with Articles 473 to 475 of the TCC, and in such cases the BoD may decide not to call the creditors and not to pay or secure their rights. In cases where the last annual balance sheet shows that two thirds of the capital and legal reserves is unsecured due to loss, if the general assembly does not decide on one of the measures indicated in the 7th Article of the CPCI, the company shall automatically be terminated.

In line with Article 376/3 of the TCC, in cases where there are signs which raise the suspicion that the company has become overindebted, the BoD is obliged to prepare an interim balance sheet based on the going concern value and based on liquidation value of the assets. In the 12th Article of the CPCI, "overindebtedness" has been defined as "the situation in which the assets of the company fail to cover the debt".[203] The signs of this situation can be understood from the annual and interim financial statements, the audit reports in companies subject to audit, the reports of the early determination committee and the determinations of the BoD. If the interim balance sheet indicates that the company's assets are not sufficient to cover its debts and the

[202] Translation of the Article has been retrieved from Bener Hukuk Bürosu Web Sitesi, "Communique Regarding the Procedures and Principles of Implementation of Article 376 of the Turkish Commercial Code Numbered 6102", see: https://bener.av.tr/communique-regarding-the-procedures-and-principles-of-implementation-of-article-376-of-the-turkish-commercial-code-numbered-6102/ (Access Date: 28.09.2020).

[203] Pulaşlı, p. 453.

measures indicated in the 7th Article are not taken the BoD must notify the court and file for bankruptcy.[204]

In terms of banks, prior and following the cases of “capital loss” and “overindebtedness”, corrective, rehabilitating or restrictive measures indicated in the TBC shall be implemented on related bank. If the bank does not implement necessary measures, liability of the bank’s BoD shall come to the fore.[205]

### 3.2.6. Liability for Obligation of Opening a Website

In accordance with Article 1524 of the TCC, in order to reach the highest level of transparency, certain companies have been encumbered the obligation of opening a website and allocating a certain part of this website for the announcements of legal notifications required to be made by the company. Additionally, in the same Article, the lawmaker has also regulated when and for how long the content to be published on the companies’ website.[206]

Since companies that are subject to independent audit shall be within the scope of this obligation[207], banks shall be under the obligation of opening a website and duly making necessary announcements in their websites.[208] In cases where these obligations are not complied with, executives and board members of the bank who are in fault, shall be held liable due to failing to fulfil their obligations.[209] (In accordance with the 553rd Article of the TCC) Additionally, board members could be subject to criminal liability for not complying with Article 1524.[210]

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204 Pulaşlı, p. 453.

205 Caymaz, p. 41.

206 In line with Article 1524, the content is announced on the website within the period indicated in the TCC, if a certain period is indicated, if not, within 5 days, starting with the date of the transaction or event on which the content is based, or in cases where the registration or announcement is made, within 5 days from the date of registration or announcement. Additionally, unless a longer period is stipulated in the TCC and other relevant codes or administrative regulations, a content uploaded on the company's website shall remain on the website for at least 6 months from the date on which it is published, otherwise it is deemed not to be uploaded.

207 Cafer Eminoğlu, *Türk Ticaret Kanunu'nda Kurumsal Yönetim*. (İstanbul: On İki Levha, 2014), p. 336.

208 Selçuk Yalçın, "Türk Ticaret Kanunda Web Sitesi Kullanım Zorunluluğu: Kurumsal Yönetim Kapsamında Menfaat Sahiplerinin İhtiyaçlarının Karşılanması." *Dumlupınar Üniversitesi Sosyal Bilimler Dergisi*, 2013, p. 176.

209 Eminoğlu, p. 338; Poroy, Tekinalp and **Çamoğlu**, p. 333

210 Board members who do not constitute a website as set forth in Article 1524, are sentenced to a judicial fine from 100 days up to 300 days and board members who do not upload the content to the website as required are sentenced to a judicial fine up to 100 days.

It should be noted that the Article has not specified the documents to be announced, rather states "*legal notifications required to be made*". Yet, many of these notifications to be made have been listed in detailed in the "*Regulation on Web Sites to be Opened by Capital Companies*"[211]. Still, provisions of various codes and regulations, concerning the information that should be published on companies' websites shall be significant.[212] Nevertheless, in terms of banks; financial reports, annual reports, documents concerning general assembly, corporate information of banks would be the first examples in terms of documents/notifications to be announced.

## 4. Provisions Concerning Board Members' Liability for Public Receivables

It has been considered that there is an overriding public interest with regards to collection of tax and other public receivables, thus, these receivables have been subjected to exclusive provisions compared to the receivables arising from private law. Hence, liability of legal representatives due to tax and tax related claims has been regulated in Article 10/2 of the TPC[213]. Likely, liability of legal representatives due to public receivables has been regulated with Repeating Article 35 of the CPCPR[214]. Board members who are responsible from management and representation, shall be considered as the legal representatives of the company and shall be subject to provisions with regards to liability of legal representatives due to public receivables. Therefore, in this part, we shall go over the provisions concerning liability of board members for public receivables as regulated in three different codes, namely as the CPCPR, the TPC and the CSSGHI[215].

### 4.1. Liability for Repeating Article 35 of the CPCPR

In accordance with Repeating Article 35 of the CPCPR, public receivables that cannot be collected (wholly or partially) from the assets of the legal person; or those which

[211] Official Gazette 31.05.2013, 28663
[212] Kendigelen, p. 597.
[213] Tax Procedure Code numbered 213, (Official Gazette 10.01.1961, 10705)
[214] Code on the Procedure for the Collection of Public Receivables numbered 6193, (Official Gazette 28.07.1953, 8469)
[215] Code on Social Security and General Health Insurance numbered 5510, (Official Gazette 16.06.2006, 26200)

are understood to be uncollected, shall be able to be collected from the personal assets of legal representatives in accordance with the provisions of the CPCPR.

Since, the Article regulates liability of legal representatives, board members of banks who are responsible from management and representation may be subject to personal liability for the bank's public receivables[216] indicated in the 1st and 2nd Articles of the CPCPR (excluding the tax and tax related receivables). In order for board members of banks to be held liable in line with the Article, firstly, there must be a public receivable within the scope of the CPCPR. Secondly, the execution proceedings must be carried out against the original debtor and as a result, the receivable could not be collected (wholly or partially) or it must be understood that the receivable would not be collected. This requirement shows that the liability of the board members is an auxiliary/secondary liability, assuring the receivable of the state.

Although the configuration of the Repeating Article 35 of the CPCPR is heavily criticized[217], according to the prevailing remarks in the doctrine, the liability regime that has been set forth by the Article is accepted as liability without fault.[218] Thus, in cases where the public receivable cannot be collected (wholly or partially) or it is understood that the public receivable would not be able to be collected, regardless of whether the board members are with fault or not, they shall be held jointly liable. Thus, creditors of the public receivable could claim the receivable from any and every board member regardless of any order or share. However, since the public receivable do not originally belong to the board members, board members would have the right

[216] Principal and accessory receivables of the State, special provincial administrations, municipalities and receivables of the above institutions arising from establishment of a public service (except receivables arising from contract, tort, usurpation) along with all kinds of receivables that are notified in various codes, to be collected in accordance with the Law on Collection of Assets (The law prior to the CPCPR, which contains similar provisions in terms of its content).

[217] According to *Geçer*, since legal representatives are not in a position to be benefitting from the actions of debtor of the public receivable, rather in a position as third persons in a public law relationship between the state and the person, holding these persons subject to liability without fault regime would conflict with justice and equity, therefore, contradict with the rule of law principle. He also states that purpose of guaranteeing the public receivable could be achieved by a provision which sets forth fault liability, thus, the provision as is, contradicts with the principle of proportionality. Ahmet Emrah Geçer, "Kanuni Temsilcilerin Amme Borçlarından Sorumluluğu: Kusurlu Sorumluluk v. Kusursuz Sorumluluk." *Gazi Üniversitesi Hukuk Fakültesi Dergisi* XX, no. 3 (2016), pp. 230, 231; in the same direction, Mert Silahşör, "Anonim Şirket Yönetim Kurulu Üyelerinin Kamu Alacağı Sorumluluğu." *Ticaret ve Fikri Mülkiyet Hukuku Dergisi,* no. 1 (2016), pp. 68, 69.

[218] Geçer, pp. 222, 223.

to recourse to the original debtor (to the joint-stock company/the bank).[219] Additionally, it would be possible for the board member who made an excessive payment in comparison to his/her share, to recourse to other board members.[220]

Lastly, the 5th sub-article of Repeating Article 35 of the CPCPR which stated that "*In cases where the legal representatives or managers of the institution at the time the public receivable arises and the legal representatives or managers of the institution at the time when the receivable is due are different, these persons shall be jointly liable for the payment of the public receivable.*" has been annulled by the Constitutional Court.[221] Consequently, each board member could only be held liable for public receivables that are not collected (wholly or partially) or understood to be uncollected during their term of office.[222]

### 4.1.1. Liability for Article 88/20 of the CSSGHI

In line with Article 88/16 of the CSSGHI, in terms of receivables arising from premiums that are not paid in due time and other receivables of the Directorate of Social Security Organization (the Directorate), provisions of the CPCPR shall be applied. (Except the CPCPR's Articles 51, 102 and 106) In other words, the Directorate's receivables shall be collected in line with the CPCPR, except for the receivables of the Directorate arising from private law. The Directorate's receivables to be collected in line with the CPCPR could be listed as receivables arising from premiums, contribution to education, special communication tax, administrative fees, etc.[223]

Since the provisions of the CPCPR shall be applied in terms of collection of the receivables of the Directorate, it could be stated that the priorly stated principles and criteria shall be applicable in this regard. However, in Article 88/20 of the CSSGHI, a significant provision has been set forth with regards to the liability of the board

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[219] Adnan Gerçek, "Türk Vergi Hukukunda Vergi Sorumlusu, Sorumluluk Halleri ve Türlerinin İncelenmesi." *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 54, no. 3 (2005), p. 172.

[220] Geçer, pp. 229, 230; Silahşör, p. 71.

[221] Constitutional Court, has decided that after the end of a legal representative's term and despite his/her lack of fault, including the legal representative in a liability which essentially arises as a result of others' intent or negligence, would contradict the rule of law principle. [19.03.2015, M. 2014/144, D. 2015/29 (Official Gazette 03.04.2015, 29315)]

[222] Geçer, pp. 224, 225.

[223] Silahşör, p. 73.

members due to the receivables of the Directorate. According to the Article, in cases where receivables of the Directorate are not paid in due time with no good cause; the employer (the company/the bank), its senior executives (including board members) or officials, the employer's legal representatives shall be jointly held liable. Hence, in order for a receivable to be collected in line with the Article, firstly, there must be a receivable of the Directorate in line with the CSSGHI, and there should not be any legal obstacle to the claim and collection of the receivable.[224] (For instance the receivable should not be barred by statute of limitation.) Most importantly, differently than the liability regime of the CPCPR which is liability without fault, the Article states that the receivables of the Directorate must not be paid in due time and with "*no good cause*". In other words, although the principles indicated in the CPCPR shall be implemented for the collection of the Directorate's receivables, liability regime shall not be liability without fault. Instead, the Article states that the payment must not be made with no good cause. Meaning that, regardless of the fault, if the payment is not made with no good cause, then board members of a bank could be held personally liable due to the receivables of the Directorate, such as premiums.

Lastly, since persons stated in the Article shall be jointly liable with the employer, liability of legal representatives arising from the receivables of the Directorate, shall be primary liability as opposed to auxiliary/secondary liability.[225] We should also note that except for the provision (Article 88/20 of the CSSGHI) concerning liability, which departs from the liability regime of the CPCPR, collection of the Directorate's receivables shall be made in line with the provisions of the CPCPR.

### 4.2. Liability for Article 10/2 of the Tax Procedure Code

In accordance with Article 10/1 of the Tax Procedure Code (TPC), tax obligation of the legal persons is carried out by their legal representatives. Thus, board members who are responsible from management and representation of the bank, have to perform tax related obligations such as submitting a declaration, complying with document order, paying the tax receivable of the bank from the assets of the bank.[226] According

[224] Silahşör, p. 77.
[225] Silahşör, p. 70.
[226] Silahşör, p. 69.

to Article 10/2 of the TPC, in cases where tax and tax related receivables[227] are not collected (wholly or partially) from assets of the legal person, as a result of legal representatives not performing their tax obligation, these receivables are collected from personal assets of the legal representative.

Essentially, it could be stated that Article 10/2 of the TPC which is a very similar provision to Article 35 of the CPCPR, intertwines with Article 35 of the CPCPR in terms of the subject matter. However, due to "general code-special code" relationship between the CPCPR and the TPC, with regards to liability of legal representatives, Article 10/2 shall be applied in terms of tax and tax related receivables, and in terms of other public receivables, the 35th Article of the CPCPR shall be applied.[228] In fact, Constitutional Court has annulled Article 35/6 of the CPCPR, which stated "*Provisions of the Tax Procedure Code numbered 213, concerning liability of legal representatives shall not abrogate the liability which has been set forth by this Article.*". According to the Constitutional Court, existence of two different legal provisions on the same event would lead to uncertainty about which of these provisions would be applied to the subject matter, thus, the Constitutional Court has decided to annul Article 35/6 due to being contradictory to the rule of law principle.[229]

In consideration of the information above, banks' board members who are responsible from management and representation could personally be held liable for the bank's tax and tax related debts. (Article 10/2 of the TPC) It should be noted that the liability regime set forth by Article 10/2 of the TPC is considered as fault liability, and banks' board members could only be held liable if they are faulty in terms of non-payment of the receivable.[230] In order for board members to get clear from liability, they have to prove that they have no fault in terms of non-payment of the receivable.[231]

For board members of banks to be held liable in line with Article 10/2 of the TPC, firstly, there must be a public receivable within the scope of the TPC and the execution

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227 In line with the 1st and 2nd Article of the TPC; (excluding the ones collected by custom administrations) taxes, duties and charges included in the general budget and taxes, duties and charges which belong to special provincial administrations and municipalities.

228 Geçer, p. 219.

229 Geçer, pp. 219, 220; Constitutional Court, 19.03.2015, M. 2014/144, D. 2015/29 (Official Gazette 03.04.2015, 29315)

230 Silahşör, p. 75.

231 Semra Kayır, "Vergide Belgelendirme ve Ticaret Şirketi Temsilcilerinin Şirketin Vergi Borçlarından Sorumluluğu." *Türkiye Barolar Birliği İdari Yargı Paneli*. 2003, p. 462.

proceedings must be carried out against the original debtor and as a result, the receivable could not be collected (wholly or partially). Meaning that, liability with regards to Article 10/2 of the TPC is an auxiliary/secondary liability. Lasty, legal representatives shall have the right to recourse to the legal person due to the payment that they have made. Yet, it is considered that right to recourse is possible for the tax and tax related receivables. Thus, in terms of tax penalties which is collectible from legal representatives in line with Article 10/2, right to recourse to the legal person would not be possible.[232]

## 5. Provisions Concerning Board Members' Liability in the TBC

Following the provisions of the TCC and other relevant codes and regulations all of which concern liability of banks' board members, we are going to go over the provisions of the TBC, on the same subject matter.

### 5.1. Obligation of Bookkeeping

In the 375th Article of the TCC, keeping the resolution book of the BoD, has been listed as one of the non-delegable and indispensable duties of the BoD. Hence, it is accepted that liability of board members may come to the fore, in cases where a damage occurs due to not complying with the relevant provision regulation the books required to be kept by banks' BoD. In this respect, main principles as to keep the board resolution book, credit committee resolution book, audit committee resolution book and board of managers resolution book have been indicated in the 28th Article of the TBC.

In line with the Article, resolutions of above-mentioned books are entered into a separate book with consecutive pages certified in accordance with related provisions of the TCC. Each resolution is allocated a date and number and arranged accordingly. The resolutions are kept in a way that not leading to any doubt as to authenticity of the text and no space is left between each text and there is no addition between lines. Each resolution is signed by the members within 1 month from the date of decision at latest. Instead of keeping a standard resolution book, it is also possible to use a loose-leaf book of which each sheet is certified by a notary public and numbered

[232] Geçer, p. 230.

consecutively. In such cases these books must be bonded until the end of following year's January. (Article 28 of the TBC)

The procedures and principles of keeping of above books are determined in the RBSMA. Additionally, "*the Communique on Commercial Books*"[233] contains certain provisions on keeping of the BoD's resolution book. In line with the above regulations, all the books above must be kept in Turkish. Thus, even the board members of banks with foreign nationality have to sign the resolutions within the books that are kept in Turkish. Yet, it is significant that board members with foreign nationality are clearly informed on the subject matter of each resolution. Meaning that, they should know about the text that they have signed, and a full translation should be made for their understanding.[234] In practice, it is seen that banks whose board of directors consist of multi-national board members, are keeping a separate book which is in a language that each board member can understand, presumably in English, still, depending on their language of choice. Yet, it should be noted that the since the obligation is keeping the afore-mentioned books in Turkish, in cases of conflict, records that are kept in Turkish shall be taken into consideration before the authorities.

### 5.2. Liability In Terms of Financial Reporting Systems and Annual Reports

In line with the 41st Article of the TBC, the BoD of a bank is responsible from "*determining the financial reporting system, and the duties, authorities and liabilities within this system; making information systems efficient and supervising the implementation.*" In the 41st Article, significant duties within the financial reporting system to be established by the BoD, have been particularly indicated to embody the financial reporting system's content. The duties indicated in the 41st Article are, "*accounting of activities in line with the 37th Article of the TBC, preparation of financial statements along with their approval, audit, publication and their submission to relevant authorities*".

In the 12th Article of the RABKD[235], above responsibility of banks' BoD has been detailed as "…*In terms of accounting and reporting systems, board of directors is*

[233] Official Gazette 19.12.2012, 28502.
[234] Caymaz, p. 57.
[235] Regulation on the Procedures and Principles for the Accounting Applications of the Banks and the Keeping of Documents (Official Gazette 01.11.2006, 26333)

*responsible for taking necessary precautions with regards to determining the basic policies, clearly defining the job definitions, duties, authorities and responsibilities in accordance with the work flow chart, making the internal and external information flow system adequate, clearly determining the authorities and responsibilities and supervising relevant implementations.*" As can be seen, banks' BoD shall be responsible from establishing an adequate financial reporting system and taking necessary precautions and supervising the system to be established. Hence, it is clear that the BoD shall be held liable in cases where a damage occurs due to failure to establish the financial reporting system in the bank in a way to fulfill the qualifications indicated in the TBC and relevant regulations, or failure concerning its duty of supervision of the implementation within the financial reporting system.

According to the 39th Article of the TBC, certain financial reports[236] have to be signed by the chairman of the BoD, the audit committee members and the general manager along with other persons[237] declaring that the financial report is in compliance with the legislation pertaining to financial reporting and with the accounting records. Additionally, the annual report, which is an obligation for banks to prepare in line with the 40th Article of the TBC, is signed by the same persons above, declaring that the report has been prepared in accordance with the RARB[238] and submitted to the board of directors' approval. (8th Article of the RARB) It is understood from these provisions that BoD of banks are responsible from financial reports to be prepared correctly and completely.

### 5.3. Obligation of Record Keeping

In the 42nd Article of the TBC, banks' obligation of record keeping has been regulated. In line with the Article, for a period of 10 years, within their bodies, banks are obliged to keep originals of the received letters and activity-related documents, or in cases where it is not possible for the originals to be kept, their copies in a way that leaves no doubt, and the photocopies of written letters in order with their number and dates.

[236] In line with the 13th Article of the RABKD, "Except for the independent audit report, year-end and interim financial reports, the financial statements attached to these reports and the related disclosures and footnotes and the financial statements prepared as of the end of the month".

[237] Assistant general manager responsible for financial reporting and the relevant unit manager or equivalent authorities.

[238] Regulation on the Procedures and Principles for the Preparation and Publishing of Annual Report of the Banks (Official Gazette 01.11.2006, 26333)

In the Article, it also stated that above-stated documents could be kept as micro-films or could be kept in electronic, magnetic or similar environments.

In the Article, the lawmaker defines the materials to be included the scope of the obligation, the period to store the records, and additional allowed methods for record keeping. However, as can be seen, the BoD of banks are not specifically encumbered an obligation with the Article. In other words, obligation of record keeping shall be valid for each personnel of a bank who is obliged to preserve above-mentioned documents in terms of their job description at the bank.[239] In terms of banks' board members liability, in cases where a damage occurs due to violation of the obligation of record keeping, the bank's board of directors' liability may come to the fore due to failure to fulfill the obligation of supervision.[240]

### 5.4. Liability for Extending Loans

The lawmaker who foresees that board members may damage the bank by misusing their authority and ability arising from their position, prohibits extending loans to board members, their relatives whom have been indicated in the TBC and certain companies of which they are partnered in.[241] Hence, according to the 50th Article of the TBC, "*Banks, under no condition and in no way grant cash or non-cash loans, and purchase bonds or similar securities of;*

*a) Their board of directors' members, general manager, deputy general managers and employees that are authorized to extend loans; their spouses and children under their custody; and the undertakings where they individually or jointly own twenty five percent or more of the capital,*

*b) Their employees other than those mentioned in sub-article (a) and their spouses and children under their guardianship,*

*c) The funds, associations, unions or foundations established by or for their employees.*"[242]

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239 Caymaz, p. 58.
240 Caymaz, p. 58.
241 Alıcı, p. 846.
242 Translation of the Article has been retrieved from Türkiye Bankalar Birliği, "*Banking Law No. 5411*", pp. 55, 56.

In the continuation of the Article, exclusions of the prohibition of extending loans, have been listed. Accordingly, real and legal person board members who directly or indirectly own qualified shares in the bank's capital, shall not be subject to above prohibition. (Article 50/2 of the TBC) It is considered that such real person board members' spouses and children under their custody; and the undertakings where they individually or jointly own twenty five percent or more of the capital shall not be subject to the above prohibition.[243] Additionally, Article 50/3 of the TBC states that even if the persons who are board members and members of audit board of a bank's undertaking, are the employees of the bank, this situation would not prevent the bank to extent loans to the undertaking.

Article 50/4 of the TBC states that in cases where a bank extents loans to those real and legal persons who are within the bank's risk group[244], the necessary decision must be taken by two thirds majority of the board members. Additionally, the conditions of the loan must not differ in favor of the borrower from the loans made available to other persons and groups and from the market conditions. Thus, banks are prohibited to extent loans to their ordinary board members, however, banks are allowed to extend loans to board members who are qualified shareholders provided that above-mentioned conditions are fulfilled.[245]

In line with Article 50/5 of the TBC, provisions of Article 50/1 and Article 50/4 shall not be applied to below loans which extended to the board members and employees of bank as well as their spouses and children under their custody;

- Loans which does not exceed five times of the monthly net total remunerations of above-mentioned persons,
- Loans to be extended through issuing check books and credit cards up to three times the monthly net total remunerations of above-mentioned persons,
- Loans to be extended in return for the securities mentioned in sub-articles (a) and (b) of Article 55 of the TBC.

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243 Reisoğlu, p. 989.

244 For definition of a bank's risk group (Article 49/2 of the TBC) see also, Türkiye Bankalar Birliği, "Banking Law No. 5411", p. 54. see: https://www.tbb.org.tr/en/Content/Upload/Dokuman/1/Banking%20Law.pdf (Access Date: 22.07.2020)

245 Özdamar & Doğan, pp. 13, 14.

According to Article 50/5 of the TBC, in terms of the loans within above limitations, even though the borrowers of the loans are persons who are indicated in Article 50/1, such persons could be extended loans without seeking the special quorum indicated in Article 50/4 and other conditions. On the other hand, regardless of the amount and the qualification of the loan, each bank is obliged to regularly report the loans extended to the persons within its risk group to the BRSA. (Article 50/6 of the TBC)

It should be noted that it is possible for a loan which does not violate prohibition set by the 50th Article, to become a violation of the prohibition due to subsequent developments. For instance, a borrower of a loan could be elected as a board member or could marry a board member. In such cases, these loans must be liquidated, within six months at the latest.[246]

In cases where the prohibition set by the 50th Article is violated, the bank shall be subject to a monetary fine which shall be in the "*amount up to five percent of the loan extended, not being less than fifty thousand Turkish Liras*" (Article 146/1-g of the TBC) Additionally, such loans shall be considered as items of reduction in the calculation of the relevant bank's own funds.[247]

Considering the duties and authorities of banks' BoD with regards to extending loans, it should be noted that banks' board members shall be held liable for the damages occurred due to loans extended unlawfully or by violating the loan limitations indicated in the TBC.[248] However, since the power to extend loans is a delegable power, in practice only loan offers which exceed certain limit are submitted for the BoD's approval. Thus, loan offers which are under the determined limits are resolved directly by credit committee or by the general management depending on delegation of the power. Even in terms of those loan offers which need to be approved by the board of directors, opinion of the management or the credit committee plays a significant role. Hence, in terms of loans which are approved and extended directly by the credit committee unlawfully or by violating the loan limitations, compensation claims due to damages occurred as a result of the loan shall be directed to the members of the credit committee in line with each member's degree of fault.[249] In such cases it

[246] Özdamar & Doğan, p. 15.
[247] Özdamar & Doğan, p. 16.
[248] Caymaz, p. 51.
[249] Caymaz, p. 52.

would be possible for the BoD to be held liable in line with Article 553/2 of the TCC, provided that it is proven that the BoD have not showed reasonable care in the selection of persons who have approved unlawful extension of the loan.

### 5.5. Liability for Confidentiality Obligation

Article 73 of the TBC regulates the confidentiality obligation, which could be summarized as the obligation of not to disclose or share confidential information of banks or customers. In line with the Article, the chairman and the members of the BRSB, personnel of the BRSA, the chairman, the members and the personnel of the Fund, and persons who have access to confidential information on banks or customers due to their title and position, are under the confidentiality obligation. For all the persons above, the confidentiality obligation continues even after the end of their duties.

Naturally, banks' board members would be in the position of those persons who have access to confidential information on banks or clients due to their title and position. In line with Article 73/3 of the TBC, these persons are prohibited to disclose such confidential information to any person or entity other than the authorities expressly authorized by law, such as the BRSA. (In line with Articles 95 and 96 of the TBC)

With a recent amendment made[250] on the TBC's Article 73/3, "customer secret" as a term has been defined as "*Data and information belonging to natural persons or legal entities collected in the course of banking activities and transactions after establishment of customer relations with banks*", and has been subjected to a private share or disclosure regime. According to the Article, provided that imperative provisions of other laws remain, even though customers' explicit consent is received in line with the Personal Data Protection Law numbered 6698[251], customer secrets shall not be disclosed to or shared with third parties, domestic or abroad, without a demand or an instruction received from the customer. Additionally, in Article 73/3 of the TBC, it is stated that, as a result of BRSB's assessment of economic security, the BRSB is authorized to prohibit shares or disclosures to be made to third parties abroad, of all kinds of data classified as customer secrets or bank secrets, and authorized to

[250] Made by the 10th Article of the Code numbered 7222, (Official Gazette 25.02.2020, 31050)
[251] Official Gazette 07.04.2016, 29677.

take decisions on information systems (and their backups) used by banks in carrying out their activities to be kept within the country.

In Article 73/4 of the TBC, exemptions to the confidentiality obligation has been listed.[252] It should be noted that the scope of exemptions listed in Article 73/4 covers both bank secrets and customer secrets. Still, including the disclosures to be made within the exemptions of confidentiality obligation, both customer secrets and bank secrets could only be shared or disclosed, provided that they are limited only to the stated purposes, and include as much data as required by these purposes, and in accordance with the principle of proportionality. (Article 73/3 of the TBC) Lastly, as priorly stated, for disclosure of a "customer secret", there must be a demand or an instruction of the customer, in this direction.

In cases of violation of confidentiality obligation, it is possible for board members to be held liable in line with the TCC, from the damage occurred due to disclosure of information classified as bank secrets.[253] Hence, it is possible for banks' board members to be held liable for the damages occurred due to disclosures of confidential information (whether it is bank secret or customer secret) in violation of Article 73, provided that the damage could be attributed to the banks' board members.

### 5.6. Liability for Corrective, Rehabilitating or Restrictive Measures

In accordance with the 65th Article of the TBC; the deposit banks, participation banks, development and investment banks, the branches in Turkey of such institutions established abroad and financial holding companies are subject to audit and supervision of the BRSA.[254] In line with the same Article, the BRSA may send representatives to the general assembly meetings of banks, solely for observation purposes. Within the scope of this Article, the BRSA is required to be notified by banks on the date and the agenda of their general assembly meetings at least 15 days

[252] For exemptions to the confidentiality obligation (Article 73/4 of the TBC) see also, Türkiye Bankalar Birliği, "*Banking Law No. 5411*", pp. 77, 78. see: https://www.tbb.org.tr/en/Content/Upload/Dokuman/1/Banking%20Law.pdf (Access Date: 22.07.2020)

[253] Akın Ekici, "Bankacılık Mevzuatı Kapsamında Banka ve Müşteri Sırrı." *Bankacılar Dergisi*, 2007, p. 58.

[254] Alıcı, p. 1226; Reisoğlu, p. 1430. Additionally, independent audit, rating and supporting service firms, leasing, factoring and financing companies are also subject to the audit and supervision of the BRSA.

prior to the general assembly meeting, and sent the minutes and the list of participants of the general assembly within the following month of the meeting.[255]

In line with the 66th Article of the TBC; parent undertaking banks, their domestic and foreign subsidiaries, their jointly-controlled undertakings, their branches and representative offices are subject to consolidated audit.[256] These institutions are obliged to keep their all of their records, information, documents, structure and systems ready and appropriate for consolidated audit.

As can be seen from the 65th and 66th Articles of the TBC, banks are subject to consolidated and non-consolidated supervision of the BRSA and in line with the 67th Article of the TBC, as a result of consolidated or non-consolidated supervisions, if one or more events listed in Article 67 is detected; necessary corrective, rehabilitating or restrictive measures that are indicated in Articles 68, 69 and 70 must be implemented by the related bank. In cases where the BoD of the bank fails to fulfill its duty concerning taking and implementing such measures, both civil and criminal liability of board members may come to the fore.

### 5.6.1. Obligation of Preparing a Precaution Plan for Systemically Important Banks

In addition to banks' obligation on implementing necessary corrective, rehabilitating or restrictive measures under relevant circumstances, banks which have been classified as "*systematically important*" by the BRSB, are subject to additional provisions in line with Article 66A of the TBC. Accordingly, these banks are obliged to prepare a precaution plan to determine the measures to be taken in cases of occurrence or probability of deterioration in their financial structure, and submit the precaution plan to the BRSB. In line with Article 66A/2, as a result of consolidated or non-consolidated assessments, if occurrence or probability of deterioration in financial structure is detected, these banks are under the obligation of taking the measures indicated in their precaution plan, and informing the BRSA on the matter, urgently. Additionally, if occurrence or probability of deterioration in financial structure of the bank is detected as a result of consolidated or non-consolidated

[255] Alıcı, p. 1227. This issue has been requested by the BRSA, via a letter (05.09.2013, 22152) sent to the Banks Association of Turkey.
[256] Reisoğlu, p. 1433.

supervisions to be made by the BRSA, the BRSA is authorized to request from the bank to take one or more measures indicated in the bank's precaution plan. (Article 66A/3 of the TBC)

### 5.6.2. Events that Require Measures to be Taken (Article 67 of the TBC)

Besides above obligation which has been set forth specifically for "*systematically important*" banks, corrective, rehabilitating and restrictive measures have been indicated in Articles 68, 69 and 70 of the TBC. Each bank could be requested either by the BRSA or the BRSB to take and implement these measures, under occurrence of certain events. In the 67th Article of the TBC, the events that require taking such measures have been listed[257]. It should be noted that -even though it is not clearly stated in Article 67- the BRSA is authorized to take measures in case of events other than those listed in the 67th Article.[258] Additionally, the measures indicated in Articles 68, 69 and 70 are not required to be taken in order. Meaning that, in cases where the related measures are not taken by the bank, or if the problem has not been resolved despite the taken measures, or it has been determined that even if the measures had been taken, any result would not be gotten; the BRSA or the BRSB shall have the authority to take and implement the measures indicated in the TBC or other measures deemed appropriate.[259]

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[257] Events that require measures to be taken are:

a) Its assets are likely not to meet its obligations in terms of maturity or that the bank does not comply with the provisions pertaining to liquidity,
b) Its profitability is not at level that is sufficient to reliably perform its activities, due to impaired balance and relations between revenues and expenses,
c) Its own funds is inadequate pursuant to the provisions pertaining to capital adequacy, or such case is likely to occur,
d) The quality of its assets have deteriorated in such a manner that its financial structure will weaken,
e) Its decisions, transactions and practices are in violation of the TBC and the applicable regulations,
f) It cannot establish its internal audit, internal control and risk management systems or cannot operate these systems efficiently or there is a factor that impedes supervision,
g) Due to the incompetence of the management, the risks defined in the TBC and the applicable legislation have increased remarkably or have concentrated in such a manner that they may weaken the financial standing
h) Failure to immediately take the measures and precautions specified in the precaution plan under Article 66/A, or failure in remedy of problems in spite of precautions, or determining that no result can be achieved even if the specified precautions are taken.

[258] Reisoğlu, p. 1437.

[259] Reisoğlu, p. 1438.

### 5.6.3. Corrective Measures

According to the 68th Article of the TBC, in cases where the events indicated in the 67th Article exist, the BRSA requests from the BoD of the bank to take appropriate corrective measures within a period of time to be deemed fit and under a schedule to be approved by the BRSA. In the 68th Article, events that require taking measures are divided into two groups, and the corrective measures to be taken shall be determined depending on the group of the event occurred. In line with the 68th Article, in cases where one or more events indicated in the sub-articles (a), (b), (c), (d) and (h) of the 67th Article occurs; the BRSA requests the BoD of the bank to take and implement one or more or all of the first group of corrective measures[260]. On the other hand, in cases where one or more events indicated in the sub-articles (e), (f), (g) of the 67th Article occurs, the BRSA requests the BoD of the bank to take and implement one or more or all of the second group of corrective measures[261].

It should be noted that in the 68th Article, primary corrective measures are indicated, hence, the BRSA is authorized to request from the BoD of the bank to take above indicated measures as well as any other measures or precautions that may be deemed fit and necessary by the BRSA. Since, the BRSA has the authority to decide on corrective measures, a decision of the BRSB would not be necessary.[262] However, if the BRSA determines that the corrective measures will not be sufficient against the risks that the bank is facing, the BRSA could ask the BRSB for implementing the measures stated in Articles 69, 70 or 71.[263]

### 5.6.4. Rehabilitating Measures

In cases where the bank fails to take the measures laid down in Article 68, or the events cannot be prevented despite the measures taken, or the BRSA considers that the corrective measures will not be sufficient, the BRSB shall directly require the BoD

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260 For the list of first group of corrective measures (Article 68/1-a of the TBC) see also, Türkiye Bankalar Birliği, "Banking Law No. 5411", p. 72. see: https://www.tbb.org.tr/en/Content/Upload/Dokuman/1/Banking%20Law.pdf (Access Date: 22.07.2020).

261 For the list of second group of corrective measures (Article 68/1-b of the TBC) see also, Türkiye Bankalar Birliği, "Banking Law No. 5411", p. 72. see: https://www.tbb.org.tr/en/Content/Upload/Dokuman/1/Banking%20Law.pdf (Access Date: 22.07.2020).

262 Reisoğlu, p. 1446.

263 Alıcı, p. 1254.

of the bank, to take and promptly implement any measure, including the ones stated in the 69th Article. In the 69th Article of the TBC, rehabilitating measures have been indicated and with regards to rehabilitating measures, instead of the BRSA, the BRSB has the authorization to request the BoD of the bank to implement rehabilitating measures. Hence, if the BRSA detects that the risk that the bank is facing requires to intervene the management of the bank, the BRSA must request the BRSB to decide on the rehabilitating measures. Even if there is no request from the BRSA, if the conditions exist, it is also possible for the BRSB to decide on rehabilitating measures or the measures indicated in the 70th and 71st Article, upon the BRSB's examination and evaluation.[264]

In terms of the rehabilitating measures, events which require measures to be taken are divided into two groups just like in the 68th Article. Accordingly, in cases where one or more events indicated in the sub-articles (a), (b), (c), (d) and (h) of the 67th Article, occurs; the BRSB requests the BoD of the bank to take and implement one or more or all of the first group of rehabilitating measures[265], and in cases where one or more events indicated in the sub-articles(e), (f), (g) of the 67th Article occurs; the BRSB requests the BoD of the bank to take and implement one or more or all of the second group of rehabilitating measures[266]. Still, the BRSB is authorized to request from the BoD of the bank to take above indicated measures as well as any other measures or precautions that may be deemed fit and necessary.

### 5.6.5. Restrictive Measures

In cases where the bank fails to take the measures laid down in Article 68 and/or 69, or the consequences of such events cannot be prevented despite the measures taken, or it is considered that no result can be obtained even after taking such measures, the BRSB shall require the bank to take and implement one or more of the measures (restrictive measures) indicated in the 70th Article or other measures deemed

[264] Alıcı, p. 1257.

[265] For the list of first group of rehabilitating measures (Article 69/1-a of the TBC) see also, Türkiye Bankalar Birliği, "Banking Law No. 5411", p. 73. see: https://www.tbb.org.tr/en/Content/Upload/Dokuman/1/Banking%20Law.pdf (Access Date: 22.07.2020).

[266] For the list of second group of rehabilitating measures (Article 69/1-b of the TBC) see also, Türkiye Bankalar Birliği, "Banking Law No. 5411", p. 73. see: https://www.tbb.org.tr/en/Content/Upload/Dokuman/1/Banking%20Law.pdf (Access Date: 22.07.2020).

appropriate. Banks are obliged to implement such measures within the time limit determined by the BRSB or within 12 months at latest.[267] Although primary restrictive measures[268] are indicated in Article 70, the BRSB is authorized to request from the bank to take and implement any other measures or precautions that may be appropriate.

### 5.6.6. Civil and Criminal Liability for Not Taking Necessary Measures

Whether it is the BRSA or the BRSB which is the institution that requesting the measures to be taken, these requests are made to the BoD of the bank. Hence, the BoD of the bank would be under the obligation of implementation of the measures requested either by the BRSA or the BRSB. Therefore, in cases where the BoD does not act in accordance with the authorities' request on taking and implementing such measures, the board of directors' liability may come to the fore.[269] If any damage occurs due to the BoD not taking or implementing the necessary measures at all or accordingly, it would be possible for the BoD to be held liable in line with Article 553 of the TCC. In fact, in cases where the bank's operation permission is revoked or the bank is transferred to the Fund as a result of the BoD not acting in accordance with the authorities' request on taking necessary measures, it would be possible for the board members to be subject to personal bankruptcy in line with Article 110 of the TBC. Additionally, in line with Article 152 of the TBC, persons who are under the obligation of taking requested "corrective, rehabilitating or restrictive" measures (such as board members) may be subject to criminal liability, in cases where they fail to take necessary measures.

It should be noted that, it is not possible for the BoD to implement certain measures indicated in the TBC by itself. For instance, for the implementation of measures such as "*increase of the shareholders' equity of the bank"* or *"temporary suspension of distribution of profit*", general assembly of shareholders must convene. It is possible that despite the BoD acts in due diligence in terms of convoking the general assembly, the necessary measures would not be taken as a result of the general assembly's

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[267] Alıcı, p. 1263.

[268] For the list of primary restrictive measures (Article 70 of the TBC) see also, Türkiye Bankalar Birliği, "Banking Law No. 5411", pp. 73, 74. see: https://www.tbb.org.tr/en/Content/Upload/Dokuman/1/Banking%20Law.pdf (Access Date: 22.07.2020).

[269] Caymaz, pp. 61, 62.

resolution. In such cases, it has to be accepted that the criminal liability would not come to the fore.[270] In our opinion, for the measures that the BoD cannot implement by itself, if the BoD has done its part in due diligence, in order for the implementation of the measure, both civil and criminal liability of the BoD shall not come to the fore.

### 5.7. Liability for Revocation of Operating Permission or Transfer to the Fund

As regulated in the 71st Article of the TBC, under certain circumstances, a bank's operating permission may be revoked, or the bank may be transferred to the Fund. In such cases, managers (including board members) of the bank could be subjected to a private and exceptional civil liability regime which is regulated by the 110th Article of the TBC. In order for this liability regime to come to the fore, as a prerequisite, it must be determined that the bank's operation permission has been revoked or the bank has been transferred to the Fund as a result of decisions and transactions that are in violation of the applicable laws of "*the managers and auditors a bank, or its general manager and assistant general managers, or its authorized signatory officers*". In such cases, bankruptcy of above-persons could be declared by the court, based on the request of the Fund, and these persons shall be held personally liable to the extent of the damage they have caused to the bank. (Article 110 of the TBC)

#### 5.7.1. Implementation of the Sanctions Indicated the 71st Article

In order for the "personal liability" regime to come to the fore, as a prerequisite, the bank must be subjected to the sanctions indicated in the 71st Article of the TBC (either revocation of the bank's operation permission or the bank's transfer to the Fund).[271] According to the Article, in cases where one or more below-listed reasons exist, with the affirmative votes of minimum five members of the BRSB, revoking the operating permissions of a bank, or the bank's transfer to the Fund could be decided. The reasons which cause implementation of sanctions are listed in the 71st Article as numerus clausus, as follows;

a) The bank has not taken, either partially or completely, the requested measures indicated in Article 70 of this Law (TBC) within the period given by the Board (BRSB) or within maximum 12 months otherwise, or, even if having taken these

[270] Alıcı, p. 1253.
[271] Göktürk, *Banka*, p. 171.

measures, either partially or completely, the financial structure has not been strengthened or, it is considered that it cannot be strengthened even if the measures are taken,

b) The continuation of the bank's activities will endanger the rights of the owners of depositors and participation funds as well as the security and stability of the financial system,

c) The bank has not fulfilled its obligations as they fall due,

d) The total value of the liabilities of the bank exceeds the total value of its assets,

e) The controlling shareholders or managers of the bank fraudulently use the resources of the bank directly or indirectly in their own or others' favor in such a manner that the sound operation of the bank will be at stake, thus causing a loss for the bank.[272]

As can be seen, in cases where one of above-listed events occurs, the BRSB shall have the authority to decide on either revocation of the bank's operation permission, or the bank's transfer to the Fund. In other words, two different sanctions have been attributed to the above-listed reasons and the BRSB has been authorized to decide on either one of these two sanctions. Consequently, this broad authority given to the BRSB in terms of deciding on either one of these sanctions, has led to discussions in the doctrine on how the BRSB should exercise its power on the matter. According to *Alıcı*[273], as deciding on either one of the sanctions, firstly, the BRSB has to evaluate the possibility of fixing the financial condition of the bank under the Fund. If the possibility exists, then the BRSB must decide on the bank's transfer to the Fund, instead of revoking the bank's operating license. Similarly, according to *Tekinalp*[274], in case there are reasons which require the bank to be removed from the system, operation permission must be revoked; on the other hand, if there are still opportunities to benefit from the bank by wholly or partially transfer, selling or merger, or if it is possible to fix the bank, the bank must be transferred to the Fund. However, *Göktürk*[275] objects to the opinions issued by *Alıcı* and *Tekinalp* and states

[272] Translation of the Article has been retrieved from Türkiye Bankalar Birliği, "*Banking Law No. 5411*", pp. 74, 75.
[273] Alıcı, p. 1268.
[274] Tekinalp, *Banka Hukuku*, pp. 255, 266.
[275] Göktürk, *Banka*, p. 189.

that the BRSB's decision must be based on a cost analysis to be made between the public (Fund, investors and the market) loss and the possible benefits to be acquired.

In our opinion, current state of Article 71 which does not separate the reasons in terms of sanctions to be implemented, possesses a significant legal gap which needs to be regulated by an amendment on the TBC. Indeed, both two sanctions cause irreparable results when implemented, thus, the BRSB's authority on deciding on either one of these sanctions must be determined by law.[276] Yet, in terms implementation of the current law, we agree with the justifications provided by *Alıcı* and *Tekinalp*. Indeed, revoking operation permission is a heavier sanction than transferring the bank to the Fund. In cases where a bank is transferred to the Fund, its operations may be suspended during the process, yet essentially, this sanction would not prevent the bank to continue to operate.[277] On the other hand, banks whose operation licenses have been revoked are subject to liquidation.[278] Hence, these banks could not be able to accept deposits and make other banking transaction starting from the BRSB's decision's date of publish in the Official Gazette and these banks are not given an operation permission again.[279] Due to these reasons, we believe that the BRSB's decision must be based on the possibility of fixing the bank's financial condition or benefitting from the bank via wholly or partially transfer, sell or merger, or any other way.

#### 5.7.2. Conditions of Claiming for Personal Liability

For a bank's managers (including board members) to be held liable within Article 110, all of previously explained elements of liability (damage, causal link, fault, unlawfulness) must exist. However, even all four elements of liability exist, if the bank has not been subjected to the sanctions indicated in the 71st Article, such persons cannot be held liable in line with the 110th Article. Thus, as mentioned, as a prerequisite, in order for this exceptional liability regime to come to the fore, sanctions indicated in the 71st Article must have been implemented on the bank as a result of the bank's managers decisions or transactions.

[276] In the same direction, Göktürk, *Banka*, pp. 187, 188.
[277] Göktürk, *Banka*, p. 172.
[278] Tekinalp, *Banka Hukuku*, p. 265.
[279] Göktürk, *Banka*, p. 171.

In order for bank managers to be liable in line with Article 110, there must be decision or transaction are in violation of the applicable laws. However, as previously stated, there are different opinions in the doctrine in terms of which codes or regulations are considered within the term “applicable laws” as stated in Article 110 of the TBC. Indeed, the TBC shall fall within the scope of the 110th Article. According to *Reisoğlu*[280], element of “*unlawfulness*” in terms of Article 110, shall cover violation of the TBC, TCC, as well as other laws. Besides these laws, violation of the regulations, communiqués, circulars and decisions enacted in accordance with these laws shall also fall within the scope of "unlawfulness" in terms of Article 110. However, according to *Tekinalp*[281], whom we agree with, in addition to the TBC, TCC shall fall within the scope of Article 110, yet, non-law regulations such as AoA, contracts of obligations law, resolutions of the BRSB shall be outside of the scope of the Article. Additionally, according to *Tekinalp*[282], in terms of violation of other codes such as “Capital Markets Code” or “Law on the Protection of Competition”, it is not possible to accept instantly that the element of “unlawfulness” is fulfilled within the scope of Article 110. Instead, it should be assessed whether there is an undeniable link between the law/code and banking, or not.

As another element of liability, to claim for the bankruptcy of managers of the bank, there must be a causal link between the bank’s managers’ decisions/actions which violate applicable laws, and the implementation of the sanctions indicated in the 71st Article.[283] In cases where it is proven that if the decision/action of the board member had not existed, the bank would not have been transferred to the Fund or the bank’s operation permission would not have been revoked, the existence of the causal link should be accepted. However, it is difficult to prove such a causal link since banks’

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280 Reisoğlu, p. 1922; averse Tekinalp, *Banka Hukuku*, p. 291. According to *Tekinalp*, it would be incompatible with the element of causal link, to consider all laws within the scope of “unlawfulness”. Because accepting that any violation of the law would fulfill the element of unlawfulness, causes inability to examine whether the condition of causal link exists or not.

281 Ünal Tekinalp, *Fondaki Bankanın Hukuku*. (İstanbul: Lebib Yalkın Yayımları, 2003) p. 76. According to *Göktürk*; AoA, general assembly resolutions, the BRSA’s sub-regulatory acts and other sub-regulatory acts shall fall within the scope of the 110th Article, as long as they are concerned with banking operations. Göktürk, *Banka*, pp. 101, 103.

282 Tekinalp, *Fondaki Banka*, p. 76.

283 Alıcı, p. 1689.

financial circumstances are affected by a lot of reasons cumulatively, and most of the time, the effects of decisions and transactions realize after a while.[284]

In the 110th Article of the TBC, it is not clearly specified that the "personal liability" regime is a fault liability. However, it is accepted that in order for banks' managers to be subjected to this exceptional liability regime which results with bankruptcy of banks' managers, these persons must have acted with fault.[285] In terms of degree of fault, according to *Alıcı*[286], considering the qualifications sought in banks' managers, and the obligations encumbered on such persons by the TCC and the TBC, along with the importance of the duties carried out by these managers whom are subject to "personal bankruptcy", banks' managers who have caused implementation of the sanctions indicated in the 71st Article of the TBC, by their decisions and actions that are in violation of the applicable laws, shall be deemed faulty. *Reisoğlu*[287], who also indicates that fault is a necessary element for liability in terms of 110th Article, states that gross fault of the banks' managers must exist for these persons to be held liable in line with the 110th Article. As defining gross fault, *Reisoğlu*[288] states that banks' managers are obliged to research the lawfulness of their decisions and actions. Thus, even if banks' managers do not know and do not need to know that their decisions and actions violate the law, not making necessary research induce their gross fault.

Lastly, in terms of damage, in the 110th Article, it has specifically indicated that banks' manager shall be liable "*to the extent of the damage they have caused to the bank*". Thus, there must be a damage and for banks' managers to be declared as bankrupt. The damage has to be material, tangible and has to be definitive.[289] Additionally, in terms of the damages caused jointly by banks' managers (for instance, damages caused due to joint decisions), joint liability of related persons shall come to the fore in line with the 61st Article of the Code of Obligations.[290]

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[284] Alıcı, pp. 1689, 1690; Reisoğlu, p. 1924.
[285] Tekinalp, *Banka Hukuku*, p. 291; Alıcı, p. 1692; Reisoğlu, p. 1924; Göktürk, *Banka*, p. 118.
[286] Alıcı, p. 1692.
[287] In the same direction, Tekinalp, *Banka Hukuku*, p. 291; Poroy, Tekinalp and **Çamoğlu**, p. 428; averse Göktürk, *Banka*, p. 119.
[288] Reisoğlu, p. 1924.
[289] Reisoğlu, p. 1923; Tekinalp, *Banka Hukuku*, pp. 294, 295.
[290] Reisoğlu, p. 1924; Alıcı, p. 1693.

### 5.7.3. Persons to be Held Liable within the Scope of the Article

As previously mentioned, banks' managers[291] who have been indicated the 3rd Article of the TBC shall be within the scope of this "personal liability" regime. However, not only those who are managers of the bank at the date when the sanctions are implemented, but prior managers shall be within in the scope of the provision. It is accepted that banks' managers for whom the claim is not barred by statute of limitation, shall be within the scope of the provision.[292]

According to Article 110, besides the bank's managers, in cases where decisions or actions of managers are taken in order to provide benefit to dominant shareholders of the bank, such shareholder who have provided benefit from decision/action shall be subject to personal liability regime as well.

### 5.7.4. The Fund's Claim and the Method of Bankruptcy

In accordance with the general provisions, a person's bankruptcy could be claimed only if the person claiming for the bankruptcy has a receivable -arising from either a contract, tort, unjust enrichment or law- from the person whose bankruptcy is to be claimed. [293] Yet, it should be noted that the Fund has been given the exclusive authority in terms of claiming banks' managers bankruptcy in line with the 110th Article, without the need to be in the position of creditor.[294] Still, for the Fund to make such claim, as the decision-making body the Fund, the Fund Board has to have a decision concerning whether the related persons shall be enforced by bankruptcy, or not.[295] As taking this decision, the Fund Board acts in compliance with the quorum and procedures indicated in Article 116/2 of the TBC.[296]

The methods to be followed in order for a person to be declared as bankrupt, are named as methods of bankruptcy, and as to claim for banks' managers' bankruptcy, the Fund has been prescribed to follow a certain method of bankruptcy. As per the CBE, there are three methods namely as "ordinary bankruptcy method", "bankruptcy method pertaining to commercial papers and bills" and "direct bankruptcy method". With

[291] For the definition of "Managers" as a term in the TBC, see also "Section I, 3..
[292] Göktürk, *Banka*, p. 192; Reisoğlu, p. 1926.
[293] Reisoğlu, p. 1927.
[294] Reisoğlu, p. 1927; Göktürk, *Banka*, p. 198.
[295] Alıcı, p. 1693; Reisoğlu, p. 1927; Göktürk, *Banka*, p. 195.
[296] Göktürk, *Banka*, p. 195.

regards to both “ordinary bankruptcy method” and “bankruptcy method pertaining to commercial papers and bills”, the creditor first must make a petition to the enforcement office and initiate bankruptcy proceedings against the debtor. Based on the petition, the enforcement office sends a bankruptcy payment order to the debtor. If the debtor does not pay the debt in due of time, then the creditor could file a claim for bankruptcy of the debtor.[297] On the other hand, in line with Article 177 of the CBE, under certain circumstances, creditors have been entitled the right to directly file a claim at a commercial court for bankruptcy, needless of either a prior petition to an enforcement office or have a payment order sent to the debtor, which is called as “direct bankruptcy method”.[298]

In terms of method of bankruptcy to be followed by the Fund pursuant to Article 110 of the TBC, direct bankruptcy method has been adopted. As a result of the bankruptcy claim of the Fund, the commercial court shall accept the fact that even though banks’ managers are not merchants, their bankruptcy could be claimed, and the court shall inquire following issues;

- Whether the decisions and the actions of the bank’s managers violate the applicable laws and whether they have acted with fault -even intent-,
- Whether such decisions or actions caused the bank to be subjected to the sanctions indicated in the 71st Article of the TBC,
- Amount of the damages caused by the bank’s managers, if such persons caused the bank to be subjected to the sanctions indicated in the 71st Article of the TBC.

Consequently, if the court decide that the Fund’s claim for bankruptcy is wrongful, the court shall dismiss the claim, or if the court does not consider the pleas and defenses of the defendant as probable, the court shall decide for provisions of bankruptcy to be implemented on the defendants.[299]

### 5.7.5. Court of Competency and Jurisdiction

In the 142nd Article of the TBC, it is indicated that the civil claims to be filed by the Fund, shall be heard by the commercial court. The term “civil claims” refers to the claims that are within the competency of civil courts. Since bankruptcy claims are

[297] Kuru, p. 376.
[298] Kuru, p, 395.
[299] Reisoğlu, pp. 1927, 1928.

among the claims that should be heard by civil courts (Article 154/3 of the CBE), commercial court shall be competent to hear the bankruptcy claims to be filed by the Fund against banks' board members.[300] In line with Article 142/1 of the TBC, in cases where there is more than one commercial court in a locality, the bankruptcy claims of the Fund shall be heard by the first and second commercial courts.

In terms of jurisdiction with regards to bankruptcy claims to be filed by the Fund, in line with Article 142/2 of the TBC, Istanbul Commercial Courts (first and second) shall be the courts of competent jurisdiction. Lastly, the court in which the bankruptcy claim has been filed, notifies the commercial court where the defendant's center of commercial activity is located. (Article 142/2 of the TBC) However, banks' board members are not expected to have a center of commercial activity since they are not considered as merchants. However, in anyway if the board member is a merchant due to his/her commercial activities besides being a board member, the court to be notified shall be the court where the defendant's center of commercial activity is located. If the board member is not engaged in any commercial activities, the court to be notified must be the court where the defendant's place of residence is located.[301]

### 5.7.6. Protective Measures

In order for the Fund to collect its receivables as a result of its claims from banks' managers, the lawmaker has set forth certain protective measures which could be implemented on the persons whose personal bankruptcy is claimed and their certain relatives. (Articles 109/2, 3, 4 of the TBC) It should be noted that the Fund is authorized to take protective measures other than the ones indicated below. These measures shall be determined in line with the characteristics of each case, provided that the Fund shall always be bound by the provisions and the inscriptions set forth by the law.[302]

#### 5.7.6.1. Requesting a Statement of Wealth

As one of the protective measures, the Fund is authorized to request a statement of wealth, not only from the person whose bankruptcy is claimed but also his/her

[300] Göktürk, *Banka*, p. 200.
[301] Göktürk, *Banka*, pp. 201, 202.
[302] Göktürk, *Banka*, pp. 2013, 203, 205, 206.

relatives indicated in Article 109/2 of the TBC.[303] The statement of wealth must include movables and immovables, rights and receivables and sources of income. In terms of movables and immovables, the statement of wealth must include not only the currently owned ones but also the ones that have been acquired or assigned with or without a gratuitous contract, over the past two years prior to the date of the statement.[304] Lastly, statement of wealth must be submitted to the Fund within 7 days at latest, starting from the day that the person is requested (noticed) a statement of wealth.[305]

#### 5.7.6.2. Precautionary Assessment or Precautionary Attachment

In line with Article 109/3 of the TBC, upon the Fund's request; precautionary assessment or precautionary attachment could be implemented on properties, rights and receivables of controlling shareholders and managers of the bank (which is transferred to the Fund or whose operation permission has been revoked) without requiring a security deposit. Unless any action or execution-bankruptcy proceedings are initiated within 6 months from the date of the order, such precautionary assessment or precautionary attachment shall automatically become null and void.

#### 5.7.6.3. Prohibition to Leave Turkey

As indicated in Article 109/3 of the TBC, controlling shareholders and managers of the bank (which is transferred to the Fund or whose operation permission has been revoked) may be prohibited to leave Turkey, in order to ensure collectability and prevent any latency and obtain results from any punitive or administrative sanctions to be implemented. Yet, according to the 23rd Article of the Constitution of Republic of Turkey, only upon a judge's decision concerning a criminal prosecution or investigation, the freedom to leave the country of a citizen could be restricted. Thus, we believe that without a judge-based decision due to a criminal investigation or

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[303] According to Article 109/2 of the TBC, the Fund is authorized to request a statement of wealth from the bank's dominant shareholders, managers as well as real persons who own more than 10 percent of the capital of corporate bodies that are shareholders of the bank, their spouses, blood relatives up to third degree and relatives by marriage up to second degree, their adopted children and their adopting parents.

[304] Göktürk, *Banka*, pp. 203, 204.

[305] Tekinalp, *Banka Hukuku* , p. 284.

prosecution, prohibiting a person to leave the country solely based on Article 109/3 would contradict with the Constitution.[306]

### 5.8. Liability for Misuse of the Bank's Resources

In line with Article 108 of the TBC, if a bank's operation permission is revoked or the bank is transferred to the Fund due to the reasons stated in the 71/1-e of the TBC, a different provision of liability shall be implemented on the related persons, in addition to the provisions of the 110th Article (personal liability regime). According to the Article, in such cases as mentioned above, the bank's controlling shareholders and managers (including board members) shall be obliged to return the misused resources and compensate the damages occurred due to such misuse.

Cases to be deemed as misuse of a bank's resources are defined in Article 108/2 of the TBC. For instance, loans to be used, and advances to be received from the bank could be given as examples to using resources of a bank. In terms of damaging the bank by misusing the bank's resources; purchasing the bank's assets cheaply, selling a good or a service to the bank for a higher price than its market value could be given as examples.[307] It should be noted that even if the misuse of the managers or controlling shareholders does not violate the law or does not cause any damage, still, these persons shall be obliged to return the misused resources.[308] In addition to the obligation of returning the misused resources, in cases where any damage occurs due to the misuse, the bank's controlling shareholders and managers shall be obliged to compensate the damage occurred.

The amounts to be returned and the amount of the damage to be compensated shall be determined by the Fund Board, within the framework of the findings of the investigation to be carried out by the BRSA, at the bank.[309] In cases where more than one person is liable for the same damage, which occurs due to misusing the bank's resources, these persons shall be jointly liable, regardless of the extent of the damaged they have personally caused.[310]

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[306] In the same direction, Süheyl Donay, *Bankacılık Ceza Hukuku*. (İstanbul: Beta, 2007), p. 66.
[307] Alıcı, p. 1664.
[308] Göktürk, *Banka*, p. 210.
[309] Alıcı, p. 1664.
[310] Göktürk, *Banka*, p. 210.

## 5.9. Liability for Missing or Excess Declaration of Insured Deposits

In line with the 135th Article of the TBC, in cases where there is a difference between the amount of the savings deposit and participation funds subject to insurance that is declared to the competent authorities by the bank, and the amount of the savings deposit and participation funds determined by the Fund; the Fund has been authorized to directly collect the difference in the amount. Persons whom could be held liable in line with the Article have been indicated in Articles 135/1 and 135/2 as, "*the chairman and members of the BoD and credit committee, and general manager and assistant general managers, authorized signatories and branch managers of the bank, and the bank shareholders directly or indirectly, alone or jointly holding the control of management and control of the bank, and their spouse and children, and the persons who act on behalf of the persons mentioned above or the persons who acquire money, properties or rights on such persons' account, but in their own name*".

As can be seen, it is possible for board members to be held liable for the amount which have been declared differently, along with their spouses and children (regardless that they have attained maturity or not). Hence, these persons could be subject to certain measures indicated in Article 135, such as seizure of all their movable and immovable properties, rights and receivables, deposits, securities, briefly all their domestic and abroad assets; imposition of precautionary attachment on records of these assets in official registers, and putting these assets under preservation.[311] These measures are demanded by the Fund from the judge of the penal court of peace, having jurisdiction in the city of the HQ of the bank. In cases where a claim has already been filed on the matter, the court which hears the claim, shall have the authority to decide on the above measures. (Article 135/1 of the TBC)

The measures decided in line with Article 135, shall last for 1 year and if the Fund does not file a criminal complaint or initiate a debt enforcement procedure or file a claim to collect the receivable, the measures would terminate automatically.[312] If one of above-mentioned procedures is initiated, the measures last during the court process and until the Fund's receivables are collected wholly.[313]

[311] Poroy, Tekinalp and **Çamoğlu**, p. 430.
[312] Reisoğlu, p. 2111.
[313] Poroy, Tekinalp and **Çamoğlu**, p. 430; Reisoğlu, p. 2111.

## 6. Provisions Concerning Board Members' Liability in the CMC

In addition to the provisions of the TBC and the TCC, banks are subject to the Capital Markets Code numbered 6362 (CMC) due to their capital markets activities[314]. According to the 136th Article of the CMC, banks which sell their own capital market instruments publicly or privately and banks which carry out investment services and activities indicated in the CMC shall be subject to the CMC, with limited to their activities. Additionally, banks which qualify as publicly held companies shall be subject to the provision of the CMC.[315]

Consequently, for banks within the above scope, the provisions of the CMC shall be applied, including the ones which encumber certain duties and responsibilities on the board members. Thus, it is possible for board members of banks to be bound by the duties and responsibilities indicated in the CMC and in cases where these duties and responsibilities are failed, liability of those persons may come to the fore. In this part of our study, we shall go over the cases of liability indicated in the CMC and relevant regulations enacted based on the CMC.

### 6.1. Liability for Preparation of the Prospectus & Public Disclosure Documents

In the CMC, "prospectus" has been defined as "*a public disclosure document which includes all information on financial status, performance, prospects, and operations of the issuer (or guarantor, if any) or the characteristics of capital market instruments to be issued or traded on the exchange and the rights and risks associated with them in order to enable investors to make an informed assessment*". The main purpose of a prospectus is to inform the public, and to reveal complete and accurate information on the capital market instruments to be issued.[316] In order for capital market instruments to be publicly offered or to be traded on the exchange, preparing a prospectus and receiving the approval of the CMB are compulsory. (Article 4 of the CMC) In terms

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[314] Capital market activities are defined in the 34th Article of the CMC.

[315] In line with the 16th Article of the CMC, companies whose shares are traded on the stock exchange and joint-stock companies with more than five hundred shareholders (excluding partnerships that collect money from the public through crowdfunding) are deemed to be publicly held and subject to provisions concerning publicly held companies. However, in line with the 136th Article of the CMC, provisions of the CMC are not applied to banks in terms of their number of partners. Consequently, even banks with more than five hundred shareholders may not be considered as publicly held, if their shares are not traded on the stock exchange.

[316] Tekin Memiş & Gökçen Turan, *Sermaye Piyasası Hukuku*. 4. Baskı (İstanbul: Seçkin, 2020), p. 69.

of issuance of capital markets instruments that are not going to be publicly offered, instead of a prospectus, an "issue document" is prepared and the approval of the CMB is obtained for the document. (Article 11 of the CMC)

The liable persons for the damages occurred due to inaccurate, misleading and incomplete information included in the prospectus, has been regulated in the 10th Article of the CMC, in a gradual manner. Meaning that, in line with the Article, the issuer[317] shall be liable for such damages, in the first place. However, if the damage cannot be compensated by the related persons or it is clear that the damage cannot be compensated, board members of the issuer shall be held liable. In terms of liability of board members, principles of the TCC's 553rd Article shall be implemented. Meaning that, liability among the board members is determined within the principle of differentiated solidarity.[318] Thus, each board member could only be held liable to the extent of their fault and to the extent the damages could be attributed to him/her.

Besides Article 10 of the CMC, which regulates the liability for preparing the prospectus, with Article 32 of the CMC, liability for preparing public disclosure documents has been regulated. Since Article 10 is the special provision in terms of prospectuses, in terms of liability for preparation of prospectuses, instead of Article 32, Article 10 shall be implemented. Yet, in terms of liability for preparation of public disclosure documents (except prospectuses) Article 32 shall be implemented.[319] In line with Article 32, persons who signed the public disclosure documents (except prospectuses) -or the persons who have these documents signed on behalf of their names- shall be liable for the damages occurred due to false, misleading or incomplete information in the documents. It should be noted that, differently than the liability which is regulated by the 10th Article of the CMC, liability due to Article 32 shall be full solidarity.[320] Still, persons who prove that they have no knowledge on the public disclosure documents having false, misleading or incomplete information and such deficiencies are not caused by their intent or gross negligence shall be free from liability. (Article 32/3 of the CMC)

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[317] Article 3/1-h of the CMC - Legal entities, who issue capital market instruments, who apply to the CMB for issue or whose capital market instruments are offered to public and mutual funds subject to the CMC.

[318] Memiş & Turan, pp. 83, 118.

[319] Senem Demirkan, *Yönetim Kurulu Üyelerinin Sorumlulukları*. (İstanbul: On İki Levha, 2016), p. 26.

[320] Memiş & Turan, p. 83.

Lastly, in line with Article 32/6 of the CMC, the compensation claims arising from public disclosure documents (including prospectuses) shall be barred by statute of limitation within 6 months starting from the date when the loss occurred.

### 6.2. Liability for Preparation & Submission of the Financial Statements & Reports

In line with the 14th Article of the CMC, financial statements and reports to be disclosed to public or be requested by the CMB when necessary, must be prepared and submitted in a timely, complete and accurate manner. The format and content of these report must be in compliance with regulations established by the CMB within framework of the Turkish Accounting Standards. Additionally, with regards to periods that are subject to independent audit, independent audit reports must be disclosed along with the financial statements.[321]

Essentially, by the 14th Article, above-mentioned obligation has been encumbered on the issuer. However, according to Article 14/2 of the CMC, the issuer shall be liable for the preparation and submission of the financial statements and reports to be in compliance with above-requirements, along with its board members, depending on the board members' fault and the necessities of the circumstance. Hence, in cases where any damage occurs as a result of the violation of above-stated provisions, board members of the issuer who cause a damage by violating these provisions, shall be held liable in accordance with the general liability provisions (the 553rd Article of the TCC) of the TCC.[322]

It should be noted that it is possible for independent audit firms to be held liable -limited to the scope of their duties-, along with the persons who have signed the reports, for the damages occurred due to not auditing the financial statements and reports in accordance with the legislation.[323] (Article 63 of the CMC)

### 6.3. Liability for Falsely Distributed Advance Dividend

Companies of which shares are traded in the stock exchange may distribute advance divided in cash over their profits in the interim financial statements, provided that

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[321] Demirkan, p. 31.
[322] Caymaz, pp. 87, 88; Memiş & Turan, p. 118.
[323] Demirkan, p. 32.

there is a provision in their AoA that allows advance dividend distribution, and the BoD is authorized for advance dividend distribution in the relevant fiscal period. (Article 9 of the Communique on Dividends II-19.1[324])

Advance dividend is calculated on based on the interim financial statements, and the BoD is responsible for ensuring that these statements are prepared in accordance with the relevant legislation, accounting principles and that they reflect the truth.[325] In such cases where the advance dividend has been distributed incorrectly due to interim financial statements are not reflecting the truth fairly or not being prepared in accordance with the legislation and the accounting principles and rules, it would be possible for the board members to be held liable for the damages occurred against the company/bank, the shareholders, the creditors and directly to the persons who have acquired shares within the accounting period in which a dividend advance has been decided to be paid or has been paid. (Article 20/2 of the CMC) In the Article, it is specifically stated that board members shall be held liable in accordance with their degree of fault, the necessities of the situation and to the extent the damage can be attributed individually to them, which is consistent with differentiated solidarity which is regulated in Article 557 of the TCC. In addition to the board members, independent auditors are also under liability, limited by the accuracy and truthfulness of the financial information included in their reports.[326]

Lastly, in cases where conditions for civil liability exist, board members and shareholders are entitled the right to file a claim for nullity of the board resolution on advance dividend distribution, in line with Article 18/6 of the CMC, within 30 days from the announcement of the decision.

### 6.4. The BoD’s Authorization on Capital Increase in Registered Capital System

In “authorized capital system” which is the ordinary capital system for joint-stock companies, capital increase could only be decided by the general assembly. (Article 456/2 of the TCC) However, it is also possible for both publicly held and closed (not publicly held) joint-stock companies to adopt the “registered capital system” which allow joint-stock companies to increase their capital without needing a general

[324] Official Gazette 23.01.2014, 28891.
[325] Demirkan, p. 34.
[326] Demirkan, p. 34.

assembly resolution. In the registered capital system, the BoD of the joint-stock company is allowed to increase the capital of the company, up to a certain limit determined in the AoA, via board resolutions. However, within the registered capital system, the authority to increase the capital of the company could only be granted to the BoD for a period of 5 years, at most. Still, the general assembly is authorized to extend the duration of this authority, provided that each extension could not be more than 5 years.

In order to switch to the registered capital system, permission of the CMB must be obtained. (The 18th Article of the CMB) However, if the registered capital system has already been accepted according to the provisions of the TCC before going public, it is no longer necessary to obtain a separate permission from the CMB.[327] In this system, authorized capital of the joint-stock company shall be the issued capital, and the capital of the joint-stock company could be increased up to the limit which is determined in the AoA, by the BoD via issuing new equity shares, notwithstanding the provisions of the TCC concerning increasing the authorized capital.[328] Additionally, in the registered capital system, in order for the BoD to take resolutions which concern issuing privileged shares or shares above their nominal value, limiting the rights of the shareholders to buy new shares, or restricting the rights of the privileged shareholders; the BoD must be authorized by the AoA.[329]

As indicated in Article 18/6 of the CMC, board members or the shareholder whose right have been violated, are able to file a claim for nullity of the board resolution taken pursuant to the 18th Article, on capital increase. In such cases, the provisions of the TCC on nullity of the general assembly resolutions shall be implemented.[330] Filing a claim for the nullity of the board resolution must be made within 30 days starting from the date on which the resolution is announced, at the commercial court of first instance located where the HQ of the company resides. Lastly, according to the 93rd Article of the CMC, the CMB is also authorized to file a claim for nullity of the board resolutions taken pursuant to the 18th Article. This claim of the CMB has to be made within 30 days starting from the date on which the resolution is announced, at the

327 Memiş & Turan, p. 136.
328 Caymaz, p. 86.
329 Caymaz, p. 86.
330 Caymaz, p. 87.

commercial court of first instance located where the HQ of the company resides. The CMB is also authorized to request to defer the execution of these board resolutions without guarantee. (Article 93 of the CMC)

### 6.5. Prohibition of Hidden Income Transfer

With the 21st Article of the CMC, hidden income transfer has been prohibited in order to protect the shareholders and investors, from private management activities and transactions which damage the rights and interests of the non-controlling shareholders of a publicly held joint-stock company, decrease the company's profit and assets, or prevent its profit and assets from increasing.[331] The prohibition of hidden income transfer covers, transfers done by publicly held companies, their subsidiaries and associates.[332] In fact, in cases where income transfer is made through the subsidiary or the associate of a publicly held company, the subsidiary or the associate do not need to be publicly held.[333]

The 21st Article of the CMC defines the persons who are at the receiving end of the hidden income transfer as "*real or legal persons who have a direct or indirect relationship with the publicly held company or its subsidiary or associate, in terms of management, audit or capital*". As stated in the Article, persons who are at the receiving end of the hidden income transfer could be a real or legal person and could be a publicly held company or not. Any case, it should be noted that for the existence of hidden income transfer, either persons to be transferred income must be in a direct or indirect relationship with the publicly held company or its subsidiary or associate in terms of management, audit or capital;[334] or the transaction in question must be a "related party transaction" as defined in the Corporate Governance Communique[335] and TAS[336]-24 (Related Party Disclosures).[337]

Following the definition of parties of hidden income transfer, actions which are considered as hidden income transfer, are indicated in the first two sub-articles of the

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[331] Arslan Kaya, "Halka Açık Ortaklıklarda Örtülü Kazanç Aktarımı Yasağı (SERPK m. 21)." *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* LXXI, no. 2 (2013), p. 194.
[332] A. Kaya, p. 197.
[333] Memiş & Turan, p. 139.
[334] A. Kaya, p. 198.
[335] Official Gazette 03.01.2014, 28871.
[336] Turkish Accounting Standards.
[337] Memiş & Turan, p. 139.

21st Article. According to these sub-articles, it is understood that hidden income transfer could be made via both active and passive behaviors.[338] Firstly, hidden income transfer could be realized actively, via performing transactions such as making contracts or commercial practices containing different prices, fees, costs or conditions or producing a trading volume in violation of the (i) comparability to similar transactions, (ii) conformity with market practices and (iii) prudence and honesty principles of commercial life. Secondly, hidden income transfer by passive actions exists, if the activities expected from the publicly held company or its subsidiary or associate as prudent and honest merchants in the framework of their AoA are not performed or the activities in order to conserve or increase these companies' profits or assets in accordance with market practices are not performed, with the aim of providing increase of profits or assets of real persons and legal entities with whom they are related.[339] Either by passive or active behaviors, as a result of the above transactions, publicly held joint-stock company or its subsidiary or associate has to suffer a decrease in its profit or assets, or an increase in its profit or assets must be prevented. If the transaction does not cause such damage, then it would not be possible for hidden income transfer to exist.[340]

It should be noted that the actions considered as hidden income transfer in the 21st Article of the CMC, has not been indicated as numerus clausus. In other words, actions indicated in Article 21/1 of the CMC have been indicated as examples.[341] Therefore, it is not possible to determine cases of hidden income transfer only by the indications of the Article.[342]

In terms of banks, it is clear that the publicly open banks shall be subject to the provision of the 21st Article. For instance, in cases where shares or an immovable is being traded between a publicly open bank and a company which is its subsidiary, the value of the trade's subject must be appraised in an accurate and health way by an independent expertise firm.[343] Under these conditions, meaning that if such transactions are made in accordance with the markets conditions, the related party

338 Memiş & Turan, p. 139.
339 A. Kaya, pp. 196, 197.
340 Memiş & Turan, p. 141; A. Kaya, p. 203.
341 A. Kaya, p. 200.
342 Memiş & Turan, p. 141.
343 Caymaz, p. 85.

transactions could be made, since the prohibition set forth by the 21st Article of the CMC does not prohibit all the related party transactions, yet it prohibits hidden income transfer.[344] Thus, in cases where the related party transactions are in accordance with the market conditions or the publicly held joint-stock company is favoring from the related party transactions of its associates or its subsidiaries, the transaction would not be considered within the scope of 21st Article of the CMC.[345] In terms of related party transactions made within the rules indicated here, publicly held companies are obliged to document that the related party transactions have been performed under conditions in conformity to similar transactions, market practices, prudence and honesty principles of commercial life and to keep the documents and information certifying this situation for at least eight years. (Article 21/3 of the CMC)

Lastly, the sanction of the violation of prohibition of hidden income transfer has been indicated in Article 21/4 of the CMC. Accordingly, in cases where the income transfer is discovered by the CMB, the publicly held company, its subsidiaries and its associate requests from the persons whom received the hidden income transfer, to return the amount transferred along with its legal interest to the company of which assets or profit have been decreased, within the duration to be determined by the CMB. Parties which have received an income transfer are under the obligation of returning the transferred amount with its legal interest within the period to be determined by the CMB. Additionally, in line with Article 94 of the CMC, the CMB is authorized to request the announcement of supervision results from publicly held company, as well as its associates and subsidiaries which have been determined to be engaged in hidden income transfer; to file a claim for the return of the amount determined by the CMB, within the period specified by the CMB. In cases where the amount is not returned, the CMB is authorized to implement administrative fines.

### 6.6. The CMB's Corporate Governance Principles

In line with Article 17/2 of the CMC, the CMB has been authorized to determine the procedures and the principles regarding corporate governance principles in terms of publicly held companies. Additionally, the CMB has also been authorized to require publicly held companies of which shares are traded on the stock exchange to comply

[344] Memiş & Turan, p. 140.
[345] Memiş & Turan, p. 140.

with corporate governance principles partially or completely and to establish the principles and procedures regarding these. In cases where the compliance requirement is not fulfilled, the CMB may utilize its authorities such as deciding on implementing sanctions on the company, file a lawsuit and claim for precautionary attachment.[346]

In line with its above-mentioned authorities and with the aim of determining the principles of corporate governance and principles and procedures on related party transactions, to be applied by companies, the CMB has issued the "*Communique on Corporate Governance numbered II-17.1*" (CCG)[347] and determined "*Corporate Governance Principles*" in the attachment of the CCG. Hence, banks that are stock exchange companies, shall be subject to the Corporate Governance Principles of the CMB.[348] The Corporate Governance Principles have been regulated under four main topics, namely as "Shareholders Rights", "Public Disclosures and Transparency", "Stakeholders", "Board of Directors"; among those principles, the imperative ones have been indicated in the 5th Article of the CCG.[349] Within the scope of our study, we shall include the corporate governance principles determined by the CMB, to the extent that they coincide with the subject of our study.

### 6.6.1. Principles Concerning General Assembly Meeting

In Principle no. 1.3.1., it is stated that announcement of the general assembly meeting, along with the documents to be made available for the examination of the shareholders in line with the TCC, and notifications and explanations to be made in line with the relevant legislation shall be published in the company's web site and at the PDP at least three weeks prior to the general assembly meeting (excluding the day of announcement and the day of general assembly meeting). In the Principle, it is also stated that certain issues are disclosed/announced to the investors, such as; total number of shares and voting rights, information on privileged shares, changes to be made in the management and activities of the company along with their reasons, changes concerning the BoD and board members, written requests of the company's

[346] Eminoğlu, p. 32.
[347] Official Gazette 03.01.2014, 28871.
[348] Sıtkı Anlam Altay, *Hukuki Açıdan Banka Anonim Ortaklığı*. (İstanbul: Vedat, 2019), p. 64.
[349] Article 5 of the CCG - Companies are liable to implement the principles of corporate governance number (1.3.1.), (1.3.5.), (1.3.6.), (1.3.9.), (4.2.6.), (4.3.1.), (4.3.2.), (4.3.3.), (4.3.4.), (4.3.5.), (4.3.6.), (4.3.7.), (4.3.8.), (4.5.1.), (4.5.2.), (4.5.3.), (4.5.4.), (4.5.9.), (4.5.10.), (4.5.11.), (4.5.12.), (4.5.13.), (4.6.2.) and (4.6.3.) from among those set forth in the annex of this Communiqué.

shareholders concerning adding an item to the meeting agenda addressed to the investor relations of the company and if such requests are denied by the BoD, the denied request, along with the reasons of denial.[350]

The Corporate Governance Principles also encumbers the chairman of the general assembly meeting with certain responsibilities in order for the content of the meeting to be clear and comprehensible for the shareholders.[351] In line with the 449th Article of the TCC, "*If otherwise is not regulated in the AoA, the meeting is chaired by a chairman who is not required to be a shareholder, elected by the general assembly.*" However, in practice the chairman of the general assembly meeting is usually elected among the board members, in fact, usually, the chairman of the BoD is directly appointed as the chairman of the general assembly.[352] Hence, in such cases, the chairman of the BoD must be prepared to fulfill the duties and responsibilities encumbered on him/her by the Corporate Governance Principles. In line with Principle no. 1.3.4., prior to the general assembly meeting, the chairman of the meeting makes preparations regarding the administration of the meeting in accordance with the TCC, the CMC and the relevant regulations, and obtains the adequate information.

According to Principle 1.3.5., at the general assembly meeting, the chairman of the meeting shall be attentive to the fact that the agenda items should be expressed in an objective and detailed manner with a simple and understandable method. Fair opportunities should be given to shareholders to express their views and raise their concerns. The chairman of the meeting must assure that any issue asked by the shareholders that is not a trade secret is addressed directly in the general assembly. If the issue is not relevant to the agenda or is too difficult to be addressed at the meeting, the Investor Relations Department shall respond to the question in writing within 15 days. All issues raised at the general assembly meeting and all their answers shall be disclosed to the public by the Investor Relations Department on the company's website within 30 days of the date of the general assembly meeting, at the latest.

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[350] Eminoğlu, pp. 38, 39.
[351] Eminoğlu, p. 40.
[352] In the same direction, Necat Azarkan, "Anonim Şirket Genel Kurullarını Kim Yönetir?" *Dicle Üniversitesi Hukuk Fakültesi Dergisi* XVII-XVIII, no. 26-27-28-29 (2012-2013), p. 73.

In line with Principle no. 1.3.6., the transactions of the company's shareholders in the controlling position or certain managers and their close relatives, made with the company or its subsidiary that may cause conflict of interest must be discussed separately at the general assembly and must be recorded in the minutes of the general assembly.[353] Lastly, according to Principle 1.3.9., in order for the execution of board resolutions which concern certain transactions[354], the majority of the independent board members' approval is required. If concerned board resolution has not been taken with the unanimous votes of the attending members, the signed board resolution and dissenting opinions to the resolution are disclosed at the PDP. In cases where the majority of the independent board members have not approved the transaction, this event is disclosed at the PDP with necessary information, and the transaction is submitted for the general assembly's approval.

#### 6.6.2. Liability Insurance (D&O - Directors and Officers Liability Insurance)

According to Article 361 of the TCC, the damages that may occur as a result of board members' fault as they are performing their duties, could be insured at a price exceeding 25 percent of the company's capital. However, it should be noted that the insurance indicated in Article 361 of the TCC, is not imperative, rather voluntary.[355] Still, in cases where the company is secured by such insurance, in terms of publicly open companies, the event is announced at the bulletin of the CMB, and if the company's shares are listed on a stock exchange, the event is also announced at the bulletin of the stock exchange, and taken into account as the company is assessed in terms of its compliance with corporate governance principles. As oppose to the voluntary insurance indicated in Article 361 of the TCC, with Principle 4.2.8., the companies that are subject to CCG (including banks) have been obliged to insure the "*damages that may be caused due to the faults of the BoD during the charge of their duties"* for an amount exceeding 25 percent of the company's capital and disclosing the matter at the PDP.[356]

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[353] Eminoğlu, p. 41.
[354] For the transactions indicated in the Principle, and methods of calculation see also Principle 1.3.9. https://www.cmb.gov.tr/SiteApps/Teblig/File/479 (Access Date: 24.12.2020).
[355] Altaş, p. 138.
[356] Altaş, p. 138.

### 6.6.3. Principles Concerning Structure and Meetings of the BoD

According to Principle no. 4.3.1., the number of board members cannot be less than five, which is a provision in compliance with Article 23 of the TBC. Additionally, in the Principle, it is stated that the number of members of the board shall be decided in order to ensure that the members of the board carry out fruitful and constructive activities, take swift and reasonable decisions and coordinate the composition and activities of the committees in an effective manner.

In Principle no. 4.3.2., as, "*non-executive board member*"[357] has been defined as a term, and it is stated that majority of the board members within the BoD, must consist of non-executive board members. Additionally, it is stated that within the group of non-executive board members, there must be independent members who have the ability to fulfill their duties impartially. In terms of banks that are subject to the CCG, the number of independent board members has been determined as 3, minimum. It is also stated that banks' duly elected audit committee members shall be considered as independent board member within the scope of the CCG. (Article 6/3-a of the CCG) Lastly, in Principles no. 4.3.5., 4.3.6., 4.3.7. and 4.3.8.; term of duty, qualifications, election processes and termination of duty of independent board members have been regulated.

### 6.6.4. Principles Concerning Board Committees and Financial Rights

With regards to the committees to be established in line with Article 366/2 of the TCC, banks which are subject to the CCG, are under the obligation of establishing a corporate governance committee and a nomination committee[358]. However, in cases where it is not possible to establish a separate nomination committee due to organization of the BoD, nomination committee's duties are fulfilled by the corporate governance committee. (Principle 4.5.1.) Additionally, the BoD determines the committee members along with the committees' duties and rules of procedures, and

[357] "Non-executive board member" is defined in the CMB's Corporate Governance Principles no. 4.3.2. as "A person who does not have any administrative duty other than being a board member or any executive unit subsidiaries to himself/herself and is not involved in the daily work routine or ordinary activities of the corporation.". For further information on executive/non-executive board members see also Alıcı, p. 389; Doğan, pp. 67, 68; Pulaşlı, pp. 408, 418.

[358] Duties of corporate governance committee and nomination committee have been indicated in Principles 4.5.10. and 4.5.11. of the CMB's Corporate Governance Principles.

all of these information are announced at the PDP. (Principle 4.5.2.) Each board committee must consist of 2 members, minimum. Majority of each board committee must be composed of non-executive board members. For those board committee which consist of already 2 members, all of these members must be among non-executive board members. The chairman of each board committee must be elected among independent board members. (Principle 4.5.3.) General manager must not have a duty in the committees. (Principle 4.5.4.) Additionally, written remuneration principles must be constituted concerning board members and executives. At the general assembly, these principles must be submitted to shareholders under a separate agenda item and the shareholders must be enabled to express their views on the issue. (Principle 4.6.2) Lastly, the remuneration policy must be published in the company's website. In addition, remuneration for independence board members must be at a standard that protects the independence of these members. (Principle 4.6.3.) [359]

[359] Eminoğlu, p. 55.

## SECTION III
## CLAIMS & TERMINATION OF LIABILITY

### 1. Parties of the Liability Claims

As we have evaluated in the Section II; in various codes and regulations, it has been regulated that under certain circumstances, it is possible for banks' board members to be held liable for the damages occurred, due to their fault or even in certain cases, regardless of their lack of fault. With regards to these events which require liability of board members, the right to file a claim is granted to certain individuals. In line with the TCC, persons who have the right to file a claim for board members liability vary, depending on whether the claim is based on proximate or remote damages, or whether the company has gone bankrupt or not. Similarly, persons to be held liable as a result of these claims, vary depending on certain circumstances such as the person's degree of fault or delegation of management. In this part of our study, we shall go over the parties of liability claims within the scope of the TCC and other relevant legislation.

### 1.1. Plaintiffs

In line with Articles 555 and 556 of the TCC; the company, its shareholders, and its creditors have been granted the right to file a claim for liability of related persons due to damages suffered by the company. However, as previously mentioned, right to file a claim for above persons varies depending on whether the damage occurred is a proximate or remote damage, or the company has declared bankruptcy or not.

According to the 555$^{th}$ Article of the TCC, each shareholder and the company have the right to file a lawsuit, claiming for a compensation to be paid to the company, due to the damages suffered by the company. In the Article, the term "*damage suffered by the company*" refers to the company's proximate damages which could be defined as the loss that causes a depreciation in the assets of the company or not occurrence of an expected value increase in the company's assets.[360] It should also be noted that proximate damages of the company would constitute remote damages of the company's shareholders and creditors. In line with Article 555, the right to claim compensation due the company's proximate damages, has been granted to the

[360] Tekinalp, *Sermaye*, p. 444.

company and the shareholders. Therefore, as long as a company has solvency, each shareholder could file a claim for one or more board member to be held liable due to proximate damages of the company. However, since the proximate damages of the company constitute remote damages of the shareholders, in terms of their claims in line with Article 555, the shareholders could only demand for the compensation to be paid to the company. Additionally, since the company has the right to file a claim due to the its proximate damages, without the need for a resolution of the general assembly on the matter, the BoD of the company shall be authorized to make the claim on behalf of the company against one or more board members and represent the company during the court processes as the company's legal representative.[361] In cases where the company would file a claim against all of its board members, the claim would be filed by the general assembly.[362]

With regards to the cases where the liability claim has been made by the shareholders, in order to prevent possible aggrievement of the plaintiff shareholder due to court case expenses, Article 555/2 states that "*If the legal and material reasons justify the claim of the shareholder, the court shall apportion the court case expenses and the attorney's fee among the plaintiff shareholder and the company on an equitable basis, in cases where these expenses cannot be encumbered on the defendant*.".[363]

As previously mentioned, along with the company and its shareholders, creditors of the company have been granted the right to file a claim for liability of board members due to proximate damages of the company. However, in line with Article 556, the creditors of the company could only make such claim in cases where the company has gone bankrupt. In line with the Article, in cases where the company has gone bankrupt, the right to file a claim for the damages proximately suffered by the company is primarily granted to the administration of bankruptcy. Thus, in such cases both the creditors and the shareholders of the company shall only be able to file a claim for the related persons' liability, if the administration of bankruptcy has not taken any action.[364] In line with Article 556/2, from the revenue collected as a result of the claims of the shareholders or the creditors, firstly, receivables of the plaintiff creditors shall

361 Pulaşlı, p. 685.
362 Akdağ Güney, p. 459.
363 Dinç, p. 155.
364 Kendigelen, p. 463.

be paid, then, from the remaining balance, plaintiff shareholders shall receive their assets in proportion to their capital shares and the rest, if any, shall be given to the bankrupt's estate.

Besides shareholders' and creditors' right to file a claim for liability due to the damages that they have remotely suffered (proximate damages of the company), it is accepted that shareholders and creditors have the right to file a claim for liability, due to the damages that they have suffered proximately. In this sense, proximate damages of the shareholders and the creditors, are considered as the damages that they have directly suffered due to their position and caused by the actions of the company's board members, regardless of whether the company suffered any damage or not.[365] For instance, prevention of shareholders' use of pre-emptive right in capital increase, the company not paying dividends to a shareholder in accordance with the shareholder's share, unjustly preventing a shareholder from attending or voting in the general assembly meeting, a shareholder selling his/her shares or suffering a loss due to buying new shares based on the wrongly prepared balance sheet, may constitute proximate damages of shareholders, and extending loan to the company by trusting the accuracy of the balance sheet could be given as an example for a proximate damage of the creditor.[366] In terms of shareholders' and creditors' claims due to the proximate damages that they have suffered, they would have the right to demand the compensation to be decided to be paid to them.[367]

#### 1.1.1. Burden of Proof in Liability Claims Against Banks' Board Members

The shareholders' and the creditors' liability claims against board members due to their proximate damages shall be based on tort[368]; thus the burden of proof in terms of proving the fault of the defendants shall be on the plaintiff party. On the other hand, since it has been considered that there is a contractual relationship (mandate contract) between the board members and the company, claims due to the company's proximate damages shall be based on breach of contract.[369] Thus, in liability claims filed due to

[365] Mehmet Çelebi Can, "Pay Sahiplerinin veya Alacaklıların Doğrudan Zararlarının Tazmini Amacıyla İkame Edilen Sorumluluk Davalarında TTK m. 1534'ün Etkisi." *Gazi Üniversitesi Hukuk Fakültesi Dergisi* XXI, no. 4 (2017), p. 14.
[366] Akdağ Güney, p. 296.
[367] Kaplan, p. 3507.
[368] Akdağ Güney, p. 297.
[369] Pulaşlı, p. 685.

the company's proximate damages, board members shall be deemed faulty and shall be under the obligation of proving that they are free from fault.[370]

With regards to burden of proof, the TBC sets forth an exceptional provision in terms of claims to be filed by the Fund according to Article 108 (Misuse of the Bank's Resources) and Article 110 (Personal Liability of the Bank's Managers) of the TBC. According to Article 137 of the TBC, in all liability cases filed by the Fund pursuant to Articles 108 and 110, the defendant party shall be under the obligation of proving that they are free from fault.[371] In fact, it is considered that Article 137 shall be applied not only in terms of the proof of fault, but also in terms of the burden of proving all elements of liability. In other words, concerning the liability cases filed by the Fund pursuant to Articles 108 and 110, defendants shall be saddled with the burden of proving that the elements of liability do not exist.[372]

According to Article 6 of the Turkish Civil Code, "*Unless otherwise is indicated in the law, each of the parties is obliged to prove the existence of the facts on which they ground.*" Hence, in principle, burden of proof shall be on the plaintiff party firstly, unless otherwise is indicated in the law. It could be considered that exceptional provision of Article 137 of the TBC justifiable, since it is allowed to make a regulation contrary to the above principle via a law. However, in our opinion, the burden of proof which is saddled on the defendant party with Article 137, is in such a way as to violate the right to a fair trial. For instance, in a bankruptcy case to be filed pursuant to Article 110, it will be sufficient for the Fund to only file a claim, and if the defendants cannot prove the opposite of the claims on which the Fund is grounded, the court shall decide the bankruptcy of the defendants. It should be noted that the information and documents that the defendants could use to oppose the Fund's claims, would be possessed by the bank whose management and control has been transferred to the Fund.[373] Additionally, since the Fund does not obliged to pay a lawsuit fee or a punitive damage or a compensation, in addition to not being obliged to prove its claims, it is possible for the Fund abuse its right to file a liability claim.[374] Hence, due

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370 Caymaz, p. 96.
371 Kendigelen, p. 460; Handan Oruç Ömeroğlu, "Banka Yönetici ve Ortaklarının İflasında Usul ve İspat." *Uyuşmazlık Mahkemesi Dergisi*, no. 11 (2018), p. 309.
372 Göktürk, *Banka*, p. 157.
373 Alıcı, pp. 1845, 1846.
374 Alıcı, p. 1846; Reisoğlu, p. 2118.

to the unfairness caused by the implementation of Article 137 in the judicial process, this provision is considered to be in violation of the Constitution.[375]

Consequently, we agree with the arguments stating that the provision in question is unconstitutional and as a solution until the provision is subjected to annulment, as *Reisoğlu*[376] states, in cases where the defendants are saddled with the burden of proof pursuant to Article 137, it will be sufficient for the defendants to reject the Fund's claims, and the burden of proof in terms of proving its receivable shall be on the Fund.

### 1.2. Defendants

Defendants of the liability claims in line with Article 553/1 of the TCC have been indicated as "*founders, board members, managers and liquidators*". Thus, these persons shall be subjected to liability claims in cases where they "*fail to fulfil their obligations arising from the law and AoA".* However, in the 2nd and 3rd sub-articles of Article 553, liability of persons or bodies who lawfully delegate an authority or duty arising from law or AoA, is regulated. In cases where delegation of an authority or duty is made, this delegation shall reflect on the liability of related persons, based on failure of such duty.

According to Article 553/2, "*Bodies or persons who lawfully delegate a duty or authority arising from law or AoA to another person, shall not be liable for the actions and decisions of these persons, unless it is proven that they have not showed reasonable care in the selection of those who have taken over these duties and authorities.*" When this provision is evaluated in terms of the liability of the board members, it is accepted that delegation of management (Article 367 of the TCC) shall mean delegation of liability. In other words, the liability is delegated along with the delegation of duty and/or authority; the delegate takes over the liability and delegator would become liability-free.[377] Thus, in terms of liability claims due to a failure of a duty that has already been delegated by the BoD, the claim should be directed to those to whom the duty has been delegated, rather than the board members. It should be

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[375] Alıcı, pp. 1845, 1846; Reisoğlu, p. 2119; Göktürk, *Banka*, pp. 157, 158.

[376] Reisoğlu, p. 2119. As another point of view, according to *Altay*, with regards to liability claims in which Article 137 shall be applied, the Fund shall be under the burden of proving the damage of the bank and the legal acts that have been unlawfully done, and on the opposite side the defendants shall be under the burden of proving that they are free from fault. Altay, p. 230.

[377] Tekinalp, *Sermaye*, p. 436.

noted that, if it is proven that the BoD has not showed reasonable care in the selection of those who have taken over these duties and authorities, the board members shall be held liable for the actions and decisions of the delegates. Yet, in any case, duties and authorities indicated in Article 375 of the TCC shall remain as duties and authorities of the BoD. Lastly, in Article 553/3, it is stated that no person shall be held liable due to violation of law or AoA, or corruption which are beyond his/her control. Since we have previously stated our remarks on the provision, we do not find it necessary to repeat them, on the subject matter.[378]

Lastly, in terms of liability claims for Article 108 of the TBC, "*the controlling shareholders and managers*" and in terms of liability claims for Article 110 of the TBC, "*the managers and auditors*" of the related bank shall be in the defendant position. Besides above-mentioned persons, in cases where decisions or actions of managers are taken in order to provide benefit to dominant shareholders of the bank, such shareholder who have provided benefit from decision/action shall be subject to personal liability in line with Article 110, as well.

### 2. Competency and Jurisdiction of the Court

In line with the 4th Article of the TCC, regardless of whether the parties are merchants or not, civil lawsuits arising from the matters stipulated in the TCC and in the regulations concerning banks, are considered as commercial lawsuits. Thus, competent court in terms of liability claims to be filed against board members, shall be commercial court.[379]

With regards to jurisdiction, the 561st Article of the TCC states that, "*Claims to be filed against liable persons can be filed at the commercial court of first instance where the HQ of the company is located.*" As stated in the preamble of the provision, Article 561 does not indicate the court of exclusive jurisdiction. Thus, the way to make arbitration and jurisdiction agreement is open.[380] In line with the preamble of the provision, arbitrators can be authorized by concluding an arbitration agreement. Also, an unauthorized court in terms of jurisdiction can be authorized by concluding a

[378] For further evaluations and criticism directed to the sub-article, see also "Section II, 3.5."
[379] Dinç, pp. 166, 167; Kaplan, p. 3508.
[380] Yaralı, "*Türk Ticaret Kanunu Madde Gerekçeleri*", p. 215.

jurisdiction agreement. However, it should be noted that the court authorized by the contract must be specified particularly.[381]

## 3. Termination of Liability

### 3.1. Release

At the end of a certain financial period, bodies of a company that are in charge of management, representation and audit are responsible to account for their activities and transactions to the company's general assembly. In line with the TCC, the persons that are under such obligation are the BoD, executives, and auditors of the company. In this regard, release is the declaration of the general assembly in a form of resolution, to the members of the bodies above, concerning the convenience of their transactions with the law and current legislations.[382]

In terms of its legal characteristics, release is a negating acknowledgement of debt. Thus, a valid release, counts as the acknowledgment of the company that the company has no claim for compensation from the released persons, due to their transactions performed in the relevant financial period. In other words, resolution of release abrogates the "*right to file a claim*"[383] of the company, along with those shareholders who voted affirmatively for the resolution of release and those shareholders who acquired the shares knowing the release.[384] Additionally, release is a formative, unilateral act. Therefore, declaration of release is not subject to any acceptance of the released persons. However, in order for release to be effective, the declaration must reach its addressee.[385] Release of the BoD, the executives and the auditor has been indicated as one of the non-delegable and indispensable authorizations of the general assembly. In other words, in terms of joint-stock companies, the general assembly is the only authorized body to release the above-mentioned groups.

General assembly could decide to release the BoD, either in an ordinary or an extraordinary general assembly, as the case requires. Yet, it should be noted that release of the BoD would not mean that the BoD has been released as a body, rather, it means that members of the BoD have been released. It is possible for board members

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[381] Dinç, p. 167.
[382] Pulaşlı, p. 695.
[383] Right to file a claim for compensation due to cases and transactions subject to the release.
[384] Tekinalp, *Sermaye*, p. 469.
[385] Akdağ Güney, pp. 417, 418.

to be released wholly or individually, meaning that the general assembly could decide to release certain board members and avoid releasing certain other board members. It is also possible for general assembly to limit resolution of release by certain a period within the financial year or certain transactions.

### 3.1.1. Implicit and Explicit Release

Board members, executives, and auditors of a company could be released in two ways. First way of release has been set forth in Article 424 of the TCC. Essentially, this Article does not directly regulate release, yet regulates the cases where general assembly's resolution on approval of balance sheet, results in release of above persons.[386] In line with the Article, in cases where the balance sheet is approved by the general assembly, unless otherwise is indicated in the general assembly resolution, the board members, auditors and executives shall be deemed released. Release made by this way is named as "implicit release". In terms of implicit release, even if the general assembly does not intent to release the board members or auditors with the approval of the balance sheet or does not know that the board members or auditors will be released by the approval of the balance sheet, the approval of the balance sheet shall still result in the release of board members or auditor.[387] However, it would not be possible for board members to claim that they have been released from cases or transactions that are not directly or indirectly included in the balance sheet but that create legal liability, by stating that the balance sheet has been approved.[388]

The second way of release is named as "explicit release" which covers the cases where the general assembly has a resolution of release by means of a specific item in the meeting agenda, separate from approval of balance sheets. In case otherwise is indicated, explicit release is considered as a negating acknowledgement of debt concerning all responsibilities of all responsible persons who are in the position of accountability due to an operating period. Whether it is explicit release or implicit release, it is deemed that release resolutions which made wholly and do not contain any reservations, cover, thus release, all the members of the BoD.[389]

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[386] Tekinalp, *Sermaye*, p. 468.
[387] Dinç, p. 174.
[388] Tekinalp, *Sermaye*, p. 468.
[389] Akdağ Güney, p. 419.

### 3.1.2. Scope of Release

In line with Article 558/2 of the TCC, release shall have its effects on "*material cases*" which are disclosed to the general assembly. The scope of the release is determined by the cases and transactions that can be recognized, agreed at the general assembly or can be known by the general assembly from the documents and accounts submitted, as well as from the additional explanations made. Nevertheless, cases and transactions that are not known and not possible for the general assembly to learn shall be outside of the scope of the release. In this regard, from documents submitted to the general assembly and verbal explanations made, issues which could be understood by an average (medium-skilled) shareholder, are considered to have reached to the information of the general assembly. Hence, issues that an average shareholder cannot understand despite showing due diligence cannot be assumed to be known by the general assembly.[390]

In terms of scope of release, a similar definition has been made by *Tekinalp*[391]. Accordingly, in terms of financial statements and reports, term of "*material case*" as stated in Article 558/2 of the TCC, would refer to the cases that should be disclosed to the shareholders, submitted to the shareholders' information and reflected on the balance sheet. For instance, loans extended by the company to the company's controlling shareholder's business or the company's participation to a redundant capital increase of the company's controlling shareholder's business must be reported in a way that to be clearly understood in the balance sheet. Otherwise, solely including these events as items of receivables and subsidiaries shall not be deemed as "*disclosure of material cases*" in line with the 558/2, thus, release would not have its effects on such events. A transaction that would not be approved by the shareholders when they learn the truth, must be disclosed specifically.

According to Article 424 of the TCC, under certain circumstances general assembly's resolution on approval of balance sheet would not result in release of related persons. Accordingly, in cases where certain matters are not specified in the balance sheet at all or as required, or if the balance sheet contains certain issues that prevent the company's actual condition to be seen as a result of deliberate actions of those who

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390 Akdağ Güney, pp. 420, 421, 424, 425, 426.
391 Tekinalp, *Sermaye*, pp. 469, 470.

prepare the balance sheet, the approval of the balance sheet does not have the effect of release.

### 3.1.3. Effect of Release

The main effect of release resolution is abrogating the right to file a claim of the company, along with those shareholders who voted affirmatively for the resolution of release and those shareholders who acquired the shares knowing the release. (Article 558 of the TCC) Hence, regardless of whether it is implicit or explicit, after the resolution of release, the company and above-mentioned shareholders shall not be able to file a claim for compensation to the company's released board members due to the transactions within the scope of release. In terms of company, release would cover both proximate and remote damages suffered by the company, however in terms of shareholders, release would cover only remote damages of the shareholders. In other words, shareholders of the company would still be able to file a claim for compensation due to their proximate damages. Besides above-mentioned shareholders whose right to file a claim is abrogated with the resolution of release, right to file a claim of other shareholders (those who have not attend the meeting or dissent to the release) shall prescribe after 6 months, starting from day of the release.[392]

### 3.1.4. Abolishment of Release and Exclusion of Voting Right

In Article 558 of the TCC, it has been openly indicated that resolution of release cannot be abolished by a resolution of the general assembly. However, in cases where necessary conditions exist, general assembly's resolution of release shall be subject to annulment due to contradicting the law, the AoA and the objective good faith principle. (Article 445 of the TCC) As indicated above, resolution of release cannot be abolished by a general assembly resolution. Hence, it should be noted that the phrase of "*cancellation/abolishment of release*" within Article 133 of the TBC, refers to the authorization of the Fund to file a claim for the resolution of release to be annulled by the court, in order for the Fund to be able to file a liability claim against former executive board members and auditors of the bank.[393] Consequently, neither

[392] Poroy, Tekinalp and **Çamoğlu**, p. 416.
[393] Akdağ Güney, p. 433; Göktürk, *Banka*, p. 269.

the Fund or a body of the bank has been authorized to abolish the resolution of release in a violation of Article of 558 of the TCC.

With regards to exclusion of voting right, according to Article 436/2 of the TCC, board members and executives that have signing authority cannot use the voting rights arising from their shares in resolutions regarding the release of board members.

### 3.2. Statute of Limitation

In the 560th Article of the TCC, statute of limitation periods for the claims concerning board members' liability has been regulated. Periods indicated in the Article are implemented on the cases of liability indicated by the TCC's Articles 549, 550, 551, 552, 553 and 554 (Liability of auditor).[394] According to Article 560, the right to claim compensation against liable persons is barred by statute of limitation within 2 years, starting from the date the plaintiff learns about the damage and the liable person, in any case, is barred by statute of limitation within 5 years starting from the date of the act that caused the damage occurred. It is also stated in the Article that, with regards to penal acts, if a longer statutory limitation period has been set forth for the act in the Turkish Penal Code, such period indicated in the Turkish Penal Code shall be applied.

With regards to above-mentioned statutory limitation period of 2 years, the period starts with the plaintiff, learning the damage and the person causing the damage. Hence, in order for the statute of limitation to start, the plaintiff has to learn both the damage and the person causing the damage. Learning solely the damaging person or solely the damage[395] or for the plaintiff to be in a position enabling him/her to know/learn,[396] would not be enough for the limitation period to start. Yet, in cases where there are more than one damaging person, learning all the persons is not necessary for the period to start.[397] Statutory limitation period would start for the persons whom have been learnt, and the period would not start for those who are unknown.[398] It is considered that the term "plaintiff" in the Article; would cover the company, the shareholders and the creditors. Thus, statutory limitation period of 2

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394 Tekinalp, *Sermaye*, p. 471.
395 Akdağ Güney, p. 457.
396 Tekinalp, *Sermaye*, p. 471.
397 Dinç, p. 183; Akdağ Güney, p. 458.
398 Akdağ Güney, pp. 458, 459.

years would be applied for all above-mentioned groups' claims in cases where they are in the position as plaintiff.[399]

With regards to the liability claims to be filed by the company, or legal person shareholders or legal person creditors; since the BoD is the authorized body to file a claim for legal persons, the limitation period would start from the date the BoD, learning the damage and the liable person. In cases where the company would file a claim against all of its board members, the claim would be filed by the general assembly, thus, the limitation period would start from the date the general assembly, learning the damage and the liable person.[400]

In order to save the board members from nervousness they may experience for a long time, due to possible liability claims against them, besides the 2 year limitation period, Article 560 states that, in any case, the right to claim compensation against liable persons is barred by statute of limitation within 5 years from the date of the damaging act. Thus, even if the liable persons and the damage had not been learnt, within 5 years from the date of the damaging act, the right would be barred by statute of limitation. In cases where either the damage or the action continues, the statute of limitation period shall start from the last damaging act.[401]

In cases where an act which requires liability is also a criminal act and a longer statutory limitation period has been regulated for such crime in the Turkish Penal Code, then the limitation period indicated in the Turkish Penal Code is applied in the compensation claims.[402] It should be noted that the TBC's Articles between 150 and 161 set forth various banking crimes. It could be seen that certain cases of liability for banks' board members which we have evaluated under the "*Provisions Concerning Board Members' Liability in the TBC*" have also been regulated as banking crimes, in certain Articles of the TBC such as Article 152, Article 154, Article 159. Hence, in terms of compensation claims in line with the TCC, on such cases, instead of 2 and 5 years of statutory limitation periods, the periods indicated in the Turkish Penal Code shall be implemented, provided that the periods indicated in the Turkish Penal Code are longer. Additionally, as stated in the 141st Article of the TBC,

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399 Dinç, p. 184.
400 Akdağ Güney, p. 459.
401 Dinç, p. 184.
402 Pulaşlı, p. 708.

the lawsuits and prosecutions pertaining to the Fund receivables covered by the TBC, shall be subject to a limitation period of 20 years. Lastly, in line with Article 133 of the TBC, with regards to the liability claims to be filed by the Fund against controlling shareholders and managers of banks of which operation permissions have been revoked, the statutory limitation period of 2 years which has been stipulated in the TCC, is increased to 5 years, and beginning of the limitation period is deferred to the completion of the liquidation of the bank.[403]

### 3.3. Settlement

Settlement contract is a sui generis type of contract (distinctive form of contract), formed by the parties to terminate a disputed or uncertain legal relationship by making mutual compromises.[404] A valid settlement contract made between parties is accepted as a way of terminating the liability of board members, however, the TCC's only provision concerning settlement contracts is the 559th Article, which states that the liability of the founders, board members, auditors; arising from the establishment of the company and capital increase, cannot be removed via settlement and release, until four years have passed from the date of registration of the company. The Article also states that after the expiration of this period, settlement and release become valid only with the approval of the general assembly. Additionally, settlement and release cannot be approved by the general assembly in cases where the minority shareholders[405] dissent to the settlement and release.

In addition to regulation of the TCC's 559th Article, the settlement contract can also be formed outside the establishment of the company and capital increase.[406] In terms of settlement contracts to be made outside the scope of Article 559, the contract shall be made between the board member(s) and the company's authorized body to

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[403] Altay, p. 231.

[404] Murat Yusuf Akın & Muhammed Sulu, "Yönetim Kurulu Üyelerinin Menfaati ile Şirket Menfaatinin Çatışması Bağlamında Sorumluluk." *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 25, no. 1 (2019), p. 180.

[405] Shareholders representing 1/10 of the capital, (For publicly held companies, shareholders representing 1/20 of the capital)

[406] Ömer Adil Atasoy & Ergün Berkay, "Anonim Şirketlerde Yönetim Kurulu Üyelerinin Sorumluluğu Konusunda Açılacak Ticari Davalarda Zorunlu Arabuluculuk Uygulaması ve Sorumluluk Davasına Etkisi." *İstanbul Aydın Üniversitesi Hukuk Fakültesi Dergisi*, no. 2 (2018), p. 121.

represent and manage, and conditions stated in the 559th Article (general assembly's approval and conformity of the minority shareholders) shall not be sought.[407]

Since the settlement contract formed within general provisions, would have its effects solely on the parties of the contract, the board member who formed a settlement contract with the company, could plea against liability claims filed by the company. It should be noted that, with regards to the settlement contracts to be formed outside the scope of Article 559, the contract could be submitted for the general assembly's approval, voluntarily.[408] In fact, in cases where the contract is submitted to the general assembly's approval, it should be accepted that the board member could plea against the liability claims filed by the shareholder (due to remote damages) who has voted affirmatively to the settlement contract.[409] Yet, it would not be possible for the board member to plea against the shareholders who voted against the settlement contract

[407] Akdağ Güney, p. 451.
[408] Akdağ Güney, p. 451.
[409] Akın & Sulu, pp. 180, 181.

## RESULT

**I.** In terms of civil liability, banks' board members are bound by the provisions of the TBC, which is the special code in terms of banks and banking activities. Additionally, provisions of the TCC, concerning civil liabilities of joint-stock companies' board members shall be valid for banks' board members. Moreover, banks' board members -particularly those who are serving at publicly held banks- shall be subject to the provisions of the CMC, in terms of civil liability. With regards to liability regime to be implemented on banks' board members pursuant to above codes, "fault liability" has been adopted, of which elements are damage, causal link, unlawfulness and fault.

**II.** In terms of determining the existence of fault for banks' board members, "care required for the job" shall be taken into consideration. In other words, as to determine whether a bank's board member has acted in fault, or not; it shall be assessed that whether the care which is expected from a prudent board member who is at the same position as the board member subject to the assessment, has shown or not. Since banking is a profession that requires a higher level of knowledge and expertise, banks' board members shall be expected to show a higher level of duty of care.

**III.** Considering that board membership at a bank requires a higher level of competence, in the TBC, certain qualifications have been stipulated for banks' board members, in addition to those qualifications that have been stipulated in the TCC for joint-stock companies' board members. However, these additional qualifications set by the TBC is not enough to ensure each board member to have the required competence. Therefore, besides requiring majority of a bank's board members to have qualifications that are required for banks' general managers, at least certain level of education and/or professional experience must be sought for each individual board member.

**IV.** In the TCC, civil liability of joint-stock companies' board members, has been regulated under two groups of provisions. Firstly, under the provision of general liability, which is Article 553 of the TCC, liability of board members in cases where they faultily fail to fulfill their obligations arising from the law and AoA, has been regulated. Secondly, under various Articles of the TCC, special cases of liability have been regulated, such as "*Documents and Declarations Contradicting with the Law*", "*Corruption in Valuation*", "*Collecting Money from Public*", etc. In terms of banks' board members, it would be possible for them to be held liable pursuant to both groups of provisions, provided that necessary legal conditions exist.

**V.** As per Article 553/2 of the TCC, in addition to being held liable as a result of board members' own actions, it would be possible for banks' board members to be held liable for the actions and decisions of those persons who have been duly delegated certain duties and authorities of the BoD, provided that reasonable care is not shown by the BoD in the selection of the delegees.

**VI.** In cases where certain duties and authorities of the BoD are delegated to one or board members or third persons, it should be noted that the BoD's non-delegable and indispensable authorities shall remain, such as "*top-level management of the company and giving instructions in this regard*", "*determination of the company's management organization*" and "*high-level supervision of the persons in charge of management*". Therefore, despite Article 553/3 of the TCC which states, "*No persons shall be held liable due to violations of law or AoA or corruption which are beyond their control; this condition of non-liability cannot be nullified with justifications of duty of supervision and care.*", it would be possible for the BoD to be held liable due to the damages caused by the transactions of the delegees that violate the law or the AoA, provided that the BoD is in fault and the adequate causal link exists.

**VII.** In terms of civil liability of joint-stock companies' board members, the TCC has adopted principle of differentiated solidarity. Therefore, in cases where more than one person is liable to compensate the same damage, each person shall be jointly liable in accordance with his/her fault and as the requirements of the circumstance, to the extent that the damage can be personally saddled on to him/her. It should be noted that most of the CMC's provisions concerning civil liability are in harmony with the differentiated solidarity principle, however, liability for public disclosure documents (except prospectuses) has been regulated within the principle of full solidarity. Hence, in cases where liability of banks' board members arises pursuant to above codes, liability of each individual board member shall be determined with principles above.

**VIII.** Besides the principle of differentiated solidarity, banks' board members have been subjected to an exceptional liability regime, namely as "personal bankruptcy", in line with Article 110 of the TBC. It should be noted that main goal of this liability regime is to ensure that the persons who will undertake management duties in a bank (such as board membership) to fulfill their duties with due diligence. In fact, it is clear that it is nonpractical to try to compensate the great amounts of damages occurred as a result of a bank being subject to either one of the sanctions indicated in Article 71 of the TBC, from individual real persons. In this respect, personal bankruptcy serves to be a deterrent and punitive liability regime, rather than serving for the purpose of compensation of a damage.

**IX.** In order for banks' board members to be held liable pursuant to Article 110 of the TBC, the bank must have been subjected to either one of the sanctions indicated in Article 71 of the TBC due to the board members' decisions and actions that are in violation of the applicable laws. With regards to the term "applicable laws", both the TCC and the TBC shall fall within the scope of the term. Yet, non-law regulations such as AoA, contracts of obligations law, resolutions of the BRSB shall be outside of the scope of the term. Lastly, in terms of violation of other codes, in cases where there is an undeniable link between the violated provision of code and banking, then violation of such provision could cause liability pursuant to Article 110 of the TBC.

**X.** In Article 71 of the TBC, reasons which may cause implementation of "revoking of a bank's operation permission" or "transferring a bank to the Fund" have been listed. In cases where at least one of these reasons exist, the BRSB shall have the authority to decide on either one of these sanctions. Indeed, both these sanctions are different from each other in terms of their essence and cause irreparable results when implemented, thus, deciding on either one of these sanctions should not be left to the discretion of the BRSB and the BRSB's broad authority on deciding on either one of these sanctions must be defined by an amendment on the TBC.

**XI.** In the liability cases filed by the Fund pursuant to Articles 108 and 110, defendants are saddled with the burden of proving that the elements of liability do not exist. (Article 137 of the TBC) Due to the unfairness caused by the implementation of Article 137 in the judicial process, the Article in question violates the right to a fair trial. Until the provision is subjected to annulment, in cases where the defendants are under the burden of proof pursuant to Article 137, it will be sufficient for the defendants to reject the Fund's claims, and the burden of proof in terms of proving the receivable shall be on the Fund.

**XII.** Lastly, in the face of many and diverse provisions and events that concern liability of banks' board members, in order for board members to fulfill all those duties and responsibilities within the duty of care and loyalty, it is vital for the BoD of banks to clearly define the duties and responsibilities both within itself and at the top-management level. Given the complexity and diversity of banking activities today, responsibilities of the BoD, that require taking part in the management of the bank, should not be saddled only on the general manager. Hence, besides independent and non-executive board members who mainly serve to supervise the bank's activities, enough number of board members who participate in the daily decision-making and operating mechanisms of the bank, should be appointed.

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İleri düzeyde İngilizce – Advanced level English

**YAYINLAR - PUBLISHING**

**-**

**HOBİLER - HOBBIES**

Yürüyüş yapmak & bisiklet sürmek – Hiking & cycling