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RESEARCH ARTICLE

Can the Chairman of Managing Directors at a Limited Liability Company Convene the Members' Meeting?

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Abstract

The convocation of members' meetings is regulated explicitly in article 617 of TCC. Accordingly, the managing directors convene the members' meetings (TCC 617/1). Provisions regarding the corporations on the convocation also apply to limited liability companies by analogy (TCC 617/3). Therefore, if there is more than one director, the convocation decision is made in accordance with the decision-making principles of the board (TCC 624/3).

On the other hand, according to article 624/2 of TCC, "The chairman or sole managing director is also authorized to make all explanations and announcements, unless a decision is taken in a different direction at the members' meeting or a different regulation is foreseen in the articles of incorporation, as in the case of convocation and the conduct of members' meeting."

The present study discusses whether the chairman is entitled by article 624/2 of TCC to make a convocation decision. If not, what are the scope and the nature of power given to the chairman by this provision? Moreover, it is also discussed whether the chairman can be entitled to decide on convocation with the articles of incorporation in the context of the delegation of power and the principles of mandatory provisions.

Keywords

Limited Liability Company, Members' meeting, Managing directors, Chairman, Power to Convene

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I. Determination of the Problem

The managing directors of limited liability companies convene the members' meeting (TCC[1] 617/1). Preparation for a members' meeting and execution of its resolutions are the non-transferable and inalienable powers of managing directors (TCC 625/1(g)). According to the 3rd paragraph of article 617 titled "Convocation" of TCC, the provisions of the corporation regarding the convocation for a general meeting are also applied to the limited liability company by analogy. In a corporation, the board of managing directors convenes the members' meeting even if its time has expired (TCC 410/1). Accordingly, if there is more than one director, the decision to convene the members' meeting in a limited liability company should be made by the managing directors in the form of a board decision. According to article 624/3 of TCC, in the presence of more than one director, they will decide by the majority. In case of equality, the chairman's vote will be deemed to be cast a vote. However, a different regulation may be stipulated in the incorporation articles regarding the managing directors' decision-making. It is understood that in the presence of more than one director, they will decide as a board.

On the other hand, article 624/2 of TCC contains the following regulation: "The chairman or sole managing director is also authorized to make all explanations and announcements, unless a decision is taken in a different direction at the members' meeting or a different regulation is foreseen in the articles of incorporation, as in the case of convocation and the conduct of members' meeting." These provisions made about whether the power to convene the members' meeting in a limited liability company belongs exclusively to the chairman, whether this power is given to the chairman as additional power to the board of managing directors, or whether the power given to the chairman by article 624/2 TCC is another power rather than the power to convene. Therefore, this study discusses the scope and nature of the power given to the chairman by article 624/2 of TCC.

II. Persons Entitled to Convene the Members' Meeting

Provisions determining the persons entitled to convene the members' meeting are mandatory[2]. Decisions made at the members' meeting upon convocation by an unentitled person or body are invalid[3].

The convocation is regulated explicitly in article 617 of TCC. Accordingly, the managing directors convene the members' meeting (TCC 617/1). In addition,

1 Turkish Commercial Code, Code Number: 6102, Acceptance Date: 13.1.2011, Official Gazette 14.2.2011/27846.

2 Murat Fatih Ülkü, 'Anonim Ortaklıklarda Genel Kurulun Toplantıya Çağrılması (Daveti)' in *Prof. Dr. Hayri Domaniç'e 80. Yaş Günü Armağanı, C. I* (Beta 2001) 575, 588.

3 Erdoğan Moroğlu, *Anonim Ortaklıkta Genel Kurul Kararlarının Hükümsüzlüğü* (9th edn, On İki Levha 2020) (a) 89; Direnç Akbay, *Türk Ticaret Kanunu Tasarısı'na Göre Limited Ortaklık Genel Kurulunun Toplanma ve Karar Alma Esasları* (Vedat 2010) 66; Ülkü (n 2) 588; Erdoğan Moroğlu, 'Anonim Ortaklıkta Genel Kurulun Daveti Merasimine Aykırılığın Yaptırımı ve Yargıtay 11. Hukuk Dairesi Uygulaması' in Erdoğan Moroğlu (ed), *Makaleler* (On İki Levha 2010) 549, 549 ff.

provisions on corporations concerning the convocation, minority members' right to convene and propose, agendas, proposals, universal meetings, preparatory measures, minutes, and unentitled participation are also applicable to the limited liability companies by analogy (TCC 617/3).

Under the provisions above, the first entitled person to convene the members' meeting is the managing director (TCC 617/1, 3, 410/1). This power is used by managing directors as a board (TCC 617/3, 410/1). Preparation for the members' meeting and execution of its decisions are non-transferable and inalienable powers of managing directors (TCC 625/1(g)). If the board consists of a sole director, the power to convene is compulsorily used by this person; on the contrary, if it consists of more than one person, the board makes the convocation decision in accordance with the decision-making principles of a board. Decisions are made by the majority in the presence of more than one director (TCC 624/3). In that case, in the presence of more than one director, the decisions made at the members' meeting upon a convocation made by one of the managing directors without a board decision are invalid[4].

The other person entitled to convene the members' meeting is the minority members who own one-tenth of the capital (TCC 617/3, 411). The minority members may request that managing directors convene by stating necessary reasons and agendas. Managing directors who accept the convocation request of the minority should convene the members' meeting within forty-five days at the most. Otherwise, the convocation is made directly by the requestor minority (TCC 411). Suppose the managing directors do not accept the request of minority members or do not respond positively within seven working days. In that case, the minority members may request the court to convene the members' meeting. If the court deems it necessary, it appoints a trustee to convene (TCC 412). If the company is in the liquidation phase, liquidators can convene the members' meeting to decide on the liquidation works (TCC 617/3, 643, 535/2). A sole company member is also entitled to convene (TCC 617/3, 410/2). Nevertheless, a sole company member can use this power indirectly, namely with the permission of the court[5]. Moreover, in the event of liquidation through bankruptcy, the bankruptcy administration, and in cases where a management trustee is appointed, the trustee is entitled to convene the members' meeting[6].

4 Eleventh Civil Department of the Supreme Court of Appeals, 11756/8994, 21.11.2016 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı, *Yargıtay 11. Hukuk Dairesinin Türk Ticaret Kanununa İlişkin Kararları 2015-2016* (On İki Levha 2018) 430]; Eleventh Civil Department of the Supreme Court of Appeals, 15527/2736, 9.5.2017 < www.sinerjimevzuat.com.tr > accessed 17.5.2022.

5 Ersin Çamoğlu, *Limited Ortaklıklar Hukukunun Temel İlkeleri* (Vedat 2020) N 248; Esra Hamamcıoğlu, *Aile Tipi Limited Şirketlerde Şirket Sözleşmesi* (Yetkin 2022) 347; Oruç Hami Şener, *Yargıtay Kararları Işığında Limited Ortaklıklar Hukuku* (Seçkin 2017) 535, 670-671; Eleventh Civil Department of the Supreme Court of Appeals, 3944/11066, 26.10.2015; Eleventh Civil Department of the Supreme Court of Appeals, 14685/203, 13.1.2015 [See for the desicions: Gönen Eriş, *Ticari İşletme ve Şirketler, C.III* (3rd edn, Seçkin 2017) 3036]; Eleventh Civil Department of the Supreme Court of Appeals, 15527/2736, 9.5.2017 < www.sinerjimevzuat.com.tr > accessed 17.5.2022.

6 Mehmet Bahtiyar and Esra Hamamcıoğlu, *Yeni TTK'ye Göre Anonim Ortaklık Genel Kurul Toplantıları* (Beta 2014) 47; Hamamcığlu (n 5) 351.

III. Managing Directors and the Chairman

There is either a sole or more than one managing director. The managing board executes the administration and representation of the limited liability company as in the corporation. When there is more than one person on a board, it is necessary to have some rules for its functioning. It is stipulated that a chairman should be elected both in the corporation and limited liability company to organize the transactions necessary for the board's functioning (TCC 366/1, 624/1). On the other hand, other powers are also given to the chairman by law. For example, the chairman is the company's spokesperson, as a rule[7], and can make all explanations and announcements on the company's behalf (TCC 624/2). In certain instances, the chairman's vote has been valued more than that of other managing directors. According to article 624/3 of TCC, which does not exist in TCC numbered 6762, if there is more than one managing director and there is equality in voting, the chairman's vote is deemed casting a vote. It should be pointed out that the purpose of this rule is not to put the chairman in a position above the other managing directors. The aim is to keep the company in a working position by preventing blockages in the management body[7]. Although the chairman's vote, as a rule, is of equal influence and value with the other members of the body, a choice was made to protect the company's interest, and the chairman's vote was given priority only in case of equality of votes. The chairman is in a *primus inter pares* position, as he manages the managing directors in principle and can determine the company's decisions exceptionally.

After the decision quorum of the managing directors is determined and a casting vote is given to the chairman in article 624/3 of TCC, it regulating otherwise is also allowed by the articles of incorporation relating to the decision-making of managing directors. For example, the chairman's casting a vote may be revoked[8], a meeting quorum for the board may be determined, or the decision quorum may be changed to "unanimously" by the articles of incorporation in this respect. On the other hand, this regulation does not allow for the demerger of work or the delegation of authority between managing directors. Therefore, it cannot be regulated in the articles of incorporation that the chairman can decide on certain issues, such as the convocation of members' meetings.

IV. The Chairman and the Convocation of the Members' Meeting

A. The Meaning of Article 624/2 of TCC

TCC 624/2 causes a problem regarding whether a chairman has the power to convene the members' meeting. It should be pointed out that there was no provision for the organization of managing directors in TCC numbered 6762. It seemed

7 Justification, TCC 624; Rıza Ayhan, Hayrettin Çağlar and Mehmet Özdamar, *Şirketler Hukuku Genel Esaslar* (4th edn, Yetkin 2022) fn 477.

8 Çamoğlu (n 5) N 337; Mustafa İsmail Kaya, 'Limited Şirkette Müdürler Kurulunun Oluşumu ve İşleyişi' (2014) 22(1) SÜHFD 61, 63.

sufficient to state that the managing directors would convene the members' meeting regarding their power to convene given them by article 538/1, which regulates the convocation of members' meetings. How to convene when there is more than one director was controversial in doctrine. One view argues that the board of managing directors is entitled to convene the members' meeting as a rule. If there is more than one managing director, they should make the convocation decision together. Although the law did not regulate a decision-making quorum for the managing directors, the wording of article 540/1 of TCC numbered 6762 and the fact that the limited liability company is a proprietorship requires that administrative decisions ought to be made unanimously[9]. According to another view, which evaluates the power to convene within the scope of power to represent, if there is more than one managing director, each of whom is entitled to represent the company, they are also entitled to convene the members' meeting. However, managing directors should act together or at least inform others about the meeting date and agenda to eliminate the inconveniences of holding meetings with the same or different agendas on different dates and in different places. If there is more than one convocation with the same agenda, it is argued that the first of these should be considered valid[10].

Article 617/1 of TCC number 6102, which stipulates that the managing directors convene the members' meeting, is the same as article 538/1 of TCC numbered 6762. On the other hand, article 624 of TCC, numbered 6102 and titled "There is more than one managing director," has no equivalent in TCC, numbered 6762. It stipulates that one of the managing directors appointed as chairman and the sole managing director is entitled to convene, conduct the members' meeting, and make all explanations and announcements. This provision suggests that the legislator acted to end the debate made in the period of TCC numbered 6762 by appointing an entitled for the convocation with article 624/2[11].

To examine the source law, managing directors convene the members' meeting. If necessary, an auditor and a liquidator also have the power to convene according to article 805/1 of the Swiss Civil Code[12] (SCC). The provisions of the corporation regarding convocation, convocation and suggestion right of the member, agenda, suggestions, universal meeting, preparatory measures, minutes, representation of the member, and unentitled participation are applied by analogy to the limited liability company (SCC 805/5). The preparation of the members' meeting and the execution of its decisions (*die Vorbereitung der Gesellschafterversammlung sowie die Ausführung ihrer Beschlüsse*) are non-transferable and inalienable duties of managing directors

9 Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar ve Kooperatif Hukuku* (10th edn, Arıkan 2005) N 1716, 1719a.

10 Halil Arslanlı and Hayri Domaniç, *Türk Ticaret Kanunu Şerhi, C. III: Sermayesi Paya Bölünmüş Komandit Şirketler (TTK M.475-484), Limited Şirketler (TTK m. 503-556)* (Temel 1989) 503-504.

11 Indeed, in this direction see: Hasan Pulaşlı, *Şirketler Hukuku Şerhi, C. II* (2nd edn, Adalet 2015) 2296.

12 Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations).

(SCC 810/2(6)). In article 810/3 of SCC, which corresponds[13] to article 624/2 of TCC, the duties of the chairman are regulated as to convene and to conduct the members' meeting (*die Einberufung und Leitung der Gesellschafterversammlung*) (1), to make announcements to company members (2), and to ensure that necessary records are entered in the trade registry (3).

In practice, there are judicial decisions that accept that article 624/2 of TCC entitles the chairman to convene the members' meeting. The Eleventh Civil Department of the Supreme Court of Appeals indicated in its decision dated 4.3.2021 and numbered 3157/2041 that, "…since the plaintiff is the chairman of the board of managing directors, he is exclusively entitled to convene both the board of managing directors and the members' meeting …"[14]. Also, the Fourth Civil Department of Trabzon Regional Courts of Appeals decided in the decision dated 10.11.2020 and numbered 920/991 that, "The plaintiff's attorney indicated as the reason for the nullity that the entitled body did not decide on the convocation of members' meeting. Article 617 of TCC states that the managing directors will convene the members' meeting. However, in article 624 of TCC, the provision of …is included... pursuant to this provision, the director, who is the chairman, is entitled to make all explanations and announcements unless a decision is made to the contrary at the members' meeting or a different regulation is determined in the articles of incorporation, as in the case of convocation and conduct of members' meeting. Within the scope of the file and from the minutes of the members' meeting dated 11.3.2015, it is understood that the company director Ö.Y was authorized as a chairman of the board. Accordingly, and considering that the decision taken regarding the convocation of the members' meeting, which is the subject of the lawsuit, was taken by this person as the chairman of the board of managing directors, the objections of the plaintiffs' attorney regarding this aspect were not considered appropriate"[15].

There are also views in doctrine stating that the chairman can make a convocation decision. According to one of them alleged in the source law, even though the managing directors have the non-transferable and inalienable power to convene the members' meeting, as a rule, this power belongs to the chairman, not to all managing directors as a collective body, due to article 810/3(1) of SCC (TCC 624/2)[16]. In Turkish doctrine, *Hamamcıoğlu* asserts that the expression "preparation for members meeting" that takes place as a non-transferable and inalienable power

13 Abuzer Kendigelen, *Yeni Türk Ticaret Kanunu (Değişiklikler, Yenilikler, İlk Tespitler)* (2nd edn, On İki Levha 2012) 540; Abuzer Kendigelen, in Abuzer Kendigelen and İsmail Kırca, *Şirketler Hukuku C.III: Sermayesi Paylara Bölünmüş, [Paylı] Komandit Şirket ile Limited Şirket* (On İki Levha 2022) (b) N 250.

14 < www.sinerjimevzuat.com.tr > accessed 1.3.2022.

15 The decision has not been published.

16 Rino Siffert, Marc Pascal Fischer and Martin Petrin, in Baker & McKenzie (eds), *Gmbh-Recht, Revidiertes Recht der Gesellschaft mit beschränkter Haftung (Art.772-827 OR)* (Stämpfli 2008) Art 805 N 3. On the same page, see: Mustafa Çeker, in Sami Karahan (ed), *Şirketler Hukuku* (1st edn, Mimoza 2012) 797.

of managing directors in article 625/1(g) of TCC is ambiguous. Therefore, it cannot be obviously said that it requires a board decision to convene the members' meeting within the scope of this article. Hence, regarding the wording of articles 624/2 and 625/1(g) of TCC, a chairman can take a convocation decision exclusively, but the board must execute the preparation process. Accordingly, this acceptance is more suitable in point of the functioning of the company in that it prevents the cases opened against the decision of the members' meeting on the grounds of the invalidity of the decision[17].

Another view argues that as the provision of TCC 624/2 is a particular regulation, the duties regulated there, including the convocation, can be carried out by the chairman after the decision is made; however, a board decision is required in all other matters[18].

The third view, which does not express the chairman among those entitled to convene the members' meeting, considers the provision from a different angle under the provision of TCC 624/2. The chairman's power is to convene the "board of managing directors" for a meeting and to conduct the board meetings[19].

Since it contained the elements specific to proprietorship and capital companies, the limited liability company was a mixed type in the period of TCC, numbered 6762. It has almost assumed the identity of a small corporation with the aim of TCC numbered 6102, bringing it closer to being a capital company[20]. It is also regulated with an explicit provision that the limited liability company is a capital company (TCC 124/2). The marks of this Law approach can be seen in the provisions that bring similar regulations to the corporation and refer to regulations related to the corporation in many subjects. In this context, management affairs in a limited liability company are carried out by the managing directors as a board as in the corporation (TCC 367/2, 390; 624/1,3), and an inclusive reference is made to the corporation regarding the representation and the convocation in limited liability companies (TCC 617/3, 629/1). Therefore, looking at the provision of TCC 624/2 from the perspective of TCC numbered 6762 on limited liability companies and managing directors will not lead us to the right conclusion. The aforementioned provisions should be interpreted within the discipline of Law numbered 6102. In this respect:

17 Hamamcıoğlu (n 5) 346, 347.

18 Ender Dedeağaç, *Uygulamalı Limited Şirketler Hukuku* (Seçkin 2020) 107-108.

19 Çamoğlu (n 5) N 245-248, 336; Ersin Çamoğlu, in Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku II* (14th edn, Vedat 2019) N 1712b-1712d, 1723.

20 General Juristiction of TCC, p.144; Çamoğlu (n 5) N 5; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (5th edn, Vedat 2020) N 18-01; Murat Alışkan, *Limited Şirket (Tarihçe, Niteliği)* (Legal 2013) 219. The provisions of TCC regarding limited liability companies differ from the source law in this respect. Although the small corporation model was discussed during the limited liability company reform that entered into force in Switzerland in 2008, it was not put into practice there [Alışkan (n 21) 219].

a. On the one hand, it is stipulated that the power to convene belongs to the managing directors as a board (TCC 617/1). On the other hand, article 410/2 of TCC, which gives the power to convene to the sole shareholder in the event of a blockage in the board of directors due to the reference to the provisions regarding corporations (TCC 617/3), will also be applied to the limited liability companies. In the face of such a situation, what purpose would it serve to accept that article 624/2 also grants the chairman the power to convene?

b. Accepting that the chairman has such power directly will result in eliminating the power to convene the board of managing directors *de facto*, positioning the chairman above the board of managing directors, and also causing a conflict of power between the chairman and the board regarding the convocation. In this case, is it appropriate in terms of law-making technique to grant the power to convene directly both to the board itself and to the chairman independently of each other?

c. The preparation of the members' meeting and execution of its decisions are the non-transferable and inalienable duties and powers of the managing directors (TCC 625/1(g)). Hence, the managing directors are responsible for the damages arising from non-compliance with the duration, the form, and the content of the convocation (TCC 644/1(a), 553). Can it be considered that power belongs to the chairman in a matter where the responsibility belongs to the board? Does the legislator impose responsibility on a subject other than the person whom he has entitled?

Provision wording and its systematics strengthen the idea that the chairman has not determined the power to convene. Indeed, as the convocation is regulated under a particular title in article 617 of TCC, it cannot be said that an entitled convocation has been appointed with article 624 of TCC. Article 624 of TCC regulates how they become organized and make their decisions when there is more than one managing director. Although the provision states that the managing director, the chairman, is entitled to convene the members' meeting, the door is left open that this power may be a process for the execution of a convocation decision. As a matter of fact, when categorized together with the other issues in the second paragraph of the provision, such as conducting members' meetings and making explanations and announcements, it is understood that the power here is an executive power rather than a founding/establishing power.

In addition, the preparation of the members' meeting and the execution of its decisions are the non-transferable and inalienable powers of managing directors (TCC 625/1(g), SCC 810/2(6)). The convocation is a preparatory process for the members'

meeting[21]. Due to the aforementioned legal nature of the convocation, the chairman cannot decide to convene the members' meeting. In order for the chairman to convene the members' meeting, a convocation decision must have been made by the managing directors (TCC 624/3) before, and the chairman must fulfill the requirements of this decision[22]. Preparing and sending the convocation letters and writing the necessary correspondence for the announcement are the duties and powers of the chairman in the context of the convocation.

According to article 617/4 of the TCC, members' meetings may make decisions with the written approval of all company members of a suggestion related to an agenda item of a member. For a decision to be valid, the suggestion shall be submitted for the approval of all members, and none of them shall request a physical meeting. Based on this provision, it can be said that insomuch as any company member can start the decision-making process of members' meetings, it should also be possible to accept the convocation power of the chairman. If the chairman is a company member, there is no doubt he can use this opportunity. Company members can apply for this simplified process because of their membership title. However, this article does not ensure they conclude the period with decision-making, in that all other members need to approve this decision-making form. This form requires the consensus of all company members, and we cannot say that article 617/4 of TCC grants any of the members the convocation power. As stated above, a company member can only use the power to convene by a court decision (TCC 617/3, 410/2). Therefore, it cannot be asserted that a chairman is entitled to make a decision instead of all company members and that article 617/4 is not an appropriate base to accept the convocation power of the chairman.

There is no regulation similar to TCC 624 in German law. In German law, the director (*Geschäftsführer*) and the management body are entitled to convene the members' meeting at a limited liability company (Gesetz betreffend die Gesellschaften mit beschränkter Haftung §49(1)). However, the dominant view in the doctrine is that when there is more than one managing director, each is entitled to convene

21 Akbay (n 3) 38; Şükrü Yıldız, *Türk Ticaret Kanunu Tasarısına Göre Limited Şirketler Hukuku* (Arıkan 2007) 258; Siffert, Fischer and Petrin (n 17) Art 805 N 3; Urs Gasser, Christian Eggenberger and Richard Staeuber, in Jolanda Kren Kostkiewicz, Stephen Wolf, Marc Amstutz and Roland Frankhauser (eds), *OR Kommentar Schweizerisches Obligationenrecht* (3rd edn, Orell Füssli 2016) Art 805 N 1.

22 Kendigelen [n 14 (b)] N 116; Roland Truffer and Dieter Dubs, in Heinrich Honsell, Nedim Peter Vogt and Rolf Watter (eds), *Basler Kommentar Obligationenrecht II: Art. 530-964 OR, Art. 1-6 SchlT AG, Art. 1-11 ÜBest GmbH* (Helbing Lichtenhahn 2012) Art 805 N 3; Brigitta Kratz, in Vito Roberto and Hans Rudolf Trüeb (eds), *GmbH, Genossenschaft, Handelsregister und Wertpapiere – Bucheffectengesetz Art. 772-1186 OR und BEG* (3rd edn, Schulthess 2016) Art 810 N 13a; Gasser, Eggenberger and Staeuber (n 22) Art 805 N 1; Şener (n 5) 533; Oruç Hami Şener, *Teorik ve Uygulamalı Ortaklıklar Hukuku* (3rd edn, Seçkin 2017) 732. On the same page see: Fatih Bilgili and Ertan Demirkapı, Şirketler Hukuku Dersleri (7th edn, Dora 2020) 436; Hakan Çebi, *Limited Şirketler Hukuku* (Adalet 2019) 82; Ünal Tekinalp, *Yeni Anonim ve Limited Ortaklıklar Hukuku İle Tek Kişi Ortaklığının Esasları* (2nd edn, Vedat 2011) N 22-32; Ali Haydar Yıldırım, *Türk Ticaret Kanunu Tasarısı'na Göre Limited Ortaklık Müdürünün Hukuki Durumu* (Güncel 2008) 125; Akbay (n 3) 39-40; Yıldız (n 22) 211. Same view for corporations, see: Peter Forstmoser, Arthur Meier-Hayoz and Peter Nobel, *Schweizerisches Aktienrecht* (Stämpfli 1996) § 23 N 19 fn 10; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* (4th edn, İstanbul 2015) N 22-23, 22-32 compare with: Tekinalp (n 21) N 22-43, 22-43a.

the members' meetings independently from the others[23]. This view stems from the fact that since the convocation is not a measure of the realization of the company's purpose, it cannot be accepted as a management or representation process; therefore, each director has the power to convene regardless of management and representation authority[24]. As a result, for example, each managing director, equipped with the power to represent together, can convene the members' meeting. Likewise, even the managing director, who is in the position of the *de facto* organ, in case of illegality in the appointment process, can convene the members' meeting validly[25].

In Turkish law, it is impossible to agree with the view that is dominantly asserted in German law, which doesn't accept the convocation as either a management nor a representation process. As is known, managing directors are entitled to make decisions and execute them on all matters related to the management that are not left to the members' meeting by law or by the articles of incorporation (TCC 623/3). The concept of direction in a broad sense includes both management and representation in a narrow sense. Management is to make decisions about all kinds of business and processes necessary for the realization of the field of operation of the company. Representation means making legal transactions against company members and third parties on behalf of the company. Convocation is an indirectly necessary process for the realization of the field of operation of the company. With the decisions made at the members' meeting upon a convocation, the institutional requirements necessary for the realization of the operation field are ultimately fulfilled. Making a convocation decision is a management process in this respect. Since a board decision shall be made on management-related issues, as regulated in article 624/3 of TCC, when there is more than one director, the convocation decision should also be made in accordance with this article. The execution of the convocation decision is to convene the company members on behalf of the company, which is related to representation authority. In matters related to representing a limited liability company, the provisions concerning corporations are applied by analogy. Accordingly, unless otherwise stipulated in the articles of incorporation or if there is more than one managing director, the power to represent belongs to the managing directors, to be used with two signatures (TCC 629/1, 370/1). Nevertheless, the execution of the power to convene was left to the chairman with a special provision (TCC 624/2).

23 Ulrich Noack, in Ulrich Noack, Wolfgang Servatius and Ulrich Haas (eds), *GmbH-Gesetz*, (23rd edn, C H Beck 2022) § 49 Rn 3; Martin C Schmidt and Jörg Nachtwey, in Ulrich Prinz and Norbert Winkeljohann (eds), *Beck'sche Handbuch der GmbH* (6th edn, C H Beck 2021) § 4 Rn 2; Christian Wentrup, in Alexander Gebele and Steffen Scholz (eds), *Beck'sches Formularbuch Bürgerliches, Handels- und Wirtschaftsrecht* (14th edn, C H Beck 2022) § 29 Anm 1.

24 Noack (n 22) § 49 Rn 2-3; Rolf Otto Seeling and Martin Zwickel, 'Typische Fehlerquellen bei der Vorbereitung und Durchführung der Gesellschafterversammlung einer GmbH' (2009) DStR 1097, 1098.

25 Seeling and Zwickel (n 23) 1097-1098; BayObLG, Beschluß vom 2. 7. 1999 - 3Z BR 298/99 (LG München I), [1999] NZG 1063, 1064 Anm 3.

B. Whether the Power to Decide on the Convocation Can Be Left to the Chairman with a Regulation Placed in the Articles of Incorporation

1. Evaluation in the Context of the Delegation of Power

The articles of incorporation regulate the management and representation of a company. They may be given to one or more company members holding the title of managing director or to all company members or third parties. At least one company member shall have the right to manage and the power to represent the company (TCC 623/1). Managing directors are entitled to make and execute these decisions on all matters related to the management that is not left to members' meetings by law or by the articles of incorporation (TCC 623/3). The duties and powers that are prohibited from being transferred even by the articles of incorporation are regulated in the provision of TCC 625/1. One of them is preparing the members' meeting and the execution of the decisions made at the meeting (TCC 625/1(g)). In this respect, since the convocation is also a preparatory process[26], it is impossible to delegate the power to make the convocation decision to the chairman through the delegation of the power[27].

2. Evaluation in the Context of the Principle of Mandatory Provisions

According to the principle of mandatory provisions, articles of incorporation can only deviate from the provisions of TCC regarding limited liability companies if it is explicitly permitted in law (TCC 579, 340). A view states that when determining whether the deviation is allowed or not, under the expression "explicitly" in the provision, the wording of the provision should be taken as a basis, avoiding the conclusions to be reached through interpretation[28]. The other view, which conforms with the explanations in the justification of the provision, is that the wording of the provision should not be contented within this regard. However, the essence of the provision should also be considered. If deemed appropriate to deviate from the provision of law considering the principle of equity and the balance of interests, a regulation different from the provision of law can be placed in the articles of incorporation[29].

26 See above fn. 22.

27 In terms of corporations including parallel regulation (TCC 367, 375/1(f)), see along the same lines: Ninth Civil Department of Adana Regional Courts of Appeals, 848/1011, 23.11.2020 (The decision has not been published). See for the view that the power to convene in corporations may be left to the persons to whom the powers are delegated (TCC 367, 370) with the articles of incorporation; however, this does not remove or limit the power to convene of those who have this authority legally. Moroğlu [n 3 (a)] 94.

28 Feyzan Şehirali Çelik, İsmail Kırca and Çağlar Manavgat, *Anonim Şirketler Hukuku, C. I (Temel Kavram ve İlkeler, Kuruluş, Yönetim Kurulu)* (BTHAE 2013) 157 ff.; Mehmet Bahtiyar, 'Türk Ticaret Kanunu Tasarısı'nın Dili İle Bazı Hükümlerinin Değerlendirilmesi' (2005) (61) TBB Dergisi 47, 70 ff.; Cem Veziroğlu, *Anonim Ortaklıklar Hukukunda Esas Sözleşme Özgürlüğü ve Sınırları* (On İki Levha 2021) 383, 384.

29 Jurisdiction, TCC 340; Rauf Karasu, *Anonim Şirketlerde Emredici Hükümler İlkesi* (2nd edn, Yetkin 2015) 50 ff.; Şener (n 5) 67; İsmail Özgün Karaahmetoğlu, *Anonim Şirket Esas Sözleşmesinin Yorumlanması* (Adalet 2021) 185.

Provisions that bind when placed in the articles of incorporation are also regulated in law. The company members are allowed to make arrangements following their own structures, especially in the internal relations of a limited liability company (TCC 577). One of them is the "provisions that give a special right to convene the members' meeting" (TCC 577/1(h)). It should be discussed whether the chairman can be entitled to make convocation decisions with the articles of incorporation based on this provision.

The source law includes a different provision. According to article 776a/2(3) of SCC, a regulation different from the legal provisions may be placed in the articles of incorporation regarding "the convocation of members' meeting" (*der Einberufung der Gesellschafterversammlung*). In doctrine, it is accepted that this provision allows for amending the "convocation procedure," which is regulated by non-mandatory provisions in law (SCC 805/2,3). In this context, for example, the duration of the convocation may be shortened to ten days, or a period longer than twenty days may be determined for this. It can be shown in which cases the members' meeting may be convened for an extraordinary meeting[30], and the minority member ratio (10 %) may be reduced. The duration of the ordinary meeting (six months) may be shortened[31]. *A contrario* of this, it is understood that provision 776a/2(3) of SCC does not cover article 805/1 of SCC. Consequently, per article 805/1 of SCC, which has a mandatory character, the power to convene the members' meeting belongs to the managing directors and cannot be left to the chairman with the articles of incorporation.

Regarding the scope of article 577/1(h) of TCC, a view in Turkish doctrine asserts that an indirect or limited right to convene the members' meeting is granted to the company members pursuant to TCC 617/3 (TCC 410/2, 411-412). This right can be converted into the right to convene directly pursuant to article 577/1(h) of TCC. However, it can only be linked to the company member, not to the share[32]. The other view states that through the articles of incorporation, an individual right in the form of the convocation of members' meetings can be granted to one or more company members or minority members with less than one-tenth of capital. There is a preferred preferential when the right is granted to a capital contribution. When granted to the member's personality, it disappears with the end of the membership title[33]. Another view is that this right can only be granted to capital contributions[34].

30 Siffert, Fischer and Petrin (n 17) Art 776a N 31; Hans Rudolf Trüeb, in Vito Roberto, Hans Rudolf Trüeb (eds), *GmbH, Genossenschaft, Handelsregister und Wertpapiere – Bucheffektengesetz Art. 772-1186 OR und BEG* (3rd edn, Schulthess 2016) Art 776a N 30; Frank Schenker, in Heinrich Honsell, Nedim Peter Vogt and Rolf Watter (eds), *Basler Kommentar Obligationenrecht II: Art. 530-964 OR, Art. 1-6 SchlT AG, Art. 1-11 ÜBest GmbH* (Helbing Lichtenhahn 2012) Art 776a N 25.

31 Trüeb (n 31) Art 776a N 31.

32 Kendigelen [n 14 (b)] N 116; Şener (n 5) 62-63, 546.

33 Akbay (n 3) 64; Çebi (n 23) 84; Bilgili and Demirkapı (n 23) 437; Hamamcıoğlu (n 5) 351-353; Yıldız (n 22) 214.

34 Tekinalp (n 21) N 19-13.

Although the expression "special right" in TCC 577 is not mentioned elsewhere in the provisions regulating corporations and limited liability companies, it is used in demerger regulations and the justification relating to regulations about mergers and conversion. According to article 167 /1(d) of TCC, a demerger contract and a demerger schedule shall include the rights allocated by the transferee company to the owners of dividend shares, non-voting shares, and special rights. The special rights are mentioned in the justification of article 183/2 and 3 as follow[35]: "This term, which is not defined in the source law, is interpreted broadly, and its scope includes voting preferred shares, rights to binding offer that is among the minority's rights (such as to suspend negotiations on the balance sheet), representation of share categories and share groups regulated in SCC 709, interests provided to founders and other persons, rights to purchase and conversion in a conditional capital increase. The term 'special rights' is used in law to emphasize the same scope." In fact, article 183 of TCC regulates only the non-voting shares, preferred shares, and dividend shares, namely the rights linked to shares. Nevertheless, the justification also remarks on rights linked to the personality of members under the concept of "special rights."[36] Therefore, it can be said that this expression may contain rights to linked shares and personality or both of them. Hereby, it is impossible to determine the scope of article 577/1(h) of TCC based on the concept.

Approaching the expression "special rights," regardless of the essential characteristics of capital companies and also of the provisions regulating the convocation, leads to confronting results with the logic of law. In addition, the purpose of the provision shall be considered when determining the scope of permissible deviation in the articles of incorporation[37]. In this respect, it cannot be said, based on the wording of the provision that does not impose any restrictions on this issue, that the "special right" to convene the members' meeting can also be granted to the personality of company members. On the contrary, it would be more suitable to say that this right is a right that does not depend on the personality of a company member. Subsequently, it is not explicitly stated that this right can be granted "to certain or determinable members" as regards the right of veto in article 577/1(e) of TCC[38].

35 "For the term of special rights in the provision, it should be looked at the justification given in the second and third paragraphs of the article 183. As stated there, special rights have a broad meaning and include preferred shares, but cannot be assigned to preferred shares" (Justification, TCC 140/4). It shall be considered that the expression of special right is not stated in article 140 of TCC. Only the "preferred rights that are linked to shares" are mentioned in this article.

36 For more information about the meaning of the term "special rights", see: Hülya Coştan, 'Türk Ticaret Kanunu Tasarısı Hükümlerine Göre Birleşme, Bölünme ve Tür Değiştirmede Özel Hak Sahiplerinin Korunması' BATİDER (2008) 24(3) 403, 414 ff.

37 Karaahmetoğlu (n 27) 187; Veziroğlu (n 29) 384.

38 See the view that the right of veto can only be granted to the personality of members: Akbay (n 3) 175; Altan Fahri Gülerci, 'Limited Şirketlerde Ortaklara Veto Hakkı Tanınması' LHD (2020) 18(211) 3051, 3061; Çebi (n 23) 61; Hamamcıoğlu (n 5) 326; İsmail Kırca, in Abuzer Kendigelen and İsmail Kırca, *Şirketler Hukuku C.III: Sermayesi Paylara Bölünmüş, [Paylı] Komandit Şirket ile Limited Şirket* (On İki Levha 2022) N 153, 663, 667; Şener (n 5) 56, 58; Eleventh Civil Department of the Supreme Court of Appeals, 2011-15478/2491, 13.2.2013 < www.sinerjimevzuat.com.tr > accessed 27.11.2022. See the view stating that right of veto and right to casting votes can be granted to certain share groups: Tekinalp (n 21) N 19-13. For the view asserting that the right of veto and the right to cast votes can be granted to the personality of members and also because of the expression "determinable members" in the article, these rights can be granted on a share basis, see: Bilgili and Demirkapı (n 23) 422.

The capital company character of the limited liability company (TCC 124/2) requires its members to be granted the rights on a share basis, not on a personality basis. However, this does not mean that a limited liability cannot contain any personal element; this is possible when the law regulates it explicitly. As a matter of fact, this principle is considered when regulating the membership rights in a limited liability company[39]. Therefore, the acceptance of the right to convene can be granted to the members' personalities according to TCC 577/1(h), contrary to the basic structure of limited liability companies.

"Special right" evokes the expression "superior right," used to define privilege in the provision of TCC 478, where the preferred share is regulated[40]. For a share to be deemed preferred, that share must be different from the others by providing more rights or priority[41]. The difference here makes it superior, preferred, and special. In addition, a privilege can only be granted to a share, not a personality[42]. For this reason, it is stipulated in the provision of TCC 577/1(h) that the capital contribution can be preferred to convene the members' meeting. This privilege differentiates the capital contribution from the others by giving its owner the right to convene the members' meeting directly.

The fact that the creation of a preferred capital contribution is optional makes it necessary to regulate this issue in article 577 of TCC. After the provision of TCC 576/1(c), which stipulates that the privileges shall be included in the articles of incorporation, the reason for making a separate regulation with 577/1(h) is to indicate that the particular or unique right may be in the matter of the convocation of the members' meeting. It should be pointed out that while the provision of TCC 577 was held, it was not taken into account whether there was a recurrence of the issues regulated with this article. With the introduction of the principle of mandatory provisions, the concern of arranging the issues that can be determined in the articles of incorporation has been neatly prioritized[43].

As such, it should be accepted that the provision of TCC 577/1(h) allows the creation of the privilege regarding the convocation of members' meetings. Therefore, the right to convene the members' meeting directly may not belong to each company member but only to the member holding the preferred capital

39 e.g. TCC 591, 608, 614, 618, 622.

40 The word "special" is defined in the dictionary as "(1) pertaining to or relating only to a person, a thing, particular (2) having a feature that distinguishes it from similar ones, (3) private, personal, concerning a person, (4) owned by the individual, not the state, private, unofficial, (5) remarkable, (6) having a distinctive character, (7) different from what is always seen, from the usual" (Türk Dil Kurumu Genel Türkçe Sözlük, sozluk.gov.tr).

41 Esra Uysal, *Anonim Ortaklıklarda İmtiyazlı Paylar* (2nd edn, On İki Levha 2018) 47-48. Compare with: Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku I* (15th edn, Vedat 2021) N 784.

42 Bilge Aytuğar, *Anonim Şirketlerde Oy Hakkında İmtiyaz* (On İki Levha 2019) 135; Uysal (42) 50 ff.

43 Indeed, see: TCC 577/1(b) and 595, TCC 577/1(c) and 603, TCC 577/1(ı) and 608/2; TCC 577/1(l) and 639 etc.

contribution. Since the privilege cannot be granted to the share group[44], it cannot be stated that the rate of the minority members (10%) who have the right to convene can be reduced based on this provision. Whether or not the minority rate can be reduced is related to the term of the minority itself, and so is the subject of a different discussion. Finally, the chairman can acquire this power not because of his title of chairman but because of his title of company member with a preferred capital contribution to the convocation[45].

Conclusion

Mandatory provisions regulate the power to convene the members' meeting. The managing directors are the body that is fundamentally empowered to convene the members' meeting of a limited liability company. When there is more than one managing director, the convocation decision should be made as a board decision. The provision of TCC 624/2 does not give power to the chairman to make a convocation decision. Based on this power regulated in TCC 642/2, the chairman can only execute the convocation decision made by the board.

The power to make a decision about the convocation cannot be given to the chairman through the delegation. Due to a regulation in the articles of incorporation, the chairman cannot be empowered to convene because of this title. If the chairman is also the company member holding the preferred capital contribution, he/she may decide to convene the members' meeting based on the title of preferred share contribution owner.

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44 Exc. see: TCC 360.

45 On the opposite page see: Hamamcıoğlu (n 5) 353.

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