

## THE THREAT OF FRAUDULENT SHARE TRANSFERS IN FOREIGN-OWNED JOINT STOCK COMPANIES AND PROTECTION MECHANISMS UNDER TURKISH LAW

### 1. Introduction

Direct investments by international investors in Türkiye through joint stock companies have become one of the important dynamics of Turkish business life. However, these investments may be subject to certain risks, particularly through unauthorized interference in company management, fraudulent acts or the disruption of corporation bodies. Recently, criminals have targeted foreign-owned companies with limited or inactive operations listed in the Turkish Commercial Register Gazette; using the information in the registry records of these companies, they create unlawful changes in the company's shareholder structure by transferring company shares through forged general assembly and board of directors decisions that appear to have been drawn up in the presence of a notary public, or by forging the signatures of the real shareholders. In this way, the company's management authority is unlawfully taken over, and the partnership rights of the true shareholders are being effectively eliminated.

This article discusses the measures that can be taken against such fraudulent acts under Turkish law and the legal remedies available in such cases.

### 2. Determination of the Nullity of Unlawful Board of Directors Decisions and General Assembly Decisions and the Cancellation of Share Transfers

In cases involving the transfer of company shares to third parties through unlawful means, such as forging the signatures of the company's true shareholders or committing criminal acts, or creating false company records, false board of directors and general assembly decisions, it is necessary to file a lawsuit requesting the determination of the invalidity of the aforementioned board of directors and general assembly decisions due to their nullity, as well as the determination of the invalidity of the share transfers executed at the company. In this context, as a result of the decision to be rendered in favour of the true shareholders, the return of the aforementioned shares and their

registration and announcement in the trade registry on behalf of the aforementioned shareholders is to be requested.

### 3. Legal Consequences for the Nullity of Board of Directors and General ASSEMBLY Decisions and Their Scope of Application

In Turkish law, there are three different legal sanctions: nullity, invalidity, and cancellation. Nullity decisions are retroactive, while cancellation decisions are not.

In terms of the validity of legal transactions, nullity represents the most severe sanction. The sanction of nullity applies when one of the constituent elements of a transaction (such as authority, intent, or form) is completely absent. Transactions affected by nullity are considered never to have come into existence in the legal context, and no validity can be attributed to them. Therefore, no rights can be asserted based on a transaction affected by nullity, and such a transaction does not produce any legal consequences. A declaratory action may be brought at any time without any statute of limitations or condition of interest for transactions affected by nullity, and such actions are related to public order and is to be considered ex officio by the courts. In contrast, in the case of cancellation, a legal transaction becomes invalid prospectively. However, in the case of nullity, a transaction is deemed never to have come into existence.

In practice, board of directors decisions taken with the signatures of persons not authorized to act on behalf of the company and general assembly decisions taken with the participation of persons that are not shareholders are null and void. Even the registration of such decisions in the trade registry does not render them valid, since the registration does not grant legal validity to null and void transactions.

Pursuant to established judicial precedents, decisions by board members elected based on a null and void general assembly decision are also null and void.<sup>1</sup>

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<sup>1</sup> [ Court of Cassation 11th Civil Chamber, Case No. 2012/8290, Decision No. 2013/8922, Date 02.05.2013.]

In another precedent decision of the Court of Cassation, it was ruled that the convening of the board of directors and the adoption of decisions based on a forged signature in an excuse letter, where the signature of a board member was forged, would be subject to the nullity sanction.<sup>2</sup>

In this context, other precedent decisions of the Court of Cassation explicitly stated that general assembly decisions taken to amend the company's articles of association in a manner that does not meet the required majority threshold should be subject to nullity rather than annulment.<sup>3</sup>

#### **4. The Difference Between the Nullity and the Invalidity of Board of Directors Decisions and General Assembly Decisions**

Although the nullity and the invalidity both refer to the absence of legal effect, there are significant differences between these two concepts. In case of invalidity, a legal transaction is formally established but is deemed invalid from the moment of its conclusion due to its violation of the law. In case of nullity, however, there is no legal transaction that can be considered to exist. While lawsuits for transactions subject to invalidity sanctions generally depend on the conditions of interest and, in some cases, time limits, whereas no such restrictions apply to nullity. Nullity may be asserted by any person at any time and is taken into consideration by courts *ex officio*. Therefore, decisions made by the company using forged signatures by duplicating the signatures of shareholders, formations contrary to the articles of association, or general meetings held with non-shareholders give rise to the nullity sanction.

The board of directors is a mandatory body in joint stock companies and is responsible for the management and representation of the company. Pursuant to Article 390/5 of the Turkish Commercial Code (TCC), the validity of decisions is contingent upon them being written and signed. The first specific provision regarding the invalidity of board of directors decisions is set forth in Article 391 of the TCC, pursuant to which certain board of directors decisions may be declared invalid by a court. In particular, decisions that are: (a) contrary to the principle of equal treatment, (b) contrary to the company's fundamental

structure or violate the principle of capital preservation, (c) violate the inalienable rights of shareholders, restrict or impede the exercise of such rights, or (d) interfere with the non-transferable powers of other organs or relate to the transfer of such powers are null and void.

The right to apply in the aforementioned article is not limited to only shareholders, but is granted to "all interested parties". Furthermore, the term "in particular" in the article indicates that the grounds for invalidity are not limited. In this context, pursuant to Article 27 of the Turkish Code of Obligations (TCO), transactions that are contrary to mandatory provisions, morality, public order, or personal rights, or that are impossible to perform, are also absolutely void.<sup>4</sup>

Which general assembly decisions of a joint stock company are subject to nullity sanctions is stipulated in Article 447 of the TCC.<sup>5</sup>

Pursuant to this provision, general assembly decisions subject to nullity sanctions are, in particular, those that restrict or eliminate the inalienable rights of shareholders or are contrary to the fundamental structure of the company as stipulated by the Law. Furthermore, this is not limited to those listed in this provision due to term "in particular," meaning that other reasons may also lead to a decision being deemed null and void.

#### **5. Appointment of a Trustee to the Company**

In joint-stock companies, when the company's management is taken over as a result of decisions made with forged signatures, the company's legal capacity is violated, and the real shareholders are unable to exercise their management and representation rights. In such cases, the appointment of a trustee under the Turkish Civil Code and the Turkish Commercial Code needs to be considered in order to protect the rights of shareholders and reestablish the company's lawful operation.

In Turkish law, a trustee can be appointed for different purposes in both civil and commercial law. Generally, there are two types of trustees:

<sup>2</sup> [ Court of Cassation 11th Civil Chamber, Case No. 2022/5225, Decision No. 2022/9637, Date: 29.12.2022]

<sup>3</sup> [ Court of Cassation, 11th Civil Chamber, Case No. 2001/11392, Decision No. 2002/427, Date: 24.01.2022; 11th Civil Chamber, Case No. 2001/7442, Decision No. 2001/7269, Date: 01.10.2001.]

<sup>4</sup> Istanbul Regional Court of Appeal, 14th Civil Chamber, Case No. 2019/2626, Decision No. 2022/1384, Date: 27.10.2022.]

<sup>5</sup> [ POROY, Rehan/ TEKİNALP, Ünal/ÇAMOĞLU, Ersin: Partnership Law, 2021, Vol. I, p. 379.]

- **Supervisory and Approval Trustee:** This trustee is appointed in accordance with Article 426 et seq. of the Turkish Civil Code. In this role, the trustee monitors, supervises, or approves the legal transactions of the company's representatives. The trustee's authority to intervene is limited. They assume a balancing role in the company's decision-making processes.
- **Management and Representation Trustee:** Under Article 427 of the Turkish Civil Code, in cases where the company's current management has become ineffective, the power of representation has been abused, or has been established in violation of the law, the management and representation of the company is completely transferred to the trustee. This type of trustee acts like a board of directors. The appointment of such a trustee is necessary, particularly in the cancellation of representation structures created by false general assembly and board of directors decisions.

Generally, in joint stock companies, the appointment of a management trustee by the court is frequently encountered in cases involving the invalidity of general assembly decisions. One of the most significant conditions for the appointment of a management trustee is that the company is deprived of its management body.<sup>6</sup>

In practice, especially in cases where general assembly and board of directors structures are established without the knowledge of the real shareholders, the court is requested to appoint a management and representative trustee to determine the absence and invalidity of such structures and to protect the company temporarily. This prevents the legal consequences that could arise from decisions made in a fraudulent manner, since the trustees appointed to the company are announced by the trade registry offices. This prevents individuals that have unlawfully transferred company shares to themselves from exercising control over the company's shares and assets.

## 6. Other Protective Measures and Preliminary Legal Protection Mechanisms

In addition to the appointment of a management trustee, various preliminary measures are also available in the Turkish legal system for the purpose of legal protection of the real shareholders. In particular, in cases where control of the company is unlaw-

fully seized by third parties through forged general assembly or board of directors decisions against the will of the shareholders, an action for provisional measures is filed at the court in accordance with Articles 389 et seq. of the Code of Civil Procedure in order to prevent the loss of any rights and assets.

In this context, it is necessary to apply for precautionary measures, particularly to suspend the respective transactions of the company or registered decisions in the trade registry. In addition, since it is possible that fraudulent board members may use their representative authority to access bank accounts or dispose of company assets, requests for precautionary measures to prevent the use of such powers must to be filed at the court.

For instance, following the registration of decisions drawn up with forged signatures in the commercial register, in a lawsuit filed on behalf of the real shareholder to determine absence, in order to prevent third parties from carrying out any transactions or operations on behalf of the company, to stop new decisions from being made in the company's decision books, or to prevent the transfer and assignment of company shares or assets to third parties, it is advisable to apply for comprehensive measures to ensure that no transactions are carried out at bank, land registry offices, and other public institutions. Such precautionary measures aim to protect the company's assets during the legal proceedings and mitigate irreparable losses and damages that may be incurred by the company and its actual shareholders.

In addition, if the transfer of shares to third parties is carried out as a result of forged general assembly decisions and an unlawful change is caused in the partnership structure, special measures such as suspension of the use of partnership rights or prevention of the exercise of voting rights by these persons may also be requested.

In this context, if, for example, the fraudulent shareholder has acquired company shares using forged signatures and decisions, following preliminary legal measures may be applied at the court:

- Restricting or preventing the fraudulent shareholder from exercising all rights arising from shareholder status, including, but not limited to, the right to dividends, the right of first refusal,

<sup>6</sup> [ KEÇECİOĞLU, Burak: Trusteeship in Joint Stock Companies, 1st Edition, November 2024, Istanbul, p. 129.]

the right to attend and vote at general meetings and board meetings, the right to participate in the management and supervision of the partnership, the right to obtain information and conduct inspections, and the right to request a special audit;

- Restricting or preventing the fraudulent shareholder from exercising their rights over the shares they hold in the company, with the aim of preventing any actions that would reduce the value of the company's shares, such as the transfer, assignment, or endorsement of shares to third parties, or the imposition of encumbrances, liens, or collateral on the shares;
- Restricting the use of the fraudulent shareholder's administrative (management, representation, and right to information, etc.) and financial rights (attendance fee, salary, bonus, commission, and share of annual profits, etc.) arising from their position as a member of the board of directors, and consequently temporarily restricting the defendant's authority to manage, represent, and bind the company;

Furthermore, pursuant to Article 449 of the TCC, with regard to general assembly resolutions against which an action for annulment or invalidity has been brought, the court may decide to suspend the execution of the resolution in question after obtaining the opinion of the members of the board of directors.

## 7. Criminal Sanctions

In addition to the legal remedies and precautionary measures mentioned above, forging signatures of company shareholders to issue board of directors decisions and general assembly decisions, or similar acts and actions, constitute criminal offenses such as fraud and forgery of private documents under the Turkish Criminal Code. Therefore, in the event of any suspicion of irregularity or forgery, this matter must be reported to the prosecutor's office immediately.

## 8. Conclusion

From the perspective of international investors, business activities conducted through joint stock companies in Turkey may give rise to serious legal problems due to the risk of fraud. These risks involve serious dangers that may result in the usurpation of partnership rights within the company and substantial losses

for the company. Turkish law provides effective protection mechanisms against such interventions, including the "nullity" sanction and the appointment of a management and representation trustee.

In accordance with the established rulings of the Court of Cassation, decisions taken by unauthorized persons at the general assembly meetings and board of directors meetings are absolutely invalid, and therefore null and void. Similarly, it is evident that decisions taken in obvious violation of the articles of association will not have any legal effect.

In this context, it is of significant importance for both local and foreign investors to regularly monitor the internal structures and decision-making processes of companies, ensure that the share register, signature circular, and trade registry records are up-to-date and reliable. Besides it is advisable to verify and update MERSIS accounts in order to mitigate such risks.

In the event of any irregularity or suspicion of coercion, legal action must be taken immediately to determine nullity, obtain a precautionary injunction, and, if necessary, file a lawsuit for the appointment of a trustee. In this context, a lawsuit will be filed to determine the nullity of the aforementioned board of directors and general assembly decisions and the invalidity of the share transfers carried out within the company. As a result of this court decision the shares of the company will be returned to their real shareholders, and they will be registered and announced in the trade registry.

Additionally, in the event of any suspicion of irregularities or forgery, a criminal complaint must be filed with the prosecutor's office immediately.

In addition, the Ministry of Justice is introducing a new system to prevent forgery in notarial documents and increase security in official transactions. As part of this initiative, a digital verification mechanism will be integrated into the notarial system, and a "QR code" will be placed on every document issued by notaries, enabling the authenticity of the document to be instantly verified in a digital environment. The QR code application will not be limited to title deeds, but will also include all documents issued by notaries, such as powers of attorney, affidavits, and contracts. This will enable the authenticity of all official documents issued by notaries to be verified, thereby minimizing the risk of forgery.

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