

# NEWSLETTER

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## **PRINCIPAL MATTERS THAT CAN BE INCLUDED IN SHAREHOLDERS' AGREEMENTS BUT CANNOT BE INCLUDED IN THE ARTICLES OF ASSOCIATION DUE TO THE TURKISH COMMERCIAL CODE**

### **Introduction**

In joint-stock companies, although the shareholding relationship is regulated through the institutional framework drawn by the Turkish Commercial Code ("TCC") No. 6102 and the company's articles of association, many critical matters regarding the operation of the partnership—especially in structures where investors, founding partners, and strategic shareholders coexist—are shaped by shareholders' agreements (SHA) concluded between the parties. Shareholders' agreements stand out as contractual tools that regulate the internal relationship between shareholders and produce binding results for the parties, unlike the articles of association, which determine the normative structure of the company.

Pursuant to the principle of freedom of contract accepted in the Turkish Code of Obligations No. 6098, parties may freely regulate the legal relationship between them, provided that it is not contrary to mandatory provisions, public order, morality, and personal rights. This freedom grants shareholders the opportunity to construct the partnership relationship in a more flexible and detailed manner, beyond the rigid and mandatory framework imposed by the TCC regarding the articles of association. However, this opportunity does not grant the authority to turn a shareholders' agreement into a "shadow articles of association" that replaces the official articles. On the contrary, the mandatory provisions of the TCC form the fundamental boundary determining which regulations can be included in the articles of association and which can only be valid at the level of a shareholders' agreement.

In this article, certain principal regulations that can be written into a shareholders' agreement but cannot be included in the articles of association due to the mandatory structure of the TCC and the fundamental principles of corporate law are discussed along with their legal justifications.

## The Fundamental Distinction Between the Shareholders' Agreement and the Articles of Association

In terms of its legal nature, a shareholders' agreement is a contract under the law of obligations with relative effect. Its parties are, as a rule, the shareholders, and the rights and obligations arising from the contract generate consequences only between these parties. A shareholders' agreement is not registered or announced; it does not gain publicity regarding third parties and does not directly bind the company organs unless the company is a party to it.

In contrast, the articles of association (AoA) serve as the "founding document" of the joint-stock company and determine the organ structure, share groups, privileges, and decision-making mechanisms of the company. The provisions of the articles of association, which are registered in the trade registry and announced, produce terms and results for third parties as well, in accordance with the principle of publicity. Therefore, regulations in the articles of association affect not only the internal relationship between shareholders but also the institutional structure of the company reflected to the outside world.

This distinction becomes even more apparent with the principle of mandatory provisions expressed in Article 340 of the TCC. According to said provision, legal regulations regarding joint-stock companies cannot be changed by the articles of association unless otherwise permitted. Therefore, the will of the shareholders does not have absolute freedom at the level of the articles of association; it has freedom within the boundaries drawn by law. At this point, shareholders' agreements function as a complementary tool that carries the will to the plane of the law of obligations, rather than forcing the articles of association in areas where the law does not permit.

## Matters That Cannot Be Written in the Articles of Association but Can Be Regulated in the Shareholders' Agreement

### **1. Voting Commitments and Voting Agreements**

The right to vote is one of the fundamental elements of shareholding and is a right strictly attached to the shareholder. For this reason, pre-binding regulations regarding how a shareholder will exercise their voting right are not accepted in the articles of association on the grounds that they would damage the free will of the general assembly and disrupt the balance between organs.

On the other hand, it is possible within the scope of a shareholders' agreement for shareholders to make commitments to exercise their votes in a certain direction on specific issues—regulations known in practice as voting agreements. In such regulations, the right to vote is not transferred; only an obligation regarding the exercise of the voting right in a certain manner is undertaken. In case of breach of this obligation, the general assembly resolution remains valid as a rule; the consequence of the breach remains limited to a claim for compensation within the framework of provisions on breach of obligation or a penal clause if provided for in the contract. In this respect, voting agreements are among the typical regulations that should be included in the shareholders' agreement, not the articles of association.

## **2. Personal Commitments Regarding Share Transfer and Option Mechanisms**

The TCC stipulates certain restrictions and procedures especially regarding the transfer of registered shares and accepts the regulation of these restrictions in the articles of association as a prerequisite for producing consequences against third parties. Conversely, shareholders tying share transfers among themselves to certain conditions, restricting transfers for certain periods, or granting options regarding the purchase or sale of shares if certain conditions are met, carries the risk of conflicting with the mandatory provisions of the TCC if written into the articles of association.

Mechanisms such as pre-emption, call and put options, tag-along, and drag-along rights are in the nature of provisions that impose personal performance obligations on shareholders and regulate share transfers on a contractual level. Therefore, while such regulations are valid in a shareholders' agreement, they either carry a risk of invalidity if included in the articles of association or are not accepted by the trade registry practice. These provisions do not automatically affect the shareholding status if breached; they only bring law of obligations sanctions to the agenda for the breaching party.

## **3. Indirect Guidance to the Board of Directors and Veto Mechanisms**

The non-transferable and indispensable powers of the board of directors are clearly regulated in the TCC. It is not possible to de facto eliminate these powers through the articles of association or shareholders, or to tie them to the instructions of certain shareholders. Therefore, direct regulations in the articles of association stating that the board of directors can only take certain decisions with the approval of shareholders may constitute a violation of mandatory provisions.

In contrast, it is possible to provide for obligations in the shareholders' agreement regarding how shareholders will act among themselves in the taking of certain decisions. Such provisions do not directly bind the board of directors; however, they function as indirect guidance by affecting the voting behavior and coordination of the shareholders. In this respect, provisions that do not directly limit the freedom of the board of directors but regulate the internal relationship between shareholders are specific to the shareholders' agreement rather than the articles of association.

## **4. Non-Compete, Confidentiality, and Personal Performance Obligations**

Pursuant to Article 329/2 of the TCC, it is generally not possible to impose any debt other than the capital contribution debt on a shareholder through the articles of association. This principle prevents regulations that impose personal obligations on shareholders from being included in the articles of association.

Regulations such as non-compete clauses, confidentiality obligations, lock-up commitments for certain periods, or mandatory sale obligations under certain conditions target the personal behavior of shareholders rather than the shareholding itself. Therefore, while these provisions can be validly regulated in a shareholders' agreement, they carry the risk of invalidity or rejection by the registry if they appear in the articles of association.

### 5. Contractual Mechanisms Regarding Financing and Exit

Obligations to participate in capital increases, additional funding commitments, and regulations regarding the transfer of shares under certain conditions in specific exit scenarios are also included in the shareholders' agreement rather than the articles of association due to their nature of imposing personal debts on shareholders. Such regulations are aimed at ensuring the economic balance between shareholders and do not aim to directly change the normative structure of the company.

### Conclusion

Shareholders' agreements are powerful tools that enable the flexible and detailed implementation of partner will in joint-stock companies. However, constructing these agreements as a structure that replaces the articles of association or bypasses the mandatory provisions of the TCC creates legal risks. While the articles of association maintain their quality as a normative document determining the institutional structure of the company reflected to third parties, the shareholders' agreement should be positioned as a complementary contract regulating the internal relationship between shareholders, personal performance obligations, and the economic balance.

If this distinction is correctly established, provisions regarding privileges and organ structure are regulated in the articles of association, while voting behavior, share transfer commitments, non-compete clauses, and exit mechanisms are regulated in the shareholders' agreement. This ensures compliance with the mandatory framework of the TCC while establishing a predictable and strong contractual protection between the parties.