



VIRTUAL GENERAL ASSEMBLY MEETINGS IN JOINT STOCK COMPANIES WITH FOREIGN CAPITAL

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Abstract:

The possibility of holding general assemblies in electronic environment, which has been included in the TCC (2012), and the restriction of physical travel opportunities of individuals during the pandemic process, and the electronic holding of general assemblies of Turkish companies with foreign partners gained importance. With this study, it is aimed to discuss how virtual general assemblies can be held and how solutions can be produced for the problems that may be encountered in the framework of both the pandemic measures and the current TCC.

Keywords:

Virtual General Assembly, Joint Stock Companies, Shareholder Rights, General Assembly

JEL Codes:

K20

1. Introduction

The primal platform where shareholders can exercise their managerial rights in joint stock companies is the general assembly. It will be very difficult for the shareholder who cannot attend the ordinary general assembly meeting once a year or extraordinarily for important decisions, to use their managerial rights in the partnership and to protect their rights arising from the partnership, especially their financial rights. Therefore the possibility of holding general assemblies in electronic environment, which has been included in the Turkish Commercial Code No. 6102 (TCC), especially for Turkish companies with foreign partners gained importance. The importance of such facilities prove themselves with the restriction of physical travel opportunities of individuals during the pandemic process.

Within the scope of this study, it has been examined whether invited, uninvited, ordinary or extraordinary general assemblies can be held electronically. In this respect, it is observed that electronic general assembly bears many advantages such as cross-border voting, instant notification, electronic proxy, electronic voting order, simultaneous voting, instant access to voting results, access to foreign investors, cost reduction, transparency, security and confidentiality. However, these advantages also bring along some technical problems that require quick intervention. These problems may be encountered at all stages of the meeting, execution and conclusion of the general assembly, including voting, representation and participation of the shareholders, and may provoke questions regarding the invalidity of the general assembly or the decisions taken in the general assembly. And as a result, while trying to protect the shareholders, may cause them to suffer losses.

2. Virtual General Assembly

2.1. The Concept "General Assembly"

The General Assembly (GA) is an obligatory body where the shareholders or their proxies declare their will, have information about the activities of the company and use their rights arising from the shareholder status (Hamamcıoğlu, 184). It is the decision body of the company, in which the shareholders come together and discuss and decide on a specific agenda upon a duly call. This organ is essential for shareholder democracy since it is the

place, fundamental shareholder rights such as gaining information and participation in management will be exercised (Pulaşlı 8 et al, Tukur 14 et al).

This is regulated under TCC Art 360 by stating that the shareholders may exercise their corporational rights in GA. This is called as the right to attend to GA in the doctrine, and in order to facilitate this right to attend to GA, the shareholder can use a representation, a Proxy.

2.2. Types of General Assembly

The GAs can be classified according to their timing, invitation or gathering style.

As per timing, it is grouped into two categories; ordinary (annual) / extra-ordinary GAs (Art. 409 TCC). Ordinary GAs are the compulsory gathering according to TCC, since it is the sole platform that the shareholder can exercise its managerial rights. However there is no specific sanction regulated under TCC if it is not held. Therefore in practice, companies may prefer to hold these GAs once in two or three years, to avert the expenses. On the otherhand extra-ordinary GAs are held whenever necessary. This necessity mainly derives from the conditions that require a GA decision (i.e. Art 408/2 TCC).

As per invitation, GAs are divided into two groups as GAs with invitation and without invitation (Art.410 – 416 TCC). The GA should be invited to a meeting at least fifteen days prior to the meeting via an announcement on Turkish Trade Registry Gazette and company's website accordingly to the Articles of Association. However, if all the shareholders representing 100% of the company's capital are present, then they can hold a GA without an invitation. A new type of GAs can be classified as GAs as per gathering. According to this classification the meetings can be held in physical form, in which all the parties physically attend the meeting at the meeting venue, or the meeting can be held virtually, in which the parties can attend the meeting through the means of internet and technology. It is observed that although some jurisdictions allow electronic/virtual attendance to a physical meeting, others allow the meeting to be held entirely virtually (Hamamcıoğlu, 187 et al).

2.3. Electronic General Assembly

At the end of the 20th century, as a result of globalization, capitals and companies became multinational through takeovers or partnerships. The investors spread around the globe affected the usage and application of shareholder rights (Arı, 178). The solution mainly seem to be in "multi-media" over the internet (Pulaşlı, 18).

One of the ways to use technology seemed to be adaptation of a way of online attendance to GAs. Therefore electronic GAs are proposed. At this point it is important to explain there are scholars that believe to differentiate online attendance to a physical GA with a completely virtual GA. By these scholars, the physical GAs where shareholders can attend online are mainly called as electronic GAs, and the latter as virtual GAs (Bahtiyar, 113 et al; Arı, 191 et al; Yayla, 42; Işık 625 et al. Also please refer to Tukur 57 et al).

According to Tukur a virtual general assembly "is the meeting in which the shareholder or his representative, in other words, the right holder, can attend the general assembly meeting by using technical means, not physical" (Tukur, 28).

When the chronological development of electronic GA in Turkey is observed it can be said that Turkey is one of the first countries to require companies listed on its stock exchange (Istanbul Stock Exchange, ISE) to allow shareholders, custodians and intermediaries to participate and vote at general assemblies through an electronic platform. The main aim to introduce electronic platforms for GAs is to eliminate the barriers of cross-border voting and complying with international standards (Ararat/Eroğlu, 2). Furthermore, not only the listed companies but also unlisted commercial companies can implement virtual GAs on an optional basis. This system is not only applicable for the general assembly, but also the board of directors can convene in this manner (Gürpınar, 1101 et al).

In an announcement of Capital Markets Board (CMB) in 2019, it is stated that a preliminary agreement was signed between MKK and NASDAQ OMX on the sales and marketing of the Electronic General Assembly System to 18 developed and developing countries. In the announcement it is explained that "e-GKS: Electronic General Assembly System" allows company shareholders to transact electronically without blocking their shares, to appoint representatives and give voting orders, to watch the general assembly live from anywhere with internet access, without physically attending the general assembly, thanks to image and sound transmission, to the agenda being discussed" system, which allows people to send their opinions and suggestions on the issue simultaneously, to cast their votes simultaneously with those who physically attend the meeting, and to receive information and notifications about all processes instantly (MKK, "NASDAQ OMX on the Sales of the Central Registry Agency Electronic

General Assembly System Abroad” Agreed with”, (Online) <http://www.spk.gov.tr/Duyuru/Goster/20140926/0> , 08 May 2019). In other words, electronic GAs can be defined as an information system in which both the preliminary preparation and the meeting can be carried out electronically (Tukur, 110). In terms of the shareholder, it refers to a system where the shareholder can appoint representatives from anywhere with internet access, ask questions, express opinions, and vote electronically, simultaneously with other shareholders who attend the general assembly physically or electronically, without physically attending the general assembly (Tukur, 111) (MKK, “Electronic General Assembly System Applications”, (Online) <https://www.mkk.com.tr/tr/general-mektup/604>, 05 August 2019; MKK, “Electronic General Assemblies to be Held by Joint Stock Companies Listed on the ISE”, (Online) [https://www.mkk.com.tr/popup/ Genel-Mektup-Duyurulari/604-MKK-Elektronik- Genel-Kurul-System -Applications](https://www.mkk.com.tr/popup/Genel-Mektup-Duyurulari/604-MKK-Elektronik-Genel-Kurul-System-Applications), 08 May 2019).

With the enhancements of technology it is suggested that especially the cross-border voting opportunity, electronic voting, participation in person or by proxy, simultaneous voting and comment possibility will be possible (Arı, 178; Ergincan/Karaağaçlı 104). In other words, any foreign investor, who is residing in another country will be able to attend the GA and put questions forward to the board of directors just within the comfort of his residing office. In addition to those, the company may benefit from the instant notification (e-MKK Information Portal/SMS/e-mail/SWIFT), Access to the information and documentation from the e-MKK Information Portal, smart reports, instant Access to vote results and simultaneous registration with relevant registries possibilities (MKK, “Incorporated Shareholders General Assemblies (Electronic General Assemblies)” (Online), <https://egk.mkk.com.tr/egkweb/assets/home/content/EGKS-Sunum.pdf> 14 May 2019) (C.Eyüboğlu, 67 et al; Turgut, 25 et al, Hamamcıoğlu, 186; Ergincan/Karaağaçlı, 104). These enhancements will also result with an increasing interest and participation in the meeting, decrease of costs due to internet usage, opportunity to lure foreign investors, transparent qualification, security and privacy as well as a more efficient audition of the company for institutional shareholders.

Moreover, the electronic platform developed for the electronic assemblies also provides an unified source for all company disclosures and functions as a central communication medium between the stakeholders and the company (Ergincan/Karaağaçlı, 104). Since TCC does not require blocking the shares before attending a GA, one of the most criticized barriers to proxy voting is removed (Ararat/Eroğlu, 3).

On the otherhand, there are some disadvantages that have been discussed throughout the process. The foremost resistance is regarding the costs, since the technology should bear some specific standards according to the regulations. In addition to that, in Turkey it is accepted by the doctrine with majority that the companies should hold both online and physical GAs at the same time (Bahtiyar/Hamamcıoğlu). Furthermore, if any technological problem occurs during voting or in the use of shareholder rights through eGAs, such conditions may increase the annulment of GAs by courts (Ararat/Eroğlu, 7). It is justifiably stated that considering the lengthy law suits in Turkey, such judicial process could put companies at risk of being unable to function effectively (Ararat/Eroğlu, 7).

As a result, especially technical issues, issues with the instruction forms for the shareholders and problems related to the participation of the right holder are main concerns regarding virtual GAs (Eyüboğlu, 76; Turgut, 25; for a detailed review Tukur 40 et al).

2.4. Regulations in Turkish Legislation

In Turkish Company Law, there are various primary and secondary regulations as well as principles implementing the electronic meetings. It can be said that these regulations are finding their source in EU Directive 11.07.2007 – 2007/36/EG on the Exercise Of Certain Rights Of Shareholders In Listed Companies as well as German and Swiss Law.

To name some of the major regulations and principles, TCC, Capital Markets Law, Corporate Governance Principles of Capital Markets can be listed as the governing rules. However, the application and procedure of the virtual GAs are mainly regulated under Regulation on Attendance at General Assembly Meetings of Joint Stock Companies by Electronic Means (Official Gazette No. 28395, 28.08.2012) and Communiqué On Electronic General Meeting System Applicable At General Assembly Meetings Of Joint Stock Companies (Official Gazette No. 28396, 29.08.2012)

The main concern of the corporate governance principles is facilitating the exercise of shareholders’ statutory rights, and one fundamental way to do is enabling the shareholder to use their right to participate in the GA. The II-17.1

Communiqué on Corporate Governance (Published in the Official Gazette dated 3 January 2014 and numbered 28871) requests companies to take precautions to facilitate the exercise of shareholders rights, and states that in order to promote the attendance of the shareholders, the general assembly meeting shall be conducted in a manner not to cause an inequality among the shareholders and to provide the attendance of the shareholders with minimum cost. For this purpose, the meeting shall be conducted at the place where the shareholders exist in nominal majority, provided that this matter is set forth in the articles of association. In addition to that, any actions that may complicate the use of voting rights must be avoided, and each shareholder should be given the opportunity to exercise his/her voting right, including cross border voting, in the most appropriate and convenient manner.

In TCC Art. 1527 / 5 (amended by Code No. 6335) it is regulated that electronic participation and electronic voting in joint-stock companies shall bear the same legal consequences as physical participation and voting (Hamamcıoğlu, 2016, 196). The conditions for the application of this article will be regulated by a regulation, and such regulation will include the AoA provision, that will be inserted within the AoAs of the companies which opts for electronic GA. The application of virtual GAs are compulsory for publicly listed joint stock companies (for the criticism: Arı, 190 et al.). It is stated by the scholars that according to this article, the company should hold a physical meeting, and should enable shareholders to attend the meeting virtually (Bahtiyar 120; Özer 635. Also to be considered; Arı 193 et al; Keser Berber 63).

In Art. 1528 TCC it is stated that any shareholder who wishes to participate in general meetings virtually must notify his/her e-mail address to the company in order to benefit from such opportunity.

According to Capital Markets Law No. 6362 , The participation in the electronic environment to the general assemblies of joint-stock corporations the shares of which are dematerialised shall be realised through the electronic environment provided by the CRA (Central Registry Agency / MKK) (Art. 30).

Regulation on Attendance at General Assembly Meetings of Joint Stock Companies by Electronic Means (Regulation on e-GA), introduces the procedural rules to allow shareholders, custodians and intermediaries to participate and vote at general shareholders meetings through an electronic platform. (Ararat/Eroğlu, 4). In addition to that, the Regulation presents a compulsory provision for AoAs of the joint stock companies (Art 5).

Communiqué On Electronic General Meeting System Applicable At General Assembly Meetings Of Joint Stock Companies (Communiqué on e-GM) regulates establishment, operations, and technical issues regarding electronic general assembly meetings and principles and procedures on security criteria. (Ararat/Eroğlu, 1). Under Art. 6 of the Communiqué right owner may convey maximum two opinions for each agenda item and each opinion is limited to maximum 600 characters. Furthermore, voting related to each agenda item included at general meeting agenda shall be consecutively started by meeting chairman for right owners participating physically and electronically. Sending votes electronically is limited to two minutes (Art 7) (Hamamcıoğlu, 196).

Under Regulation on Principles and Procedures of General Assembly Meetings of Joint Stock Companies and Representatives of the Ministry of Customs and Trade (Regulation on GA) it is stated that the presence of a Ministry Representative is mandatory at all general meetings of companies whose incorporation and articles of association amendments of which are subject to Ministerial permission and for all other companies at general meetings with an agenda item on capital increase or decrease, switching and exiting there from registered capital system, increasing registered capital ceiling or changing field of activity as well as merger, demerger, type change, general meetings of companies implementing system of participation in general meetings electronically, all general meetings held abroad and special board meetings of privileged shareholders held abroad. [...] (Art 32) (Hamamcıoğlu, 195).

2.5. An Overview of the Procedure and Application

As can be understood from the above mentioned regulations the shareholder, who has the right to attend the GA of the company, may attend virtually in accordance with Art. 1527 of the TCC. In accordance with the provisions of the Regulation on e-GA, if a company wishes to provide online attendance option, it should establish an electronic general assembly system that will enable the right holders to participate in the general assembly meetings electronically, express their opinions, make suggestions and vote, or purchase services from the systems created for this purpose. The right owners should be able to exercise their rights through an electronic system established and supervised by MKK (the Central Securities Depository Institution- a subsidiary of Settlement and Custody Bank and the ISE, the electronic platform operated by Central Registry Agency for capital market instruments (MKK) (Tukur, 37 et al; Hamamcıoğlu, 196).

To summarize it can be said that, in order to held a virtual GA, there should be a regulation in the AoA, the company should have a website dedicated to the GAs, the shareholder should request to attend the meeting in virtual form and should have an electronic signature and registered electronic mail.

The company should make the invitation duely including the agenda and should inform the shareholders that they can attend the meeting virtually. In other words, it is crucial that the invitation to include the option for virtual attedance and explain the system in detail.

The meeting and decision quorra will be the same as a physical meeting. The discussions and voting should be held in a way that enables both physical and virtual attendees to use their rights such as suggestions, declaring opinion and voting effective and in an equal way. And the Ministry Representative must be present during the meeting.

After the metting, the list of attendees and the meeting minutes should be given to the Ministry Representative at in an environment suitable for the transportation and storage of electronic documents (Regulation, Art. 12). All documents created through the electronic general assembly system can be signed with secure e-signatures by the members of the meeting chairmanship, company executives and Ministry Representative, and these documents must be made available to the shareholders on the company's website (Tukur 37 et al; Turgut, 105 et al; Hamamcıoğlu, 192 et al).

3. Conclusion

As a result of this study it is concluded that virtual general assemblies for ordinary general assemblies are a very useful method in terms of facilitating the use of the shareholder's right to attend and vote in the general assembly and the related rights. It has been understood that if the technical problems can be minimized, virtual general assemblies will be a method that can be preferred for all companies.

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