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STATE SURVEILLANCE AND SUPERVISION OF JOINT-STOCK COMPANIES IN TURKISH LAW

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Summary. In this study, the principles regarding the surveillance and supervision of joint-stock companies by the state, whose influence and role increased as a result of post-liberal policies, will be examined. The article's aim is to point out the increasing importance of the state for joint-stock companies in the 21st century from the perspective of Turkish Law and to include opinions and suggestions in terms of *de lege feranda*.

Key words: Turkish company law, joint-stock companies, state control, state surveillance

INTRODUCTION

Joint-stock companies are regulated in the Turkish Code of Commerce in the Art. between 329 and 572 with a new understanding. One of the most important pillars of this new understanding is the motivation for European Union membership, which lost its effect as of today. A further basis is the existence of the public authority that assumed a more effective role that came to the agenda with the Sarbanes Oxley Act which became valid in the United States as a result of the Enron scandal. With this Law, the existence of the public authority, which assumed a more active role, came to the fore. With the perspective of EU membership, provisions that can be described as reforms in Turkish joint-stock companies law, such as independent auditing and establishment of one-person company, were regulated and the corporate and professional management of joint-stock companies were aimed. On the other hand, especially with the effect of the Sarbanes Oxley Law, the understanding of the state that protects, controls, intervenes and supervises markets abandoned a long time ago was reactivated. As a result of this new approach, it was observed that from the establishment of joint-stock companies until their termination, the state took an active role in the legal regime of joint-stock companies through its ministries and other institutions and organizations. In this study the principles regarding the surveillance and supervision of joint-stock companies by the state, whose influence and role increased due to post-liberal policies, will be examined. My aim is to point out the increasing importance of the state for joint-stock companies in the third era of the 21st century from the perspective of Turkish Law and to include opinions and suggestions in terms of *de lege feranda*.

1. THE ROLE OF THE STATE COMING TO THE FORE IN THE LAW OF JOINT-STOCK COMPANIES

There is a description frequently used in Turkish legal doctrine regarding joint-stock companies. According to this description, joint-stock companies are market determining companies. Considering that a very large proportion of the capital accumulation in the country is used by joint-stock companies and that large-scale activities such as banking and insurance are required to be carried out only by joint-stock companies, it should be accepted that joint-stock companies have a decisive role in the capital markets [Üçışık and Çelik 2013, 8]. Ensuring stability in a market is not only important for the interests of the market actors. In addition, it has vital importance in terms of macro-economic balances, in other words, in terms of public interest [ibid., 304; Bahtiyar 2019, 107; Yasan 2013, 450].

The importance of joint-stock companies caused the state to have a wide range of influence on joint-stock companies' practices from the establishment to their termination, from the supervision to their management, by institutions and organizations bodies of the state. As a result of the post-liberal developments, the state abandoned its passive role that does not interfere with the markets [Kayar 2015, 395–96; Üçışık and Çelik 2013, 8–9; Bahtiyar 2019, 107]. This issue is not only in question in terms of Turkish law. With the effect of the Enron scandal in the 1990s, the understanding of the state that controls and monitors the capital markets and intervenes when necessary, showed its effect first in the USA and after 2007 more in continental Europe. In Turkish law, in the TCC, which entered into force in 2012, the provisions in the nature of reform for the surveillance and supervisory authority of the state are included in all corporate law, especially for joint-stock companies.

The course of corporate law and today's recent developments in comparative law perspective shows that corporate law has gained a more social aspect. It started to be preferred not only as a corporate law that generates more profits and continuously gains its partners but as a corporate law that provides the environment, human rights, sustainability and welfare to the whole society. Therefore, the social aspect of corporate law is at the forefront as a requirement of the post-liberal approach. The state's surveillance and supervision of joint-stock companies by institutions and organizations are the results of such an understanding. The criteria as a public benefit, public interest, public service, etc. are taken as some of the significant references in the TCC. Thanks to these criteria, the state plays a more active role in economic life for the stability of the capital markets. This active role is in harmony with the duties imposed on the state in the Turkish Constitution 1982 and with the economical constitution doctrine. As a matter of fact, according to Art. 167 of the Constitution, "The State is supposed to take measures to ensure and develop the sustainable and regular functioning of money, credit,

capital, goods and services markets; it prevents monopolization and cartelization that will arise as a result of de facto or de jure in the markets."

Here in the TCC, the institution of supervision and surveillance of joint-stock companies by the state was regulated as a result of the approach summarized above. The state's supervision and surveillance of joint-stock companies is sometimes carried out by the Turkish Ministry of Trade and sometimes by autonomous institutions and organizations such as the Capital Markets Board of Turkey. The legislator has preferred to regulate the supervision and surveillance mechanisms of joint-stock companies in a scattered and non-systematic manner, rather than under a specific heading in the TCC. This choice is not correct in my opinion. In terms of *de lege feranda*, I suggest to regulate the provisions regarding the supervision and surveillance of the state including joint-stock companies and all commercial companies in a holistic way in a separate chapter of the TCC, or even in an independent codification instead of the TCC.

2. SURVEILLANCE AND SUPERVISION OF JOINT-STOCK COMPANIES BY THE STATE ACCORDING TO TCC

2.1. Art. 210 TCC the Surveillance and Supervision Authority of the Ministry of Trade

The Ministry of Trade is meant in every article referred to the Ministry in the TCC, especially in Art. 210 TCC. The regulatory and supervisory authority of the Ministry of Trade is regulated exclusively in Art. 210 TCC and not only for joint-stock companies but all types of commercial companies. For this reason, under Art. 210 TCC, the Ministry of Trade has the supervisory and regulatory authority for joint-stock companies as well as for collective companies, limited liability companies, limited companies and cooperatives [Moroğlu 2012, 109; Bilgili and Demirkapı 2018, 109].

The first power granted to the Ministry of Trade is the regulatory authority. The Ministry is authorized to issue communiqués regarding the implementation of the provisions of the TCC on commercial companies. The Communiqué is one of the sub-regulations in the legislation. The Ministry is assumed to have the authority to publish regulations and other sub-regulations as well as notifications. All types of commercial companies and trade registry offices are also obliged to comply with the regulations published and validated by the Ministry.

Another power of the Ministry of Trade is the authority to inspect/audit. Trade registry directorates are also included in the scope of those subject to the inspection of the Ministry, although it is not clearly understood from the expression in Art. 210 TCC. The transactions of the trade registry offices and companies within the scope of the TCC are inspected by the officials of the Ministry of Trade. All types of commercial companies are subject to inspection by the Ministry officials without discrimination. Keeping the scope of the audit so broad gives an idea of the role the legislator wants the State to play in company law. The Regu-

lation will also be issued by the Ministry of Trade on the procedure to be followed in the inspection carried out by the Ministry officials. As a matter of fact, this regulation referred to in Art. 210, subsect. 1 TCC was published in the Official Gazette dated 28.02.2012 and numbered 28395 titled as "Regulation on the Inspection of Commercial Companies by the Ministry of Trade."

The authority to make regulations regarding commercial companies is not only applied by the Ministry of Trade. It is also possible for other ministries, institutions, boards and organizations to make regulations in matters concerning all or joint-stock companies only, and within the limits of the authorities granted to them by the legislation. The sub-regulations enacted by the Capital Market Authority, the Banking Regulation and Supervision Agency, Central Bank of the Republic of Turkey and the Competition Authority can be considered as samples mentioned below [Bilgili and Demirkapı 2018, 110].

A question mark arises at this point. What is the legal consequence of the unlawfulness of commercial companies and therefore joint-stock companies determined as a result of the inspection/audit activities carried out by the Ministry officials? There is a provision to answer this question in Art. 210, subsect. 3 TCC. Accordingly, if it is determined that commercial companies are involved in transactions contrary to the public order or business issue, or they are making preparations in this direction or performing collusion, in addition to the provisions and sanctions underlined in these provisions specified in the Banking Code, Capital Markets Code, Turkish Penal Code etc. a lawsuit may also be filed by the Ministry of Trade for dissolution of the company [Tekinalp 2013, 160; Moroğlu 2012, 109]. At this point, there is a 1-year lawsuit period, which has the characteristic of the duration of the loss of rights. This 1-year period starts from the moment the Ministry is informed about such procedures, preparations or activities. The filing of the dissolution case is left to the discretion of the Ministry of Trade, despite the detection of illegality requiring termination. As a matter of fact, it was stated in Art. 210, subsect. 3 TCC the Ministry may file a lawsuit for dissolution, not the Ministry must do it. In my opinion, this is the wrong choice. If it is determined that the conditions in Art. 210, subsect. 3 TCC are fulfilled, the filing a lawsuit for dissolution should not be left to the discretion of the Ministry, which is an administrative as well as a political organisation [Tekinalp 2013, 160; Kayar 2015, 409]. Another mistake is that the contradiction to the business issue is accepted as one of the reasons for the dissolution lawsuit, because by Art. 125, subsect. 2 TCC, the rule of restricting the capacity of commercial companies to the subject of operation was abolished by Art. 125, subsect. 2 TCC. Nevertheless, considering the contradiction with the business subject as a reason for filing a dissolution lawsuit conflicts with Art. 125 subsect. 2 TCC.

2.2. Art. 333 TCC Obtaining State Consent for the Establishment and Amendments of Articles of Association in Listed Joint-stock Companies

The establishment of joint-stock companies is regulated in Art. 335 TCC while the amendment of the articles of association is regulated in Art. 452 TCC. Establishment stages of joint-stock companies can be listed as signing the company contract subject to the requirement of official written form, the fulfilment of the obligation to put capital, registration in trade registry system and announcement in Turkish Trade Registry Gazette (TTRG). On the one hand, the stages of amendments of articles of association appear as the decision of the general assembly, registration in the trade registry and announcement in the TTRG [Üçışık and Çelik 2013, 175]. On the other hand, obtaining permission/consent from the Ministry of Trade was considered as another requirement among the stages of establishment and amendment of articles of association for specific joint-stock companies [Tekinalp 2013, 155; Çeker 2013, 317; Bilgili and Demirkapı 2018, 200; Bahtiyar 2019, 139]. The requirement to obtain permission from the Ministry is foreseen for listed joint-stock companies only, not for all. These joint-stock companies can be referred to as "listed joint-stock companies" [Çeker 2013, 317; Sumer 2020, 191; Moroğlu 2012, 131; Bahtiyar 2019, 139].

Which joint-stock companies are required to get consent from the Ministry of Trade for the establishment and amendment of articles of association? Art. 333 TCC gives the Ministry of Trade the authority and at the same time the task of issuing communiqués to determine joint-stock companies subject to the consent of the Ministry both for establishment and amendment of articles of association [Üçışık and Çelik 2013, 177; Bilgili and Demirkapı 2018, 200]. As a matter of fact, with the "Communiqué on the Increase of Capital of Joint-stock and Limited Companies to New Minimum Amounts and the Establishment and Determination of Joint-stock Companies Subject to Authorization Amendment to the Articles of Association," which was published in the Official Gazette dated 15.11.2012 and numbered 28468, a limited number of joint-stock companies were determined by the Ministry. Accordingly, banks, leasing companies, factoring companies, financing companies, consumer finance and card services companies, asset management companies, insurance companies, holdings, foreign exchange kiosk companies, companies dealing with public merchandising, agricultural products licensed warehousing companies, product specialized exchange companies, independent audit companies, surveillance companies, technology development zone management companies, free zone founder and operator companies, companies subject to the Capital Market Code No. 6362, portfolio management companies, brokerage firms (securities/securities) companies, investment trusts (Securities/real estate/venture capital) companies, real estate appraisal companies, publicly traded companies and asset leasing companies must obtain permission/consent from the Ministry of Trade to complete their establishment and amendments to their articles of association. This listing is subject to the principle of

numerous clauses. Joint-stock companies other than those listed above cannot be obliged to obtain permission in order to be established or to amend the articles of association, regardless of their legal position, nature and field of operation [Tekinalp 2013, 155; Kayar 2015, 409; Kendigelen 2016, 222–23].

On what principles will the Ministry carry out its review? What are the issues that the Ministry should take into consideration when granting permission? The scope of the examination to be carried out by the Ministry is determined in Art. 333 TCC. Accordingly, the examination of the Ministry can only be made in terms of whether there is a violation of the mandatory provisions of the law. What is meant by the mandatory provisions in this article is not only the mandatory provisions in the TCC. The mandatory provisions included in codes other than the TCC also will be taken into consideration by the Ministry while permitting. This limitation is very important. The fact that the Ministry cannot carry out its examination in terms of appropriateness nor necessity may contribute to the objective of the examination to be carried out by the Ministry, which is an administrative and at the same time a political organisation.

2.3. Art. 407, subsect. 3 TCC the Obligation to Have a Ministry Representative in General Assembly Meetings

In joint-stock companies, the general assembly is the highest decision-making body. General Assembly is regulated in Art. 407 TCC. Those who will attend the general assembly meetings are counted as shareholders, auditors, executive members and board members [Moroğlu 2012, 209; Kayar 2015, 421; Üçışık and Çelik 2013, 271; Sumer 2020, 218]. However, there is another relevant official who should be present in the general assembly meetings of joint-stock companies subject to the permission requirement of the Ministry in order to establish or amend the articles of association: the representative of the Ministry of Trade, in other words, the government commissioner (Art. 407, subsect. 3 TCC). This is a must. If the representative of the Ministry does not attend the general assembly meeting, if he does not sign the minutes of the general assembly meeting even though he attended, the decisions taken in the general assembly meetings are subject to non-existence sanction [Moroğlu 2012, 209]. Envisioning the participation of the Ministry representative as a necessity in the general assembly meetings is a measure taken by the legislator to ensure the general assembly meetings of the listed joint-stock companies are held in accordance with the law and the articles of association, and to comply with the law and the articles of association in the decisions to be taken [Tekinalp 2013, 252; Kendigelen 2016, 307; Çeker 2013, 349; Üçışık and Çelik 2013, 271]. In this way, it is prevented from making decisions contrary to the law and the articles of association in the general assemblies by the direction of the management in these companies. In other words, an effort is made to avoid wasting time by filing a lawsuit for the determination of annulment or cancellation of the decisions. The expenses and fees of the Ministry representative are covered by the relevant company.

The obligation of the Ministry representative to attend the general assembly meetings is in question for joint-stock companies that require permission from the Ministry for their establishment and amendment of articles of association. However, for joint-stock companies that are not subject to the permit requirement, it is also possible that the representative of the ministry is assigned to the general assembly meetings. In other companies, the conditions in which the Ministry representative will be present in the general assembly are determined by a regulation to be issued by the Ministry of Trade. Regarding the participation of the representatives of the Ministry in the general assemblies, the distinction between those subject to establishment permission and those who do not have any justification does not have any reasonable excuse. As a matter of fact, the legislator could not explain with justifiable reasons why special conditions were required for the need for representatives of the Ministry to participate in the general assembly meetings of joint-stock companies that are not subject to establishment permission [Kendigelen 2016, 223].

In practice, the participation of the Ministry representatives in joint-stock company general assembly meetings goes no further than symbolic. It is considered as a formality only and as a necessary step to complete the procedure. It is imperative for the Ministry representatives to play an active role in the general assembly meetings and raise the criteria sought in the Ministry representatives for this purpose. To give an example, representatives of the Ministry may be required to have graduated from the Faculty of Law.

2.4. Art. 334 TCC Representation of Public Legal Entities in the Board of Directors of Joint-Stock Companies

Another regulation regarding the surveillance and supervision authority of the State on joint-stock companies is related to the representation of public legal entities in the board of directors. According to Art. 334 TCC, public legal entities have the authority to have representatives on the boards of directors of joint-stock companies under certain conditions. The first of these conditions is that the business subject of a joint-stock company is related to public service. Business issues such as mining and energy generation can be cited as examples of business issues that concern the public service [Kendigelen 2016, 223; Çeker 2013, 328; Kayar 2015, 436; Bilgili and Demirkapı 2018, 274]. The second condition is that there is a clear provision in this direction in the articles of association of the joint-stock company (Art. 334, subsect. 1 TCC). If these two conditions are met at the same time, public legal entities (State, special provincial administration, municipality, village and one of the other public legal entities) can have a representative on the board of directors of the joint-stock company [Kayar 2015, 436]. The representative must be a public official and therefore a real person. However, the representative doesn't have to be a shareholder in the joint-stock company [Tekinalp 2013, 197].

Representatives appointed by public legal entities have the title of members of the board of directors of the joint-stock company. Therefore, comparing to the members of the board of directors who should be elected by the general assembly, the representative appointed by the public legal entities has an exceptional feature. At the same time, the relevant representative can only be discharged by the public legal entity (Art. 334, subsect. 2 TCC). Even if appointed and dismissed by the public legal entity, the representatives in the board of directors of public legal entities have the same rights and duties of the members elected by the general assembly (Art. 334, subsect. 3 TCC). However, public legal entities are liable to the company and its creditors and shareholders for the tortious acts and transactions committed by their representative members of the board of directors. The right of recourse to the representative of the public legal entities is reserved [Bilgili and Demirkapı 2018, 274].

Who will the State appoint as representatives on the board of directors in joint-stock companies? Unfortunately, objective appointment criteria on this issue were not determined by the legislator. As a result, it is noted in practice that appointments are made by public legal entities with populist priorities that have no merit. The appointment of its supporters to the boards of directors of joint-stock companies with high transaction volume and capital has increased especially recently. The political power may assign its supporters to the boards of directors of joint-stock companies with a very high transaction volume and capital, without professional and corporate governance priorities. In Turkey, this negative practice has increased. I would like to underline a recent debate on this issue. Hamza Yerlikaya was appointed to one of Turkey's biggest state-owned banks, Vakıfbank's board of directors by the State on 12th June of 2020. Hamza Yerlikaya is a retired world champion wrestler. According to his C.V. he had no training in banking. It is alleged that Hamza Yerlikaya's political identity came to the fore when he was appointed as a member of the board of a joint-stock company such as Vakıfbank. As a matter of fact, Hamza Yerlikaya is the deputy minister of the Ministry of Sports after serving two terms as a member of parliament of the ruling party. He is also one of the Presidential advisors. This situation is an indication that public legal entities can make appointments without criteria such as merit, professionalism, knowledge, skill and experience when appointing members to the board of directors of joint-stock companies. Unfortunately, this approach leads to practices contrary to the expectations of the legislator while stipulating Art. 334, subsect. 3 TCC. As *de lege ferenda*, it is required to regulate certain and objective criteria that oblige public legal entities to use their discretionary powers for the public interest when appointing representatives by Art. 334, subsect. 3 TCC.

2.5. Art. 353 TCC the Ministry of Trade Filing a Lawsuit for the Dissolution of the Joint-Stock Company due to Violation of the Law in the Establishment

A provision exists in Art. 353 TCC that can also be applied to limited companies. According to this provision, after the establishment of a joint-stock company, it can no longer be given a ruling on its nullity nor absence. However, if there is a violation of the law while establishing a joint-stock company and if the interests of the creditors, shareholders or the public are violated or seriously endangered due to this violation, a dissolution action can be filed within 3 months from the registration in the trade registry [Üçışık and Çelik 2013, 184; Kendigelen 2016, 237; Şener 2017, 343; Yasan 2013, 454]. The court in charge of the dissolution case is the commercial court of the first instance. The competent court is the court at the registered office of the joint-stock company. The defendant party is the legal personality of the joint-stock company [Çeker 2013, 324; Kayar 2015, 410; Moroğlu 2012, 151; Şener 2017, 343; Bilgili and Demirkapı 2018, 206; Yasan 2013, 454].

A lawsuit may be filed by the board of directors, the relevant creditors, shareholders and the Ministry of Trade for the dissolution of the joint-stock company in accordance with Art. 353 TCC. Therefore, the Ministry has the authority to file a lawsuit for the dissolution of a joint-stock company whose establishment was already completed and registered in the trade registry. However, to file the case, the public interests must be violated or even seriously endangered. First of all, it has to be stated that granting the Ministry, which also has a political aspect, the authority to file a lawsuit for the dissolution of a joint-stock company that completed its establishment by claiming the public interests, carries risks in terms of impartiality [Kayar 2015, 410; Üçışık and Çelik 2013, 184]. In addition, the inclusion of all joint-stock companies within the scope of Art. 353 TCC without any discrimination can be considered as exceeding the purpose of the legislator. However, it must be admitted that Art. 353 TCC has significant importance in terms of proving that joint-stock companies play an active role in the supervision and surveillance by the State. It also draws attention in terms of demonstrating the value that the legislator attaches to the role of the State in the new joint-stock company law. Nevertheless, in terms of *de lege ferenda*, it can be suggested as a proposal to give the Ministry the authority to file a dissolution case in case of illegal establishment of joint-stock companies only subject to the permission of the Ministry for their establishment, instead of all joint-stock companies.

2.6. Art. 530 TCC the Ministry of Trade Filing Lawsuit for Dissolution of the Joint-Stock Company on the Ground of Lack of Organ

A specific reason for termination is regulated for joint-stock companies in Art. 530 TCC: deciding to dissolve joint-stock company due to lack of organs. There are two legally mandatory organs in a joint-stock company. The first is the board of directors, which is the company's management and representative body.

Secondly, the highest decision-making body of the joint-stock company is the general assembly. As a major change by the TCC, auditors are no longer legally required bodies of the joint-stock companies. As the TCC has adopted an independent audit, there is no longer a body in the form of an auditor or a board of auditors for joint-stock companies [Poroy, Tekinalp, and Çamoğlu 2017, 1561; Bahtiyar 2019, 381].

According to Art. 530 TCC, if one of the legally required organs of the joint-stock company is not available or cannot be gathered or if it cannot make a decision even if it is gathered, in other words, if it cannot perform its function, this constitutes a reason for the dissolution of the joint-stock company to be sued. The claim for dissolution is brought before the commercial court of first instance. The competent court is the court where the registered office of the joint-stock company is located. The defendant party is the legal personality of the joint-stock company [Poroy, Tekinalp and Çamoğlu 2017, 1561; Şener 2017, 629; Bilgili and Demirkapı 2018, 380]. The court cannot immediately decide on the dissolution of the company, even if the requirements for termination are met [Tekinalp 2013, 168; Kayar 2015, 482; Sumer 2020, 258; Moroğlu 2012, 312]. First, it must give certain time to the joint-stock company to correct the situation and isolate the deficiencies. If the deficiencies are not corrected within this period, the court decides on the dissolution of the joint-stock company. Who can sue the dissolution of a joint-stock company for lack of organs? According to 530 TCC, shareholders, company creditors and the Ministry of Trade can file a dissolution action. The Ministry of Trade was given the right to file a lawsuit for dissolution and the limits of the authority and duty of the state with regard to the supervision and surveillance of joint-stock companies are extended [Tekinalp 2013, 167; Poroy, Tekinalp, and Çamoğlu 2017, 1561].

3. SUPERVISION AND SURVEILLANCE OF JOINT-STOCK COMPANIES BY THE STATE ACCORDING TO THE CODES OTHER THAN TURKISH CODE OF COMMERCE

The state supervision and surveillance of joint-stock companies is not only carried out within the framework of the TCC. In addition to the supervision and surveillance carried out by the Ministry of Trade on qualified joint-stock companies such as banks, insurance companies and publicly-held joint-stock companies, more expertise supervision and surveillance activities are also carried out by other institutions and organizations. These institutions and organizations are designed differently for each qualified joint-stock company. This multi-headedness leads to a lack of coordination between these institutions and organizations. In my opinion, it is only necessary to establish a supreme board that will eliminate the lack of coordination between the institutions.

Under this heading, it is not possible to examine all the principles of the qualified joint-stock companies in question and the supervision and surveillance ca-

rried out on these companies, considering the scope of the study. However, I think it would be useful to examine the main lines of the state's supervision and surveillance authority regarding banks, insurance companies and publicly traded joint-stock companies and only as an example. The common feature of these three companies is that it is an obligation for these company types to be established in the form of a joint-stock company. However, it should be reminded that insurance companies can also be established as cooperative as well as being established as a joint-stock company.

3.1. State Supervision and Surveillance on Banks

The principles regarding the supervision of banks and the measures to be taken are regulated in Art. 65 of the Banking Code (BC). Accordingly, the activities of banks are subject to the supervision and surveillance of the Banking Regulation and Supervision Agency (BRSA). BRSA is an administratively and financially autonomous institution with a public legal personality. It was first established by the repealed Banks Code No. 4389 published in the Official Gazette dated 23.06.1999 and numbered 23734.

Thanks to BC No. 5941 in effect, the BRSA has been strengthened in terms of independence, efficiency and capacity. The establishment of the BRSA was driven by efforts to prevent informality in the Turkish banking system and to carry out an external audit in accordance with universal banking principles by the state. The core values of the institution are prudence, independence, reliability, participation, efficiency, competence and sensitivity. The decision-making body of the BRSA is the Banking Regulation and Supervision Board (Board) [Üçışık and Çelik 2013, 113].

The BRSA may appoint a representative as an observer to the general assembly meetings of banks as a view of its oversight authority. The supervision and surveillance authority of the BRSA on banks is observed primarily when the banks are established and obtain an operating license. Accordingly, the establishment of a bank in Turkey and opening the first branch of a bank established abroad, at least five members' vote in the same direction is required for decisions to be taken (Art. 6 BC). Even if a bank is established and/or granted with a license to open a branch, it also must obtain an operating license/permit in order to perform banking transactions. An operating permit must also be obtained from the Board upon the written request of the bank. The Board must decide on the application for operating permit within three months at the latest from the date of application (Art. 10 BA).

The BRSA may decide to cancel the establishment permit and to cancel or limit the operating licence of a bank as a result of the audits it carries out. Accordingly, the establishment permit of a bank is cancelled by the decision taken with the same directional votes of at least five members of the Board after the realization of any of the reasons indicated in Art. 11 BA. The operating license of a bank is also cancelled if the operating license is obtained with false declarations,

if it does not start operating within six months after the operating license is obtained, or if it has not been operating for six months without interruption within a year. In case of not becoming a member of the Banks Association, which is the relevant institution association, or not depositing the remaining instalments of the system into the Savings Deposit Insurance Fund account within one month from the date of receipt of the operating license, and if these obligations are not fulfilled despite the warning made by the BRSA, the fields of activity may be limited by Board one by one (Art. 12 BC).

3.2. State Supervision and Surveillance on Insurance Companies

Whether insurance companies are established as joint-stock companies or cooperatives, they are primarily subject to state supervision and surveillance within the scope of the TCC. However, in addition to the TCC, insurance companies are also included in the scope of the State's supervision and surveillance within the framework of the provisions of the Insurance Code (IC) numbered 5684. According to IC, the institution that carries out the supervision and surveillance of insurance companies is the Insurance and Private Pension Regulation and Supervision Agency (IPRSA). This institution was established as the Insurance Supervision Agency when Code No. 5684 came into effect. By the Presidential Decree published in the Official Gazette dated 18.10.2019, it was transformed into the recent organisation. According to Art. 28 IC, insurance companies operating in Turkey, reinsurance companies, organizations in insurance activities according to special codifications, insurance and reinsurance intermediaries, insurance expertise activities, actuaries and other entities operating in the engaged or insurance operations are subject to supervision and surveillance performance by the IPRSA. IPRSA conducts its audits through insurance audit experts, insurance audit actuaries and all their assistants.

3.3. State Supervision and Surveillance on Publicly Traded Joint-Stock Companies

Publicly traded companies must be established in joint-stock company form. For this reason they are subject to the TCC and the surveillance and supervision regime regulated in the TCC. However, they are also subject to the provisions of the Capital Market Code No. 6362, which is a more specific codification, and to the supervision and surveillance of the Capital Markets Agency (CMA) in accordance with the *lex specialis* principle. The CMA will fulfil the duties and powers assigned to it underlined in the Code, through the Capital Markets Board (Board) [Adıgüzel 2019, 85; Sumer 2020, 184].

The Board has a wide range of authority to make regulations related to capital markets. The Board exercises its powers both by enacting regulatory procedures such as regulations and communiqués and by making special decisions. It is obligatory to obtain the consent of the Board for the prospectus for the capital market instruments to be offered to the public or to be traded on the stock exchange and

the issuance document for the capital market instruments to be issued without a public offering. The transition to the registered capital system of all publicly traded companies, whether they have shares traded on the stock exchange or not, and the increase of the registered capital ceiling, mergers, transfers and divisions, amendments to the articles of association, share purchase proposal, exemption requests from the obligation to make a share purchase offer, collecting proxy by invitation, their removal must be authorized by the Board [Adıgüzel 2019, 240].

CMA has the supervision authority for publicly traded joint-stock companies. Surveillance activities include the revision of the financial statements of publicly traded joint-stock companies, the disclosure of the findings resulting from the revision, the improvement of the quality of the financial statements, the value of capital market instruments and the public disclosure of important events and developments that may affect the investment decisions of the investors or to exercise their rights, when deemed necessary, participating in ordinary/extraordinary general assembly meetings as an observer.

CMA also has the authority to audit. The purpose of the audit is to prevent negligence, violation, abuse and all similar illegal acts and actions that keep the capital market away from operating in a reliable, transparent, effective, stable, fair and competitive environment and the protection of investors' rights and benefits. One of the organizations to be audited by the CMA is publicly traded joint-stock companies. The audit activity is carried out by the assigned Board experts at the Board or in the presence of the relevant institutions, using various audit techniques. The results achieved are presented to the Board Decision Making Body with a report. As a result of the inspections, the Board can impose sanctions in the form of warnings, administrative fines, judicial fines and imprisonment. The fact that the authority to impose punishments binding freedom, such as imprisonment, is left to the Board creates a risk in terms of legal security and the rule of law.

CONCLUSION

The importance of joint-stock companies in terms of capital markets caused them to be subject to the supervision and surveillance of the State. The State regulates the supervision and surveillance of joint-stock companies both in TCC and in special codes other than TCC. In addition, the State inspects and supervises joint-stock companies with the support of other public legal entities, institutions and organizations with administrative and financial autonomy, other than the Ministry of Trade. Regarding the supervision and surveillance of joint-stock companies, my first suggestion for *de lege ferenda* is to gather the scattered provisions, devoid of systematic contained in both TCC and special codes, under a single heading. Another suggestion is to determine objective criteria for the members to be appointed to the board of directors of joint-stock companies by public legal entities and to prevent the abuse of discretionary power by public legal enti-

ties. The criteria for the representatives of the Ministry to attend the general assemblies of joint-stock companies should be increased. Objective criteria such as having a law degree should be determined. The scope of joint-stock companies subject to dissolution action to be filed due to violation of the law in the establishment should be narrowed and only for joint-stock companies subject to permission for the establishment, a dissolution case regulated in Art. 353 TCC should be filed. Finally, to eliminate the lack of coordination between different institutions in the supervision and surveillance carried out by special codifications and autonomous institutions other than the TCC, the existence of a higher board for coordination is needed.

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NADZÓR I KONTROLA PAŃSTWA NAD SPÓŁKAMI AKCYJNYMI W PRAWIE TURECKIM

Streszczenie. W niniejszym artykule zostaną zbadane zasady dotyczące nadzoru i kontroli przez państwo spółek akcyjnych, których wpływ i znaczenie wzrosło w wyniku polityki postliberalnej. Celem artykułu jest zwrócenie uwagi na rosnące znaczenie państwa dla spółek akcyjnych w XXI w. z perspektywy prawa tureckiego oraz uwzględnienie opinii i sugestii w zakresie *de lege feranda*.

Słowa kluczowe: tureckie prawo handlowe, spółki akcyjne, kontrola państwowa, nadzór państwowy

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