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TURKISH CORPORATE GOVERNANCE GOES MAINSTREAM:

A SOCIO-LEGAL ANALYSIS OF TURKEY'S RECENT CORPORATE GOVERNANCE LAW REFORMS

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Abstract

This thesis examines the reasons, methods, and implications of the legal reforms in Turkey's corporate governance framework. The mainstream model of corporate governance that is based on the shareholder primacy theory, which currently enjoys global hegemony, holds that the purpose of the company is to maximize shareholder wealth. Its critics argue that corporate governance should also pursue stakeholder interests, including societal interests. The thesis moves beyond these debates by analysing the recent reforms in Turkey, an emerging market, from a socio-legal perspective to determine whether Turkish corporate governance laws have conformed to the mainstream model. This research's unique contribution to the body of knowledge lies in its inter-disciplinary and critical approach in its examination of Turkish corporate governance laws.

The thesis begins by exploring the process by which the shareholder primacy theory gained prominence alongside the rise of neoliberal ideology. It illustrates how this theory has been disseminated outside the Anglo-American context through the promotion of 'universal' corporate governance standards. It finds that Turkey has conformed to the mainstream model as evidenced by the alignment of its corporate governance laws with the OECD Principles. Nevertheless, while Turkish companies are characterised by concentrated ownership with family owners in control, the mainstream model is derived from an Anglo-American system of wide share dispersal that reduces corporate governance to an agency problem of aligning the interests of managers and shareholders. In this context, the research employs a Marxist theoretical framework to uncover the reason for imposing an Anglo-American variant of corporate governance rules on Turkish companies.

Turkey has justified the recent corporate governance reforms with the need to attract foreign investors and its aspiration of joining the EU. The new legislation focuses on the rights of minority shareholders in an attempt to curb the power of controlling owners in favour of outside shareholders. Across this backdrop, the thesis critically assesses the implications of these legal reforms. It examines the possibility of the ownership structure of listed companies transforming from concentrated to diffused ownership, which is more suitable for the functioning of the mainstream model. Furthermore, the thesis discusses the consequences of the change of control from family owners to dispersed shareholders, concluding that this will align the objectives of Turkish companies with the interests of global investors.

Overall, this thesis reveals the broader context in which neoliberal mainstream corporate governance laws are constructed, disseminated, and operate in capitalism, so that their raison d'etre can be understood and challenged.

List of Abbreviations

BIST	Borsa Istanbul
CLS	Critical Legal Studies
CMB	Capital Markets Board of Turkey
CML	Capital Market Law
EBRD	European Bank for Reconstruction and Development
EC	European Commission
EU	European Union
FDI	Foreign direct investment
FRC	Financial Reporting Council
FSF	Financial Stability Forum
FSB	Financial Stability Board
IFI	International Financial Institutions
IIF	Institute of International Finance
IMF	International Monetary Fund
ISE	Istanbul Stock Exchange
MKK	Central Securities Depository of Turkey
OECD	Organization for Economic Cooperation and Development
PDP	Public Disclosure Platform of Turkey
TAIDER	Turkish Family Business Association
TBMM	The Grand National Assembly of Turkey
TUSIAD	Turkish Industry and Business Association
TCC	Turkish Commercial Code
UNCTAD	United Nations Conference on Trade and Development
WB	The World Bank

CHAPTER I – Introduction

1 Introduction

The company[1] is the predominant form of business organisation in the global capitalist setting. Companies are the main aggregators of productive activity, consumption, economic growth, and development. Currently, society relies on companies for all its needs, such as employment, education, health, and communication; this has led to the 'corporatisation of life'.[2] Thus, modern companies have 'acquired the capacity to influence the circumstances of the societies within which they operate',[3] which means that their activities have an impact on everyone and everything. In fact, this impact occurs regardless of the subject's association with the company. Just as the shareholders, employees, creditors, suppliers, and customers are directly affected by the company, so are the environment and members of the public who are located where the company operations take place. Hence, the rules that determine how companies are managed, how their resources are allocated, and to what end those resources are allocated are of the utmost importance. These rules are the subject matter of corporate governance.

The broad definition of corporate governance is that it is a set of rules, systems, or mechanisms 'by which companies are directed and controlled'.[4] However, this is as far as the consensus for an applicable definition of corporate governance. The differences in definition are because corporate governance rules inform both the creation and the distribution of wealth in society, thereby 'touching upon one of the most sensitive, controversial and therefore deeply fundamental issues at the core of public debate'.[5] These debates are underpinned by the issue of whose interests the company should be managed for; phrased more generally, the debate is over the purpose of the company. Executives who are in charge of companies can take decisions that create long-term value for the company, stakeholders, and society, or they can focus on short-term share price gains to prioritise shareholder interests. However, these choices do not result from purely economic reasoning. Instead, as Ireland has argued, 'these different outcomes have been determined as much as by political decisions and their impact on prevailing

[1] Unless otherwise stated, the term 'company' will be used to refer to the 'public joint-stock company' and the term 'corporation' will be used interchangeably with 'company'.
[2] G Baars and A Spicer (eds), *The Corporation: A Critical, Multi-Disciplinary Handbook* (Cambridge University Press 2017) 2.
[3] RAG Monks and N Minow, *Corporate Governance* (5th edn, John Wiley & Sons 2011) 117.
[4] The Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance* (Gee 1992) para 2.5. [hereinafter *The Cadbury Report*].
[5] J Dine and M Koutsias, *The Nature of Corporate Governance: The Significance of National Cultural Identity* (Edward Elgar 2013) 64.

institutional arrangements as they have by the economic logic of either capitalism or the market'.[6]

Shareholder primacy theory[7] is the mainstream view today and gained prominence in the 1970s with the 'law and economics' scholarship of the Chicago School of Economics (Chicago School). The law and economics approach entailed the application of the Chicago School's free-market economics to corporate governance laws[8] and asserted shareholder primacy on the basis of economic efficiency justifications.[9] The shareholder primacy norm is underpinned by the agency theory, which regards the managers of the company as the 'agents' of the shareholders.[10] The proponents of the agency theory perceive the company as 'a set of contracts'.[11] Hence, they argue that managers are contracted to act in the best interest of shareholders and that 'shareholders alone are the parties to whom corporate managers should be accountable'.[12] Thus, the core issue of corporate governance becomes that of 'motivating the agent to act in the principal's interest rather than simply in the agent's own interest'.[13] Shareholder primacy theory is defended on the basis of the claim that pursuing shareholder interest is the most efficient way to allocate resources in free markets and will thus increase aggregate social wealth.[14] In terms of this theory, shareholder interest is understood as the maximisation of shareholder wealth as measured through share price increases.[15] Corporate governance mechanisms are thus used to 'provide constraints and incentives that reduce deviations from shareholder-value maximization'.[16] In sum, shareholder primacy theory dictates that the only purpose of a

[6] P Ireland, 'The Corporation and the New Aristocracy of Finance' in Robé, Jean-Philippe, Antoine Lyon-Caen and Stéphane Vernac (eds), *Multinationals and the Constitutionalization of the World-Power System* (Routledge, 2016) 97.

[7] This thesis refers to the shareholder primacy theory as the mainstream corporate governance model; it has also been referred to with varying terms in literature such as the shareholder theory of corporate governance, shareholder primacy norm or the outsider system of corporate governance. These terms are used interchangeably throughout this thesis.

[8] LA Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler 2012) 18-19. See RA Posner, 'The Economic Approach to Law' (1975) (53) Texas Law Review 757.

[9] L Talbot, *Progressive Corporate Governance for the 21st Century* (Routledge 2013) 117-118.

[10] MC Jensen and WH Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) Journal of Financial Economics 305, 309. Also, see W Lazonick, 'Innovative Enterprise and Shareholder Value' (2014) 8(1) Law & Financial Markets Review 52, 57.

[11] EF Fama, 'Agency Problems and the Theory of the Firm' (1980) 88(2) Journal of Political Economy 288, 289.

[12] H Hansmann and R Kraakman, 'The End of History for Corporate Law' (2001) 89(2) Georgetown Law J 439, 441.

[13] R Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (OUP 2004) 21.

[14] FH Easterbrook and DR Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 38; MC Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2002) 12(2) Business Ethics Quarterly 235, 239.

[15] LA Stout, 'The Toxic Side Effects of Shareholder Primacy' (2013) 161(7) University of Pennsylvania Law Review 2003, 2004.

[16] LA Bebchuk, 'The Case for Increasing Shareholder Power' (2005) 118(3) Harv Law Rev 833, 850.

company is to increase profits for the benefit of its shareholders[17] and perceives corporate governance to be the means to ensure that providers of capital to companies maximise investment returns.[18]

Stakeholder theory is an alternative to the shareholder primacy norm and advances a more inclusive approach to corporate governance. This theory requires management to consider the interests of all stakeholders including employees, customers, suppliers, creditors, the environment, and the public. These interests are considered in addition to those of shareholders. The proponents of the stakeholder theory have argued that 'management should make decisions for the benefit of all stakeholders'.[19] Freeman has defined stakeholders as 'any group or individual who can affect, or is affected by, the achievement of a corporation's purpose'.[20] For Donaldson and Preston, 'Stakeholders are identified by *their* interests in the corporation, whether the corporation has any corresponding functional interest in *them*'.[21] However, there are different justifications for recognising stakeholder interests in corporate decision-making. Some scholars have argued that stakeholder interests should be considered by management as a means to maximise shareholder wealth.[22] Some are of the view that only the interests of stakeholders who make 'firm-specific' contributions to the company should be protected.[23] Others have asserted that pursuing stakeholder interest should be an end in itself instead of a means to profit.[24] This thesis agrees with the latter view, which has been summarised by Clarkson as follows: 'The economic and social purpose of the corporation is to create and distribute increased wealth and value to all its primary stakeholder groups, without favoring one group at the expense of others.'[25]

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[17] M Friedman, 'The Social Responsibility of Business is to Increase its Profits' The New York Times Magazine (13.09.1970)

[18] A Shleifer and RW Vishny, 'A Survey of Corporate Governance' (1997) 52(2) The Journal of Finance 737, 737.

[19] RE Freeman and J McVea, 'A Stakeholder Approach to Strategic Management' in Michael A Hitt, Edward R Freeman and Jeffrey S Harrison (eds), *The Blackwell Handbook of Strategic Management* (Blackwell 2001) 197.

[20] RE Freeman, *Strategic Management: A Stakeholder Approach* (Pitman 1984) 53.

[21] Emphasis in the original text. T Donaldson and LE Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20(1) The Academy of Management Review 65, 67.

[22] This view is also known as the instrumentalist approach to stakeholding theory. See Thomas M Jones, 'Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics' (1995) 20(2) The Academy of Management Review 404, 421-423.

[23] MM Blair, 'Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century' in Thomas Clarke (ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (Routledge 2004).

[24] Donaldson and Preston, 'The Stakeholder Theory of the Corporation' (n 21) 67. Also referred to as the intrinsic value approach to stakeholding theory.

[25] MBE Clarkson, 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20(1) The Academy of Management Review 92, 112.

Debates over the purpose of companies and their accompanying forms of governance models have been ongoing since the 1930s, which featured the famous debate between two prominent scholars, Berle and Dodd.[26] There have been claims that the shareholder primacy theory of corporate governance has triumphed over alternative models due to its economic superiority, thereby resulting in an 'end of history for corporate law'.[27] However, this is hardly the case because diverse corporate governance regimes continue to exist today. In fact, the corporate governance rules based on the shareholder primacy theory are specific to the Anglo-American corporate system of widely dispersed share ownership and highly developed stock markets.[28] In this system, the only viable company objective is shareholder wealth maximisation, and corporate governance serves as a monitoring mechanism to ensure that the management pursues this purpose. Hence, shareholder primacy theory adopts a very narrow approach to corporate governance by limiting its focus to the relationship between the shareholders and managers. Moreover, this view disregards stakeholder interests in company decision-making by portraying these interests as being adequately protected by contracts with the company or relevant laws.[29]

Corporate governance has many dimensions that are determined by 'the interdependence between firms and their market, technical, cultural, social, political, and institutional environments' and not solely by the agency relationship between the shareholders and managers.[30] By confining corporate governance to a singular focus, shareholder primacy theory conveniently disregards other stakeholder interests in the company. The corporate system on which shareholder primacy theory is based is not a global norm because companies typically have concentrated ownership structures that usually feature family owners in control.[31] Nevertheless, the corporate governance regime of the Anglo-American corporate system has become the conventional view of corporate governance on a global scale. Hansmann and Kraakman have argued that this is 'because important economic forces have made the virtues

[26] The 'Berle-Dodd debate' is elaborated in detail under Chapter 3, see text to footnote 275.
[27] Hansmann and Kraakman, 'The End of History for Corporate Law' (n 12). The scholars list the alternative corporate governance models as: The Manager-Oriented Model; The Labor-Oriented Model; The State-Oriented Model and Stakeholder Models. For the purposes of this research, albeit acknowledging the importance and the variants of other models, this thesis examines the stakeholder model as the alternative to shareholder theory.
[28] BG Pettet, JP Lowry and A Reisberg, *Pettet's Company Law: Company and Capital Markets Law* (3rd edn, Pearson 2009) 62.
[29] Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 14) 14-15. This view is based on the contractual theory of the company; see RH Coase, 'The Nature of the Firm' (1937) 4(16) Economica, New Series 386; Jensen and Meckling, 'Theory of the Firm' (n 10); MC Jensen, 'Organization Theory and Methodology' (1983) 58(2) The Accounting Review 319; EF Fama and MC Jensen, 'Separation of Ownership and Control' (1983) 26(2) J Law Econ 301; O Hart, *Firms, Contracts, and Financial Structure* (OUP 1995).
[30] G Jackson, 'Comparative Corporate Governance: Sociological Perspectives' in Gamble, Andrew, Gavin Kelly and John Parkinson (eds), *The Political Economy of the Company* (Hart 2000) 265.
[31] R La Porta, F Lopez-De-Silanes and A Shleifer, 'Corporate Ownership Around the World' (1999) 54(2) The Journal of Finance 471, 496. The concentrated ownership is also referred to as the 'insider' system.

of that model increasingly salient'.[32] Yet, Stout has argued that 'the increasing influence of shareholder value thinking in business law and practice has been accompanied by, if anything, a decline in American corporate and economic performance'.[33] Thus, explanations for the hegemonic position of shareholder primacy theory must go beyond the economic justifications. Ireland has asserted that 'the spread of the shareholder-oriented corporation is a triumph not for economic logic or efficiency but for the growing political power of the shareholder class'.[34] Indeed, to grasp how the shareholder primacy theory became the orthodoxy in corporate governance thinking, the interests that this model seeks to advance must first be explored.

The dominance of the shareholder primacy theory can be explained by tracing the rise of neoliberal ideology in the context of advanced capitalist economies. Neoliberalism, as defined by Harvey,

> is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.[35]

In the post-war era, large companies in the United States acquired thousands of dispersed shareholders which, as Berle and Means have demonstrated, led to the separation of ownership from control.[36] Control thus passed from shareholders to managers. Managers, who were more powerful than dispersed shareholders, were perceived capable of considering societal interests throughout the 'golden age of capitalism' that lasted from the post-war era to the 1970s.[37] These developments undermined the power of shareholders in the company; in turn, as Ireland has noted, 'corporate governance was more "socialized" than before or since'.[38] Nevertheless, events that unfolded after the 1960s have provided capitalists with the opportunity to reassert the free-market ideology of neoclassical economics. Some of these factors were the

[32] Hansmann and Kraakman, 'The End of History for Corporate Law' (n 12) 449.
[33] Stout, *The Shareholder Value Myth* (n 8) 105.
[34] P Ireland, 'Shareholder Primacy and the Distribution of Wealth' (2005) 68(1) The Modern Law Review 49, 52-53.
[35] D Harvey, *A Brief History of Neoliberalism* (OUP 2005) 2.
[36] AA Berle and GC Means, *The Modern Corporation and Private Property* (first published 1932, Transaction Publishers 1991) 84.
[37] This period, also referred to as the managerial era in terms of corporate governance is discussed under Chapter 3.2.
[38] P Ireland, 'Efficiency or Power? The Rise of the Shareholder-oriented Joint Stock Corporation' (2018) 25(1) Indiana Journal of Global Legal Studies 291, 318.

deteriorating macroeconomic conditions and falling profitability rates,[39] rise of institutional investors and creation of new types of financial institutions,[40] weakening of union power,[41] the demise of the international monetary system (the Bretton Woods),[42] increasingly competitive markets due to globalisation and the creation of a 'market for corporate control' that subjected underperforming companies to takeovers.[43] These developments have led to a 'shift from postwar to neoliberal capitalism'[44] and enabled shareholders to reclaim their power over company management. Furthermore, the ownership justifications of shareholders were replaced with the efficiency arguments of the shareholder primacy theory. As a result of these developments, company managers became subjective to the sole objective of maximising shareholder wealth by the 1980s.[45]

In the decades that followed, the shareholder primacy theory of corporate governance was exported from the United States to the rest of the world as part of the neoliberal Washington Consensus agenda and its 'primary institutions […] namely the international financial institutions (IFIs) such as the IMF and World Bank'.[46] The central premise of the Washington Consensus was 'that liberalized financial flows promote a more efficient allocation of capital by permitting capital to travel across national borders where it could be employed in the most productive manner'.[47] To this end, the IMF and the WB have determined international standards in 12 policy areas; these standards are known the Reports on the Observance of Standards and Codes (ROSCs).[48] The ROSCs are mainly used by the IFIs as benchmarks to assess debtor countries' compliance levels with their loan 'conditionalities'.[49] Corporate governance is one

[39] P Ireland, 'From Lonrho to BHS' (2018) 29(1) King's Law Journal 3, 19.
[40] Ireland, 'Efficiency or Power?' (n 38) 320.
[41] Harvey, *A Brief History of Neoliberalism* (n 35) 23.
[42] W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2nd edn, Verso 2017) 1.
[43] The term 'market for corporate control' was coined by Manne, who argued that underperforming managers would be replaced by the natural functioning of the markets; accordingly, 'lower the stock price, relative to what it could be with more efficient management, the more attractive the take-over becomes to those who believe that they can manage the company more efficiently' in HG Manne, 'Mergers and the Market for Corporate Control' (1965) 73(2) Journal of Political Economy 110, 113. This theory formed the foundations of the idea that pursuing share price increase would equate to the most efficient way of operating the company.
[44] Streeck, *The Delayed Crisis of Democratic Capitalism* (n 42) 3.
[45] G Duménil and D Lévy, *Capital Resurgent: Roots of the Neoliberal Revolution* (Derek Jeffers tr, Harvard University Press 2004) 185.
[46] S Soederberg, 'The Emperor's New Suit: The New International Financial Architecture as a Reinvention of the Washington Consensus' (2001) 7(4) Global Governance 453, 460.
[47] Ibid 465. The Washington Consensus is further elaborated in Chapter 3, see text to footnote 434.
[48] IMF, 'Standards and Codes: The Role of the IMF' (Factsheet, March 2016) <www.imf.org/external/np/exr/facts/pdf/sc.pdf> accessed 16 August 2018.
[49] S Soederberg, *The Politics of the New International Financial Architecture: Reimposing Neoliberal Domination in the Global South* (Zed Books 2004) 136-138.
According to the IMF, 'conditionality' implies 'the macroeconomic and structural policies—and the specific tools used to monitor progress toward the goals outlined by the country in cooperation with the IMF. Conditionality helps countries solve balance of payments problems without resorting to measures

of the 12 areas and is assessed on the basis of the Organisation for Economic Cooperation and Development (OECD)'s[50] Principles of Corporate Governance (OECD Principles).[51] Thus, the OECD acts as the standard-setting body for the corporate governance module of the ROSCs, and the IFIs use the OECD Principles as a benchmark for evaluating countries' corporate governance frameworks and practices.[52] Aside from its standard-setting function in the area of corporate governance, the OECD also seeks to promote and disseminate its corporate governance principles internationally. It assists 'member and non-member governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries'.[53] Hence, the OECD has adopted 'a two-track approach, involving the development of benchmark principles and the active promotion of their use'.[54] The OECD Principles have become 'an international benchmark for policy makers, investors, corporations and other stakeholders worldwide'[55] and have been referred to by over 60 countries during the construction of national corporate governance frameworks.[56]

The OECD Principles contain neoliberal undertones that accommodate the shareholder primacy theory of corporate governance. For example the OECD Principles' preamble uses terms such as 'efficiency' and 'monitoring performance', which bear resemblance to the concepts of the agency theory.[57] The OECD Principles also refer to the contractual nature of the company; its first article describes the company as 'private contractual relations'.[58] In its foreword, the OECD

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that are harmful to national or international prosperity. At the same time, the measures are meant to safeguard IMF resources by ensuring that the country's balance of payments will be strong enough to permit it to repay the loan.' in IMF, 'IMF Conditionality' (Factsheet, 06.03.2018) <https://www.imf.org/en/About/Factsheets/ Sheets/2016/08/02/21/28/IMF-Conditionality> accessed 1 August 2018.

[50] The OECD was established in 1961 'to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy' in OECD, 'Convention on the Organisation for Economic Co-operation and Development' (1960) <http://www.oecd.org/general/> accessed 2 December 2018. It currently has 36 members and Turkey is one of the founding members.

[51] IMF, 'Standards and Codes: The Role of the IMF' (n 48) 2; OECD, 'Principles of Corporate Governance' (1999). The OECD published its corporate governance principles for the first time in 1999, which was revised in 2004 and finally in 2015 the G20/OECD jointly published the latest version 'G20/OECD Principles of Corporate Governance' <https://doi.org/10.1787/9789264236882-en> accessed 15 November 2018.

[52] The WB, 'Brief: Corporate Governance' (24.02.2016) <http://www.worldbank.org/en/topic/financialsector/brief/corporate-governance> accessed 10 October 2018; The WB, 'Reports on the Observance of Standards and Codes' <http://www.worldbank.org/en/programs/rosc> accessed 19 October 2018.

[53] OECD, 'OECD Principles of Corporate Governance' (1999) 9.

[54] G Kirkpatrick, 'Improving Corporate Governance Standards: The Work of the OECD and the Principles' (OECD 2004) <https://www.oecd.org/daf/ca/corporategovernanceprinciples/33655111.pdf>.

[55] OECD, 'OECD Principles of Corporate Governance' (2004) <http://www.oecd.org/daf/ca/oecd-principles-corporate-governance-2004.htm> 3.

[56] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 3.

[57] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 9-10.

[58] Emphasis added. OECD, 'G20/OECD Principles of Corporate Governance' (2015) 13.

Principles' objective is stated to be 'to help policy makers evaluate and improve the legal, regulatory, and institutional framework for corporate governance, with a view to supporting *economic efficiency*, sustainable growth and financial stability'.[59] Thus, the use of the term 'economic efficiency' hints at the OECD Principles' reliance on the neoliberal 'law and economics' scholarship. Although the OECD Principles have been revised in 2004 and 2015, as the OECD Secretary-General has acknowledged, the 'Principles maintain many of the recommendations from earlier versions as continuing essential components of an effective corporate governance framework'.[60] Indeed, the neoliberal foundations of the 1999 OECD Principles have remained intact in both revisions.

The OECD's corporate governance approach is problematic because stakeholders are omitted from the scope of good governance. Dignam and Galanis have noted that the shareholder-centric approach of the OECD Principles is evident through its 'advocating for managerial accountability solely to shareholders'. [61] Second, the OECD disregards the most common ownership structure worldwide by basing its supposedly universal principles on the agency problem, which is mainly endemic to corporate systems with wide share dispersal. Due to the OECD's emphasis on the effective monitoring of managers as the benchmark for good corporate governance, it appears that the OECD Principles advance a corporate governance model which is specific to the market-centric systems of the United States and the United Kingdom. Indeed, the agency problem between the shareholders and the managers is not a common issue for companies worldwide. The majority of countries around the world are characterised by concentrated ownership,[62] which require a different set of corporate governance rules and mechanisms. However, the OECD has portrayed shareholder primacy and its underlying agency theory to be universal corporate governance standards because those theories allegedly produce the most desirable system for profitability and efficiency.[63] This assumption has entrenched shareholder primacy theory as the mainstream model of corporate governance globally.[64]

[59] Emphasis added. OECD, 'G20/OECD Principles of Corporate Governance' (2015) 3.
[60] Ibid.
[61] A Dignam and M Galanis, *The Globalization of Corporate Governance* (Routledge 2016) 141-142.
[62] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 496.
[63] S Soederberg, *Corporate Power and Ownership in Contemporary Capitalism: The Politics of Resistance and Domination* (Routledge 2010) 118. Also see TJJ Andre, 'Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany' 73(1998) Tul L Rev 69, 77.
[64] There are other international organisations that exercise rule-setting functions in the area of corporate governance; for example, the International Corporate Governance Network. On the other hand, the Bank for International Settlements has an active role in promoting the corporate governance standards of banks or the International Accounting Standards Board which develops international accountancy standards. However, the OECD Principles are taken as a general reference point here due to their relevance in the context of Turkish corporate governance reforms.

The OECD Principles have been particularly taken up by emerging market economies because of their dependence on foreign capital. This is due to the consensus that stock market development is an important aspect of economic growth.[65] Neoliberal logic dictates that liberalised and free markets lead to mutual gain for all market participants because capital inflows help to supplement the lack of domestic resources in developing countries.[66] On this point, the OECD Principles have asserted that countries that wish to attract 'international flows of capital' must 'adhere to internationally accepted principles'.[67] The OECD Principles have further highlighted that 'corporate governance is one key element in […] enhancing investor confidence'.[68] Ararat has noted that 'in many developing economies with emerging markets, liberalisation efforts overlap with corporate governance reforms to attract international capital to domestic firms'.[69] Although the OECD's corporate governance standards are non-binding, failure to implement the OECD Principles in emerging markets would risk investment strikes (not investing) or capital flight (investments flowing out of the country).[70] This dependency has been aptly described by Arthur Levitt, the former US Securities and Exchange Commission Chairman: 'If a country does not have a reputation for strong corporate governance practices, capital will flow elsewhere.'[71] Thus, the OECD Principles have an implicitly coercive character when coupled with the IFIs' ROSC assessments that ultimately determine a country's access to financial assistance. Hence, the imposition of the OECD Principles is aimed at creating conditions that are suitable for the interests of foreign investors, who this thesis will broadly refer to as global investors.[72] The main objective of this strategy is to instil shareholder wealth maximisation as the sole purpose of the company in emerging markets so that the interests of the global investors who invest in foreign stock markets can be protected and further advanced.

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[65] R Levine and S Zervos, 'Stock Markets, Banks, and Economic Growth' (1998) 88(3) Am Econ Rev 537, 537.
[66] Soederberg, 'The Emperor's New Suit' (n 46) 455.
[67] OECD, 'OECD Principles of Corporate Governance' (2004) 13.
[68] Ibid 11.
[69] M Ararat, '"Comply or Explain" Without Consequences: The Case of Turkey' in Christine Mallin (ed), *Handbook on International Corporate Governance* (2nd edn, Edward Elgar 2011) 355.
[70] S Gill, *Power and Resistance in the New World Order* (2nd edn, Palgrave Macmillan 2008) 111; S Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South: Who benefits from the new international standard?' (2003) 24(1) Third World Quarterly 7, 13.
[71] Arthur Levitt (SEC Chairman), 'Remarks Before the Conference on the Rise and Effectiveness of New Corporate Governance Standards' (New York, 12.12.2000) <https://www.sec.gov/news/speech/spch449.htm>.
[72] The term 'global investors' or the 'global investor class' is used throughout this thesis to refer to the investors operating on an international scale, mainly from the advanced capitalist economies, and organized in the form of institutional investors around the common objective of maintaining shareholder wealth maximization in stock markets abroad. Similarly, Ireland refers to such rentier shareholders as 'new aristocracy of finance' which he describes as: 'Operating in liberalized global financial markets, increasingly transnationally integrated, with no loyalty to place or community' in Ireland, 'The Corporation and the New Aristocracy of Finance' (n 6) 96.

To instil the shareholder wealth maximisation objective of corporate governance in emerging markets, the concentrated ownership structure found in these countries must be replaced with a corporate system of wide share dispersal and developed stock markets. This is because a liquid stock market is a prerequisite for the company share to maintain its mobile character and generate surplus without being stuck in the production process.[73] Liquidity provides other advantages for global investors, such as cheap exit options and risk diversification.[74] Economists have defended liquid markets on the basis of efficiency, arguing that the 'one best way' of corporate governance 'is a close look-alike of the American institutions'.[75] However, these corporate governance rules prioritise foreign shareholder interests to enable investors from wealthy economies to penetrate emerging stock markets where they can generate higher returns than in developed markets. To this end, rules that constrain the power of controlling owners are implemented, and listed company boards are restructured to align the company purpose with shareholder interests. Additionally, as global investors capitalise on the volatilities of emerging markets, their gains occur to the detriment of these countries' economies and other stakeholders.

Within this backdrop, Turkey, an emerging market country, has recently implemented corporate governance reforms with the explicit policy objective to attract foreign investment to its stock market. This is because Turkey has been unable to garner enough capital from its domestic investor base and has been reliant on foreign capital for its stock market development. However, the concentrated and family controlled ownership structure of Turkish companies has been regarded an important deterrent for foreign investors. To provide assurance for the prospective investors, the new corporate governance laws strengthen minority shareholder rights and introduce further rules to curb the controlling owners' influence in listed companies. However, the corporate governance model that Turkey has adopted does not address the particular issues of its companies or stock market. Turkey has introduced reforms that align its corporate governance laws with the market-based rules found in the Anglo-American corporate system. Therefore, grasping the motives behind these legal reforms requires understanding which parties benefit the most from Turkey's new corporate governance framework.

In sum, the shareholder primacy theory's global hegemonic position demonstrates not so much its economic superiority, but the relative power of the capitalist class over the rest of the

[73] This process is explained through Marx's theory on the circulation of money capital, see Chapter 2.2.a.
[74] E Engelen, 'Corporate Governance, Property and Democracy: A Conceptual Critique of Shareholder Ideology' in Thomas Clarke (ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (Routledge 2004) 306.
[75] Ibid 304. Also, see MC Jensen, 'Takeovers: Their Causes and Consequences' (1988) 2(1) The Journal of Economic Perspectives 21, 22.

company stakeholders and the society.[76] The global investor class is the particular capitalist class that benefits from the mainstream corporate governance model. Through the allegedly universal corporate governance standards, the Anglo-American, market-based corporate governance regime has been disseminated to emerging markets regardless of the differences in national contexts. The mainstream model's underlying theories and its proposed solutions to corporate governance problems do not address the particular issues of many emerging markets' corporate structures. This necessitates a critical inquiry into the raison d'etre of the mainstream corporate governance model.

2 Why Turkey's Corporate Governance Laws Matter

Turkey is currently the world's 17th largest economy and has had an overall high growth rate since 2002.[77] Yet, the WB reported that 'Turkey's capital markets remain thin compared to other countries at the same level of development'.[78] As at the end of 2017, Turkey's market capitalisation was 26.7% (% of GDP), whereas the average for upper middle-income countries is 67.2%.[79] Domestically, Ararat, Suel and Yurtoglu express that 'Turkey has a low savings rate and serious limitations on capital formation'.[80] This feature of the Turkish economy has been pointed out by the IMF, which has indicated that 'raising domestic savings [is a] critical component that will assure Turkey's place as one of the world's most promising emerging economies'.[81] As a result, the Turkish economy has largely been reliant on foreign investment to finance the country's development and its companies.

Another underlying reason for the low level of market capitalisation has been attributed to the hesitation of Turkish companies to float their shares.[82] The wide availability of credit to

[76] I have used the terms the capitalist class or the capitalists and the labour in a broad sense, adopting a class-based generalisation from Marx, but with the distinction that the labour class is used here to refer to a broader group of interests including the various company stakeholders other than the shareholders. In doing so, I acknowledge that there are differences of interest within these broad categories, yet for the purposes of this research, I do not attempt to breakdown each of these differences as they do not change the nature of the arguments.

[77] The WB, 'National accounts data GDP - current US$' <https://data.worldbank.org/> accessed 25 August 2018. Turkey experienced a severe financial crisis in 2000-2001, but since then its GDP has steadily inclined, save for the year following the global financial crisis of 2008.

[78] The WB, 'Turkey's Transitions: Integration, Inclusion, Institutions (Vol. 2): Main report' (2014) 22.

[79] The WB classifies Turkey in the Upper Middle-Income countries group. See the WB, 'Market capitalization of listed domestic companies (% of GDP)' <https://data.worldbank.org/> accessed 26 August 2018.

[80] M Ararat, E Suel and BB Yurtoglu, 'Sustainable Investment in Turkey: The Case in Context – An Update' (March 2014) <http://ssrn.com/abstract=2447937> 14.

[81] IMF, 'IMF Survey: Turkey: Increasing Saving to Reduce Vulnerabilities' (2013) <https://www.imf.org/en/News/Articles/2015/09/28/04/53/socar122013a> accessed 2 August 2018.

[82] Ararat, Suel and Yurtoglu, 'Sustainable Investment in Turkey' (n 80) 13.

businesses, either through government connections or the company's affiliate banks, has led to a dependence on bank financing as the main source of capital for Turkish companies, which has deterred them from resorting to stock market.[83] Despite Turkey's financial liberalisation efforts from the 1980s onwards to create a market-based system, the Turkish business setting remains bank-based.[84] These factors are coupled with the economic and political instability that has been prevalent in the country throughout the last decade; hence investments in relatively risky financial instruments such as company stocks remained limited. In turn, the main cause of macroeconomic stability has been linked to Turkey's high level of dependence on external financing.[85] Although there are various impediments to the development of Turkey's stock market, this thesis focuses on the ownership and control structure of its listed companies, which has been identified as an important element deterring investors from entering the Turkish stock market.[86]

Turkish companies are characterised by highly concentrated ownership.[87] In these companies, family ownership and control throughout the financial and industrial company groups is the norm.[88] In fact, according to Turkish Family Businesses Association (TAIDER), 95% of all companies in Turkey are family-owned.[89] Yüksel notes that 'controlling shareholders often play a leading role in the management and strategic direction of company groups, many of which include companies that are listed on the Istanbul Stock Exchange'.[90] Large companies in Turkey are often set up as holding companies as a result of the founding families' close ties with the state and are thereby able to operate across various industries. Yamak and Ertuna explain that the 'state has provided incentives and supported the development of these family business groups by easing their access to finance through equity participations and credits from state banks, supplying low cost inputs, and protecting them from foreign competition'.[91] Therefore,

[83] S Yamak and B Ertuna, *A Primer on Corporate Governance: Turkey (Business Experts Press 2017)*11.
[84] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 31.
[85] Ibid 19.
[86] M Ugur and M Ararat, 'Turkey, Corporate Governance at the Crossroads' (2006) <https://ssrn.com/abstract=2093453> 17.
[87] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 69.
[88] OECD, *OECD Corporate Governance Factbook 2017* (2017) 14. La Porta, Lopez-De-Silanes and Shleifer make a distinction between 'widely-held' companies, and companies with 'ultimate owners'. They classify five types of ultimate owners in which 'the family' is one of them. Accordingly; 'a corporation has a controlling shareholder (ultimate owner) if this shareholder's direct and indirect voting rights in the firm exceed 20 percent' in La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 476.
[89] TAIDER, 'İş'te Aile Sayı: 2' (2017) <https://taider.org.tr/images/belgeler/iste_aile_2_sayisi.pdf> accessed 6 June 2018.
[90] C Yüksel, 'Recent Developments of Corporate Governance in the Global Economy and the New Turkish Commercial Draft Law Reforms' (2008) 3(2) Journal of International Commercial Law and Technology 101, 103. Istanbul Stock Exchange (ISE) has been restructured in 2012 and renamed as the Borsa Istanbul (BIST).
[91] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 72.

it is vital for private enterprises to maintain close ties with the government in order to maintain their advantageous position.[92] This situation has also led to the owner families being involved in the management of their companies even once the company goes public so that they can continue to handle the company's relations with the state.[93] As a result, the majority of the listed companies in Turkey are still controlled by their founding family-owners. A recent study found that '13 holding companies and their eight affiliated banks account for an estimated 40% of the market capitalization of Borsa Istanbul (BIST). 11 of these 13 holding companies are controlled by 11 leading families'.[94] It can further be observed that the owner-families maintain control either through holding large blocks of shares or through cross-ownership within their group companies.

With this type of company ownership and control structure, it has been argued that the controlling shareholders have the ability and incentives to expropriate from minority shareholders, that is, to use company resources for their own benefit at the expense of minority shareholders.[95] In turn, the risk of expropriation by the controlling shareholding results in 'sub-optimal levels of investment' by outside investors.[96] The situation is exacerbated by the presence of 'pyramidal groups and cross-holdings',[97] such as in the case of group companies, which creates opaqueness in the management structure and thereby incurs additional monitoring costs for outside investors.[98] Moreover, there is a lack of a disclosure tradition in Turkish companies, as the market forces promoting transparency are weak.[99] Due to the presence of the controlling owners, takeover risks are low and it is not possible to acquire a company without their consent; nor does the market have a disciplining function for managers who underperform.[100] These features make investment in Turkish companies unattractive for the outside investor since minority shareholders have little power in the presence of the controlling owners in this corporate setting.

[92] A Buğra, *State and Business in Modern Turkey: A Comparative Study* (State University of New York Press 1994) 4-5.
[93] Ibid.
[94] Ararat, Suel and Yurtoglu, 'Sustainable Investment in Turkey' (n 80) 17.
[95] S Claessens, S Djankov and LHP Lang, 'The Separation of Ownership and Control in East Asian Corporations' (2000) 58(1) Journal of Financial Economics 81, 82.
[96] M Maher and T Andersson, 'Corporate Governance: Effects on Firm Performance and Economic Growth' (OECD 1999) 34.
[97] M Ararat, H Orbay and BB Yurtoglu, 'The Effects of Board Independence in Controlled Firms: Evidence from Turkey' (2010) <http://ssrn.com/abstract=1663403> 3.
[98] D Claessens and BB Yurtoglu, 'Corporate Governance in Emerging Markets: A Survey' (2013) 15(0) Emerging Markets Review 1, 9.
[99] Yüksel, 'Recent Developments of Corporate Governance' (n 90) 102.
[100] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 88.

In order to increase the foreign investor base in Turkey's stock market, the government initiated legal reforms in various areas, including corporate governance, starting in mid-2000s.[101] In fact, the Turkish legal framework in general has undergone an overhaul throughout the last decade due to Turkish government's eagerness to align national laws with the EU acquis en route to EU membership.[102] Hence, the main motivators behind Turkey's new corporate governance laws have been the prospect of joining the EU and attracting foreign investors by basing its corporate governance rules on the OECD Principles.[103] These influences have been openly admitted by both the legislator and the regulator.[104] It should be noted that Turkey is part of the continental legal system; therefore, legal rules are codified in the form of legislation. The primary legislation dealing with corporate governance is the new Turkish Commercial Code (TCC), which came into effect in July 2012. Moreover, a new Capital Markets Law (CML) was promulgated on December 2012. The reform process has been accompanied by various Capital Markets Board (CMB) regulations, which introduced detailed rules on corporate governance for listed companies, as well as the CMB's Principles of Corporate Governance (CMB Principles), first published in 2003 and which took their final form in 2014. The CMB Principles initially had a soft-law nature that was later augmented by the comply-or-explain approach. Yet, as Ararat notes, this approach was ineffective and that companies were reluctant to implement the CMB Principles, particularly the rules concerning minority shareholders.[105] On the other hand, the new legislation on corporate governance and the latest revisions of the CMB Principles introduced a hard-law approach to regulating corporate governance for the first time, thereby making compliance with various corporate governance principles mandatory for certain listed companies.

Indeed, the new legislation introduced many novelties, especially in terms of strengthening the position of minority shareholders, who were granted with added rights and protections against the controlling owners. It established rules for facilitating the participation of outside shareholders in company decision-making through means such as electronic general assembly meetings and online voting, detailed rules regarding the protection of the shareholders of group companies, mandatory minimum independent board membership, and increased disclosure requirements. Thus, the new corporate governance laws are mostly aligned with the OECD

[101] TBMM, 'Sermaye Piyasası Kanunu Tasarısı ile Plan ve Bütçe Komisyonu Raporu (Draft Capital Markets Law and the Report of the Planning and Budget Commission)' (18.06.2012) 15.
[102] See Chapter 5.3 for a brief history of the EU – Turkey relations.
[103] AP Arsoy and D Crowther, 'Corporate Governance in Turkey: Reform and Convergence' (2008) 4(3) Social Responsibility Journal 407, 412.
[104] CMB, 'Annual Activity Report' (2013) <http://spk.gov.tr/Sayfa/Dosya/1085>; CMB, Corporate Governance Principles (2003) 7; M Dinç (ed), *Türk Ticaret Kanunu / Karşılaştırmalı – Gerekçeli (Turkish Commercial Code with Justifications)* (Seçkin 2012) 1194 [hereinafter *TCC with Justifications*].
[105] Ararat, '"Comply or Explain" Without Consequences' (n 69) 368.

Principles, which will be demonstrated in detail under Chapter 6. These rules, however, have been incorporated into Turkish laws without regard for the particular characteristics of Turkey's business environment, traditions, and ownership and control structure. As discussed earlier, the mainstream corporate governance model, which is underpinned by shareholder primacy theory, is peculiar to a corporate system with diffused ownership and developed stock markets thus this creates an obvious contrast with Turkey's circumstances. On this point, scholars have observed that 'the OECD benchmark was adopted in Turkey *in spite of* the lack of supporting regulatory institutions and institutional structure'.[106] With this backdrop, the case of Turkey's recent corporate governance law reforms requires critical inquiry in order to understand the insistence on incorporating the mainstream model into national law.

The answer to the above contradiction can be found by exploring Turkey's history with the IFIs. Turkey has taken on an economic liberalisation policy with neoliberal reforms since the beginning of the 1980s. The financial liberalisation policies adopted by emerging markets during the 1980s and 1990s have indeed played a prominent role in attracting foreign capital, particularly in the form of portfolio investments.[107] Foreign portfolio investments have been hailed by economists as 'as an unambiguous benefit' to these countries.[108] In this regard, Turkey was also applauded for showing significant economic progress in terms of completing its integration into the global financial system.[109] Yet, financial liberalisation policies also brought economic volatility and vulnerability as Turkey became dependent on foreign capital. As a result of this dependency, Turkey experienced recurrent 'boom-and-bust cycles' signifying consecutive expansions and contractions in the Turkish economy.[110] The recurring solution was to obtain IMF credit, which came with the requirement of implementing the IMF's stabilisation programmes. These programmes had the principal goals of reducing inflation, as well as implementing extensive privatisation schemes, laws facilitating foreign investment, a reduction in labour costs, and decreases in social security spending.[111] Soederberg argues that the imposition of neoliberal ideology in emerging markets has occurred through this IMF conditionality, which 'describes conditions in the form of policy implementations that debtor countries must undertake if they are to receive IMF financing'.[112] Hence, in order to continue

[106] Emphasis added. Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 114.
[107] I Grabel, 'Marketing the Third World: The Contradictions of Portfolio Investment in the Global Economy' (1996) 24(11) World Development 1761, 1763. Examples to these emerging markets included Mexico, Brazil, Argentina, China and Turkey.
[108] Ibid.
[109] Ararat, Suel and Yurtoglu, 'Sustainable Investment in Turkey' (n 80) 16.
[110] Ü Cizre and E Yeldan, 'Politics, Society and Financial Liberalization: Turkey in the 1990s' (2000) 31(2) Development and Change 481, 484.
[111] M Dufour and Ö Orhangazi, 'The 2000–2001 Financial Crisis in Turkey: A Crisis for Whom?' (2009) 21(1) Review of Political Economy 101, 104.
[112] Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South' (n 70) 13.

receiving financial assistance, Turkish policy-making autonomy was restricted to the implementation of the terms imposed by the IMF.

The IMF stabilisation programmes did manage to lower inflation by 1999, yet, shortly after, in 2000 and then again 2001, Turkey experienced two severe financial crises.[113] At the time, commentators asserted that 'the blame for the crisis lies in the failure of Turkey to adapt to globalization and seek benefits from it'.[114] Yet, Cizre and Yeldan argue that the actual cause of the crises was exposure to 'speculative short-term capital (hot money) attacks which increased instability and precipitated a series of financial crises'.[115] Indeed, such speculative capital in the form of portfolio investments has two negative impacts on emerging markets: first, it constrains the autonomy of national policy-making and, second, it increases their economic vulnerabilities.[116] It restricts policy-making as emerging markets have to adjust their economic, monetary, and social policies in order to secure investor confidence. On the second point, their economies become vulnerable because of the risk of withdrawal, since portfolio investment is associated with the highest degree of risk of exit.[117] Indeed, Turkey experienced a considerable amount of foreign capital outflow from portfolio investments during its 2000–1 financial crises, which further damaged the economy.[118] The government had to spend $47.2 billion to bail out failing financial institutions.[119] This point illustrates how policy-making has been shaped by the demands of investors. As a result, Turkey's foreign debt peaked following the crises and the country was 'effectively pushed into debt peonage'.[120] Scholars note that the 'way in which the Turkish government has embraced policies benefiting international capital, as well as the role played by IMF, appears instructive'.[121] The consequence of these developments has been that, in the aftermath of the crises, the balance of power has shifted largely in favour of capital in Turkey.[122] In fact, one of the conditions of the IMF loan obtained following the crises was that Turkey needed to introduce 'good governance' practices in its private sector.[123] Here, bearing in mind the relationship between the ROSCs and the OECD Principles briefly discussed earlier,

[113] T Demiroğlu and M Karagöz, 'IMF Stabilization Programs and their Effects on the World Economic Crises' (2016) 38 Procedia Economics and Finance 396, 403-405.
[114] Ü Cizre and E Yeldan, 'The Turkish Encounter with Neo-liberalism: Economics and Politics in the 2000/2001 Crises' (2005) 12(3) Review of International Political Economy 387, 390.
[115] Ibid 388.
[116] Grabel, 'Marketing the Third World' (n 107) 1763.
[117] Ibid 1767.
[118] Dufour and Orhangazi, 'The 2000–2001 Financial Crisis in Turkey' (n 111) 105.
[119] Ibid 106. These events closely resembled what occurred following the 2007-08 financial crisis, where the systemic meltdown of the global financial markets resulted in governments around the world bailing-out the corporations and the financial institutions with tax payers money.
[120] Dufour and Orhangazi, 'The 2000–2001 Financial Crisis in Turkey' (n 111) 108.
[121] Ibid 111.
[122] Ibid 115. Also, see Cizre and Yeldan, 'The Turkish Encounter with Neo-liberalism' (n 114).
[123] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 119.

it can be assumed that the OECD standards are referenced as good governance practices. In sum, Turkey's legal reforms in the area of corporate governance, which were initiated shortly after the 2000–1 crises,[124] appear to be mandated by IFIs and the interests they serve, which explains the adoption of the Anglo-American derived mainstream model in Turkish laws.

Thus, it appears that Turkey's new corporate governance laws will have implications on listed companies beyond increasing the number of their foreign shareholders. The adoption of the mainstream corporate governance model requires a business environment that can accommodate the proper functioning of its rules, one with transparent, liquid stock markets and widely held companies run by professional managers according to shareholder interests. Yet, due to the presence of controlling owners and the corollary opaque governance practices, a system of concentrated ownership does not allow outsiders to interfere in or monitor company's management. In this context, outside investors do not have the ability to influence how their money will be spent or for what purpose; in other words, they cannot ensure that the company management will pursue the objective of shareholder wealth maximisation. Thus, in order to attract investors, Turkey initiated legal reforms that advance minority shareholder rights over and above those of the domestic controlling owners. These developments are likely to affect the dominant ownership structure of the Turkish stock market and hint at a possible transformation from concentrated to diffused ownership structure. In turn, such transformation would be followed by the controlling owners giving away their control in lieu of professional management and boards with independent directors, who will bound by market discipline to pursue shareholder interests.

Overall, the socio-legal analysis of Turkey's recent corporate governance law reforms provides an opportunity to grasp who benefits the most from the 'universal' corporate governance rules promoted by the OECD and the IFIs. This inquiry also demonstrates how the Anglo-American derived standards are imposed on the rest of the emerging markets to assert shareholder primacy as the sole purpose of companies worldwide. On a broader perspective, the analyses of the reasons and the ways by which Turkey has incorporated the mainstream model into its national corporate governance laws illustrate the role of law in advancing capitalist interests.

[124] E Bektas and T Kaymak, 'Governance Mechanisms and Ownership in an Emerging Market: The Case of Turkish Banks' (2009) 45(6) Emerging Markets Finance & Trade 20, 20.

3 The Aim and the Research Question

The aim of this research is to determine the reasons, methods, and implications of the recent reforms of Turkish corporate governance laws. The thesis attempts to achieve this objective by examining a number of sub-questions.

The first question involves exploring the process by which the Anglo-American variant of corporate governance that is based on shareholder primacy theory became mainstream internationally. This inquiry is especially significant because the system of wide share dispersal on which the model is based is the exception rather than the norm around the world.[125] The corporate governance rules based on shareholder primacy have been promoted by international organisations as universal values which all countries must abide by as an indispensable part of economic growth, even if those countries have different corporate systems. The reason why a particular corporate governance model has been portrayed as an international standard must be sought within the underlying capitalist relations of production. I use a Marxist theoretical framework to illustrate the class interests the mainstream corporate governance model strives to advance.

The second sub-question examines whether Turkey has conformed to the mainstream model through its corporate governance law reforms and examines the methods it has used in doing so. Here, I analyse the corporate governance rules found in the new Turkish Commercial Code (TCC), the new Capital Market Law (CML), and the recent Capital Markets Board (CMB)'s regulations. Using the OECD Principles as the benchmark for the mainstream model, I assess the extent to which Turkish policymakers have been instructed by the demands of the IFIs and the OECD in constructing Turkey's corporate governance framework.

The third subsidiary question analyses the effects of Turkey's corporate governance laws on the ownership structure of listed companies. I look into the possibility of transformation to a system of wide share dispersal due to the new legal rules, since this system is more conducive to the functioning of the mainstream model and to the interests of the global investors. In line with the dissipation of ownership, I discuss the consequences of the transfer of control from family owners to dispersed shareholders in the context of Turkish listed companies and evaluate the case for company stakeholders and society at large.

[125] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31).

4 Methodology: A Socio-legal Approach to Corporate Governance

The corporate governance phenomenon contains elements from various disciplines such as law, economics, management, sociology, psychology, and political science. This brings both advantages and challenges to conducting a legal study on any topic related to corporate governance. The challenge is that although a traditional doctrinal study would lead to a systematic analysis of the sources of law and allow a certain degree of interpretation, it would not be able to provide the complete picture of corporate governance. On the other hand, corporate governance has the advantage of being a fruitful area of research since there is a great deal of interaction between the disciplines, which offers multiple insights.

When determining the most appropriate methodology for the inquiry at hand, the theoretical perspective is a key factor because it is 'inextricably inter-linked' to the methodology of choice.[126] Accordingly, the thesis rejects the narrow definition of corporate governance as derived from the agency theory, which reduces it to the singular issue of aligning the interests of shareholders and managers in public companies. Corporate governance concerns more than the agency relationship; it 'takes account of a wider range of relations and institutional arrangements that shape who controls corporations, what interests corporations serve, and how risks and rewards are allocated among stakeholders'.[127]

This thesis advances the wider definition of the stakeholder theory and perceives corporate governance to be 'the political economic, cultural, social and legal mechanism which govern the activities of corporations'.[128] Indeed, the research question of this thesis cannot be answered by relying on traditional doctrinal methodology alone. The doctrinal or black-letter approach relies on the analytical tools of the legal discipline; it employs interpretive methods to study various legal sources to carry out a formal and descriptive analysis as well as normative evaluations of legal rules and principles.[129] By not engaging with other fields of study, doctrinal methodology perceives law to be a self-sufficient discipline that 'sees no use for social scientific insights or methods of analysis'.[130] Such a methodology is not suitable for addressing the myriad aspects of my research question.

[126] R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research (Hart 2005)* 19.
[127] Jackson, 'Comparative Corporate Governance: Sociological Perspectives' (n 30) 267.
[128] L Talbot, *Critical Company Law* (Routledge 2008) 107.
[129] Banakar and Travers (eds), *Theory and Method in Socio-Legal Research* (n 126) 7.
[130] Ibid 8.

Instead, an inter-disciplinary approach is more suited to the inquiry at hand.[131] Within the various inter-disciplinary research areas, the socio-legal approach best suits the aim of uncovering the raison d'etre of the recent reforms in Turkish corporate governance laws. Socio-legal methodology broadly refers to the study of law as a social phenomenon,[132] whereas others use the methodology to 'refer to the study of the law and legal institutions from the perspectives of the social sciences (viz all the social sciences - not only sociology)'.[133]

Overall, the socio-legal approach views the relationship of law to a social situation to which the law applies to be necessary for understanding of that situation.[134] Hence, the socio-legal methodology is able 'to highlight the issues that neither law nor sociology alone can study and grasp adequately'.[135] In this thesis, the use of the word 'socio' is adopted in a broad sense to mean 'an interface with a context within which law exists, be that a sociological, historical, economic, geographical or other context'.[136] The use of the sociology discipline in socio-legal methodology brings the ability to look 'beyond what is given and immediate to what is latent and inchoate'.[137] In sum, socio-legal methodology enables insights from social disciplines other than law, thereby allowing critical analysis of the supposedly neutral character of the international standards of corporate governance.

Understanding the objectives of the mainstream corporate governance model and how it became international orthodoxy requires further critical scrutiny. To that end, I have employed the critical legal studies (CLS) approach[138] in addition to the socio-legal methodology, although

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[131] An inter-disciplinary research is described by Banakar and Travers as 'an ambition to understand and integrate aspects of two or several disciplinary perspectives into one single approach […] in an attempt to transcend some of the theoretical and methodological limitations of the disciplines in question and create a basis for developing a new form of analysis.' Here, the writers make a distinction between inter-disciplinary and multi-disciplinary research, where the latter 'juxtaposes several disciplines without any attempt to integrate or synthesis aspects of their knowledge and perspectives' in Banakar and Travers (eds), *Theory and Method in Socio-Legal Research* (n 126) 5.

[132] F Cownie and A Bradney, 'Socio-legal Studies: A Challenge to the Doctrinal Approach' in Watkins, Dawn and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 35.

[133] DR Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3 Legal Studies 315, 315.

[134] DN Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39(3) The Modern Law Review 287, 287.

[135] Banakar and Travers (eds), *Theory and Method in Socio-Legal Research* (n 126) 12.

[136] S Wheeler and P Thomas, 'Socio-Legal Studies' in Hayton, David J (ed), *Law's future(s): British Legal Developments in the 21st Century* (Hart 2000) 270.

[137] P Selznick, 'Sociology and Natural Law' in Black, D and Mileski, M (eds), *The Organization of Law* (New York, 1973) quoted Banakar and Travers (eds), *Theory and Method in Socio-Legal Research* (n 126) 10.

[138] The Critical Legal Studies (CLS) movement gained momentum in the United Kingdom with the establishment of British Critical Legal Conference (CLC) in 1984, which held its first conference on 'Law, Critique and Social Transformation' at the University of Kent in 1986, in 'From the KLS CLC Archive' <https://www.kent.ac.uk/law/research/clc-2016/archive.html> accessed 21 October 2018. See, Paddy Ireland and Ian Grigg-Spall (eds), *The Critical Lawyers' Handbook* (Pluto Press 1992).

they have overlapping aims in that they both attempt to transcend the boundaries of traditional doctrinal research. In fact, Schiff has expressed that socio-legal methodology 'must always remain in critical perspective'.[139] The CLS approach is primarily concerned with the critique of liberal legal scholarship and expresses 'a deep dissatisfaction with the dominant "black-letter" approach of the traditional legal education with its emphasis on the exposition of legal rules abstracted from their social, political and economic context'.[140] Accordingly, legal liberalism implies,

> (a) the separation of law from other varieties of social control, (b) the existence of law in the form of rules which both define the proper sphere of their own application and (c) which are presented as the objective and legitimate normative mechanism whilst other normative types are partial or subjective, and (d) yield determinant and predictable results in their application in the juridical process.[141]

Thus, law is treated as 'a discrete and distinct object' which has an autonomous existence.[142] Apart from this common ground, there is significant diversity of theoretical positions amongst CLS scholars.[143] In this research, I use a Marxist theoretical framework, which has been one of the key traditions that have informed the CLS debates.[144]

A Marxist critique holds that 'the central question concerning the role of law in a class society is its apparent autonomy and neutrality'.[145] On this point, Pashukanis has argued that all law was bourgeois law by the virtue of its form serving capitalist interests and should hence be discarded[146] while other critical Marxists have considered the possibility of socialising the law.[147] I agree with the latter camp, which finds expression in Fine and Picciotto's remarks: 'The point is not merely to denounce the legal form but to fight for the best possible form and

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The CLS movement has its origins in the United States with the proceedings of the conference held at the University of Wisconsin in 1977, in RM Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso 2015). Other CLS groups were also established in countries such as France and Germany, in P Fitzpatrick and A Hunt, 'Critical Legal Studies: Introduction' (1987) 14(1) Journal of Law and Society 1.

[139] Schiff, 'Socio-Legal Theory' (n 134) 287.

[140] Paddy Ireland and Ian Grigg-Spall (eds), *The Critical Lawyers' Handbook* (Pluto Press 1992) ix.

[141] A Hunt, 'The Theory of Critical Legal Studies' (1986) 6(1) Oxford Journal of Legal Studies 1, 4.

[142] A Thomson 'Foreword: Critical Approaches to Law. Who Needs Legal Theory?' in Paddy Ireland and Ian Grigg-Spall I (eds), *The Critical Lawyers' Handbook* (Pluto Press 1992) 3.

[143] Ibid.

[144] P Fitzpatrick and A Hunt, 'Critical Legal Studies: Introduction' (1987) 14(1) Journal of Law and Society 1, 2.

[145] R Fine and S Picciotto, 'On Marxist Critiques of Law' in Paddy Ireland and Ian Grigg-Spall (eds), *The Critical Lawyers' Handbook* (Pluto Press 1992) 16.

[146] EB Pashukanis, *Law and Marxism: A General Theory* (Ink Links 1978).

[147] Fine and Picciotto, 'On Marxist Critiques of Law' (n 145) 19.

content of law'.[148] As Hunt has noted, a Marxist theory of law is 'directed at converting the conventional wisdom of liberal legalism'.[149] Thus, the Marxist critique employed in this research does not suggest the abolition of law; instead it attempts to 'expose the real social antagonisms concealed beneath their apparently smooth surfaces'.[150] To that end, Marxist theory on the capitalist relations of production are essential for grasping how the capitalist class was able to dominate the labour class (or more generally, the rest of the society). In turn, this dominance has enabled the capitalists to create legal rules and mechanisms such as the public company share to facilitate capital accumulation while portraying these legal rules as common sense.[151] The mainstream corporate governance laws constitute such an example; their form and content are informed by the global capitalists and their collective interests.

I employ a Marxist theoretical framework in this research because it is the most suited to explain the power relations underlying the current capitalist system and to illustrate how the laws work for the benefit of the dominant class in society. Moreover, the use of Marxist insights on the power disparity between the capitalist and the labour classes provides an understanding of how the shareholder primacy theory of corporate governance succeeded other forms of corporate governance and became the mainstream model. Therefore, I use a Marxist CLS approach to illustrate how capitalists promote corporate governance laws to emerging markets like Turkey to advance the interests of the global investor class, disregarding the rest of the stakeholders and society.

I also make use of the black-letter methodology in Chapters 4 and 5 to explain and interpret the sources of corporate governance law in Turkey. Chapter 4 deals with the corporate governance provisions found under the capital markets legislation, and Chapter 5 examines the articles in the Turkish Commercial Code relating to corporate governance. In these two chapters, I discuss the legal provisions in detail. However, I also include the historical process by which the reforms took place, which means that Chapters 4 and 5 also include elements of socio-legal research. Alongside the primary laws, I utilise the *Genel Gerekçe* (General Justification) of these primary legal sources. *Genel Gerekçe* is an official text published by the legislators along with the legislation and includes the detailed reasoning behind the enactment of particular laws and its individual articles. I also use legal scholars' views, especially those of Turkish law scholar Ünal Tekinalp because he is the head of the commission in charge of drafting the new commercial code. Finally, I examine the parliamentary discussions from the Turkish Grand

[148] Fine and Picciotto, 'On Marxist Critiques of Law' (n 145) 20.
[149] A Hunt, 'Marxist theory of law' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishers 1996) 355.
[150] Fine and Picciotto, 'On Marxist Critiques of Law' (n 145) 22.
[151] This is further elaborated under the theoretical framework presented in Chapter 2.

National Assembly (TBMM) regarding the passing of the related laws because commentaries from both the government and the opposition parties provide useful insights on the viewpoints of domestic actors. I also use the data from Turkey's stock exchange, the Borsa Istanbul (BIST), to determine the level of stock market development over the years and the changes in the number of foreign shareholders in Turkish listed companies.[152] I exclude the corporate governance of banks from the scope of the research because the rules pertaining to financial institutions' governance require separate analyses and distinct research methodologies.

5 Contribution to Research

The methodology of choice, namely the socio-legal approach, is the main contributor to the novelty of this research. In light of the current state of the literature, this thesis aims to distinguish itself by employing a critical Marxist analysis to the interpretation of Turkey's adoption of the Anglo-American legal rules on corporate governance. To my knowledge, as of the time of writing, no work on Turkey's corporate governance issues has been produced from a socio-legal perspective or used critical legal theory. Therefore, this research will be the first of its kind.

In Turkey, corporate governance has not been prevalent in law studies or legal academia until recently. Pulaşlı was the first legal scholar in Turkey to publish an academic book specifically on corporate governance in 2003,[153] and even to this date, there are a limited number of books focusing on corporate governance laws.[154] In his book, Pulaşlı has admitted that although international scholarship is advanced on the topic of corporate governance, Turkish scholars have been late to catch up to this growing field of law.[155] Following the reform process of the new TCC, interest from legal academia has increased because the new law contained the first mention of the term 'corporate governance' in a piece of primary legislation in Turkey. There is a significant amount of literature concerning the drafting process of the new commercial code, which includes discussions on corporate governance law in Turkey but excludes theoretical discussions.[156] In general, legal scholarship in Turkey tends to rely solely on black-letter

[152] Central Depository Institution of Turkey (MKK)'s *Borsa Trendleri Raporu* (Exchange Trends Reports) provide detailed data on Borsa Istanbul, such as market capitalization data, free-float ratios the and types of investors.
[153] H Pulaşlı, *Corporate Governance - Anonim Şirket Yönetiminde Yeni Model (New Model in the Governance of Joint-stock Companies)* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2003).
[154] One of the few books covering exclusively Turkish corporate governance laws is C Eminoğlu, Türk Ticaret Kanunu'nda Kurumsal Yönetim (Corporate Governance in the Turkish Commercial Code) (1st edn, On İki Levha Yayıncılık 2014).
[155] Ibid Introduction.
[156] See Ü Tekinalp, 'Türk Ticaret Kanunu Tasarısının Kurumsal Yönetim Felsefesine Yaklaşımı (The Corporate Governance Approach of the Draft Turkish Commercial Code)' in Mehmet Murat İnceoğlu

methodology or comparative studies because Turkish law education follows a conservative legal formalism and does not introduce law students to other disciplines or research methodologies.[157]

On the other hand, there is relatively more literature on Turkish corporate governance from scholars from backgrounds other than law. Many scholars have researched and written extensively on corporate governance, especially from an economics or business studies perspective. These scholars have mostly used empirical research methods to explain the relationship between corporate governance and issues such as board size and company performance in the context of Turkey.[158] However, while informative in terms of shedding light on the current state of corporate governance in Turkey, these studies have not critically engaged with the corporate governance orthodoxy and instead accepted it as given. The aforementioned studies have used a technical and narrow perception of corporate governance and have not extended their analysis beyond this understanding. In contrast, as elaborated in this thesis' methodology, a socio-legal approach explores the interaction of corporate governance laws with various disciplines and adopts a critical stance that extends beyond readily accepted perceptions. Research on corporate governance laws from this vantage point has evidently been missing in the literature. With this thesis, I aim to fill an important gap in the legal studies of corporate governance, encourage more research that takes an inter-disciplinary approach to Turkish law, and garner further interest in critical legal studies internationally.

(ed), *Uğur Alacakaptan'a Armağan (Tribute to Uğur Alacakaptan)* (Bilgi Üniversitesi Yayınları 2008); 'Türk Ticaret Kanunu Tasarısının Sermaye Piyasasına ve Sermaye Piyasası Kanununa İlişkin Hükümleri (Draft Turkish Commercial Code Articles on Capital Markets and the Capital Markets Law)' in K Özkorkut (ed), *Impacts of the Draft Turkish Commercial Code (DTCC) on Capital Markets from an EU Perspective International Conference* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2010); R Karasu '6102 Sayılı Türk Ticaret Kanunu ile Anonim Şirketlerde Kurumsal Yönetim ile İlgili Getirilen Yenilikler (Novelties of the Turkish Commercial Code No.6102 Regarding Corporate Governance)' (2013) 4(2) İnonu Üniversitesi Hukuk Fakültesi Dergisi 33; Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154).

[157] These are my own observations from studying law in a Turkish university.

[158] Some examples of these works are: M Ararat and M Ugur, 'Does Macroeconomic Performance Affect Corporate Governance? Evidence from Turkey' (2006) 14(4) Corporate Governance: An International Review 325; M Ararat, BS Black and BB Yurtoglu 'The Effect of Corporate Governance on Firm Value and Profitability: Time-series Evidence from Turkey' (2017) 30 Emerging Markets Review 113; P Mandaci and G Gumus, 'Ownership Concentration, Managerial Ownership and Firm Performance: Evidence from Turkey' (2011) 5 South East European Journal of Economics and Business 57; H Güçlü 'İMKB Kurumsal Yönetim Endeksinin Performansının Oluşturulan İki Yeni Endeksle Karşılaştırılması (Comparison of the ISE Corporate Governance Index Performance with Two New Indices)' (2012) 50(13) IMKB Dergisi 49; H Orbay and BB Yurtoglu, 'The Impact of Corporate Governance Structures on the Corporate Investment Performance in Turkey' (2006) 14(4) Corporate Governance: An International Review 349.

6 Structure of the Thesis

In Chapter 1, I initiated the discussion by laying out the importance of the general subject. I briefly touched upon the ongoing debates on corporate governance and provided different perspectives. I presented the case for why research on Turkey's corporate governance laws has merit. I also highlighted how this thesis can be distinguished from previous research in the field. After stating the aims of the research, I formulated the research question. Finally, I expressed why the inquiry at hand presents a unique contribution to the existing body of knowledge, drawing particularly on the methodology of choice.

Chapter 2 presents the theoretical framework which forms the foundation of the analyses presented throughout this thesis. The chapter begins with Marx's base and superstructure metaphor for locating law within the capitalist system. It expands on the central elements of the Marxist critique of capitalism, such as the use and the exchange values of a commodity that elucidate how money commodifies social relations of production. It discusses Marx's theory on the 'circuit of capital', which explains money's transformation into capital and how profit is accumulated by the capitalist in turn. The chapter then elaborates on the roles of the joint-stock company and the company share in capitalism, which both commodify social relations and sustain the liquid and mobile character of money in the circulation of money capital. Next, I discuss the capitalistic character of law and demonstrate how the law works to conceal underlying struggles and power relations by using supposedly neutral legal structures such as the property right. I then elaborate that the mainstream corporate governance laws are also capitalistic in that they strive to advance the interests of the capitalist class. More specifically, these rules aim to provide global investors with control of company management, so they can appropriate the revenues for themselves. In sum, the use of the Marxist lens exposes how capitalism is sustained globally by law, more specifically corporate governance laws. This analysis also illustrates how capitalism serves the dominant class interests, which represents the global investor class in the context of the inquiry at hand.

Chapter 3 presents an historic account of the shareholder primacy theory to illustrate the process by which it has been able to supersede other views and become the mainstream model in corporate governance. I discuss the shareholder primacy theory's emergence in the context of United States' era of managerial corporate governance, which is roughly defined as the period from the end of Great Depression until the late 1970s. The chapter continues by tracing the period marked by the rise of neoliberal ideology and the corresponding law and economics scholarship. I discuss the theoretical underpinnings of the shareholder primacy theory by examining the legal justifications put forth by its proponents. Through this analysis, I make the

point that both the form and substance of the mainstream corporate governance model is derived from an Anglo-American variant with dispersed ownership structure and highly liquid markets. Next, I explore the process by which the mainstream corporate governance model was exported to emerging market countries and promoted as universal standards by international organizations. This section draws on the role of the IFIs and their ROSCs, which rely on the OECD Principles as the benchmark for corporate governance. Finally, the chapter presents an alternative; the stakeholder theory of corporate governance. I highlight the various perspectives within this scholarship to underline the significance of the different approach to promoting stakeholder interests in company management. Overall, the chapter serves two interconnected purposes. First, this chapter attempts to explain how the shareholder primacy theory became the mainstream model of corporate governance by laying out the historical process by which capital gained power over labour and the rest of the stakeholders in a company. The chapter also exposes the motivation behind the process of exporting the OECD Principles to emerging markets, which in turn allows an understanding of the causes of Turkey's adoption of the mainstream model into its corporate governance laws.

Chapter 4 examines the first pillar of the Turkish corporate governance framework to explain the methods by which the mainstream model has been integrated into Turkish laws. The chapter provides a detailed analysis of the corporate governance reforms brought with the new CML, as well as the regulations of the CMB. The chapter begins with a narrative of the development of the capital markets in Turkey to provide the necessary background to the reform process of the corporate governance of listed companies. Next, I provide a black-letter analysis of the specific provisions of corporate governance envisaged in the new CML, the CMB's communiques on corporate governance, and the CMB's Corporate Governance Principles (CMB Principles). In particular, I highlight the CMB's move from the comply-or-explain approach adopted in its earlier corporate governance principles to a hard law approach. Finally, the chapter reviews the substance of the CMB Principles under the following four sub-sections: Shareholders, Public Disclosure and Transparency, Stakeholders, and Board of Directors.

Chapter 5 explores the new TCC and its corporate governance reforms, which constitutes the second pillar of the Turkish corporate governance framework. This chapter is a continuation of the previous chapter's black-letter analysis of the laws and illustrates the methods of how the mainstream model of corporate governance has been incorporated into Turkish laws. The subject of the inquiry is the new TCC, which stipulates general rules on company law. Hence, its corporate governance provisions are applicable to not just joint-stock companies, but also all capital companies. The chapter starts with a background to the drafting process of the new commercial code and pinpoints the reasons and influences behind the new legislation. I then

provide a brief account of relations between Turkey and the European Union to demonstrate the influence of Turkey's membership aspirations in the development of the new code. Next, the chapter explains in detail the articles pertaining to corporate governance and focuses on the new shareholder rights such as the principle of equal treatment as well as on the provisions on minority shareholders. The chapter concludes by discussing the extent and applicability of the rights provided to stakeholders in the new TCC. This chapter and the preceding chapter attempt to illustrate the particular provisions and methods by which Turkey has adopted the mainstream corporate governance model through its new legal framework for corporate governance.

Chapter 6 constitutes the critical assessment portion of this thesis and attempts to determine whether Turkey has conformed to the mainstream model in its new corporate governance framework as discussed in Chapters 4 and 5. I utilise the OECD Principles and the related OECD report on Turkey, which provides recommendations for the Turkish policy makers to fully conform with the OECD Principles.[159] Next, I analyse the CMB's shift from the comply-or-explain approach to mandatory corporate governance principles. In the last part of the chapter, I discuss the implications of the new Turkish corporate governance laws on two levels: on the ownership structure of listed companies and for the stakeholder as well as society at large. I determine whether there have been more foreign investors in the Turkish stock market since the new corporate governance laws have been enacted. In line with the findings on whether there have been more investor, I engage the law and finance theory by analysing the possible implications of the new laws on the concentrated and family-owned structure of Turkish companies. This analysis assesses the likelihood of a transformation from that structure to a wide share dispersal system. I elaborate on the subsequent changes of the control of listed companies passing from family owners to independent boards and professional management as dictated by the demands of dispersed shareholders. I also discuss the likely consequences of this change for the stakeholders and society in general.

Finally, in Chapter 7, I restate my overarching research question, followed by a summary of the main findings and analyses presented throughout this thesis. I conclude by briefly illustrating how I have achieved the aims laid out at the beginning of the research. I mention the areas left outside the scope of this thesis', which present opportunities for further research. I also provide two broad topics that could be examined in the future that would continue the discussions and findings of this thesis.

[159] OECD, 'Corporate Governance in Turkey: A Pilot Study' (2006) <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/37550252.pdf>.

CHAPTER II – The Theoretical Framework

1 Introduction

This chapter lays out the theoretical framework used to understand and analyse the capitalist system in which laws such as corporate governance laws work to advance the interests of a particular capitalist class, namely global investors. This thesis employs the Marxist theory of law and certain themes from the Marxist theory on the capitalist mode of production. The chapter starts with Marx's base and superstructure metaphor to provide a general theory of law. Accordingly, the theory dictates that one must inquire into the economic base of the society to make sense of the legal structure, or the superstructure, which is built upon the material base. This material base refers to the social relations of production. The chapter continues with outlining the main elements of Marx's theory on relations of production, drawing on the distinction between use and exchange values of a commodity, which explain how money commodifies social relations of production and the surplus creation. From here, I locate the role of the joint-stock company within the capitalist mode of production discuss that role from the viewpoints of contemporary theorists. I also point out how the company share also commodifies the relations of production within the company, thus conceals the underlying power relations.

I expand on the importance of company share in capitalism by using Marx's 'circuit of capital' formulation to elaborate how money turns into capital in the production process to generate profit. I build on this theory to indicate that a liquid stock market with wide share dispersal is a prerequisite for the capitalists to extract surplus with the company share. It is therefore unsurprising that the shareholder primacy theory of corporate governance that is derived from an Anglo-American market system has become the mainstream model globally. The mainstream corporate governance rules not only strive for liquid markets to continue the circuit of capital, but also work to protect the interests of the capitalists by ensuring that the profits accrue to the capitalist shareholders alone. On this point, the use of Marxist theory reveals that the profit accrues to the shareholders as 'the appropriation of other people's surplus labour'[160] and results in the externalisation of costs onto other stakeholders, environment, and society at large.

Indeed, the surplus generated from company operations accrues to the shareholders as a result of the exploitation of labour, which has been legitimised through particular capitalist legal

[160] K Marx, *Capital Volume III: A Critique of Political Economy* (Penguin Classics, 1991) 568.

forms. This is explained through law's capitalist or bourgeoise character, which always seeks to reinforce and advance dominant class interests. Since neither Marx nor Engels have formulated a systematic theory of law,[161] I refer to the ideas of various Marxist scholars to define the relationship between law and class interests. These discussions provide further insights on the role of law in the capitalist mode of production, thus allowing the analysis of corporate governance laws from a Marxist lens. Finally, the chapter discusses how various legal constructs such as the property right or corporate governance laws commodify social relations of production thus conceal the power disparities underlying these forms. This analysis in turn explains why the shareholder primacy theory's lynchpin is the contractual model of the company, which is further elaborated under Chapter 3. All in all, the chapter presents a framework that attempts to surpass the conventional wisdom of the liberal legal orthodoxy by providing a Marxist perspective in which the logic of the capitalist system can be understood.

2 Law and its Economic Base

Marx's starting point for a theory of law is his abstraction of the base and the superstructure metaphor:

> In the social production of their existence, men inevitably enter into […] relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of the society, the real foundation, on which arises a legal and political superstructure […][162]

In this description, law constitutes a part of the superstructure, which is founded upon an economic and material base. Marx adds that any changes in the economic foundation will eventually 'transform' the superstructure.[163] Thus, to understand Marx's legal superstructure phenomenon, we must examine the economic base, the relations of production, and the corresponding class relations which determine the mode of production in a society.

According to Marx, the prevalent mode of production is determined by examining the possession of the means of production.[164] In the industrial capitalist system, there are two main

[161] H Collins, *Marxism and Law* (OUP 1984) 10.
[162] K Marx, *A Contribution to the Critique of Political Economy* (Maurice Dobb ed, Lawrence & Wishart 1970) 20.
[163] Ibid 21.
[164] Marx, *Capital Volume III* (n 160) 927. Accordingly, 'The specific economic form in which unpaid surplus labour is pumped out of the direct producers determines the relationship of domination and

social classes: capitalists (bourgeoise), who are in a dominant position because they have access to the means of production such as land, factories, and raw materials; and labourers (proletarians), 'the class of modern wage-labourers who, having no means of production of their own, are reduced to selling their labour power in order to live'.[165] In this mode of production, profit is of utmost importance. In fact, 'It is the rate of profit that is the driving force in capitalist production, and nothing is produced save what can be produced at a profit.'[166] The capitalists employ the labourers to produce a commodity that would have an 'exchange-value' in the market 'greater in value than the sum of the values of the commodities used to produce it, namely the means of production and labour-power'[167] which results in profit, or 'surplus value'.[168] It must be highlighted that Marx's starting point in his critique of the capitalist system is his analysis of commodities.[169] He has made a distinction between the use-value and the exchange-value of a commodity. The use-value refers to the usefulness of a commodity which satisfies human-needs,[170] whereas the exchange-value of a commodity is a quantitative value determined independently of its use-value.[171] The exchange-value is constituted of the product of labour, which is determined by 'the labour time socially necessary for its production'.[172] He has added that for a commodity to be of any exchange-value, it must be useful to others by being exchanged in the market.[173]

In the market exchange, the value of commodities is expressed by a 'universal-value', which is money.[174] Yet, according to Marx, money 'fetishizes' the social relations of production.[175] In other words, 'the money form – which conceals the social character of private labour and the social relations between the individual workers, by making those relations appear as relations between material objects'.[176] As Marx has elaborated, 'Profit thus appears […] as simply the appropriation of other people's surplus labour, arising from the transformation of means of production into capital; i.e. their estrangement vis-à-vis the actual producer'.[177] Under

servitude […]. On this is based the entire configuration of the economic community arising from the actual relations of production […]'.

[165] Marx K and Engels F, *Manifesto of the Communist Party* (Benton 1952) 419.

[166] Marx, *Capital Volume III* (n 160) 368.

[167] K Marx, *Capital Volume I: A Critique of Political Economy* (Penguin Classics, 1990) 293; see Chapter 7, Section 2.

[168] Ibid 251.

[169] Ibid 125

[170] Ibid 126.

[171] Ibid 128.

[172] Ibid 128-129. Accordingly, what this means is 'the labour time required to produce any use-value under the conditions of production normal for a given society and with the average degree of skill and intensity of labour prevalent in that society'.

[173] Marx, *Capital Volume I* (n 167) 131.

[174] Ibid 162-3.

[175] Ibid 165.

[176] Ibid 186.

[177] Marx, *Capital Volume III* (n 160) 568.

capitalism, the social relations of production are commodified through the use of money, which works to hide the fact that the surplus-value created at the end of the production accrues to the capitalist because the labour is paid less than the value it produces.

In sum, Marx perceives the production process to be the exploitation of labour, which means that surplus labour produced by the worker accrues as profit to the owner of the means of production because of the owner's dominant position in society. The organisation of production within the joint-stock company can be analysed in the same light. According to Marx, the formation of joint-stock companies merely represented the expansion in the scale of production of businesses which would be impossible for individual capitalists.[178] Talbot has drawn on a Marxist perspective to assert that the company is a way of organising social relations of production where labour produces products and value as well as where investors (and the credit system) invest their money into production.[179] She has concluded that the 'company is a legal vehicle for the extraction of the surplus value which labour creates and therefore the company is no different from any other legal vehicle under which capitalist production is organised'.[180] In a similar vein, Ireland has defined the incorporated companies to be the 'dominant legal organisational form of capital' which is a major site for 'relations of domination and subordination in society.'[181]

Just like in industrial capitalism and by the same capitalistic logic, shareholders of the company can claim entitlement to revenues because the employees are not remunerated according to the actual value they create, but rather receive the lowest the employer can pay. Thus, Talbot asserts that 'capital's ability to make this claim is therefore not an attribute of capital per se but as a result of the power disparity between capital and labour'.[182] According to Marx, this is merely 'the misrepresentation and the objectification of the relations of production'.[183] The dominant position of the capitalist over labour is moreover facilitated by laws, which will be discussed in the final part of the chapter. To conclude in agreement with Talbot's assertion, the shift to investor capitalism did not change the fundamental nature of capitalism.[184] The investors' or shareholders' claim to profit arises because of the money they invested in the company and not because of their labour. For Marx, transition to investor capitalism is 'a mere point of transition

[178] Ibid 567.
[179] Talbot, *Progressive Corporate Governance* (n 9) 36.
[180] Ibid 38.
[181] P Ireland, 'The Conceptual Foundations of Modern Company Law' (1987) 14(1) Journal of Law and Society 149, 149.
[182] Talbot, *Progressive Corporate Governance* (n 9) 37.
[183] Marx, *Capital Volume III* (n 160) 516.
[184] Talbot, *Progressive Corporate Governance* (n 9) 36.

to a new form of [capitalist] production'.[185] The company form and its share merely function to commodify the social relations of production within the company by concealing the power struggles between the capitalist and labour.[186]

a. The Link Between the Company Share and the Circuit of Capital

According to Marx, 'The driving motive and determining purpose of capitalist production is […] the greatest possible production of surplus value, hence the greatest possible exploitation of labour-power by the capitalist.'[187] To expand on the capitalists' motive of the 'greatest possible production of surplus value', Marx's theory on the 'the circulation of capital' must be grasped. In the capitalist mode of production, money goes into circulation to create surplus value. As previously mentioned, capitalists invest in the production process with the expectation of profit by producing a commodity that would be sold at the market exchange for a monetary value greater than the total production costs. Until that product is sold at a profit, however, the money that the capitalist has invested is stuck in the production process.[188] At this point, money, which is inherently mobile and liquid, becomes capital, thus interrupting the circulation.[189] The capitalist must wait to reap the benefits of their investment, and it is only when the product is sold that the capital turns into its liquid and mobile money-form again. Marx explains this circuit of capital as follows:

> Money is advanced as capital, first transformed into the elements of production, then transformed from these into the commodity product, and this commodity product then again converted into money. […] the result being money which can be used by anyone for anything.[190]

Moreover, once the capital is a part of production, there is the risk that the surplus value may not be realized if the product is not sold at a profit or at all. Yet, money has to enter the production process to gain 'the ability to function as capital' since capital 'produces profit, i.e. it enables the capitalist to extract and appropriate for himself a certain quantity of unpaid labour,

[185] Marx, *Capital Volume III* (n 160) 569.
[186] Although Marxism formulates the relationship between the capitalist and the labour classes, for the purpose of this research, the labour class encompasses a broader group translated into all company stakeholders in the context of corporate governance.
[187] Marx, *Capital Volume I* (n 167) 449.
[188] K Marx, *Capital Volume II: A Critique of Political Economy* (Penguin Classics, 1992) 369. Marx explains the process of the circuit of money with the formula M-C... P…C'-M' where M is the capital invested, C represents the costs to production, and the C' and M' denotes an increase in the former; the dots, on the other hand, indicate the interruptions in the circuit.
[189] Ibid 109.
[190] Ibid 172.

surplus product and surplus-value'.[191] Considering the arduous and lengthy process that money must undergo en route to profit, the capitalists have sought ways to generate surplus while keeping their investment as liquid as possible.[192]

The laws which have facilitated the transformation of the company share as a form of 'money capital' are prominent examples of the methods used by capitalists. Indeed, the fundamental function of the company share lies not in its contribution to the production process but rather in its ability to allow capital to retain its mobility and liquidity by generating surplus for the investor. Talbot has argued that laws such as the legislation that strengthened the rights of investors or that allowed the creation of a market in shares played a crucial role in facilitating investors' capitalism.[193] Indeed, it was through law that the company share was able to acquire the 'money capital' function as a result of the capitalists' aspiration to expand their opportunities for wealth creation.[194] As Baars has pointed out, the emergence of the joint-stock company with its particular characteristics such as the freely transferable company share 'were each developed as a result of specific historical circumstances and in order to facilitate the advent of bourgeois capitalism'.[195] The historical account of how the company share was reconceptualised in English law has been further illustrated by Ireland's Marxist demonstration of how law redefined the company share from an equitable interest in the assets of the company to an autonomous form of property.[196] This transformation was accompanied by the establishment of a developed market, which gave the company share its mobile and liquid character. Through these legal and economic developments, the company share has become a form of 'fictitious capital'[197] or money capital; 'a commodity in itself which commands a price'.[198] In sum, the company share now carries a value that is independent from the production process because the law enabled capitalists to 'reduce the length of the circulation process to a minimum'.[199]

Along with the changes in the legal nature of the company share, its value was also disconnected from the tangible assets of the company and instead became tied to 'the market's assessment of the revenue they were likely to generate in the future'.[200] In line with the commodification of

[191] Marx, *Capital Volume III* (n 160) 459.
[192] L Talbot, 'Why Shareholders Shouldn't Vote: A Marxist-progressive Critique of Shareholder Empowerment' (2013) 76(5) The Modern Law Review 791, 800.
[193] Talbot, *Progressive Corporate Governance* (n 9) 3.
[194] Talbot, 'Why Shareholders Shouldn't Vote' (n 192) 800.
[195] G Baars, 'Law(yers) Congealing Capitalism: On the (im)possibility of restraining business in conflict through international criminal law' (Thesis, UCL 2012) 37.
[196] Ireland, 'The Conceptual Foundations of Modern Company Law' (n 181) 152-154.
[197] Marx, *Capital Volume III* (n 160) 625.
[198] Ireland, 'The Conceptual Foundations of Modern Company Law' (n 181) 154.
[199] Marx, *Capital Volume II* (n 188) 78.
[200] P Ireland, 'History, Critical Legal Studies and the Mysterious Disappearance of Capitalism' (2002) 65(1) The Modern Law Review 120, 134.

the company share, the connection between the share price and the actual production process was severed.[201] This has led to the emergence of rentier investors who provide no contribution other than their capital but expect to obtain the revenues from production.[202] Marx has commented on the rentier investor class as follows:

> In joint-stock companies, the [entrepreneur] function is separated from capital ownership, so labour is also completely separated from ownership of means of production and of surplus labour. This result of capitalist production is its highest development, is a necessary point of transition towards the transformation of capital back into property of producers […].[203]

Thus, the rentier investor's lack of any entrepreneurial function did not change the fact that the surplus value accrued to the capitalist, 'though no longer the private property of individual producers, but rather as their property as associated producers, as directly social property'.[204] To summarise, legal developments have facilitated the commodification of the company share to allow capitalists without entrepreneurial functions to nevertheless appropriate profit from production.

The company share has been referred to as fictitious capital by Marx because the share circulated as money capital in the stock exchange.[205] He explains this transformation as follows: 'On the basis of capitalist production, money […] can be transformed into capital, and through this transformation it is turned from a given, fixed-value into a self-valorising value capable of increasing itself.'[206] Thus, in the stock exchange, company share 'exists in a state which it can perform monetary functions'.[207] For Marx, as opposed to commerce capital used in production, this 'interest-bearing capital' is the most 'fetishized form' of capital because it refers to money that produces more money.[208] Likewise, the company share performs the function of interest-bearing capital regarding shareholders' entitlement to company profits:

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[201] Ireland, 'The Conceptual Foundations of Modern Company Law' (n 181) 152.
[202] Ibid 158.
[203] Marx, *Capital Volume III* (n 160) 568.
[204] Ibid.
[205] Ibid 625.
[206] Ibid 459.
[207] Marx, *Capital Volume II* (n 188) 112.
[208] Marx, *Capital Volume III* (n 160) 515. The commerce capital involves M-C-M', where money enters the production process and becomes a commodity first, then when the commodity is sold at the market, it is transformed into a money form but with a greater value this time. On the other hand, interest-bearing capital represents M-M' where money simply skips production process and generates a greater sum of money by itself.

> […] dividends they draw include both interest and profit of enterprise […] this total profit is still drawn only in the form of interest, i.e. as a mere reward for capital ownership, which is now completely separated from its function in the actual production process.[209]

Thus, the dividends that accrue to the shareholder are the result of the investors' money creating profit by itself without engaging in production. As Marx has explained, 'it now appears conversely as if interest is the specific fruit of capital, the original thing, while profit, now transformed into the form of profit of enterprise, appears as a mere accessory and trimming added in the reproduction process'.[210] Therefore, he has added, the circulation of capital is 'abbreviated' with this form of capital.[211] He defines this development as 'the hoarder's most fervent wish realized'.[212] The interest-bearing capital function of the company share is further sustained by capitalist legal structures that seek to legitimise and conceal the underlying relations between capital and labour, which can be explained by law's inherently capitalistic character.

b. Capitalistic Character of Law and the Mainstream Corporate Governance Laws

In line with the above explanations regarding Marx's theory on the relations of production which form the economic foundation on which the law is built, it follows that a Marxist approach to law is concerned with the role of law in the reproduction of the relations of production in a capitalist society.

Since this thesis attempts to demonstrate the role of corporate governance laws in advancing the interests of the global investor class within the broader context of capitalism, the role of law as an instrument to serve dominant class interests must be further explored. However, apart from the base and superstructure metaphor[213] and analyses of specific legislation of his time,[214] Marx has not formulated a systematic theory of law.[215] Instead, scholars from the Marxist tradition have extracted ideas from his writings to determine the purpose of law within capitalist

[209] Marx, *Capital Volume III* (n 160) 567-568.
[210] Ibid 516.
[211] Ibid 517.
[212] Ibid 518.
[213] Marx, *A Contribution to the Critique of Political Economy* (n 162) 20-21.
[214] See, for instance, Marx's examination of the English Factory Legislation on working hours in Marx, *Capital Volume I* (n 167) Chp 10.
[215] Collins, *Marxism and Law* (n 161) 10.

societies.[216] According to Hunt, a Marxist approach to law questions the role of law 'in the reproduction of the structural inequalities which characterize capitalist societies'.[217] For Hunt, 'the content and procedures of law manifest, directly or indirectly, the interests of the dominant class(es)'.[218] In a similar vein, Collins has asserted that law ensures 'the preservation of a particular mode of production and its corresponding class structure, thereby placing nearly all the available wealth and power in the hands of a fraction of the population'.[219] The commonality in these Marxist perceptions to law is that both scholars form the link between law and class interests. This theme is apparent in the *Manifesto of the Communist Party* by Marx and Engels, where they state that the law is 'but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class'.[220] Engels has also acknowledged that 'The working man knows too well, has learned from too oft-repeated experience, that the law is a rod which the bourgeois has prepared for him.'[221] It follows that a Marxist approach to law accepts that the dominant class employs law as 'a coercive instrument to foster its own interests'.[222]

Indeed, in capitalism, the surplus value from production is appropriated by the capitalist due to their exploitation of labour, which has been legitimised by particular capitalist legal forms. An example of this are the laws that establish and protect a regime of property ownership.[223] The property right is derived from the liberal legal doctrine, which asserts that property ownership is a neutral concept.[224] In capitalism, the property owner is regarded as the person who possesses a commodity and can in turn exchange that property in the market through contractual relations between equal juridical subjects.[225] Thus, capitalism portrays every individual in the society as equal, having free will, and the ability to freely enter into contracts.[226]

According to Gill, at the start of modern capitalism in England, legal reforms were introduced to facilitate the law of contracts to benefit the propertied class of the society. As a result, the contractual relationship between the owners of the means of production and the worker is

[216] See Pashukanis, *Law and Marxism* (n 146); P Phillips, *Marx and Engels on Law and Laws* (Robertson 1980); Collins, *Marxism and Law* (n 161).
[217] Hunt, 'Marxist theory of law' (n 149) 355.
[218] Ibid.
[219] Collins, *Marxism and Law* (n 161) 28.
[220] Marx and Engels, *Manifesto of the Communist Party* (n 165) 427.
[221] F Engels, *The Condition of the Working Class in England* (David McLellan ed, OUP 1993) 235.
[222] G Young, 'Marx on Bourgeois Law' (1979) 2 Law and Sociology 133, 139.
[223] Hunt, 'Marxist theory of law' (n 149) 363.
[224] E Engelen, 'Corporate Governance, Property and Democracy: A Conceptual Critique of Shareholder Ideology' (2002) 31(3) Economy and Society 391, 400.
[225] Marx, *Capital Volume I* (n 167) 178-180.
[226] Gill, *Power and Resistance* (n 70) 164.

perceived to be on equal footing because both parties have 'formal equality before law'.[227] Thus, Gill has rightly pointed out that 'this legal form underpins the commodification of labour and of things'.[228] Indeed, in the case of employment contracts, law works to conceal an underlying power disparity through a seemingly fair exchange between the employer and the worker. However, the capitalist owner of the means of production gains authority over the worker as a result of this contract.[229] Even though it seems as if the worker entered the contract of their own free will, the contract codifies an inherently unequal relationship.

The capitalistic nature of law is also evident from the mainstream corporate governance model that enjoys hegemony today. The corporate governance laws that are based on shareholder primacy theory hold that the sole objective of the company is to maximise shareholder wealth and that this is a natural consequence of share ownership. However, the right to property ownership is not a neutral legal form; instead, it reflects the dominant position of the capitalist class in society and works to the benefit of that class alone. As Engelen has asserted, 'specific legal rights always reflect historical societal constellations and the class relations and ownership structures of which they consist'.[230] This will become more apparent in Chapter 3's examination of the managerial era in the post-war period in the United States, where labour had a stronger position vis-à-vis the capitalists. Thus, the laws at the time encouraged company management to run companies in line with broader interests than those of shareholders.[231]

On the other hand, mainstream corporate governance rules commodify the relations between shareholders, labour, and the rest of the stakeholders. Shareholders accumulate the profit that accrue from company operations (i.e., the production process), where the surplus essentially arises as a result of the exploitation of stakeholders. This has been possible due to the power gap between the shareholders and the other stakeholders in the capitalist system. Yet, it should be noted that this in no way suggests that the interests of labour and other stakeholders are homogeneous in a company. They may have varying objectives and interests; however, their commonality lies in their position in relation to the shareholders.[232] Therefore, the analysis of the ways in which capitalists use laws to maintain their dominant position over labour has wider repercussions for all stakeholders.

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[227] Ibid.
[228] Ibid.
[229] Ibid 166.
[230] Engelen, 'Corporate Governance, Property and Democracy' (n 224) 399.
[231] For managerial corporate governance, see Chapter 3.2.
[232] Drawing from a Marxist approach, Streeck provides a more up-to-date class dichotomy; the capitalist class who are 'profit-dependant' and the worker class who are 'wage-dependant. In Streeck, *The Delayed Crisis of Democratic Capitalism* (n 42) 21.

Contract law commodifies the relations of production and conceals the relative power of the parties to the contract. This explains why the shareholder primacy theory of corporate governance laws rests on the contractual theory of the company and insists that a company is nothing but a set of contracts.[233] Moreover, contract law's nature also explains why the mainstream corporate governance model provides that only those stakeholder rights which are specified in their contracts with the company should be protected.[234] This view is evident from the OECD Principles, which state that stakeholder rights that are established 'through mutual agreements' should be respected.[235] This understanding, which is prevalent in mainstream corporate governance regulation, does not provide any guarantees for the protection of labour or other stakeholder rights, which are already protected through existing legislation. Thus, corporate governance laws that purport to protect stakeholder rights instead commodify the relation between shareholders and stakeholders. The exploitative character of capitalism remains unchanged; the mainstream corporate governance laws that advocate the purpose of the company to be increases in share price or dividends are a reflection of underpaid labour, unsafe work environments, environmental hazards, and all other costs that are borne by stakeholders. This has been explained by Marx to be the capitalists' tendency 'towards increasing the productivity of labour, in order to cheapen commodities, and by cheapening commodities, to cheapen the worker himself'.[236] In sum, law's seemingly technical corporate governance rules, such as the optimal size of boards or the necessity for certain committees within boards, mask the power struggle between the capitalist and the labour inherent in the company. These rules serve the sole purpose of ensuring that surplus value accrues to the capitalist.

In search for greater surplus value, the capitalists have expanded their reach beyond their national markets by investing in cross-border company stocks. As Soederberg has explained, this is a result of the globalised mode of capital accumulation, 'whereby money dominates over productive capital [which] leads to the necessity of effectively expanding (as opposed to valorising) capital by continually increasing one's exposure to risk, and thus higher returns'.[237] Hence, the developing world, particularly the emerging markets, provide ample opportunities for capital expansion due to their high expected growth rates and risks associated with their economic and political landscape. Neoliberal policies of market and capital liberalisation have been employed in emerging market economies by the IFIs that have asserted the importance of

[233] Coase, 'The Nature of the Firm' (n 29); Jensen and Meckling, 'Theory of the Firm' (n 10).
[234] FH Easterbrook and DR Fischel, 'The Corporate Contract' (1989) 89(7) Columbia Law Rev 1416, 1434-1436.
[235] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 37.
[236] Marx, *Capital Volume I* (n 167) 436-437.
[237] Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South' (n 70) 22.

free capital mobility for development.[238] This expansion was accompanied by legal mechanisms to strengthen the position of mobile capital.

To this end, international organisations representing the neoliberal discourse have disseminated a set of corporate governance rules to be adopted under the legal frameworks of emerging market countries.[239] The adoption of these laws benefit the global investors by allowing them control over the distribution of company profits in the form of specific rights that take precedence over the rights of domestic controlling owners and stakeholders.[240] Global investors can thus ensure that the surplus value created does not mainly flow to owner families, labour, or stakeholders. Moreover, the global investors are in a stronger position than the relatively immobile stakeholders due to the mobile character of their capital. Hence, they can exploit the opportunities in one market and change location once the economic conditions deteriorate, whereas the stakeholders do not have similar exit opportunities.[241] These factors augment the already strong position of the global investor within the company. All in all, corporate governance laws help secure the prominent position of the global capitalist in the company through rules that allow control over how company profits are distributed, hence ensuring that the surplus value accrues to the capitalists alone.

3 Conclusions

A Marxist approach to law provides an understanding of how laws are shaped and whose interests they are designed to serve. This allows a critical analysis of the objectives of certain laws with extensive distributive consequences; including legislation on corporate governance. The Marxists argue that under capitalism, law serves the interests of the dominant class, which is the capitalist class due to their superior position from owning the means of production. There is no consensus amongst Marxists whether all law is capitalistic law or whether some form of law would be possible in the stage following the overthrow of capitalism.[242] This argument is not relevant for the purposes of the research. The main Marxist assertion here is that, as Hunt has articulated, law is ‘an instrument through which the capitalist class imposes its will’.[243] The

[238] TS Sedik and T Sun, 'Effects of Capital Flow Liberalization—What is the Evidence from Recent Experiences of Emerging Market Economies?' (2012) IMF Working Paper 12/275.
[239] Such as the OECD Principles of Corporate Governance.
[240] Emerging market countries are characterized with concentrated ownership structures where a dominant family, person or a group owns a majority of the shares and in turn hold the control, see KV Lins, 'Equity Ownership and Firm Value in Emerging Markets' (2003) 38(1) The Journal of Financial and Quantitative Analysis 159.
[241] Gill, *Power and Resistance* (n 70) 112-113.
[242] Collins, *Marxism and Law* (n 161) 94; Hunt, 'Marxist theory of law' (n 149) 360.
[243] Hunt, 'Marxist theory of law' (n 149) 356.

analyses of certain legal forms such as the property right or law of contracts illustrates this point because these constructs help commodify the relations of production by creating the image of fairness and equal bargaining between the capitalist and the worker. Thus, as Gill has noted, 'the most important relations within capitalist society are moulded into the form of contractual relations'.[244] Through this commodification, the underlying struggles and the exploitation of labour associated with the capitalist mode of production are conveniently hidden. In sum, law assumes its capitalist character due to the material disparity between different social classes. This leads to the conclusion that shareholder-centric corporate governance became mainstream because of shareholders' relative power over the rest of the stakeholders.

Indeed, the mainstream corporate governance rules ensure that the primary objective of the company is to maximise shareholder wealth. This notion has been exported by the IFIs into the laws of emerging markets to enable global capitalists to expropriate the surplus value from these cross-border markets that offer higher returns, providing them with more opportunities for capital expansion. Through a Marxist lens, the surplus value accruing to shareholders is in fact unpaid labour time and constitutes the externalisation of any costs onto stakeholders due to capitalists' desire to achieve the highest possible returns. As Marx has noted, 'Expropriation is the starting-point of the capitalist mode of production, whose goal is to […] expropriate all individuals from the means of production.'[245] To this end, if money is to retain its mobility, it must be released from the confines of the production process, which is 'the basic curse of capitalism that commodities must go through the phase in which they contain – in as yet unrealized form – the surplus-value produced by the working class'.[246] Thus, the transformation in the legal nature of the company share into 'fictitious capital'[247] has enabled capitalists to generate profit through stock markets without being involved in the lengthy production process.

Marx's theory on the circuit of capital thus explains the mainstream corporate governance model's insistence for liquid stock markets. The shareholder primacy theory that underlies the mainstream model is derived from an Anglo-American market system where wide share dispersal is the norm and, which leads to highly liquid stock markets.[248] A developed stock market is necessary for the capitalists to circumvent the production process. Thin stock markets are perceived as undesirable by the capitalists because they block the 'circuit of capital', causing capital to lose its mobile character. The mainstream corporate governance laws are portrayed as benefiting the economic development of the emerging market countries. Yet, instead, these laws

[244] Gill, *Power and Resistance* (n 70) 166.
[245] Marx, *Capital Volume III* (n 160) 571.
[246] Marx, *Capital Volume II* (n 188) 18.
[247] Marx, *Capital Volume III* (n 160) 625.
[248] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 476.

allow global investors to gain control over the governance of companies abroad and acquire decision-making power over how the revenues will be allocated amongst the various stakeholders. This implicit objective of the mainstream model is reflected in its preference for outside shareholders, which will be elaborated in the following chapters. This chapter concludes with the finding that the corporate governance laws that currently enjoy hegemony ensure capitalist interests are protected while using seemingly neutral rules to conceal the exploitative nature of company share ownership. Capitalists, by insisting on corporate governance rules that protect shareholder interests, are thus able to secure their position as the recipient of all surplus value accruing from company operations. Turkey, with its recent corporate governance reforms, is a case on point. The new legislation gives preference to shareholder interests, especially those of minority shareholders, to the detriment of other stakeholders and controlling shareholders. Examining this development from a Marxist lens elucidates whom these rules are designed to serve.

CHAPTER III – Development of the Mainstream Corporate Governance Model

1 Introduction

The shareholder primacy theory of corporate governance, referred to in this thesis as the mainstream corporate governance model, holds that the sole purpose of the company is to maximise shareholder wealth broadly through dividend distribution and share price appreciation. Various justifications have assisted this shareholder-centric model to dominate the current corporate governance agenda. In fact, as Stout has pointed out, shareholder primacy ideology has turned into 'dogma: a belief system so widely accepted that most of those who embrace it cannot recall where they first learned of it or explain what evidence supports it over other theories'.[249] This chapter explores how the shareholder primacy theory became 'conventional wisdom'[250] to illuminate whose interests the mainstream model of corporate governance aims to serve. Thus, the goal of this chapter is to provide a comprehensive historical account of the current hegemony of the mainstream corporate governance model. The shareholder primacy theory advocates Hansmann and Kraakman have argued in their much-deliberated article *The End of history for Corporate Law* that the mainstream corporate governance model's 'triumph' over other governance models was due to its economic superiority.[251] However, in this chapter I argue that the shareholder primacy theory became the orthodoxy in corporate governance because of the strengthened position of the capitalist class from the 1970s onwards. This position strengthened alongside the rise of neoliberal ideology, which has enabled the capitalists to influence policies and laws that advanced their own interests.[252]

The first part of the chapter traces the evolution of the mainstream corporate governance model, starting with a narrative of how the purpose of the company has been perceived in legal thought since the 1930s in the context of the United States, where the phrase 'corporate governance'

[249] Stout, 'The Toxic Side Effects of Shareholder Primacy' (n 15) 2010.
[250] Stout, *The Shareholder Value Myth* (n 8) 7.
[251] Hansmann and Kraakman, 'The End of History for Corporate Law' (n 12) 468. Their title is derived from Francis Fukuyama's argument that entering the 1990s there has been an 'end of history'; 'the end point of mankind's ideological evolution' where there has been a 'total exhaustion of viable systematic alternatives to Western liberalism', see F Fukuyama, 'The End of History?' (1989) (16) The National Interest 3; F Fukuyama, *The End of History and the Last Man* (Penguin 1993).
[252] Ireland refers to this 'finance reasserting its power' in P Ireland, 'Financialization and Corporate Governance' (2009) 60(1) NILQ 1, 18.

first appeared.[253] The chapter commences with the period when managerial corporate governance, also known as 'the golden age of capitalism'[254], reigned public companies. This period is roughly defined between the post-war era to late 1970s. During this time, the prevalent view amongst businesses, scholars, and society was that public companies ought to have a social purpose and that managers had fiduciary duties to not just shareholders but also the public.[255] This was reflected in Berle and Means' seminal book *The Modern Corporation and Private Property,*[256] which illustrated that ownership in large public companies in the United States has become so widely dispersed that their control has passed on to the managers, which establishes the 'separation of ownership and control' thesis.[257] Berle and Means have argued that shareholders no longer had any interest in the running of these large companies since they held an insignificant portion of the overall shares.[258] Hired managers came to be in charge of the largest corporations of the time, and therefore the corporate governance theory that dominated this period came to be known as managerial corporate governance. The result was that managers were seen as 'capable of balancing the interests of all those involved from shareholders to consumers and employees' and the companies were 'conceived as public organisations'.[259]

Therefore, Talbot notes that, in the managerial era the company 'was viewed as a vehicle for social progress as well as dividend creation'.[260] It is in this context that I present the Berle-Dodd legal debates of the 1930s over the issue of whose interests the company managers should pursue. Initially, ownership arguments were used to assert that shareholders were the owners of the company, and their interests should thus prevail. However, with the spread of large public companies with widely dispersed shareholders during this period, shareholders' ownership claims subsided as they became passive rentier investors. The shareholder entitlement failed on the grounds of ownership defences and was resolved 'by the subsequent emergence of an economics-derived neoliberal conceptualisation of the company in the "law and economics" tradition'.[261]

The chapter continues by exploring the trajectory of events that have unfolded during the transition from the managerial era to neoliberalism to make sense of the arguments put forth by the proponents of the shareholder primacy theory. I discuss the demise of the managerial

[253] BR Cheffins, 'The History of Corporate Governance' (2012) ECGI Law Working Paper No.184 <https://ssrn.com/abstract=1975404>.
[254] See E Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914-1991* (Abacus 1994) Chp 9.
[255] EM Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45(7) Harv Law Rev 1145, 1156.
[256] Berle and Means, *The Modern Corporation and Private Property* (n 36).
[257] Ibid 84.
[258] Ibid 66.
[259] Talbot, *Critical Company Law* (n 128) 108.
[260] Ibid.
[261] Talbot, *Progressive Corporate Governance* (n 9) 117

corporate governance across the macroeconomic backdrop of the United States. As the Keynesian policies that marked the post-war era started to lose their validity, neoliberal economic and political policies started to take centre stage in the Anglo-American context. Margaret Thatcher became the Prime Minister in the United Kingdom in 1979 and Ronald Reagan was elected as the President in the United States in 1980. These two elections accompanied the gradual implementation of the neoliberal policies of free markets, privatisation, deregulation, disempowering of unions, and the roll-back of the welfare state. These policies were disseminated abroad, underpinned by the policy goals of the Washington Consensus agenda. In turn, as Ireland has noted, 'concerted efforts have been made to universalize the shareholder-oriented, stock-market-market based forms of corporate governance found in the United Kingdom and the United States'.[262] The neoliberal shareholder primacy model of corporate governance was primarily imposed on the emerging markets by IFIs in line with the interests of global investors. The OECD Principles have played a pivotal role in setting the supposed universal standards of good corporate governance in that process.[263] In this section, I elaborate on the essential components of the mainstream corporate governance model to identify its distinguishing characteristics.

I also introduce the stakeholder theory, which is perceived to be an alternative to the mainstream model of corporate governance. The stakeholder theory's supporters are of the view that managers should consider the interests of all the company constituents and recognise 'the pluralistic nature of the corporation'.[264] A broader definition explains stakeholder corporate governance as concerned with as 'a wide range of groups with "stakes" in public companies - employees, customers, creditors, the community at large - should be recognised and, in some cases, represented in corporate legal and managerial structures'.[265] Although this definition is the starting point of their arguments, stakeholder theorists differ in terms of their justifications for considering all stakeholder interests in company management. For instance, some have resorted to the efficiency justifications of the shareholder primacy theory to assert that a stakeholder approach is a more viable alternative.[266] I elaborate on the possible implications of each of these perspectives. In summary, this chapter aims to clarify what the mainstream corporate governance model entails by delving into the historical process by which it became

[262] Ireland, 'The Corporation and the New Aristocracy of Finance' (n 6) 84.
[263] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 143-144. Soederberg argues that the OECD acts as the satellite organization for the IFIs on the implementation of the ROSCs.
[264] LE Mitchell, 'A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes' (1992) 70(3) Tex L Rev 579, 586.
[265] P Ireland, 'Defending the Rentier: Corporate Theory and the Reprivatisation of the Public Company' in John Parkinson, Gavin Kelly and Andrew Gamble (eds), *The Political Economy of the Company* (Hart 2000) 2.
[266] MM Blair and LA Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) Va Law Rev 247, 248.

orthodoxy and the interests it purports to serve. The chapter also provides the necessary context to analyse the reasons behind Turkey's recent corporate governance reforms.

2 Managerial Corporate Governance: The Golden Age of Capitalism

The beginning of the 19th century experienced a rapid advancement of technology, which enabled entrepreneurs to take on projects that necessitated vast amounts of capital, know-how, and the professional management to handle these extensive undertakings. This was facilitated through the legal developments that allowed 'fractionated ownership' of businesses through public offerings which in turn 'enabled the access to capital that funded modern industry'.[267] On the other hand, the management aspect of these large-scale projects had been handled by 'salaried managerial hierarchies who held no significant equity'.[268] The drastic shift in business organisations captured the attention of two prominent American scholars: Adolf A. Berle and Gardiner C. Means. The authors put forth their landmark 'separation of ownership from control' thesis in their book *The Modern Corporation and Private Property* in 1932.[269] Their research used empirical evidence from the large public companies in the United States to demonstrate that as these companies grew in size and their shareholdings became more dispersed, share ownership disconnected from control. This new organisation was a '*quasi-public corporation*: a corporation in which a large measure of separation of ownership and control has taken place through the multiplication of owners'.[270] Shareholders were no longer interested in business affairs because their stakes were too insignificant in proportion to the total amount of shares. They had become 'the passive beneficiaries'[271] who owned shares, a form of 'passive property [which] gives its possessor an interest in the enterprise but gives them practically no control over it and involve no responsibility'.[272] In these companies, shareholders had 'surrendered all disposition of it [profits] to those in control of the enterprise'.[273] Berle and Means' findings hinted the start of the managerial corporate governance era.

Shortly before Berle and Means published their research, there had been an ongoing legal debate regarding 'the interests corporations should properly serve with its correlative concerning the

[267] Monks and Minow, *Corporate Governance* (n 3) 109.
[268] A Dignam and M Galanis, 'Corporate Governance and the Importance of Macroeconomic Context' (2008) 28(2) Oxford Journal of Legal Studies 201, 210.
[269] In their study, Berle and Means examined the control structures of the 200 largest US companies concluding: 'It is apparent that, with the increasing dispersion of stock ownership in the largest American corporations, a new condition has developed with regard to their control. No longer are the individuals in control of most of these companies dominant owners. Rather, there are no dominant owners, and control is maintained in large measure apart from ownership' in Berle and Means, *The Modern Corporation and Private Property* (n 36) 110.
[270] Emphasis added. Berle and Means, *The Modern Corporation and Private Property* (n 36) 5.
[271] Ibid xxvii.
[272] Ibid 304.
[273] Ibid 9.

duties of directors to various constituencies'.[274] This famous debate was between the co-author of the *Modern Corporation and Private Property*, Berle, and another American corporate law professor, Dodd, known as the so-called Berle-Dodd debate of the early 1930s. Concerned with the growing power of managers and the fear that they would divert company profits to themselves,[275] Berle launched the debate with his article 'Corporate Powers as Powers in Trust',[276] arguing that 'managerial powers are held in trust for stockholders as sole beneficiaries of corporate enterprise'.[277] This position of Berle's has made him renowned as 'the grandfather of shareholder primacy',[278] although Ireland has pointed out that Berle had been supporting shareholder primacy due to 'pragmatic reasons' arising from his fear of managers abusing their discretionary power.[279] Dodd responded with disagreement in his article 'For Whom Are Corporate Managers Trustees?':[280]

> He [Dodd, referring to himself] nevertheless believes that it is undesirable, even with the laudable purpose of giving stockholders much-needed protection against self-seeking managers, to give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for their stockholders. He believes that public opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function[281]

Dodd had advanced his proposition by rejecting the notion that the public company is 'a mere aggregate of stockholders' and instead highlighted the traditional legal view that the 'corporation is a distinct legal entity'.[282] In this view, the company is treated 'as an institution directed by persons who are primarily fiduciaries for the institution rather than for its members'.[283] Hence, the argument goes that the managers did not owe fiduciary duties to the shareholders alone. The debate continued with Berle's article 'For Whom Corporate Managers

[274] AAJ Sommer, 'Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later' (1991) 16(1) Del J Corp L 33, 35.
[275] The debate took place shortly after the stock market collapse in the United States in 1929, where the abuses of managerial corporate power come to light in its aftermath, leading to the concerns Berle had in establishing his position. See Sommer, 'Whom Should the Corporation Serve? (n 274) 36.
[276] AA Berle, 'Corporate Powers as Powers in Trust' (1931) 44(7) Harv Law Rev 1049.
[277] In his article responding to Berle, Dodd summarises Berle's argument, in Dodd, 'For Whom Are Corporate Managers Trustees?' (n 255) 1147.
[278] WW Bratton and ML Wachter, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation' (2008) 34(1) Journal of Corporation Law 99.
[279] Ireland, 'The Corporation and the New Aristocracy of Finance' (n 6) 78. See P Ireland, 'Back to the future? Adolf Berle, the Law Commission and directors' duties' (1999) 20(6) Company Lawyer 203.
[280] Dodd, 'For Whom Are Corporate Managers Trustees?' (n 255).
[281] Ibid 1147-48.
[282] Ibid 1160.
[283] Ibid 1162-63.

Are Trustees: A Note'.[284] Berle was sceptical of Dodd's stance of granting 'uncontrolled power to corporate managers in the hope that they will produce that development'.[285] He argued that 'unchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe […] Meanwhile, as lawyers, we had best be protecting the interests we know […]',[286] referring to shareholder interests. However, Berle changed the initial position he took in the debate. Throughout the book *Modern Corporation and Private Property*, his position transformed 'from a friend of shareholders to advocate of the corporation as an instrument for furthering national social welfare policy'.[287] Scholars have attributed this change to the changing political trajectory in the United States at the time.[288] The Berle-Dodd debate is significant in illustrating how the de facto separation of ownership from control and the increasing power of managers in large companies have shaped the legal scholarship on the purpose of the company and whom the managers owed fiduciary duties to. A few decades later, Berle came to accept that Dodd had won the debate. He admitted, 'Events and the corporate world pragmatically settled the argument in favour of Professor Dodd.'[289] Indeed, the period between the 1930s and 1970s was marked by 'managerialism'[290] as the dominant corporate governance model, which has the underlying premise that the company's purpose is to consider not only the shareholders' interest but also the broader public's interest.

Another point to highlight is that the shift in business patterns had important consequences for share ownership and the associated property rights. In this regard, Berle and Means have drawn an analogy between the owners of the company in the past and the owners of the modern company. They have pointed out that the owners of previous business had two attributes: the first was providing capital and the second was managing the business. However, these two attributes were no longer combined in the same person in the modern company. Instead, the shareholder has 'surrender[ed] control over his wealth' to solely become the 'provider of capital'.[291] In light of these reduced attributes, Berle and Means have posed the question, 'Must we not, therefore, recognize that we are no longer dealing with property in the old sense?'[292]

[284] AA Berle, 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45(8) Harv Law Rev 1365.
[285] Ibid 1372.
[286] Ibid.
[287] Bratton and Wachter, 'Shareholder Primacy's Corporatist Origins' (n 278) 118
[288] The political climate and the developments in this period in the Unites States are depicted in Bratton and Wachter, 'Shareholder Primacy's Corporatist Origins' (n 278).
[289] AA Berle, 'Modern Functions of the Corporate System' (1962) 62(3) Columbia Law Rev 433, 443.
[290] Talbot discusses the dichotomy in managerialist thought as pro-managerialist or anti-managerialist (or non-sectional and sectional managerialist) in terms of their perception of management as a progressive force; in Talbot, *Progressive Corporate Governance* (n 9) 103.
[291] Berle and Means, *The Modern Corporation and Private Property* (n 36) 297.
[292] Ibid

They have replied that 'An answer to this question cannot be found in the law itself. It must be sought in the economic and social background of law.'[293]

A similar change in share ownership occurred in the context of British businesses, which is illustrative of this 'economic and social background of law'. Ireland has depicted this change in his account of the economic and legal transformation of the joint-stock company share in the United Kingdom.[294] Accordingly, the transformation of the company share has been facilitated through the complete separation between shareholders and the company as well as the emergence of a developed share market.[295] Ireland has explained that the first joint-stock companies found in England in the 16th century were more akin to partnerships; their shares were large in denomination, there were restrictions on their transfer, and there was an absence of a market for their trade.[296] Thus, throughout the 17th to early 19th century, share ownership was regarded as having an 'equitable interest in the assets of the company',[297] which in effect 'tied' the members to the company. Thus, 'complete separation' could not be realised.[298] This situation changed in the first half of the 19th century. The judiciary reconceptualised the legal nature of the joint stock company share from an equitable interest in the assets of the company whose value was derived from the company's underlying assets to 'an autonomous form of property, independent of the assets of the company'.[299] Thus, Ireland has argued that the actual separation of incorporated companies from their members occurred once the legal and economic nature of the company share changed, not through the act of incorporation.[300]

The complete separation of the company from its members not only further distanced the shareholders to the companies' activities; 'they were expelled from the sphere of production into the sphere of exchange where titles to revenues circulated'.[301] The trajectory of these developments enabled the investor capitalist to generate greater surplus with minimal effort and risk. By contrast, the industrial capitalist who engaged in the production process had to undertake risks and contribute entrepreneurial activity into the business. On the other hand, as

[293] Ibid 298.
[294] See P Ireland, 'Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (1996) 17(1) J Legal Hist 41; Ireland, 'The Conceptual Foundations of Modern Company Law' (n 181).
[295] Ireland, 'Capitalism without the Capitalist' (n 294) 67-68.
[296] Ireland, 'The Conceptual Foundations of Modern Company Law' (n 181)
[297] Ireland, 'Capitalism without the Capitalist' (n 294) 49.
[298] Ibid 67.
[299] Ibid 68.
[300] Ireland, 'The Conceptual Foundations of Modern Company Law' (n 181) 151.
[301] Ireland, 'Capitalism without the Capitalist' (n 294) 68. Ireland further expands this point by referring to Marx's theory on 'money capital' and explains that through these developments shareholders became the 'sole owners of money capital' in Ireland, 'Capitalism without the Capitalist' (n 294) 69. For further discussions on Marx's theory on money capital, see Chapter 2.2.a.

Ireland has noted, 'shareholders [have] gradually relinquished many of the rights and powers traditionally associated with ownership'.[302] In a similar vein, Talbot has argued that this commodification of the company share has made shareholders more distant from the companies, undermining their entitlement claims.[303] The weakening of the ownership status of the company shareholders later became problematic for the supporters of the shareholder primacy theory who tried to justify corporate governance rules protecting shareholder interests by claiming that shareholders' interests should prevail because they own the companies.[304]

Berle and Means have also observed the change in the nature of ownership status of shareholders in the United States. They have argued that 'in earlier times the owner of property has been entitled to the full use or disposal of his property'[305], but as shareholders became owners of passive property, their lack of entrepreneurial activity meant that their 'real right of disposition' over their property was only 'over any returns which may be distributed to him, and over the proceeds of its sale'.[306] Subsequently, shareholders becoming passive property owners had ramifications for shareholders' entitlement claims, especially over the important issue of whose interests the company should be operated for.[307] The authors have concluded as:

> On the one hand, the owners of passive property, by surrendering control and responsibility over the active property, have surrendered the right that the corporation should be operated in their sole interest, they have released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights. At the same time, the controlling groups, by means of the extension of corporate powers, have in their own interest broken the bars of tradition which require that the corporation be operated solely for the benefit of the owners of passive property.[308]

Throughout Berle and Means' analysis, they reject the application of strict property rights to the passive shareholder and opt for a 'modification of the principle of private property', which they regard as an essential consequence of shareholders giving up their control.[309] This freed the managers from solely pursuing shareholder interests, and that 'they have placed the community in a position to demand that modern corporation serve not alone the owners or the

[302] Ireland, 'Defending the Rentier' (n 265) 6.
[303] Talbot, 'Why Shareholders Shouldn't Vote' (n 192) 792-793.
[304] Lynn Stout presents arguments against this justification that the shareholders own the corporation from the perspective of American corporate law, in Stout, *The Shareholder Value Myth* (n 8) 37-38.
[305] Berle and Means, *The Modern Corporation and Private Property* (n 36) 294.
[306] Ibid 251.
[307] Ibid 293.
[308] Ibid 312.
[309] Ibid 311.

control but all society'.[310] The situation created the possibility that companies, or management more specifically, could in fact seek a social purpose. According to Talbot, the weakening of shareholders' ownership rights has manifested 'a potential for social change' in the companies.[311] For this change to materialise, Berle and Means have proposed that managers 'develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity'.[312] This idea of managers as 'autonomous decisionmaking bodies'[313] further resulted in the public company being perceived by scholars and the public as 'capable of balancing the interests of all those involved from shareholders to consumers and employees'.[314] Stout has asserted that neither shareholder interests nor the idea of shareholder value was prioritised over the interests of stakeholders in the managerial corporate governance era.[315] Moreover, Ireland has noted that by the 1950s, there was a widely held belief in the ability of managers to balance different interests using the discretion they had acquired in this period. [316] Indeed, the arguments put forth by Dodd in the early 1930s materialised in the decades that followed. Subsequently, he argued:

> Business - which is the economic organization of society - is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers even if the proprietary rights of its owners are thereby curtailed. […] legal tradition is rather in favor of treating it as an institution directed by persons who are primarily fiduciaries for the institution rather than for its members.[317]

The separation of ownership from control and the subsequent changes in ownership rights were not the only reasons for the shift in perception of whom the managers owed fiduciary duties to. Ireland has pointed out that the period following the Second World War experienced the disempowerment of the capitalist class over labour, which was evident from decreasing income and wealth inequality levels.[318] The post-war period was characterised by immense technological progress that led to increased profit, growth, and employment. This was supplemented by Keynesian policies 'which made it possible for social struggles to obtain a

[310] Ibid 312.
[311] Talbot, *Critical Company Law* (n 128) 112.
[312] Berle and Means, *The Modern Corporation and Private Property* (n 36) 312-313.
[313] Stout, 'The Toxic Side Effects of Shareholder Primacy' (n 15) 2005.
[314] Talbot, *Critical Company Law* (n 128) 108.
[315] Stout, 'The Toxic Side Effects of Shareholder Primacy' (n 15) 2005.
[316] P Ireland, Law and the Neoliberal Vision: Financial Property, Pension Privatisation and the Ownership Society' (2011) 62(1) NILQ 1, 12.
[317] Dodd, 'For Whom Are Corporate Managers Trustees?' (n 255) 1162-1163.
[318] P Ireland, 'Law and the Neoliberal Vision' (n 316) 12.

substantial increase in workers' purchasing power, coupled with a system of social protection'.[319] A class comprise between capital and labour was fully realised by the 1950s in the United States with the help of Keynesian policies that had the objective of 'full employment, economic growth, and welfare of its citizens, and that state power should be freely deployed, alongside of, or if necessary, intervening in or even substituting for market processes to achieve these ends'.[320] It was in this period that the power of finance started declining in relation to labour.[321]

Dignam and Galanis have noted that the period between the post-war era to the late 1970s witnessed 'an unprecedented period of economic growth and wealth creation often referred to as "the golden age of capitalism"'.[322] These developments proved that 'corporate governance could be non-shareholder oriented and corporations could operate in the interests of the community'.[323] Nevertheless, this view was to be strongly rejected by the neoliberal proponents in the period starting from the mid-1970s. During this time, falling profits and economic problems created the opportunity for capitalists, particularly the financial property owners, to regain their power over workers.[324] The next section discusses the shift from the managerial corporate governance era to a shareholder primacy dominated one, which was enabled by the change of power configurations in society facilitated by the rise of the neoliberal ideology.

[319] Duménil and Lévy, *Capital Resurgent* (n 45) 184.
[320] Ireland, 'Financialization and Corporate Governance' (n 252) 10.
[321] Ibid 14-15.
[322] Dignam and Galanis, 'Importance of Macroeconomic Context' (n 268) 212.
[323] Talbot, *Progressive Corporate Governance* (n 9) 117.
[324] Ireland, 'From Lonrho to BHS' (n 39) 19.

3 The Mainstream Corporate Governance Model

a. Introduction: Shareholder Primacy on the Rise

The years of social peace and economic stability sustained under the post-war class compromise started to break down throughout the Anglo-American economies from the late 1960s onwards. Subsequently, liberal thought re-emerged[325] with its classical economic assumptions[326] as an alternative to the Keynesian policies of the time. In line with Talbot's argument that the neoliberal corporate governance in hegemony today 'reveals a political as much as an economic theory',[327] it is necessary to explore the premises of the neoliberal ideology to grasp how it became the 'economic and political orthodoxy of the capitalist system'[328] and how it has facilitated the rise of the shareholder primacy theory as the prevailing mode of corporate governance globally.

At the core of neoliberal ideology lies the idea that social welfare can be most optimally achieved through freeing the markets and individuals from any state constraints.[329] Harvey, however, has asserted that neoliberalism should be perceived 'as a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites'.[330] In the managerial era, the capitalists' power has been restrained through the policies adopted by the welfare state and the managers of large companies who were inclined to consider a broader range of interests beyond those of shareholders whilst running the company. Moreover, the financial architecture established under the Bretton Woods system has kept the power of finance in check through fixed exchange rates and restrictions on international capital flows. Nevertheless, when economic conditions deteriorated in the advanced capitalist economies, the opportunity arose for the capitalist class to reassert their power over labour by promoting neoliberal policies. Indeed, as Harvey has noted, such policies could only become influential in

[325] I used the term re-emerged as it first emerged as a 'collective thought' in the 1940s with the establishment of the Mont Pelerin Society, by scholars formed around Friedrich von Hayek 'to shift elite opinion in a neoliberal direction' in D Cahill and M Konings, *Neoliberalism* (Polity Press 2017) 8.
[326] See A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (The Library of Economics and Liberty, first published 1776, Edwin Cannan ed, Methuen 1904) where Smith discusses the laissez-faire, free markets through his articulation of the 'invisible hand' hypothesis. (419-421). Accordingly, free individuals acting in their best interests in a market guided by the natural forces - a phenomenon called the 'invisible hand', will create the greatest value both for themselves, and ultimately for the whole society (456). The conclusion that follows is that markets are not only made up of rational individuals, but the acts of these rational individuals also lead to the mutual gain of all, also known as the 'trickle-down' effect. Also, see M Friedman, Capitalism and Freedom (Chicago UP, 1962).
[327] Foreword in Talbot, *Progressive Corporate Governance* (n 9).
[328] C Crouch, *The Strange Non-Death of Neoliberalism* (Polity 2011) vii.
[329] Harvey, *A Brief History of Neoliberalism* (n 35) 2. See Friedman, *Capitalism and Freedom* (n 326).
[330] Harvey, *A Brief History of Neoliberalism* (n 35) 19.

a particular set of circumstances.[331] These circumstances have materialised from the late 1970s onwards in the United States and the United Kingdom, both of which experienced economic turmoil mainly in the form of 'stagflation', which refers to an economy with high inflation, unemployment, and low growth.[332]

According to Duménil and Lévy, the main reason why the advanced capitalist economies experienced economic crisis was the falling rates of profit.[333] They have drawn from a Marxist analysis to argue that the low levels of profits decrease companies' abilities to accumulate capital, thus causing slowdowns in production and increasing unemployment.[334] The falling rate of profits can be attributed to several factors. The international financial order created by the Bretton Woods Agreement in 1944[335] through the establishment of the IMF and the WB had constructed a regime of fixed currency exchange rates pegged to the US dollar. The dollar was then convertible to gold at a fixed rate. This system aimed to 'shield countries from the destabilizing dynamics of international finance'.[336] This regime also strictly controlled cross-border capital movements, limiting any speculative activity and thus the financial gains of the capitalists. However, one pillar of this financial architecture was discarded in 1971 when President Nixon announced the end of the US dollar's convertibility into gold,[337] and the US transitioned to a floating exchange rate system.[338]

The system of floating exchange rates was necessary for the successful implementation of neoliberal policies since it signified that the state had less authority over price determination and hence over the workings of the market. As a corollary, state regulation on capital movements became less effective, and financial deregulation took off in the Western economies, signalling the move away from Keynesianism towards a neoliberal free-market policy.[339] The rate of profits continued declining after the drastic increase in oil prices due to

[331] Ibid 20. In the 1990s, the collapse of communism has further facilitated neoliberal economic and political policies to become the orthodoxy in the world.
[332] Cahill and Konings, *Neoliberalism* (n 325) 36.
[333] Duménil and Lévy, *Capital Resurgent* (n 45) 22-23.
[334] Ibid 27.
[335] UN Monetary and Financial Conference, 'Proceedings and Documents of the United Nations Monetary and Financial Conference 1-22 July 1944 ' (United States Government Printing Office, 1948).
[336] Cahill and Konings, *Neoliberalism* (n 325) 33
[337] 'Nixon Ends Convertibility of US Dollars to Gold and Announces Wage/Price Controls' *Federal Reserve History* (August 1971) <https://www.federalreservehistory.org/essays/gold_convertibility_ends> accessed 28 April 2017.
[338] Entering the 1960s, as United States started losing its superiority in manufacturing to competition elsewhere, coupled with the increased military expenditures, it started experiencing trade deficits. This led to the overvaluation of the US dollar against the gold, resulting in foreigners to 'cash in' their dollars for gold, creating further difficulties for the US economy, therefore resulting in the decision to end US Dollar's peg to gold. See Cahill and Konings, *Neoliberalism* (n 325) 33-34.
[339] Cahill and Konings, *Neoliberalism* (n 325) 34.

the Arab oil embargo against the US between 1973-1974.[340] The increase in oil prices negatively affected US industry, resulting in rising prices, inflation, and stagnated growth. The low levels of profit meant that there were no investors willing to put their money in financing companies, which led to a bear stock market which entails continuously downward share prices and a generally negative outlook. In sum, the falling stock prices considerably led to doubts over the 'efficacy' of managerial corporate governance and its ability to generate profit.[341]

Another development in this period was the increasing power of institutional shareholders due to the spread of share ownership amongst the public through mutual funds, pension funds, and insurance companies. Accordingly, the ratio of institutional shareholdings in US public companies increased from 16% in 1965 to 47% in 1987.[342] As share ownership passed from individuals to institutional investors, collective shareholders became much more influential in affecting company objectives. Also, because their shareholdings were large enough, they now had the power to sell their holdings if they believed the company was being poorly run, which would depress the share price.[343] This paved the way for the active shareholder monitoring of corporate managers' performance through 'objective' performance criteria that corresponded to share price.[344] Moreover, the pay structures of top managers became tied to the share price through mechanisms such as stock options from the 1950s onwards; thus, 'US corporate managers developed an ever-growing personal interest in boosting the market value of their companies' stock.'[345]

On the other hand, the agency theorists have argued that managers should not be left to their own discretion because 'like all rational economic actors, [managers] have incentives to perform suboptimally when acting as agents'.[346] On this point, Manne's 'market for corporate control' thesis has argued that managers needed to be disciplined by market mechanisms so they would not diverge from pursuing shareholder interests.[347] He has argued that there is 'a high positive correlation between corporate managerial efficiency and the market price of shares

[340] According to the United States' Department of State; 'During the 1973 Arab-Israeli War, Arab members of the Organization of Petroleum Exporting Countries (OPEC) imposed an embargo against the United States in retaliation for the U.S. decision to re-supply the Israeli military and to gain leverage in the post-war peace negotiations' in United States Department of State, 'Oil Embargo, 1973–1974' <https://history.state.gov/milestones/1969-1976/oil-embargo> accessed 27 April 2017.
[341] Stout, 'The Toxic Side Effects of Shareholder Primacy' (n 15) 2008.
[342] Cheffins, 'The History of Corporate Governance' (n 253) 11.
[343] Ibid.
[344] Stout, 'The Toxic Side Effects of Shareholder Primacy' (n 15) 2009.
[345] W Lazonick and M O'Sullivan, 'Maximizing Shareholder Value: A New Ideology for Corporate Governance' (2000) 29 (1) Economy and Society 13, 25.
[346] WW Bratton, 'Confronting the Ethical Case Against the Ethical Case for Constituency Rights' (1993) 50(4) Wash & Lee L Rev 1449, 1462.
[347] Manne, 'Mergers and the Market for Corporate Control' (n 43).

of that company'. Therefore, inefficient managers who fail to increase stock price would be replaced through the market mechanism.[348] This theory formed the foundations of the idea that pursuing share price maximisation would be the most efficient way of operating a company. As Lazonick and O'Sullivan have noted, 'the rate of return on corporate stock was their measure of superior performance, and the maximization of shareholder value became their [agency theorists'] creed'.[349] It was in the context of a market for corporate control and hostile takeovers that company executives began to 'push up the market value of the company's stock' at all costs.[350] Cheffins has noted that by the 1980s, these developments had paved the way for 'a shareholder oriented corporate governance infrastructure'.[351] Subsequently, the perceptions of the purpose of the company started to shift; many started to believe that the company's purpose was to maximise shareholder wealth and were aided by prominent scholars who spread the shareholder primacy agenda. Friedman, in his infamous newspaper article 'The Social Responsibility of Business is to Increase its Profits', went as far as stating that businessmen who consider social goals to be the responsibility of business were 'unwitting puppets of the intellectual forces that have been undermining the basis of a free society'.[352]

For Harvey, the purpose of the neoliberal project is to 'disembed' the capital from the constraints of the Keynesian policies of an interventionist state.[353] As Cahill and Konings have argued, the supporters of neoliberal ideology 'sought to cultivate the image of neoliberalism as concerned with the freeing of markets by limiting the state'.[354] However, neoliberals believed that state intervention was still required to sustain the proper functioning of the market. As Friedman has acknowledged, 'The existence of a free market does not of course eliminate the need for government.'[355] On the political front, the election of Margaret Thatcher as the Prime Minister of the United Kingdom in 1979 and Ronald Reagan as the President of the United States in 1980 ignited the transition process to neoliberalism. The two leaders consolidated the neoliberal policies as the 'new economic orthodoxy' through methods such as dismantling union power and the welfare state, privatisations, and policies to tackle inflation regardless of their consequences.[356] Both leaders insisted that the Keynesian policies were the root cause of

[348] Ibid 112.
[349] Lazonick and O'Sullivan, 'Maximizing Shareholder Value' (n 345) 16.
[350] Ibid 18.
[351] Cheffins, 'The History of Corporate Governance' (n 253) 11.
[352] Friedman, 'The Social Responsibility of Business is to Increase its Profits' (n 17).
[353] Harvey, *A Brief History of Neoliberalism* (n 35) 11.
[354] Cahill and Konings, *Neoliberalism* (n 325) 8.
[355] Friedman, *Capitalism and Freedom* (n 326) 15.
[356] Harvey, *A Brief History of Neoliberalism* (n 35) 23.

the problems faced in the previous decades.[357] Thus, Hertz has asserted that the commonality of their policies has been 'a rejection of all the pillars of the post-war Keynesian consensus'.[358]

A part of this consensus has been the less shareholder-oriented understanding of corporate governance of the managerial era. Stout has argued that the perception of the company having a social purpose came under attack from the neoliberal Chicago School of free-market economics and 'its intellectual cousin, the "law and economics" movement'.[359] The law and economics movement promoted a shareholder-centric corporate governance model and legitimised it on 'efficiency' grounds so that investor interests and claims to profit could be reasserted as the main purpose of management over any other societal purposes. Neoliberalists discarded the concept of managerial corporate governance, replacing it with the assertion 'that shareholder value corporations and open financial markets operate to maximise efficiency, wealth and welfare'. [360] This assertion seeks to legitimise the pursuit of shareholder wealth as a viable company objective. Thus the 'Reaganite and Thatcherite revolutions' led the way for shareholder value maximisation to be the 'exclusive focus of corporations'.[361] Harvey has added that 'once "the English-speaking world" adopted the neoliberal shareholder primacy model of corporate governance, it was hard to gainsay its considerable relevance to how capitalism in general was working internationally'.[362] In line with these developments, it became clear by the start of the 21st century that the shareholder primacy theory established itself as the mainstream model of corporate governance.

b. Legal Justifications for the Mainstream Corporate Governance Model

Neoliberalism is an ideology of political and economic thought. However, as Ireland notes, its premises have 'exerted enormous influence not only on policy making but on the trajectory of legal thought and scholarship'.[363] This has been particularly the case in the field of corporate governance law. The 'law and economics' scholarship that emerged from the neoliberal Chicago chool of free-market economics in the 1970s established most of the arguments for a pro-shareholder model of corporate governance; these arguments consisted of contractual theorisations of the company, the agency model, and efficiency-based assumptions. In an effort

[357] Cahill and Konings, *Neoliberalism* (n 325) 20.
[358] N Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy* (William Heinemann 2001) 20.
[359] Stout, 'The Toxic Side Effects of Shareholder Primacy' (n 15) 2005.
[360] P Ireland, 'Law and the Neoliberal Vision' (n 316) 13.
[361] Lazonick and O'Sullivan, 'Maximizing Shareholder Value' (n 345) 14.
[362] Harvey, *A Brief History of Neoliberalism* (n 35) 62-63.
[363] P Ireland, 'Law and the Neoliberal Vision' (n 316) 5.

to promote shareholder interests and reassert the power of capital over labour in the company, these scholars have resorted to various justifications for shareholders' entitlement to have the company run in their sole interests. In this section, I first discuss the ownership arguments of the shareholders. The ownership claims started losing their validity in practice by shareholders becoming passive investors and in law by the doctrine of separate personality. Hence, towards the end of the managerial era, the supporters of shareholder primacy theory relied on other justifications such as the efficiency claims of the law and economics scholarship to legitimise shareholder wealth maximisation as the proper purpose of the company.

Regarding the ownership claims, Kraakman and others have defined one of the core features of the corporate form to be 'investor ownership'.[364] Friedman has also asserted that the 'individuals own the corporation'.[365] These claims are based on the 'liberal legal doctrine, [whereby] stocks and shares are equivalent to ownership titles, which give the owner full and absolute disposition rights over the object of ownership'.[366] The ownership claim has historical underpinnings in English law, which have been depicted by Ireland in his article *'Defending the Rentier: Corporate Theory and the Reprivatisation of the Public Company'.*[367] In the early 19th century, when joint-stock companies were regarded by law to be similar to partnerships due to the close ties the shareholders had with the companies they invested in, shareholders were regarded 'as the company'. Later, in the mid-19th century, the legal position of shareholders changed along with the establishment of large joint-stock companies with many investors, small denominations, and the establishment of a developed stock market. The share was legally redefined from an equitable interests in company assets to 'an intangible form of property right in their own right'. The joint-stock company emerged as a separate entity capable of owning its own assets, leading to the doctrine of separate legal personality. By the end of this process, shareholders were perceived as 'owners' of the company instead of 'being' the company.[368] This resulted in what Ireland has described as the 'ownership myth', which is the perception that companies were the private property of its shareholders.[369]

Indeed, this view is still relevant. For instance, UK company law stipulates that the directors' duty is to promote the success of the company 'for the benefit of its members as a whole',[370]

[364] Kraakman and others, *The Anatomy of Corporate Law* (n 13) 33.
[365] Friedman, 'The Social Responsibility of Business is to Increase its Profits' (n 17).
[366] Engelen, 'Corporate Governance, Property and Democracy' (n 224) 395.
[367] Ireland, 'Defending the Rentier' (n 265).
[368] Ibid 145-148.
[369] Ibid 148.
[370] Companies Act (2006), 172(1).

which translates to the interest of the shareholders.[371] The ownership claims are also reflected in the debates on corporate governance over the purpose of the company. Proponents of the ownership argument assert that 'the company and its shares are private accumulations of capital, and any goal other than profit for shareholders is an infringement of private property'[372], thereby justifying shareholder wealth maximisation. However, the shareholders being the owners of the company is a misleading and legally incorrect perception. Stout has asserted that from the perspective of American law, 'shareholders are not the owners of the company'; instead, companies are separate legal entities that own themselves.[373] The situation is similar in English law. The modern doctrine of separate corporate personality, which completely separates joint-stock companies from their members,[374] has been established. Therefore, it can be concluded that from a common law perspective, the incorporated joint-stock company has its own legal personality and cannot be owned by its shareholders.

As previously discussed, in the managerial era, the shareholders' claims to profit as the owners of the company were side-lined alongside the transformation of the shareholder's ownership status from an entrepreneurial and active investor to a passive and rentier investor. On this point, Berle and Means have argued that because share ownership became passive and shareholders surrendered their control function, they could no longer claim the full extent of the rights provided under the 'strict doctrine of property rights'.[375] The waning ownership status of shareholders meant that the justifications for a corporate governance model that solely pursued shareholder interest became less valid. To reassert the shareholder entitlement to company profits, the law and economics scholarship defended shareholder primacy on the basis of economic efficiency, arguing that 'advancing shareholder wealth trickles down and advances societal wealth'.[376] This defence acclaims shareholder primacy as 'a means to the end of maximising the general wealth'[377] and is thus referred to as the 'consequentialist justification' of the shareholder primacy theory.[378] Yet, as Ireland has argued:

> contractual theories of the corporation, with their emphasis on efficiency-based justifications, emerged as an attempt to defend and legitimate the rights and privileges

[371] P Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62(1) The Modern Law Review 32, 62.
[372] Pettet, Lowry and Reisberg, *Pettet's Company Law (n 28)* 69.
[373] Emphasis added. Stout, *The Shareholder Value Myth* (n 8) 37.
[374] Ireland, 'The Myth of Shareholder Ownership' (n 371) 43.
[375] Berle and Means, *The Modern Corporation and Private Property* (n 36) 312.
[376] K Greenfield, 'Proposition: Saving the World with Corporate Law' (2008) 57(4) Emory Law Journal 948, 966.
[377] Bratton, 'Confronting the Ethical Case Against the Ethical Case for Constituency Rights' (n 346) 1462.
[378] Ireland, 'The Corporation and the New Aristocracy of Finance' (n 6) 84.

> of *rentier* shareholders in face of the increasing difficulties involved in characterising corporations as private property and shareholders as corporate 'owners'.[379]

The contractual nature of the company has its foundations in the dichotomy of the origins of the company. The contractarians regard the company as 'a single contracting party that coordinates the activities of suppliers of inputs and consumers of products and services'.[380] In other words, the form of the company is defined as 'associations formed by the agreement of the shareholders'.[381] This view is in contrast with the state theory, which asserts that companies exist by an act of the state. In other words, 'corporation's legal power is derived from the state'.[382] It follows from this view that since the company is created by the state, the state has the right to intervene in the running of the company. [383] The supporters of pure contract theory reject the state theory and argue for a non-interventionist approach to company law. Other supporters agree that the state has a role to play in the organisation of companies, but that role is limited to providing a standardised contract for reducing contracting costs and ensuring that the systems which allow a free market are in place.[384] The contract theory of the company has practical uses for the law and economics approach because it provides the intellectual basis for the idea of the company as a profit-maximising vehicle and 'entitlement to profit arises from the bargain made by shareholders'.[385]

Jensen and Meckling have formulated the company as 'one form of fiction which serves as a nexus for contracting relationships' in their 1976 article *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*.[386] They have argued that defining the company as an aggregate of contracts 'serve[d] to make it clear that the personalization of the firm implied by asking questions such as "what should be the objective function of the firm", or "does the firm have a social responsibility" is seriously misleading.'[387] Through this analysis, they were able to avoid the discussion of whether the company should have a social purpose because the company was not an individual; it was merely a legal fiction that was devoid of any motivations or intentions.[388]

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[379] Ireland, 'Defending the Rentier' (n 265)144.
[380] Kraakman and others, *The Anatomy of Corporate Law* (n 13) 6.
[381] Pettet, Lowry and Reisberg, *Pettet's Company Law* (n 28) 56.
[382] Ibid 55.
[383] HN Butler, 'The contractual theory of the corporation' (1989) 11(4) George Mason University Law Review 99, 100.
[384] Talbot, *Critical Company Law* (n 128) 1. In general, see Friedman, *Capitalism and Freedom* (n 326).
[385] Talbot, *Critical Company Law* (n 128) 37.
[386] Jensen and Meckling, 'Theory of the Firm' (n 10) 311.
[387] Ibid.
[388] Ibid.

In a similar way, Easterbrook and Fischel have emphasised the contractual nature of the corporation and concluded that this approach made redundant the debates over the purpose of the company or whether companies should have any social purpose.[389] Their reasoning is that since the company is a fiction, it is not capable of making moral choices. Also, the law and economics scholars have openly discarded the ownership arguments which became problematic for defending shareholder primacy since shareholders transformed into rentier investors. Fama has also argued that: 'The firm is just the set of contracts covering the way inputs are joined to create outputs and the way receipts from outputs are shared among inputs. In this "nexus of contracts" perspective, ownership of the firm is an irrelevant concept.'[390] Accordingly, the ownership of shareholders becomes a trivial concept; as the company is a set of contracts, it simply could not be owned.

In addition to the contractual model of the company, Jensen and Meckling have also elaborated on the agency relationship found within the company. Accordingly, an agency relationship is defined 'as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent'.[391] They have added that 'the relationship between the stockholders and manager of a corporation fits the definition of a pure agency relationship'.[392] They have also argued that if managers were to be given discretion over the allocation of company profits, they would use that discretion opportunistically for their own benefit.[393] Therefore, the shareholders need to limit these

> divergences from his interest by establishing appropriate incentives for the agent and by incurring monitoring costs designed to limit the aberrant activities, of the agent. In addition, in some situations it will pay the agent to expend resources (bonding costs) to guarantee that he will not take certain actions which would harm the principal or to ensure that the principal will be compensated if he does take such actions.[394]

All these create an 'agency cost' which is 'the dollar equivalent of the reduction in welfare experienced by the principal due to this divergence'.[395] Hence, the main preoccupation of

[389] Easterbrook and Fischel, 'The Corporate Contract' (n 234) 1446. In fact, they respond to such question with a 'Who Cares?' in the end of their article.
[390] Fama, 'Agency Problems and the Theory of the Firm' (n 11) 290.
[391] Jensen and Meckling, 'Theory of the Firm' (n 10) 308.
[392] Ibid 309.
[393] Ibid 313.
[394] Ibid 308.
[395] Ibid.

corporate governance becomes the alignment of the interests of company managers with those of shareholders to minimise the abovementioned agency costs.

In sum, the contract theory of the company 'sought to show that companies were associations formed by the agreement of the shareholders'.[396] The understanding of the company as a bundle of contracts has been instrumental in furthering a shareholder-centric agenda in other ways as well. According to Easterbrook and Fischel, the constituencies of the company negotiate for or accept a set of terms under its contract with the company. Those terms are the extent of their rights and liabilities.[397] The residual risk, however, 'is borne by those who contract for the rights to net cash flows'[398], where 'those' refers to the shareholder. In turn, the contracts of the managers stipulate that 'in exchange for the specified payoff, the agent agrees that the resources he provides can be used to satisfy the interests of residual claimants'.[399] Therefore, they conclude, the managers are bound by their contractual terms to pursue shareholder interest or be in breach. The idea of shareholders as risk bearers 'derives from the fact that the remuneration of equity holders is not specified beforehand in the contract which binds them to the company, unlike the remunerations of wage earners and creditors.'[400] Therefore, the argument goes, 'they should take precedence in the distribution of power and profit.'[401]

To summarise, the agency relationship between the shareholders and the managers and its accompanying contractual theory of the company constitute the building blocks of the shareholder primacy theory. The advocates of this theory perceive corporate governance to be merely 'about what system of legal or other mechanisms exist to ensure that the interests of the managers of the company are aligned with those of the shareholders'.[402] Hence, the law and economics scholarship has managed to reduce the complex set of issues surrounding corporate governance into a mere problem of conflict of interest between the shareholders and managers. In this regard, Talbot has argued that the contract theory of the company is actually 'an attempt to morally neutralize its [company's] activities'[403] and that it is not a purely legal theory but 'a highly ideological doctrine, encompassing and promoting neo-liberal values'.[404] This is evident

[396] Pettet, Lowry and Reisberg, *Pettet's Company Law* (n 28) 56.
[397] Easterbrook and Fischel, 'The Corporate Contract' (n 234) 1447.
[398] Fama and Jensen, 'Separation of Ownership and Control' (n 29) 302.
[399] Ibid 303.
[400] M Aglietta and A Rebérioux, *Corporate Governance Adrift: A Critique of Shareholder Value* (Edward Elgar 2005) 34.
[401] Ibid.
[402] Pettet, Lowry and Reisberg, *Pettet's Company Law* (n 28) 60.
[403] Talbot, *Critical Company Law* (n 128) 76. Also see, P Ireland, 'Property and contract in contemporary corporate theory' (2003) 23(3) Legal Studies 453, 453-509.
[404] Talbot, *Critical Company Law* (n 128) 77.

both in the substance and form of the supposedly universal standards of corporate governance propagated by the IFIs to the rest of the world.

c. Dissemination of the Mainstream Corporate Governance Model

Thus far, I have used a historical narrative to discuss how neoliberalism and the shareholder primacy theory of corporate governance with its various legal justifications managed to assert itself as the orthodoxy in corporate governance debates. It has not only succeeded over managerial corporate governance in Anglo-American countries; it has also been disseminated to the developing world in line with the neoliberal Washington Consensus agenda. These neoliberal policies which are based on the impetus of capital mobility and free markets have, as Dufour and Orhangazi have argued, facilitated 'the creation of conditions that enable international capital to increase its wealth and power over developing economies'.[405] Gill has noted that free capital mobility has given global investors from wealthy economies greater control over the profits of stock markets abroad and ensured more flexible labour markets 'so that capital can better exploit labour.'[406]

One of the most concerning aspects of the mainstream corporate governance model has been its legitimisation of the return of company profits to shareholders instead of reinvestment in production, research and development, improvement of working conditions, cleaner environment, or any other social purpose. Despite the claims that the mainstream corporate governance model facilitates stock market development and is therefore essential for country's economic growth,[407] this section argues that these rules instead seek to advance the interest of global investors. Drawing on this argument, I will analyse how particular corporate governance rules have been standardised and disseminated to the emerging markets under the auspices of the IFIs and the interrelated international organisations such as the OECD to secure the interests of foreign investors vis-à-vis other constituents of the company and the emerging markets' societies.

In identifying the mainstream corporate governance model, I utilise Talbot's assertion that neoliberal objectives are served through the form and substance of corporate governance laws.[408] Accordingly, she has argued that the substance of the shareholder primacy model of

[405] Dufour and Orhangazi, 'The 2000–2001 Financial Crisis in Turkey' (n 111) 103.
[406] Gill, *Power and Resistance* (n 70) 151.
[407] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 14.
[408] Talbot, *Progressive Corporate Governance* (n 9) 153.

corporate governance is derived from American scholarship and the model's form is derived from the United Kingdom.[409] Thus, the mainstream corporate governance model can be referred to as the 'Anglo-American variant' as per Soederberg's terminology.[410] It should be pointed out that this term does not imply that the two countries have identical corporate governance regimes. Nevertheless, both share common features such as well-developed stock markets, many companies listed on the exchange, and dispersed ownership amongst institutional and individual investors.[411] As discussed earlier, the legal and theoretical foundations of the mainstream model originated in the United States alongside the neoliberal law and economics scholarship. Unlike the managerial era, when the separation of ownership from control was seen as an opportunity to pursue societal objectives, that separation came to be regarded as a corporate governance problem from the 1970s onwards.[412] According to Fama, 'the separation of ownership and control can be perceived as an efficient form of economic organisation, *as long as one perceived the company as a "set of contracts"*'.[413] This contractual theory of the company and the agency relationship it accommodates helped to justify the shareholder primacy theory of corporate governance in the context of the Anglo-American corporate governance systems.

In the United Kingdom, the issue of corporate governance came to the fore with the establishment of the Committee on the Financial Aspects of Corporate Governance in 1991. This committee was established in reaction to the 'concerns about the working of the corporate system [which] were heightened by some unexpected failures of major companies and by criticisms of the lack of effective board accountability for such matters as directors' pay'.[414] The committee produced a report titled *The Financial Aspects of Corporate Governance* in 1992, which was also referred to as the Cadbury Report and was named after Sir Adrian Cadbury who chaired the committee. It included recommendations with the aim of increasing the corporate governance standards of UK-listed companies and 'to contribute positively to the promotion of *good corporate governance* as a whole'.[415]

The Cadbury Report contained a Code of Best Practice[416] that covered issues such as non-executive directors (NEDs), roles of shareholders in ensuring the application of corporate governance standards, and independent audits. Although the application of its provisions was

[409] Ibid 145.
[410] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 25.
[411] BR Cheffins, 'History and the Global Corporate Governance Revolution: The UK Perspective' (2001) 43(4) Business History 87, 88.
[412] Talbot, *Progressive Corporate Governance* (n 9) 91.
[413] Emphasis added. Fama, 'Agency Problems and the Theory of the Firm' (n 11) 289.
[414] *The Cadbury Report* (n 4) para. 2.2.
[415] Emphasis added. Ibid para. 1.2.
[416] Ibid 16.

not mandatory, the London Stock Exchange required all UK-listed companies to state in their annual reports whether they had complied with the Code or the reasons for non-compliance.[417] Thereby, 'the "comply or explain" approach was explicitly introduced by the committee [Committee on the Financial Aspects of Corporate Governance]'[418] into corporate governance regulation. According to the committee, 'the approach based on compliance with a voluntary code coupled with disclosure will prove more effective than a statutory code'.[419] However, its voluntary nature allowed a great deal of autonomy to companies in terms of implementation. Talbot has argued that this regulatory form has 'enabled the dominant shareholder primacy values of neoliberal corporate governance to flourish.'[420]

Aside from its form, the substance of the rules contained in the Cadbury Report also included the same theoretical underpinnings as the shareholder primacy theory. As Cheffins has noted, in the Cadbury Report and its consecutive revisions, 'the single overriding objective shared by all listed companies was to preserve and enhance over time their shareholders' investment'.[421] The corporate governance understanding of the report is explicitly founded upon the agency relationship between the shareholders and managers; the committee states that 'The issue for corporate governance is how to strengthen the accountability of boards of directors to shareholders.'[422] To further prevent the agency problem, the committee stresses the importance of separating the roles of the chief executive officer (CEO) and the chairman.[423] This rule still persists to date in the UK Corporate Governance Code of 2018.[424] Finally, the separation of executive and non-executive directors is stipulated in the Cadbury Report, whereby the NEDs are envisaged as monitors of the management and there is a minimum quantity of NEDs required for the sub-committees.[425]

The importance of the NEDs is also clear in the subsequent revisions to the Cadbury Report. The insistence on NEDs is criticised by Talbot on the grounds that it creates a 'dependency relationship' for the executives who are being monitored by the non-executives who have much less information relating to company operations.[426] Indeed, the mechanism of the Cadbury Report ensures that the NEDs monitor managers' performance mainly on the basis of objective

[417] Ibid para. 1.3.
[418] Dine and Koutsias, *The Nature of Corporate Governance* (n 5) 205.
[419] *The Cadbury Report* (n 4) para. 1.10.
[420] Talbot, *Progressive Corporate Governance* (n 9) 146.
[421] BR Cheffins, 'Corporate Governance Reform: Britain as an Exporter' (2000) Hume Papers on Public Policy 8(1) 14; Also see *The Cadbury Report* (n 4) para. 2.5.
[422] *The Cadbury Report* (n 4) para. 6.1.
[423] Ibid para. 4.9.
[424] FRC, The UK Corporate Governance Code (2018) 6.
[425] *The Cadbury Report* (n 4) para. 4.11.
[426] Talbot, *Progressive Corporate Governance* (n 9) 162.

share price criteria because they would not have the same level of knowledge of the intricacies of the business to evaluate their performance in greater depth. On the other hand, Ireland has argued that the NEDs have been pivotal in engraving the shareholder primacy norm at the board level in the United Kingdom since they 'enforce the general priorities of financialization'.[427]

Additionally, the voluntary form of the corporate governance regulations allow companies to sidestep any requirements relating to stakeholders since they are in charge of their own compliance under the comply-or-explain approach. Thus, executives are incentivised by the form of the regulation to prioritise shareholder interests. Indeed, directors do not owe any duties towards the stakeholders under corporate governance rules, unlike their contractual duties to shareholders that are emphasised under the agency model of the company. This voluntary and principle-based approach to corporate governance, which originated in the UK with the Cadbury Report, has thereafter influenced the corporate governance regulations globally.[428] The Code of Best Practice approach and the corporate governance principles prescribed under the Cadbury Report have 'struck a chord in many overseas countries; it has provided a yardstick against which standards of corporate governance in other markets are being measured'.[429]

Due to increasing global competition in the 1990s, companies had to resort to capital markets for funding, which necessitated that they be 'responsive to the concerns of shareholders'.[430] Alongside the companies looking for financing, investors who were no longer bound by national boundaries due to the liberalisation of markets turned their attention to stock markets abroad for more lucrative returns. By the mid-1990s, US institutional investors were already an active proponent of shareholder primacy and wanted to carry this approach to the companies in Europe and Japan that they were looking to invest in.[431] Moreover, following the Asian financial crisis of 1997-98, the corporate governance failures resulting from the family-controlled structure of the companies in the region were criticised. This led the OECD to publish a report in 1998 that stressed the importance of good corporate governance to economic performance and noted that good corporate governance was the key to obtaining funds from the global capital markets. The OECD report advanced the neoliberal 'common sense' assumption that companies with good corporate governance practices were more efficient because they reduced agency costs by providing mechanisms to ensure that managers pursued goals that maximised shareholder

[427] Ireland, 'Financialization and Corporate Governance' (n 252) 21.
[428] Talbot, *Progressive Corporate Governance* (n 9) 162.
[429] The Committee on Corporate Governance, *Committee on Corporate Governance Final Report (The Hampel Report)* (Gee 1998) para 1.5. For a discussion on the influence of the Cadbury Report on other countries see Cheffins, 'Corporate Governance Reform' (n 421) 6-8.
[430] Cheffins, 'The History of Corporate Governance' (n 253) 20.
[431] Ibid 20-21.

wealth. In the decades that followed, shareholder primacy theory has been exported to the rest of the world as a universal corporate governance standard through the apparatus of the IFI such as the IMF and the WB.

The IMF and the WB were established with the Bretton Woods agreement in 1944 'to avoid a repetition of the disastrous economic policies that had contributed to the Great Depression'.[432] Along with the United States government's decision to abandon the convertibility of the dollar to gold and float the exchange rate, the monetary system created with Bretton Woods came to an end by the early 1970s. Subsequently, the roles assumed by the IFIs began to change in line with neoliberal policy objectives summarised under the 'Washington Consensus' agenda.[433] The term 'Washington Consensus' was coined in 1989 to describe a list of policy reforms agreed to in Washington for implementation in developing countries. At their core, these reforms had the objective of financial liberalisation, along with policies that involved removing any barriers to foreign trade and investments, curbing public expenditure, and privatisation, further emphasising 'macroeconomic discipline, outward orientation, and the market economy' as fundamental for economic growth.[434] Cahill and Konings have argued that these policies had the sole objective of furthering the interests of 'Northern capital'.[435]

One of the ways by which the neoliberal policies have been imposed on the developing world has been through the use of 'conditionality' in return for the financial assistance provided by the IMF.[436] The period between 1970-80s witnessed a series of recessions in most of the developing countries, which made them resort to IMF loans that were extended in exchange for liberalising their economies.[437] By the 1980s, the IMF was imposing structural adjustment programs (SAPs) on the heavily indebted countries, which gave them access to funds for the repayment of their loans. In turn, however, they were required to undertake a 'radical neoliberal restructuring that included the deregulation of finance and trade as well as the privatization of public assets.'[438] The SAPs provided the template for what was referred to as the 'conditionality'

[432] IMF, 'Cooperation and reconstruction' <https://www.imf.org/external/about/histcoop.htm> accessed 5 August 2018. Also see UN Monetary and Financial Conference, 'Proceedings and Documents of the United Nations Monetary and Financial Conference 1-22 July 1944 ' (United States Government Printing Office, 1948). The World Bank was formerly called the International Bank for Reconstruction and Development (IBRD).
[433] See Soederberg, 'The Emperor's New Suit' (n 46).
[434] J Williamson, 'The Strange History of the Washington Consensus' (2004) 27(2) Journal of Post Keynesian Economics 195, 197. Also see J Williamson, 'Democracy and the "Washington consensus"' (1993) 21(8) World Development 1329.
[435] Cahill and Konings, *Neoliberalism* (n 325) 62.
[436] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 138.
[437] Gill, *Power and Resistance* (n 70) 96.
[438] Cahill and Konings, *Neoliberalism* (n 325) 42.

of the IMF loans.[439] Put simply, the IMF conditionality referred to the set of policy recommendations in the form of SAPs which the debtor countries were required to undertake if they were to receive financing from the IMF. In effect, the SAPs applied immense pressure on these countries to create investment conditions that are 'favourable to global capital'.[440]

The conditions favourable for capital have been defined by the IMF and the WB under their mutually administered ROSCs. The ROSCs initiative was launched in 1999 for 'promoting greater financial stability, both domestically and internationally, through the development, dissemination, adoption, and implementation of international standards and codes'.[441] Soederberg describes this post-Washington Consensus agenda as the new international financial architecture, which includes the G20 and the Financial Stability Forum (FSF).[442] She argues that the new international financial architecture, similar to 'its predecessor'[443], 'remains firmly rooted in the principle of global capital mobility found in the Washington Consensus'.[444] Following the East Asian financial crisis of 1997–98, the G7 leaders 'acknowledged that the participation of major emerging market countries is needed on discussions on the international financial system.'[445] Thus, the G20, founded in 1999, also included 'strategically important' emerging market countries.[446] Within this system, the FSF was mandated 'to coordinate the emerging international standards'.[447] In 2009, the FSF was replaced by the Financial Stability Board (FSB), the primary objective of which is defined as promoting international financial stability through 'coordinating national financial authorities and international standard-setting bodies as they work toward developing strong regulatory, supervisory and other financial sector policies'.[448] In turn, the FSB 'has also been assigned more effective mechanisms for encouraging compliance with international standards'.[449]

[439] Cahill and Konings, *Neoliberalism* (n 325) 43.
[440] Ibid 62.
[441] The WB, 'Reports on the Observance of Standards and Codes' (n 52).
[442] See Soederberg, *The Politics of the New International Financial Architecture* (n 49).
[443] Soederberg, 'The Emperor's New Suit' (n 46) 453.
[444] Ibid 464.
[445] 'What is the G20 Summit?' <https://g20.org/en/summit/about/> accessed 15 December 2018.
[446] Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South' (n 70) 12. The G20 'participants are heads of state and government from Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Republic of Korea, Republic of South Africa, Russia, Saudi Arabia, Turkey, the United Kingdom, the United States of America, and the European Union (EU)' in 'What is the G20 Summit?' (n 445).
[447] E Helleiner, 'The Financial Stability Board and International Standards' CIGI G20 Papers No.1 (June 2010) 4.
[448] FSB, 'About the FSB' <http://www.fsb.org/about/#mandate> accessed 17 December 2018.
[449] Helleiner, 'The Financial Stability Board and International Standards' (n 447) 8.

To this end, as previously mentioned, the IMF and the WB have determined 'international standards' in 12 policy areas that constitute the ROSCs.[450] The ROSCs contain information on member countries' levels of compliance with these defined standards in each of the policy areas, thereby forming a component of the FSB's compliance mechanism to ensure that its objectives are met.[451] The ROSCs are also employed by IFIs, in particular the IMF, as benchmark to assess debtor countries' compliance levels with their loan conditionalities.[452] Although the implementation of the ROSCs is entirely voluntary, refusing to abide by these standards would not only put further financing from the IMF at risk, but as Soederberg has noted, 'refusal to submit to such practices will inevitably send negative signals to the international investment and financial communities'.[453] Corporate governance has been established as one of these 12 policy areas of the ROSCs. This has been a key step in facilitating the global dissemination of the standards envisaged under the mainstream corporate governance model. The IFIs measure national corporate governance frameworks, laws, and practices against the OECD Principles to determine whether they are being implemented at the country level.[454] Thus, the OECD acts as the standard-setting body for the corporate governance module of the ROSCs.

The background to the OECD's rule-setting in the area of corporate governance follows the East Asian financial crisis, which highlighted the role of weak corporate governance practices in causing the crisis and the need to address these governance practices to 'revive investor confidence'.[455] In 1998, the OECD Advisory Group on Corporate Governance, with the mandate 'to analyse international corporate governance issues and to suggest an agenda for further OECD initiatives' published the report titled *Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets*.[456] The neoliberal undertone of the report can be identified through its references to efficiency, competitive labour markets, the private nature of the company, and its reliance on market-driven solutions for corporate governance, rather than regulation by the state.[457] Moreover, the report places shareholder primacy at the core of corporate governance by defining 'the mission of the corporation in the

[450] IMF, 'Standards and Codes: The Role of the IMF' (n 48).
[451] Helleiner, 'The Financial Stability Board and International Standards' (n 447) 18.
[452] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 136-138.
[453] Ibid 138.
[454] The WB, 'Reports on the Observance of Standards and Codes' (n 52).
[455] I Magdi and N Chamlou, 'Corporate Governance: A Framework for Implementation' (The World Bank 2000) 15.
[456] OECD, 'Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets' (1998) 8 <https://www.oecd-ilibrary.org/content/publication/9789264162709-en> accessed 10 September 2017. This report has been commonly referred to as 'The Millstein Report' named after the chairman of the advisory group Ira M. Millstein.
[457] Ibid 13-16.

modern economy' as being one of creating long-term profit for the purpose of enhancing shareholder value.[458]

Although the report acknowledges that companies should recognise wider societal interests, it adds that serving social purposes should ultimately benefit investors in the long run.[459] Furthermore, it adopts an instrumental approach towards stakeholders by asserting that social costs may be necessary to ensure that the company makes profit and that this would benefit the society in the long term.[460] Finally, the report also identifies two types of agency costs which corporate governance needs to resolve to protect shareholder interests: limiting management discretion and ensuring that minority shareholders are protected.[461] The OECD Principles, first published in 1999, draws on the findings of this report.[462] They were revised in 2004 and again following the financial crisis of 2008, which was 'to an important extent attributed to failures and weaknesses in corporate governance arrangements',[463] and took their current form with a revision in 2015.[464]

As with the OECD Advisory Group's report published a year earlier, the 1999 OECD Principles contain neoliberal undertones. For instance, their preamble notes that corporate governance is 'one key element in improving *economic efficiency*'.[465] As pointed out by Dine and Koutsias, the use of 'a key neoliberal axiom' – efficiency 'gives the message that markets should be "efficient" without properly defining efficiency'.[466] Thus, in the context of corporate governance, efficiency is equated with increasing share prices and hence with maximising shareholder wealth. The preamble also indicates that 'the Principles represent a common basis that OECD member countries consider essential for the development of *good* governance practice.'[467] What is meant by good practice is elaborated as follows: 'Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and shareholders and should facilitate effective monitoring, thereby encouraging firms to use resources more efficiently.'[468] This broad statement reveals the OECD's take on corporate governance, which appears to be based

[458] Ibid 27.
[459] Ibid 67.
[460] Ibid.
[461] Ibid 40.
[462] Magdi and Chamlou, 'Corporate Governance: A Framework for Implementation' (n 455) 7.
[463] G Kirkpatrick, 'The Corporate Governance Lessons from the Financial Crisis' (OECD 11 February 2009) <https://www.oecd.org/finance/financial-markets/42229620.pdf> 2.
[464] OECD, 'G20/OECD Principles of Corporate Governance' (2015).
[465] Emphasis added. OECD, 'OECD Principles of Corporate Governance' (1999) 9.
[466] Dine and Koutsias, *The Nature of Corporate Governance* (n 5) 12.
[467] Emphasis added. OECD, 'OECD Principles of Corporate Governance' (1999) 9.
[468] Ibid.

on the same theoretical underpinnings as shareholder primacy theory, as evidenced in its exclusive focus on the relationship between shareholders and managers.

There have been minor changes to the OECD Principles of 1999 through its revisions in 2004 and 2015. For instance, the 2004 revision added a new heading titled 'Ensuring the Basis for an Effective Corporate Governance Framework', in addition to the existing 'The Rights of Shareholders', 'The Equitable Treatment of Shareholders, 'The Role of Stakeholders in Corporate Governance', 'Disclosure and Transparency', and finally 'The Responsibilities of the Board'.[469] Another novelty in the 2015 version was the introduction of a new set of corporate governance principles for 'Institutional Investors, Stock Markets, and Other Intermediaries' that 'addresses the need for sound economic incentives throughout the investment chain, with a particular focus on institutional investors acting in a fiduciary capacity.'[470] The important points regarding the substance of the OECD Principles and any changes in the revisions will be briefly discussed in the following paragraphs.

The new set of principles added under the area of 'Ensuring the Basis for an Effective Corporate Governance Framework' along with the 2004 revisions includes the overarching principle that 'The corporate governance framework should promote transparent and *efficient* markets […]' and stresses the importance of the rule of law and enforcement.[471] The second set of OECD Principles deals with the 'The Rights and Equitable Treatment of Shareholders and Key Ownership Functions'.[472] These principles broadly state that the corporate governance frameworks should protect shareholder rights such as the transferability of their shares, the right to access relevant information on a timely and regular basis, participation and voting rights, electing the board members, and so forth. This heading also deals with the presumably universal corporate governance principle of fairness, which was initially designed as a separate heading under the 1999 and 2004 versions as 'The Equitable Treatment of Shareholders'.[473] The rules under this section require that the corporate governance frameworks should ensure that shareholders are subject to equitable treatment, particularly the minority and foreign shareholders, although what is implied by the principle of equitable treatment is not provided. The equitable treatment of shareholders is mentioned primarily in terms of facilitating their attendance to general shareholder meetings and voting.[474] The principle of equitable treatment

[469] OECD, 'OECD Principles of Corporate Governance' (1999).
[470] G20/OECD, 'OECD Principles of Corporate Governance' (2015) 5.
[471] Emphasis added. OECD, 'OECD Principles of Corporate Governance' (2004) 17.
[472] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 18.
[473] OECD, 'OECD Principles of Corporate Governance' (1999) 17; OECD, 'OECD Principles of Corporate Governance' (2004) 20.
[474] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 20.

is also referred to under the principles on disclosure and transparency, which require the 'simultaneous reporting of material or required information to all shareholders in order to ensure their equitable treatment'.[475]

Finally, the principles envisaged under the 'The Responsibilities of the Board' assert that the board members have a duty of loyalty towards all shareholders and must ensure the equitable treatment of the minority shareholders and the shareholders of the dependent companies in the context of group companies.[476] This provision was not included in the 1999 OECD Principles, but was later added in the 2004 revisions and maintained in the latest version. The rules concerning the principle of equitable treatment carry particular significance for concentrated ownership structures because the OECD Principles strive to protect the rights of minority shareholders in companies with controlling owners. The principles can thus be construed as primarily advancing the interests of outside shareholders, which, as Soederberg has argued, serves the interests of foreign capital.[477]

Another area envisaged under the OECD Principles is 'The Role of Stakeholders in Corporate Governance'. This heading states, 'The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements'.[478] The overarching principle of this heading echoes the neoliberal contractual nature of the company. In terms of the progression of the principle for stakeholders, the initial version of the OECD Principles solely recognised that the stakeholder rights that were established by law ought to be protected,[479] while the 2004 revision added that their rights as established by mutual agreements also need to be recognised.[480] Hence, Dine and Koutsias have noted that 'stakeholders have a slightly enhanced status' in the revised 2004 Principles.[481] The final revision in 2015 maintained the earlier version's position on the overarching principle for stakeholders. This principle essentially implies that the company should safeguard stakeholder interests insofar as it is required by law or by mutual bargaining only. The principle for stakeholders is therefore the clearest expression of the shareholder primacy theory because it allows and possibly incentivises the company managers to pursue objectives against the interests of the stakeholders as long as they are lawful.

[475] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 41.
[476] Ibid 52.
[477] Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South' (n 70) 18.
[478] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 37.
[479] OECD, 'OECD Principles of Corporate Governance' (1999) 18.
[480] OECD, 'OECD Principles of Corporate Governance' (2004) 21.
[481] Dine and Koutsias, *The Nature of Corporate Governance* (n 5) 16.

It should also be noted that the 2015 revision moved away from its former position of recommending stakeholder participation in corporate governance as a 'performance-enhancing' tool[482] and instead stated that 'Mechanisms for employee participation should be permitted to develop.'[483] This is in line with the 'inclusive' approach of the 2015 Principles, wherein the OECD acknowledges the interdependency between stakeholders and 'corporate wealth creation'.[484] Nevertheless, the OECD Principles are not binding and do not require corporate governance principles to be implemented in national contexts on a mandatory basis. Therefore, as Talbot has rightly noted, the OECD Principles not only allow but also further encourage companies 'to fudge the issue of wider social concerns'.[485]

The next area of the OECD Principles is on 'Disclosure and Transparency', which stresses the importance of 'timely' and 'accurate' disclosure of material information.[486] The OECD has determined that material information is 'information that a reasonable investor would consider important in making an investment or voting decision'.[487] The rules under this heading are formulated in great detail and lay out extensive lists of points in relation to corporate matters which need to be disclosed for maintaining investor confidence. Moreover, the OECD has noted that having principles on disclosure and transparency 'helps improve public understanding of the structure and activities of enterprises, corporate policies and performance with respect to environmental and ethical standards, and companies' relationships with the communities in which they operate'.[488] However, the Principles also note that the disclosure requirements should not 'place unreasonable administrative cost or burdens on enterprises' or 'endanger their competitive position'.[489] This provision effectively curtails the extent of disclosures on compliance with environmental or ethical standards that will be available to public because it allows companies to keep information if they consider its release to cost the company.

Finally, the principles under the 'Responsibilities of the Board' include recommendations for 'the strategic guidance of the company, the effective monitoring of management by the board, and the board's *accountability to the company and the shareholders*.'[490] Thus, the accountability of the board is envisaged only in terms of shareholders, which mirrors the agency theory between managers and shareholders that underpins the OECD's approach to corporate

[482] OECD, 'OECD Principles of Corporate Governance' (1999) 18; OECD, 'OECD Principles of Corporate Governance' (2004) 21.
[483] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 38.
[484] Ibid 3.
[485] Talbot, *Progressive Corporate Governance* (n 9) 162.
[486] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 41.
[487] Ibid.
[488] Ibid 42.
[489] Ibid 41.
[490] Emphasis added. OECD, 'G20/OECD Principles of Corporate Governance' (2015) 51.

governance. Indeed, the Principles state that 'the board is chiefly responsible for monitoring managerial performance and achieving an adequate return for shareholders',[491] which is a clear expression of the shareholder primacy theory. Moreover, the annotations to the principle assert that the board has a duty to act in the best interest of the company and its shareholders whilst also mentioning that the board members 'are expected to take due regard of, and deal fairly with, other stakeholder interests'.[492] This position on boards' responsibilities is maintained throughout the initial 1999 version of the principles to the 2015 version.

Also, the OECD Principles stress the importance of NEDs, whose importance was initially highlighted in the Cadbury Report,[493] by stating that 'independent non-executive board members can provide additional assurance to market participants that their interests are safeguarded.'[494] The provisions on independent directors or NEDs signify the need for a control mechanism to restrict the power of controlling shareholders in companies with concentrated ownership. As the OECD has acknowledged, such shareholders may have 'considerable powers to appoint the board and the management'.[495] Thus, the presence of NEDs ensures that minority shareholder interests are safeguarded by restricting the influence of controlling shareholders on company management. Similarly, the OECD Principles perceive the separation of the chairman and the chief executive officer to be good practice since it strengthens 'the objectivity of the board and its independence from management'.[496] This principle works to ensure that no executive has sufficient independent power to supersede shareholder power over management. In other words, this principle helps to align management interests with shareholder interests. The separation of the chairman and the CEO roles has been foreseen in the OECD Principles since the first 1999 version and has been maintained to date.

In sum, both the substance and the form of the international corporate governance standards, which find expression in the OECD Principles as part of the IFIs' ROSCs modules, are founded upon 'the Anglo-American variant'.[497] The non-binding character of the corporate governance principles draw mainly on the voluntary approach, which was introduced in the United Kingdom by the Cadbury Report under the comply-or-explain method for regulating corporate governance. This accords with the neoliberal laissez-faire economics that rely on deregulation as a main policy objective. The OECD Principles are legally non-binding, and the OECD

[491] Ibid.
[492] Ibid.
[493] *The Cadbury Report* (n 4) 22-24.
[494] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 59.
[495] Ibid 57-58.
[496] Ibid 57.
[497] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 25.

refrains from explicitly recommending that its corporate governance principles should be regulated on a mandatory basis in national contexts, thus allowing companies to self-regulate their actions. This approach to corporate governance, as Ireland has argued on point, will 'serve to naturalize and depoliticize the corporate form as currently constituted and to entrench, as universal economic common-sense, a conception of the joint stock corporation as a "naturally" shareholder-oriented, private enterprise.'[498]

Second, the content or substance of the OECD Principles are underpinned by American law and economics scholarship with its contractual theory of the company and the agency relationship between the shareholders and managers. The scholarship holds that latter is solely accountable to the former and thus, managers are responsible to pursue shareholder interests only. Furthermore, the frequent use of the term 'economic efficiency' in the definitions of the objective of corporate governance frameworks signals the neoliberal undertone of the OECD's approach to corporate governance. Overall, it can be concluded that the OECD Principles have a 'neo-liberal tenor'[499] that is founded upon the primacy of the shareholder.

A critical analysis of the OECD Principles yields the conclusion that the primary concerns of universalising standards for good corporate governance are to ensure that shareholder interests are prioritised in the company and controlling shareholders' powers are restricted to further the interests of outside shareholders. As previously discussed, the process by which universal corporate governance standards were constructed came about as a policy response to the aftermath of the East Asian financial crisis. The concentrated ownership structure has been identified as a root cause of the crisis, which led to calls for corporate governance reforms that would protect minority shareholders.[500] Thus, instead of abandoning the neoliberal policies which caused the crisis in the first place,[501] the prescribed solution was the transformation of ownership and control patterns which involved 'a shift away from state capitalism towards a free market system based on investor interests and the maximisation of shareholder value'.[502] For Soederberg, the East Asian crisis has created 'an opportunity for more powerful states and capitals to take advantage of the weakened negotiating power of crisis-plagued governments and markets'.[503] Indeed, following the crisis, the IFIs were able to leverage the situation to impose neoliberal policies in the form of corporate governance standards in return for financial assistance.

[498] Ireland, 'Efficiency or Power? ' (n 38) 294.
[499] Dine and Koutsias, *The Nature of Corporate Governance* (n 5) 17.
[500] Cheffins, 'The History of Corporate Governance' (n 253) 21.
[501] JE Stiglitz, *The Price of Inequality* (Penguin Books 2013) 289-290.
[502] Gill, *Power and Resistance* (n 70) 151.
[503] Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South' (n 70) 9.

According to Gill, the policy measures which were led by the United States and the IMF 'sought to […] liberalize domestic social and economic structures so that they are more amenable to penetration, ownership and exploitation by the United States and other foreign corporate interests.'[504] Similarly, Soederberg has argued that the OECD Principles had two purposes. First, the dissemination of the OECD Principles ensures that developing countries abide by neoliberal policies, thereby stabilising the international financial system. Second, by promoting shareholder interest alone, the policies protect the interests of foreign capital.[505] This is evident in the preamble to the initial OECD Principles, which highlights 'the relation between corporate governance practices and the increasingly international character of investment'[506] and points out the increasing need to respond to the demands of 'institutional investors' in defining corporate governance.[507]

In terms of the raison d'etre for the OECD Principles and their dissemination, this thesis agrees with the arguments postulated by Gill and Soederberg. By blaming 'crony capitalism'[508] as the root cause for the East Asian crisis, the IFIs have made clear that the region needed

> restructuring along the lines of the American model of 'capital-market' based free enterprise where owners make all the key decisions, in contrast to the variants of East Asia model in which the interests of not only owners but also workers and the wider community are often taken into account in situations of crisis.[509]

This restructuring is still ongoing: the OECD Principles are exported to emerging markets and the rest of the world, where its standards have been used as 'the international reference point' in over 60 countries worldwide.[510] In sum, the primary aims sought by the IFIs and the OECD in line with the neoliberal agenda appears to be embedding the shareholder primacy norm in companies around the world, prioritising the interests of minority shareholders over those of controlling owners, and attempting to advance the rights of global investors in countries with concentrated ownership structure.

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[504] Gill, *Power and Resistance* (n 70) 78.
[505] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 132; Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South' (n 70) 9.
[506] OECD, 'OECD Principles of Corporate Governance' (1999) 10.
[507] Ibid.
[508] 'Crony capitalism' refers to the business system of East Asian countries where the prevalent form of company ownership is highly concentrated ownership, where there are also opaque pyramidal control structures. See Claessens, Djankov and Lang, 'The Separation of Ownership and Control' (n 95).
[509] Gill, *Power and Resistance* (n 70) 77-78.
[510] OECD, 'G20/OECD Principles of Corporate Governance' (2015) 3.

4 Stakeholder Theory of Corporate Governance

The mainstream corporate governance model with its common-sense goal of shareholder wealth maximisation as the sole purpose of the company gave rise to concerns over its viability as a system due to a series of company scandals mainly in the United States from the late 1990s onwards.[511] More recently, the global financial and economic crisis of 2008 has demonstrated that the mainstream corporate governance rules only brought short-termism. This led to detrimental outcomes for everyone, even for the shareholders because the shareholder primacy model of corporate governance, in fact, did not achieve efficiency.[512] Proponents of shareholder primacy who claimed that the pursuit of efficiency would be for the benefit of all have been proven wrong; instead, as Ireland has noted, that pursuit contributed to greater levels of inequality, especially in the United States and the United Kingdom where the shareholder primacy model has been endorsed the most.[513]

It is in this context that an alternative approach to the shareholder primacy theory has taken centre-stage in the debates on corporate governance, although that the idea was introduced much earlier.[514] The stakeholder corporate governance model holds that company managers should make decisions that benefit not just the shareholders, but also the other stakeholders of the company. [515] In line with this perspective, the stakeholder theory perceives the public company in a broader sense; they view it 'as public entities rather than just the private property of owners [which] have a variety of stakeholders, including insiders such as owners, managers, and employees, and outsiders such as lenders, suppliers, and customers.'[516] In turn, the stakeholder theory rejects the assumption that corporate governance is a set of means to ensure that capital providers ensure returns on their investment.[517] Instead, the stakeholder theory assumes that the company has the broader purpose of serving a variety of interests, including societal interests.

However, there is a divergence of views between the proponents of stakeholder theory in terms of the justifications for recognising stakeholder interests. One camp paradoxically considers taking into account stakeholder interests as long as they lead to profit. They argue on the basis of economic performance, claiming that 'adherence to stakeholder principles and practices

[511] BR Cheffins, 'The History of Corporate Governance' in Wright, Mike and others (eds), *The Oxford Handbook of Corporate Governance* (OUP 2013) 58-59.
[512] Talbot, 'Why Shareholders Shouldn't Vote' (n 192) 809.
[513] Ireland, 'Shareholder Primacy and the Distribution of Wealth' (n 34) 81.
[514] See Freeman, *Strategic Management: A Stakeholder Approach* (n 19).
[515] Freeman and McVea (n 19) 197.
[516] A Pendleton and H Gospel, 'Corporate Governance and Labor' in Wright, Mike and others (eds), *The Oxford Handbook of Corporate Governance* (OUP 2013) 636.
[517] Shleifer and Vishny, 'A Survey of Corporate Governance' (n 18) 737.

achieves conventional corporate performance objectives as well or better than rival approaches'.[518] Thus, the supporters of this version of the stakeholder theory attempt to justify stakeholder claims on the basis of efficiency by measuring whether the inclusion of broader interests would have more efficient outcomes, translated vaguely to increased share price. However, this is the very justification that the neoliberal law and economics scholars use to legitimise the shareholder primacy model. According to Talbot, this approach essentially implies that 'managers can best promote *shareholders'* interest by ignoring them.'[519] She argues that 'The simple and logical truth is that managers cannot take better care of shareholders (and therefore also their own performance-related remuneration) by looking after stakeholders.'[520] Thus, recognising stakeholder interests only as an instrument to achieve shareholder wealth maximisation does not challenge the mainstream corporate governance model; if anything, it supports the shareholder primacy theory's underlying assumptions.

The second camp argues that certain stakeholders contribute to the overall success of the company. Therefore, management should take decisions considering the stakeholder interests that make a 'firm-specific' contribution to the company.[521] Building on this approach, Blair and Stout have developed the 'the team production theory' of corporate governance.[522] This theory also has its foundations in the law and economics approach of the company; the authors assert that their theory is 'consistent with the "nexus of contracts" approach to understanding corporate law'.[523] Accordingly, team members are stakeholders who make firm-specific investments, which are those investments that are committed to the company. Thus, 'each party's specialized investment has little or no value outside the joint enterprise; neither can walk away from the venture and realize the value of the investment by selling it elsewhere'.[524] In this context, the board becomes 'a mediating hierarch-whose primary function is to exercise that control in a fashion that maximizes the *joint welfare of the team as a whole*'.[525] This hierarchical model of the company allows wide discretion to directors to mediate different stakeholder interests when deciding the allocation of profits. Subsequently, as Blair and Stout have admitted, the weakness of this theory is that 'any number of possible allocations among groups is possible.'[526] Since the team production theory is not backed by laws that require directors to considers all stakeholders'

[518] This view is called instrumentalist approach, in Donaldson and Preston, 'The Stakeholder Theory of the Corporation' (n 21) 67.
[519] Emphasis in the original text. L Talbot, 'Trying to save the world with company law? Some problems' (2016) 36(3) Legal Studies 513, 518.
[520] Ibid.
[521] Blair, 'Ownership and Control: Rethinking Corporate Governance' (n 23).
[522] Blair and Stout, 'A Team Production Theory of Corporate Law' (n 266).
[523] Ibid 254.
[524] Ibid 272.
[525] Emphasis is in the original text. Ibid 271.
[526] Ibid 325.

interests, the authors have added that the interests that they will ultimately take into account will be decided by 'political forces'.[527] They conclude that currently, political power is in favour of the shareholder class, which allows them to capture greater gains from the mediating process.[528] Considering the balance of power between the shareholders and the stakeholders has not shifted since the publishing of Blair and Stout's article in 1999, it is unlikely that the team production theory of corporate governance will challenge the orthodoxy of the shareholder primacy theory.

Finally, the third camp of stakeholder theory argues that stakeholder claims have an 'intrinsic value' of their own; in other words, 'each group of stakeholders merits consideration for its own sake and not merely because of its ability to further the interests of some other group, such as the shareowners'.[529] This view conceives pursuing stakeholder interest as a goal in itself and not as an instrument for furthering shareholder interests. To that end, Mitchell has argued from an American law perspective that the reason company directors prioritise shareholder interests above all others is 'a natural consequence of the existing legal order'.[530] Thus, there needs to be a legal recognition of stakeholders interests within the company structure.[531] He has criticised the established common law principle that company directors owe fiduciary duties primarily to shareholders on the basis that 'the fiduciary obligations […] are designed to deal with a variety of different types of conflict of interest'.[532] Therefore, Mitchell has concluded as follows:

> The increasing recognition of the modern corporation's profound effect on the lives of a variety of groups not traditionally within the corporate law structure has the potential to lead corporate law into the next century in a manner more reflective of the role that this type of organization actually plays in our society.[533]

This view is more in line with a 'progressive' model of corporate governance[534] that can induce a change in the mainstream model for the benefit of the stakeholders and society at large.

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[527] Ibid.
[528] Ibid 326.
[529] Donaldson and Preston, 'The Stakeholder Theory of the Corporation' (n 21) 67.
[530] Mitchell, 'Enforcing Corporate Constituency Statutes ' (n 264) 594.
[531] Ibid 585. Here Mitchell provides the American 'constituency statutes' as an example which allow (but not require) a company's board of directors to take into account the interests of a list of constituents alongside the shareholders in decision making.
[532] Ibid 590.
[533] Ibid 584.
[534] According to Talbot, progressiveness is defined as 'that which promotes the interests of the people as a whole, as that which puts labour at the centre of corporate governance and as that which enhances substantive social equality, enabling all to share in economic progress' in Talbot, *Progressive Corporate Governance* (n 9) xx.

Examination of the various perspectives on stakeholder theory indicates that their perceptions of the company and the responsibilities of managers generally contrast with the mainstream corporate governance model. It has been argued that 'the enlightened shareholder value' approach provided in the UK Companies Act 2006 may provide a middle way between the two opposing views.[535] In 1998, the Company Law Review Steering Group (the Steering Group) appointed by the Labour government at the time initiated a revision of UK company law with the aim of creating 'a modern company law for a competitive economy'.[536] The Steering Group identified two approaches to corporate governance: 'the enlightened shareholder value' and 'the pluralist' approach. The enlightened shareholder value approach corresponded to the shareholder primacy model by recognising the ultimate objective of company to be 'to generate maximum value for shareholders [which] is in principle the best means also of securing overall prosperity and welfare.'[537] On the other hand, the pluralist approach rejected the idea that shareholder wealth maximisation will achieve overall prosperity and welfare, accordingly:

> company law should be modified to include other objectives so that a company is required to serve a wider range of interests, not subordinate to, or as a means of achieving, shareholder value (as envisaged in the enlightened shareholder value view), but as valid in their own right.[538]

The term 'pluralist' signified that 'the interests of a number of groups should be advanced without the interests of a single group (shareholders) being overriding'.[539] As noted by Monks, these discussions effectively posed 'the alternatives as between "shareholder" and "stakeholder"' models of corporate governance'.[540]

After a series of consultation papers, the review process led to the enactment of UK Companies Act 2006, which eventually adopted the enlightened shareholder value approach. A novel aspect of this legislation was that the common law fiduciary duties of the directors were codified in the new Companies Act, thereby clarifying the issue of whose interest the company would be managed for.[541] Section 172 of the Companies Act 2006 deals with the director's 'duty to promote the success of the company'. Accordingly, the directors are required to promote the

[535] Pendleton and Gospel, 'Corporate Governance and Labor' (n 516) 636.
[536] This is the title to the consultation papers produced by the Company Law Review Steering Group.
[537] Department of Trade and Industry, 'Modern Company Law For a Competitive Economy: The Strategic Framework' (Company Law Review Steering Group, February 1999) para. 5.1.12.
[538] Ibid para 5.1.13.
[539] Ibid.
[540] RAG Monks, 'Modern Company Law for a Competitive Economy: The strategic framework' (2000) 8(1) Corporate Governance: An International Review 16, 19.
[541] Talbot, *Critical Company Law* (n 128) 181.

success of the company 'for the benefit of its members as a whole' whilst considering a set of other considerations such as the long-term consequences of their decisions and other stakeholder interests. As Tsagas has argued, under the enlightened shareholder value approach, 'stakeholders interests do not come second to shareholders interests, but rather constitute a means to an end of serving shareholder interests.'[542] In effect, this informs directors that their duty to promote the success of their company for the benefit of its members generally means for the benefit of the shareholders.[543] On this point, Talbot has noted that the decisions that are for the interests of stakeholders are most likely to be contrary to shareholder interests, such as wage rises.[544] Therefore, although the enlightened shareholder value approach is portrayed as a compromise between the shareholder primacy and the stakeholder theories of corporate governance, the directors are effectively under a legal duty to make decisions that primarily serve shareholders' interests.[545] In this way, the Companies Act 2006's formulation of directors' duties and enlightened shareholder value approach reaffirm the premises of the mainstream corporate governance model.

5 Conclusions

The development and dissemination of the mainstream corporate governance model reveal the ways the capitalist class, in particular the global investor class, has managed to assert its power over labour and other constituents of the company. In the post-war period, when the Berle-Dodd debate took place over the proper purpose of the company, the prevailing view was that the company had a social duty to consider a variety of interests aside from shareholder interests. The company was perceived as capable of pursuing social goals through managers who used their discretion to balance different interest groups. Although the managerial corporate governance model resonates with the stakeholder theory, many proponents of the stakeholder model perceive stakeholders as a means to an end. This is still the case with the more recent corporate social responsibility initiatives of companies, which pursue socially responsible objectives as long as they contribute to profit. As Ireland has argued on point, this is a 'conservative' notion as opposed to 'the earlier idea of the "socially responsible corporation" with its transformative aspirations'.[546] On the other hand, during the managerial era, there was

[542] G Tsagas, 'Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures' in Boeger, Nina and Charlotte Villiers (eds), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart 2018) 135.
[543] Department for Business, Energy & Industrial Strategy, *Green Paper: Corporate Governance Reform* (November 2016) 35.
[544] Talbot, *Critical Company Law* (n 128) 183.
[545] Ibid 191.
[546] P Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34(5) Cambridge Journal of Economics 837, 853.

a social compact between capital and labour. Thus, the dominant thinking in business, academia, and the public was that managers ought to consider stakeholder interests as a worthy purpose by itself and not as a way of creating value for shareholders.

The rise of neoliberal ideology from the 1980s onwards facilitated the acquisition of influence in corporate decision making by the shareholders. This was particularly as a result of the increased power of transnational capital relative to both governments and organised labour.[547] The law and economics scholarship and its neoliberal underpinnings provided the legal justifications for the shareholder wealth maximisation purpose of the company after the 1980s. Accordingly, managers were contractually bound to serve shareholder interests only. The company was conceptualised as a fiction that was incapable of having any moral values. However, I have demonstrated that the alleged 'triumph'[548] of the shareholder primacy theory 'rests less on its empirical accuracy, validity or intellectual merit and more on its consonance with certain powerful class interests'[549], as asserted by Ireland.

In terms of implementing the mainstream corporate governance model at the national level, policy making in the developing world has become tied to the interests of foreign capital due to the dependency created by the Washington Consensus agenda. This is particularly the case in emerging markets, where a deviation from neoliberal policies will be punished by investors in the form of investment strike or capital flight.[550] This leaves countries with no option but to abide by the dictates of neoliberal policies. The OECD Principles constitute an integral part of this overall strategy 'to make states operate under greater market discipline', which gives the global investors free entry and exit options through promoting 'an ideology of best practice'.[551] The OECD Principles draw on the shareholder primacy theory and are derived from the Anglo-American model of corporate governance, which is evident in both the content and the form of these principles. A critical analysis of the OECD Principles exposes its underlying motive of restructuring national corporate governance regimes towards a single model of shareholder primacy where the interests of shareholders, particularly foreign shareholders, are prioritised over the controlling owners and other stakeholders. In turn, this provides global investors greater control over companies, resulting in the exploitation of other stakeholders, companies, and the countries in which they invest in to receive the highest possible returns. This finding thus provides the context to analyse the reasons for Turkey's corporate governance reforms.

[547] Gill, *Power and Resistance* (n 70) 113.
[548] Hansmann and Kraakman, 'The End of History for Corporate Law' (n 12).
[549] Ireland, 'Defending the Rentier' (n 265) 171.
[550] Gill, *Power and Resistance* (n 70) 111.
[551] Ibid 170-171.

CHAPTER IV – Turkey's Corporate Governance Framework Part – I: Capital Market Law and Capital Markets Board Regulations

1 Introduction

The purpose of this chapter is to provide a black-letter account of the first pillar of the Turkish corporate governance framework to analyse the legal rules and regulations that accompany the recent reforms. Three main pieces of legislation constitute Turkey's corporate governance framework: the Turkish Commercial Code (TCC), the Capital Market Law (CML), and the Capital Markets Board (CMB)'s secondary legislation in the form of communiques. The CMB Chairman has stated that corporate governance rules are 'to be used primarily by listed companies as well as by joint stock companies in both the private and public sector'.[552] Listed companies and the corporate governance rules applicable to them constitute the focus of this chapter because the research question of this thesis explores how these rules will impact the ownership structures of listed joint-stock companies in Turkey.

The primary legal source for public companies in Turkey is the CML.[553] The legislation has been revamped in its entirety; new capital markets legislation entered into force on 30 December 2012 to replace the previous CML which has been in force since 1981.[554] The new law, which is designed as a framework legislation with general outlines, sets out that the detailed issues relating to capital markets shall be regulated by the CMB's secondary legislation.[555] Following the CML's enactment at the end of 2012, the CMB issued 67 communiques in a 1-year period to regulate the more detailed issues pertaining to public companies.[556] In terms of corporate governance-related reforms, the most important novelty was a 2014 CMB regulation, the Communique on Corporate Governance. This communique made the implementation of some

[552] CMB, Corporate Governance Principles (2003, amended 2005) 2.
According to Turkish law, a public joint-stock company does not equate to a listed company. A joint-stock company will be deemed a public company once the number of its shareholders exceed 500, in which case the company will have two years to apply to BIST for listing. Article 16 of the new CML reads: 'Joint stock corporations the shares of which are not traded on exchange are obliged to apply to the exchange within two years at the latest after gaining the status of publicly-held corporation in order to have their shares traded on the exchange. Otherwise, without seeking the demand of the corporation the Board shall take the necessary decisions in order to have these shares traded on the exchange or for removing corporation from the publicly-held corporation status.'
[553] Capital Markets Law No. 6362 (30.12.2012) <http://www.cmb.gov.tr/Sayfa/Dosya/87> [hereinafter the CML]
[554] Capital Markets Law No. 2499 (30.07.1981) <http://www.cmb.gov.tr/Sayfa/Dosya/64> [hereinafter the old CML]
[555] TBMM, 'Draft Capital Markets Law and the Report' (n 101) 13.
[556] S Soydemir and A Akyüz, *Sermaye Piyasasi ve Borsa: Ekonomik Analiz, Kurumsal ve Yasal Yapı, Tarihçe ve Tanıklar (Capital Markets and the Stock Exchange: Economic Analysis, Institutional and Legal Structure, History and Witnesses)* (2nd edn, Scala 2016) 559.

corporate governance principles mandatory for listed companies in accordance with their systemic importance.[557] It should be noted that the new rules of the CMB constitute a radical departure point from the previous state of law on corporate governance. Prior to the new capital markets legislation and the subsequent CMB communiques, corporate governance regulation in Turkey was in the form of comply-or-explain approach that was based on corporate governance principles with voluntary application.[558] In the Communique on Corporate Governance, which includes the CMB's Corporate Governance Principles (CMB Principles) as an annex, 24 principles out of the total of 97 are binding. The rest of the principles are subject to comply-or-explain approach, which imposes requirements on public companies to report their adherence to the CMB Principles in their annual activity reports.[559] The specific principles which are binding for listed companies will be elaborated in detail under this chapter.

The chapter begins with an historical account of the development of Turkish capital markets. I trace the developments back to the late Ottoman era, when the seeds of a Turkish capital market were first planted. I focus on the establishment of the joint-stock company, which had a separate legal personality from its members and whose shares could be traded in the secondary (unorganised) markets. This is followed by the history of the stock exchange. The first organised exchange was established in 1866, following the enactment of legislation with the aim to create investor confidence in the secondary markets. However, the exchange failed to become a success due to a fraudulent incident and was later shut down during the first World War. I then introduce the events that took place following the proclamation of the Republic of Turkey in 1923 concerning the regulation of capital markets. Due to restrictive laws, foreign investors could not enter the Turkish stock markets for a long time. This was to change when the Turkey-IMF lending relationship intensified, and the liberalisation process of the Turkish economy took off from the mid-1950s.

In line with the liberal economic policies that were gradually included after the 1950s, the first CML was enacted in 1981. The Istanbul Stock Exchange (ISE) was also established in 1985. These developments were followed by lifting prohibitions on foreigners investing in Turkish stock markets, which occurred in 1989. The following years were marked by an influx of foreign investment into the ISE as well as an increase in Turkish company listings. Turkey experienced two severe financial crises in 2000 and 2001, resulting in capital flight. The crises also led the way for the victory of the AKP (Development and Justice Party) in the 2003 elections. The AKP

[557] CMB, Communique on Corporate Governance II-17.1 (03.01.2014) [hereinafter Communique on Corporate Governance] < http://www.cmb.gov.tr/SiteApps/Teblig/File/479>.
[558] Ararat, '"Comply or Explain" Without Consequences' (n 69) 355.
[559] Communique on Corporate Governance Article 8.

implemented more rigorous reforms in line with IMF programmes, one of which was to expand the role of the ISE in Turkey's economic growth prospects. Thus, the next stage came in the development of the capital market legislation, resulting in the enactment of the new CML in 2012. In this chapter, I include the parliamentary discussions of different political groups prior to passing the draft law to illustrate the criticisms of it. This section serves the purpose of providing the background information to why certain corporate governance reforms took place. The chapter is therefore a descriptive account of the capital markets law in Turkey that includes elements of socio-legal research: the legal developments are evaluated within the trajectory in which they take place.

The second part of the chapter is concerned with the history of corporate governance in Turkey. Corporate governance gained prominence in Turkey in the aftermath of the 2000 and 2001 crises, when banking law reform was enacted.[560] These reforms in corporate governance came shortly after the OECD's publication of its Corporate Governance Principles in 1999.[561] Thereafter, Turkish business circles began to indicate interest in the topic, publishing guidelines and forming associations to make discussions of the issue of corporate governance more widespread. Finally, in 2003, corporate governance regulation took off for non-financial companies in Turkey for the first time; the CMB published its Corporate Governance Principles[562] in the form of voluntary soft-law rules. I will be further elaborating on these developments. This will be followed by a discussion of the corporate governance reforms of the new CML. Then, I discuss the CMB's efforts to regulate corporate governance for public companies, starting from its usage of soft law principles in 2003 to its latest Communique on Corporate Governance in 2014, which uses a semi-hard law approach. Finally, I explain the CMB's Corporate Governance Principles under the four categories as envisaged by the CMB: Principles on Shareholders, Principles on Disclosure and Transparency, Principles on Board of Directors, and finally Principles on Stakeholders.

2 Development of Turkey's Capital Market Legislation

Capital market development took off in the late Ottoman Empire era, when the country resorted to foreign investment as a solution to its financial troubles in the first half of the 19th century. Starting from the 1840s, the government started issuing short-term bonds to French banks

[560] Ararat, '"Comply or Explain" Without Consequences' (n 69) 356.
[561] OECD, 'OECD Principles of Corporate Governance' (1999).
[562] CMB, Corporate Governance Principles (2003).

through intermediaries known as 'Galata Bankers'.[563] In the following years, European investors started forming joint-stock companies in the Ottoman Empire by obtaining special concessions.[564] Most joint-stock companies established in the Ottoman Empire at the time were owned by either foreigners or minorities. The government also wanted to incentivise the Turkish population to bring their capital together to establish companies. For this purpose, the Ottoman Empire enacted a Commerce Code for the first time in 1850 to provide the legal basis for the joint-stock company form. This code was a direct translation of the French commercial code.[565] Following the enactment of the Commerce Code, the first joint-stock company called the 'Sirket-i Hayriye'[566] was established in 1851. The importance of the 'Sirket-i Hayriye' to the development of capital markets was that the company was regarded as a separate entity from its members, and its shares could be traded in the secondary markets. By the start of the 1900s, there were only 46 joint-stock companies, and 43 of them were owned by foreigners. The reason for the low number of companies is that Sultan's approval was required for establishment and this approval was not granted often.[567] Nonetheless, the enactment of the Commerce Code triggered an increase in the number of public joint-stock companies and share issuances, allowing these companies to access capital from the public.[568]

During this period, trading of company stocks did not take place through a formal exchange; it was usually unregulated and over-the-counter. This led to a distrust in the market towards company shares.[569] To remedy this situation, the Ottoman Empire enacted legislation setting up its first official exchange in 1866 called the *Dersaadet Tahvilat Borsasi*, which was located in Istanbul.[570] As the use of telegraph became more common, stock trading spread to farther Turkish cities and European investors.[571] However, in 1895, the reputation of the exchange was shattered when stock investors lost all their money in the 'Sir Vincent incident',[572] leading to a

[563] These bankers were people with connections to investors in Europe and were called Galata Bankers as they were located in the Galata district of Istanbul. Through facilitating the trading of government bonds to investors in Europe, they accumulated great amount of wealth and set up their own banks. See S Şener and C Kılıç, 'Osmanlı'dan Günümüze Türkiye'de Yabancı Sermaye (Foreign Capital in Turkey from Ottoman Era to Today)' (2008) 16(1) Bilgi Sosyal Bilimler Dergisi 22, 25; M Beşirli, 'Stock Exchange in the Ottoman State: New Regulatory Attempts to the Stock Exchange of Debenture Bonds and Shares from the Stock Exchange of Debenture Bonds of Dersaadet' (2009) 19(1) Firat University Journal of Social Science 185, 187-188.
[564] Şener and Kılıç, 'Foreign Capital in Turkey' (n 563) 25.
[565] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 107.
[566] The name of the company translates as the 'Auspicious Company'.
[567] H Kazgan, *Osmanlı'dan Cumhuriyet'e Şirketlesme (Incorporation from the Ottoman era to the Republic)* (Vakıfbank 1999) 80.
[568] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 108.
[569] Ibid.
[570] Beşirli, 'Stock Exchange in the Ottoman State' (n 563) 191.
[571] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 109
[572] Sir Edgar Vincent, the director of the Ottoman Bank, established a fictional company with the objective of operating gold mines, and issued its shares to public, collecting a large sum of capital. In a

temporary closure of the exchange. To regain investor confidence in the capital markets and to regulate them more thoroughly, the Ottoman government issued a decree changing the name of the exchange to *Esham ve Tahvilat Borsasi* in 1906. With the new rules, the exchange officials were required to be civil servants, thereby increasing the role of the state in the oversight of the exchange.[573] During World War I, the activities of the exchange were halted. The activities resumed after the end of the war but were thereafter dominated mainly by the foreigners in charge of the exchange.[574]

Following Turkey's independence war and the proclamation of the Republic in 1923, the government of the Republic of Turkey immediately enacted new stock exchange regulations to curb foreign influence over Turkish capital markets. The new legislation required the primary members of the exchange to be of Turkish citizenship and mandated all records to be kept in Turkish.[575] Nevertheless, the first government of Turkey expressed that it was not against foreign investments. In the first Turkish Economic Congress which took place in Izmir in 1923, Mustafa Kemal Ataturk, the first President of the Republic of Turkey, stated, 'We are not opposed to foreign investment. Turkey would need substantial amount of investment and hard work to establish the newly found Republic and foreign investments are welcome as long as they are beneficial for our country's interests.'[576] This meant that the new Republic did not want to be indebted to foreigners and provide them with leverage over its policies the way Ottoman Empire did.[577] In 1926, the parliament passed the *Menkul Kiymetler ve Kambiyo Borsasi Kanunu* (Securities and Foreign Exchange Law), placing the stock exchange under the supervision of the Ministry of Finance. According to this legislation, all company shares and bonds that were in circulation were required to be registered with the stock-exchange, thereby marking the first step towards transparency in Turkish capital markets.[578]

The stock exchange failed to play an active role in the economy in the first years of the Republic of Turkey.[579] Due to the Great Depression in the United States in 1929, which spread to other advanced capitalist economies, liberal economic policies were replaced with protectionist

short period of time, the company declared insolvency, resulting in many investors including small investors such as war widows to lose all their investments. To protest this fraudulent activity, investors start a march towards the exchange, all the stock and bonds lose their value and in the end the government shuts down the operations of the exchange. See Beşirli, 'Stock Exchange in the Ottoman State' (n 563) 192.

[573] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 109.

[574] Ibid.

[575] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 110.

[576] Own translation from quote in Şener and Kılıç, 'Foreign Capital in Turkey' (n 563) 28.

[577] Ibid 38.

[578] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 110-111.

[579] Ibid 110.

measures, and investors started retracting their investments to their countries. In Turkey, in line with the state-controlled economic policy of the time, most foreign-owned companies were nationalised. In 1930, the government passed a law for the protection of the value of the Turkish currency,[580] which enabled the Council of Ministers to restrict the sale and purchases of foreign exchange, shares, and bonds.[581] Accordingly, the transactions of foreigners were largely restricted. These developments temporarily prevented the progress of Turkish capital markets. This situation lasted until the end of the Second World War, and even though Turkey did not partake in the war, its economy was still affected negatively. In its search for a new economic policy, Turkey sided with the United States, who came out of the war as an important global power. Turkey thus became a member to the United States-led IMF and World Bank in 1947.[582] Since it sided with the 'capitalist camp', Turkey started drafting legislation that would facilitate foreign investments.[583] Furthermore, as Turkey switched to a multi-party political system in 1946; the state control over the economy started to transform towards a liberal economic system with a focus on private enterprises.[584]

At the start of the 1960s, the capital market was 'reborn' in Turkey, with the widespread use of savings and treasury bonds. The over-the-counter trading of these savings bonds led to the creation of informal secondary markets. [585] This period also witnessed the revival of the private sector and an increase in joint-stock companies. Some well-known families established companies in their own names and issued shares to the public, which led to an increase in stock investments in Turkey. [586] These factors created the need for a legal framework for an exchange that would allow the effective trading of these bonds and stocks. In 1962, works began on drafting a capital market law, and scholars and legislators organised seminars and meetings.[587] During these meetings, the prominent view was that the United States was to be taken as an example of regulating the capital markets.[588] The CMB's Ozcam has also noted that there were talks with the IMF in the 1960s regarding the regulation of the capital markets.[589]

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[580] TBMM, Law on the Protection of the Value of Turkish Currency No. 1567 (25.02.1930)
[581] Ibid Article 1.
[582] Şener and Kılıç, 'Foreign Capital in Turkey' (n 563) 30.
[583] Ibid.
[584] M Özçam, 'Uluslararası Para Fonu (IMF) ve Türkiye (International Monetary Fund and Turkey)' (CMB 30.09.2004) 4.
[585] B Yalçıner, 'SPK ve Türk Sermaye Piyasaları (CMB and Turkish Capital Markets)' (Presentation) (CMB 15.04.2010) 15. The government used these bonds as a method of payment to public, therefore these bonds were 'compulsory savings' and soon the public started looking for ways to convert the bonds into cash, creating the necessity for an exchange.
[586] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 111.
[587] Z Aytaç, 'Sermaye Piyasası Kanunu ve Çok Ortaklı Şirketler (Capital Markets Board and Public Companies' (2014) 40(1) Ankara University SBF Journal 229, 229.
[588] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 112.
[589] Özçam, 'IMF and Turkey' (n 584) 5.

The first draft capital markets code, *Sermaye Piyasasinin Tanzimi ve Tesviki Hakkinda Kanun Tasarisi* (Draft Law on the Establishment and the Promotion of Capital Markets), was presented to the parliament in 1964. It included provisions on encouraging companies to go public and issue shares.[590] The draft was largely based on the Anglo-American legal system because joint-stock company legislation based on continental European legal systems were too rigid and did not facilitate the development of capital markets, as the scholars who drafted the code have admitted.[591] It should be noted that the TCC at the time,[592] which contained provisions on the joint-stock company, was drafted by the German scholar Hirsch and was based on the continental European legal system.[593] The committee drafting the capital market code seems to have had a preference for the Anglo-American legal system, despite the whole of Turkish legislation being based on the laws of civil law countries. This implies the influence of liberal economic policies at the time in Turkey.

The draft code of 1964 failed to turn into legislation. Hence, a second draft code was prepared in 1970 that contained similar provisions to the old draft but increased incentives for companies going public, such as a reduction in corporate tax rates.[594] The second draft also did not pass through parliament. One of the reasons for both draft codes being rejected was the influence of the domestic interest groups who were benefiting from the absence of a regulated market for the exchange of securities.[595] However, their influence was overcome by external factors such as the IMF, which envisaged the establishment of a functioning capital market.[596] As Onis and Bakir have analysed, 'external anchors' such as the IMF have had an important role in Turkey's reform processes and have helped domestic policy-makers to overcome the resistance of the domestic groups.[597]

[590] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 118.
[591] The group that drafted the code consisted of well-known Turkish legal scholars such as Reha Poroy, Turgut S. Erem, Raif Olgun, Unal Tekinalp and Vural Gunal, in Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 117.
[592] TBMM, Turkish Commercial Code No. 6762 (09.07.1956).
[593] M Can, 'Türk Ticaret Kanunu Tasarısına İlişkin Düşünceler (Thoughts on the Draft Turkish Commercial Code' (2011) 14(157) Mevzuat Dergisi <https://www.mevzuatdergisi.com/2011/01a/02.htm#>.
[594] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 119.
[595] Yalçıner, 'CMB and Turkish Capital Markets' (n 585) 17.
[596] Ibid.
[597] Z Öniş and C Bakır, 'Turkey's Political Economy in the Age of Financial Globalization: The Significance of the EU Anchor' (2007) 12(2) South European Society and Politics 147, 148

A brief note on the IMF and Turkey relations is necessary.[598] Turkey joined the IMF in 1947[599] and received its first financial support in 1948.[600] Since then, Turkey has been one of the countries most indebted to the IMF, which, as Yavuz has asserted, has created pressure and restrictions on the Turkish government's policies.[601] Even though the Turkish economy grew in the first few years after the switch to the multi-party system and the liberalisation policies, the uncontrolled increase in imports caused a balance of payments deficit and led to an economy dependent upon external financing.[602] Evrensel has noted that by 1955, Turkey became the only country out of IMF members that exceeded its lending quota.[603] Karagol has noted that the mid-1950s were 'the beginning of Turkey's economic crisis and the need for external loans and eventually the IMF-imposed stabilization programs'.[604] Thereafter, the impact of the IMF in influencing government policies, particularly in terms of capital market liberalisation, became more evident.

In the second half of the 1970s, Turkish economy began to face severe distress and almost came to the point of shutdown due to a lack of liquidity, high inflation, and depleting foreign currency reserves. These economic troubles led the Turkish government to call upon the IMF again for assistance.[605] The situation worsened with the global hikes in oil prices in 1973 and 1979, leading to stagnation in the Turkish economy.[606] The IMF conditionality tied to its financial assistance meant that certain measures were taken, such as the devaluation of the currency, adding surcharges to public goods and services, and signing debt deferral protocols with the OECD member countries.[607] These measures constituted the liberalisation process of the Turkish economy, which accelerated substantially in 1980 with a set of decisions named *Istikrar*

[598] A comprehensive account of the IMF-Turkey relations is beyond the scope of this research; this section intends to provide a brief summary of the outlines only.
[599] IMF, 'Annual Report of the Executive Directors ' (30.06.1947) <https://www.imf.org/external/pubs/ft/ar/archive/pdf/ar1947.pdf>.
[600] IMF, 'Turkey: History of Lending Arrangements' (31.03.2008) <https://www.imf.org/external/np/fin/tad/extarr2.aspx?memberKey1=980&date1key=2008-03-31> accessed 31 July 2018.
[601] A Yavuz, 'Başlangıcından Bugüne Türkiye'nin Borçlanma Serüveni: Durum ve Beklentiler (Turkey's Debt Adventure to Date: The Case and Expectations)' (2009) (20) SDU Fen Edebiyat Fakültesi Sosyal Bilimler Dergisi 203, 217.
[602] Ibid.
[603] AY Evrensel, 'IMF Programs and Financial Liberalization in Turkey' (2004) 40(4) Emerging Markets Finance & Trade 5, 11.
[604] ET Karagol, 'Does Turkey Need a New Standby Agreement?' (March 2008) SETA Policy Brief No.9 <http://file.setav.org/Files/Pdf/does-turkey-need-a-new-standby-agreement.pdf> 1. Turkey asked for the IMF assistance for the first time in 1961 in the form of a stand-by agreement, since then there have been ten stand-by agreements between the IMF and Turkey from 1961 to 1970, see IMF, 'Turkey: History of Lending Arrangements' (n 600).
[605] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 121.
[606] Şener and Kılıç, 'Foreign Capital in Turkey' (n 563) 36.
[607] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 121.

Programi (Stability Programme).[608] These decisions brought structural changes to the Turkish economy and were instituted by the government of the time, which was headed by Prime Minister Suleyman Demirel.[609] Arpac has argued that these neo-liberal reforms were carried out under the auspices of the IMF and the WB.[610] The structural changes envisaged by the Stability Programme have been dubbed as the 'breaking point' that transformed the Turkish economy to a capitalist and liberal economic system.[611] Indeed, the reforms envisaged under the Stability Programme were implemented, and the 'program reached its initial targets very soon in terms of a lower inflation, a higher gross domestic product (GDP) growth, and a relatively liberalized external trade regime and financial system'.[612]

As a part of the Stability Programme process, the government began working on establishing regulatory institutions that would limit the state's involvement in the economy en route to economic liberalisation.[613] In line with these efforts, the establishment of Turkey's first regulatory authority, the CMB, was envisaged by CML No. 2499, which was enacted in 1981.[614] The relation between IMF conditionality and the passing of the capital market legislation has been covered in the media. As one of the most prominent newspapers in Turkey later commented, the passing of the CML has been instrumental in ensuring further financial assistance by the IMF.[615] The economic liberal policies which gained momentum in Turkey at the beginning of the 1980s and the influence from IMF can thus be regarded as the reasons why the draft capital market code finally obtained parliament's approval in 1981.

The CML has been designed as a framework law with general provisions on the workings of the capital markets, leaving the regulation of more detailed issues to the CMB through

[608] The Stability Programme is also known as the '24 Ocak Kararlari' which translates as the '24 January Decisions'. It included a set of policy reforms undertaken by the government that were announced to the public on this date.
[609] Some of the main points of the Stability Programme were: the devaluation of the currency, shrinking the role of the state in the economy, foreign trade liberalization and incentivizing foreign investments, in İ Dağdelen, 'Liberalizasyon (Liberalization)' (2004) 1(1) Int Journal of Human Sciences 1, 36.
[610] O Arpaç and G Bird, 'Turkey and the IMF: A case study in the political economy of policy implementation' (2009) 4(2) The Review of International Organizations 135, 139.
[611] F Öztürk, 'Türkiye ekonomisinin kırılma noktası: 24 Ocak İstikrar Kararları (Breaking point of Turkish economy: 24 January Stability Decisions)' *Dünya Bülteni* (25.01.2013) <https://www.dunyabulteni.net/haber-analiz/turkiye-ekonomisinin-kirilma-noktasi-24-ocak-istikrar-kararlari-h244303.html>.
[612] A Ertuğrul and F Selçuk, 'A Brief Account of the Turkish Economy, 1980-2000' (2001) 37(6) Russian & East European Finance and Trade 6, 6.
[613] S Sezen, *Türk Kamu Yönetiminde Kurullar: Geleneksel Yapılanmadan Kopuş (Institutions in Turkish Public Governance: Breaking-free from Traditional Structuring)* (TODAİE 2003) 118.
[614] Capital Markets Law No. 2499 (30.07.1981)
[615] 'Ödevimizi yaptık, IMF onayladı (We did our homework and the IMF approved)' *Hürriyet* (24.12.1999) <http://www.hurriyet.com.tr/ekonomi/odevimizi-yaptik-imf-onayladi-39120968>

secondary legislation.[616] The CML also included a provision establishing the CMB, which started its activities in 1982 and had 'the status of a public legal entity with administrative and financial autonomy'.[617] The objective of Turkey's first CML was stated in its first article:

> The subject of this Law is to regulate and control the secure, transparent and stable functioning of the capital market and to protect the rights and benefits of investors with the purpose of ensuring an efficient and widespread participation by the public in the development of the economy through investing savings in the securities market.[618]

Sezen has argued that the main objective of the first CML was to free companies from the restrictions imposed by the TCC and provide a legal framework that is more conducive to the development of capital markets.[619] Indeed, prior to the enactment of the CML, joint-stock companies were subject to the commercial code's lengthy and arduous procedures for capital increases, which hindered the financing of joint-stock companies. The CML, on the other hand, included provisions that were more conducive to raising capital.[620] The CML also aimed to create investor confidence in Turkish capital markets and stipulated that any public offering in the primary markets was to be subjected to the approval of the CMB. According to Soydemir and Akyuz, the approval of the CMB was an implicit affirmation that the securities issued by that company were trustworthy and could be invested.[621]

Following the promulgation of the first CML in 1981, the government enacted a decree in 1983 regarding stock exchanges; *Menkul Kiymetler Borsalari Hakkinda Kanun Hukmunde Kararname* (Decree regarding Stock Exchanges).[622] Following this legislation, the ISE was established and began its operations in 1985 in Istanbul. According to the CML, the CMB 'is the competent authority for the monitoring and supervision of the exchanges, markets and other organized markets';[623] the ISE is therefore supervised by the CMB. In its first few years, the ISE remained under-developed and 'was characterised by low liquidity, high volatility, high cost of capital (low firm valuation) and limited new capital formation'.[624] To attract foreign investors to the ISE, in 1989 the government issued a decree known as Decision No. 32.[625] This

[616] Aytaç, 'Capital Markets Board and Public Companies' (n 587) 229-230.
[617] Capital Markets Law No. 2499 (30.07.1981) Article 17.
[618] Ibid Article 1.
[619] Sezen, *Institutions in Turkish Public Governance* (n 613) 118.
[620] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 126.
[621] Ibid 127.
[622] TBMM, Decree No. 91 on Securities Exchanges (06.10.1983).
[623] Capital Markets Law No. 2499 (30.07.1981) Article 40.
[624] M Ararat and M Ugur, 'The Turkish National System of Corporate Governance' in A Naciri (ed), *Corporate Governance Around the World* (Routledge 2008) 259.
[625] TBMM, Decision No.32 on the Protection of the Value of Turkish Currency (11.08.1989).

decree created capital account liberalisation by lifting the restrictions on the purchase and sale of securities in the ISE by foreigners[626] as well as allowed their earnings from the stock markets to be transferred outside of Turkey.[627] After this decree's enactment, there was an influx of foreign investors and increased demand for ISE-listed stocks, which provided liquidity to the markets and incentivised more companies to go public.[628] While only 25 companies were listed between 1985-1989, this number increased to 252 between 1990-2000.[629] It can be concluded that Decision No.32 was important for the development of capital markets in Turkey.

Yet, despite the government's attempts to create a legal framework conducive to attracting investments to the capital markets, the ISE remained under-capitalised in comparison to the stock exchanges abroad.[630] Aytac has argued that this was due to the CML provisions being disadvantageous for public joint-stock companies; he has claimed that the obligations tied to issuing shares deterred many joint-stock companies from going public. [631] Indeed, there were only 76 listed companies in the ISE by the end of 1989.[632]

At the beginning of the 1990s, the Turkish government initiated a project to revamp its capital market legislation in line with the global developments; thus, the Capital Markets Modernisation Project began.[633] The government decided that Citibank[634] would be in charge of the project, which produced its final report in July 1991. The findings of report included the need to take measures to increase the stock and bond issuances of companies, to create standards for public disclosure, and to transform the ISE into a joint-stock company independent from the public sector.[635] The project led to the first amendment to the CML in 1992 and then the second in 1999. Both the amendments mainly pertained to issues of transparency and public disclosure. The most important novelty introduced by the amendments was the requirement for the public

[626] Ibid Article 15.
[627] Ibid Article 12/2.
[628] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 312.
[629] Ibid.
[630] The WB, 'Market capitalization of listed domestic companies (% of GDP)' <https://data.worldbank.org/> accessed 26 August 2018.
[631] Aytaç, 'Capital Markets Board and Public Companies' (n 587) 252.
[632] The WB 'Listed domestic companies, total' ' <https://data.worldbank.org /> accessed 21 July 2018.
[633] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 150.
[634] Citibank is the retail banking unit of the Citigroup, based in the United States. The Citibank's regional website indicates the history of Citibank operations in Turkey as: 'Citi started doing business in Turkey in 1975 with corporate banking services and began to operate as a branch in 1981. However, even before the bank established a presence in Turkey, Citi was involved into many development projects such as motorway financings, power plants and dams. In 1998 Citi began providing Commercial Banking services' in <https://www.citibank.com.tr/gcb/english/aboutus/ > accessed 1 August 2018.
[635] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 150-151. It should be noted that although the recommendation of the Citibank report to transform the ISE into a joint-stock company did not materialize at the time, with the recent Capital Markets Law enacted in 2012, the ISE was converted into a company.

companies to provide detailed, adequate, and timely information to the public to enable the investors to make informed decisions.[636] This was a deviation from the former system, which involved the CMB hinting at the investment quality of the security by approving the security offerings after its investigation of the company documents and disclosures. After the amendments, however, the public became endowed with the duty to make its own informed decision on whether to invest.[637] Moreover, the CMB became more independent from the state.[638] The reforms of capital market legislation during this period help to explain the increase in company listings in the ISE between 1990-2000.[639]

The amendments to the CML were important steps towards creating confidence in the stock market and were expected to lure in more investors. In fact, foreign investment in the form of portfolio investments reached an all-time high in 1993.[640] However, due to the scepticism of investors in the aftermath of the East Asian financial crisis of 1997-98, many foreign investors withdrew their money from stock markets abroad.[641] Later in 2000 and 2001, Turkey experienced severe 'twin crises'.[642] Although there are differing views as to the causes,[643] the crises 'broke out in the midst of an IMF-directed adjustment program.'[644] At the time, The Economist reported that just prior to the crisis in 2000, the 'International Monetary Fund was showering praise on Turkey's coalition government for successful implementation of the Fund's ambitious economic stabilisation programme.'[645] As per the IMF programme, the government had to take measures such as curtailing spending on social security services and freezing wages of public sector employees whilst also providing guarantees to investors for any losses incurred through bank deposits.[646] Despite implementing the IMF's advice, the investors were alarmed by the deteriorating economic conditions, causing a flight from the Turkish lira that led to a liquidity crisis, which sent interest rates up to 2,000% overnight in November 2000.

[636] Soydemir and Akyüz, *Capital Markets and the Stock Exchange* (n 556) 153.
[637] Ibid 155.
[638] Ibid.
[639] Ibid 312.
[640] The amount of portfolio investment from foreigners reached 3,917 million US dollars in 1993, in Şener and Kılıç, 'Foreign Capital in Turkey' (n 563) 41.
[641] Ibid. Accordingly, foreign portfolio investments worth over 6 billion US dollars left Turkey in 1998.
[642] Öniş and Bakır, 'Turkey's Political Economy in the Age of Financial Globalization' (n 597) 152.
[643] Some of these views perceive the causes of the crises as 'political mistakes, insufficient liberalization and flawed IMF-directed policies' see Dufour and Orhangazi, 'The 2000–2001 Financial Crisis in Turkey' (n 111). The media reports that the initial crisis in 2000 was triggered by the corrupt practices in private banks which also implicated people connected to the government, causing an immense sell-out and plunging the price of ISE securities, in 'The crisis in Turkey' *The Economist* (06.12.2000) <http://www.economist.com/node/443043>.
[644] Cizre and Yeldan, 'The Turkish Encounter with Neo-liberalism' (n 114) 393.
[645] 'The crisis in Turkey' *The Economist* (n 643).
[646] Dufour and Orhangazi, 'The 2000–2001 Financial Crisis in Turkey' (n 111) 104.

In February 2001, investors pulled out a further 5 billion US dollars in a single day, depleting the central bank's reserves.[647]

In the aftermath of the crises, the inflation rate, government debt, and interest rates were soaring, which were the opposite results of the primary objectives of the IMF stabilisation programme.[648] However, the only way out of the financial turmoil was for the government to substantially increase its borrowing, mostly from the IMF.[649] In exchange for the debt burden, a number of structural changes were introduced that were in line with the Washington Consensus agenda, such as the 'acceleration of the privatization process, an increased regressive taxation, Central Bank independence, a (virtually exclusive) focus on inflation, increasing flexibility in labour markets, and the liberalization of the agriculture sector'.[650] The crises increased unemployment rates; in 2001, it rose to 10.6% and 11.3% in 2002.[651] While the high levels of unemployment reduced the bargaining power of labour, the number of unionised workers also declined by the end of 2001, causing real wages to drop by around 19% in 2001.[652] To sum up, following the crises in 2000 and 2001, the IMF gained the upper hand in domestic policymaking, while the power of government and labour weakened.

It was in this context that the AKP won a 'landslide victory' in the 2002 Turkish parliamentary elections.[653] Ozdemir has argued that the reason AKP won even though it had been founded 14 months prior to the elections was because the Turkish people were fed up with the economic measures taken after the financial crises of 2000 and 2001 and hence wanted a change in politics.[654] As commentators have pointed out, 'with the election of the majority AKP government, a stronger political commitment to the IMF program emerged.'[655] Indeed, using their broad public support, the AKP was able to introduce reforms in line with IMF programmes that the former governments had resisted.[656] In this context, the need to revamp the capital market legislation emerged alongside the government's objective to make Istanbul one of the top 10 financial centres of the world by 2023.[657] In fact, enactment of the new law was given

[647] Ibid 105.
[648] Ibid.
[649] Ibid 107.
[650] Dufour and Orhangazi, 'The 2000–2001 Financial Crisis in Turkey' (n 111) 102.
[651] 'Derin krizin işsizlik acısı 2002'de çıktı (Deep crises hit unemployment in 2002)' *Hürriyet* (26.02.2003) <http://www.hurriyet.com.tr/ekonomi/derin-krizin-issizlik-acisi-2002-de-cikti-130137>
[652] Dufour and Orhangazi, 'The 2000–2001 Financial Crisis in Turkey' (n 111) 105.
[653] ET Karagol, 'The Turkish Economy During the Justice and Development Party Decade' (2013) 15(4) Insight Turkey 115, 115.
[654] Y Özdemir, 'AKP'nin Neoliberalizmi (AKP's Neoliberalism)' *Yenidüzen* (11.07.2016) <http://www.yeniduzen.com/akpnin-neoliberalizmi-83516h.htm>.
[655] Arpac and Bird, 'Turkey and the IMF' (n 610) 147.
[656] Öniş and Bakır, 'Turkey's Political Economy in the Age of Financial Globalization' (n 597) 156.
[657] Karagol, 'The Turkish Economy During the Justice and Development Party Decade' (n 653) 127.

top priority because it was seen as essential towards achieving the Istanbul International Finance Centre project.[658] Dufour and Orhangazi have argued that 'the quick enactment of laws that considerably reduced the risk borne by international capital' has been one illustration of the government's lack of autonomy.[659]

During the deliberations over the enactment of the new CML in parliament, a member of CHP (Republican People's Party), the main opposition party, criticised the AKP government for rushing the preparation of the law.[660] Another opposition party member from the MHP (Nationalist Movement Party), also stated that AKP had been trying to pass the draft law from the parliament in a hurry, 'as if trying to hide it from public opinion'.[661] Another MHP parliamentarian commented that the Turkish stock market is already dominated by foreigners, which is detrimental to the national interests of the country, and questioned the motives for introducing provisions to lure further foreign investors. [662] These critiques of the AKP's reform of capital markets legislation implies that there seems to be IMF influence on this area of government's policy making.

The official reasons for drafting new capital market legislation are listed under the *Genel Gerekçe* (General Justification).[663] The justifications for the new law include the reforms undertaken in countries across the world following the 2008 crisis, the enactment of the new TCC and the need to create conformity between the two legislations, Turkey's ongoing European Union accession process and the need to comply with EU's acquis communautaire, the need to increase the competitiveness of the Turkish stock exchange in relation to its international counterparts, and the need to introduce corporate governance into capital market legislation to lure domestic and foreign investors to the stock market.[664]

As discussed above, there have been dissenting views from opposition parliamentarians during the discussions over the passing of the new CML. A MHP representative argued that the real reasons behind the reforms in capital market legislation are to establish more market-based legislation and protect the investors first.[665] The left-wing HDP (Peoples' Democratic Party)

[658] TBMM, 'Draft Capital Markets Law and the Report' (n 101) 4.
[659] Dufour and Orhangazi, 'The 2000–2001 Financial Crisis in Turkey' (n 111) 108.
[660] TBMM, 'Minutes of the General Meeting' (06.12.2012) 184.
[661] (Own translation) TBMM, 'Minutes of the General Meeting' (06.12.2012) 181.
[662] Ibid 188.
[663] *Genel Gerekçe* translates as 'General Justification', it refers to the official text published alongside the relevant legislation which includes the reasonings of the legislator in promulgating that law. Alongside the general justification, each article's own justification is also published. For the CML's *Genel Gerekçe* see TBMM, 'Draft Capital Markets Law and the Report' (n 101).
[664] Ibid 10-15.
[665] TBMM, 'Minutes of the General Meeting' (04.12.2012) 94.

representative commented that the new CML provisions have been drafted with the top 5% wealthy population in mind, not the general public of 74 million and that 'it is designed to make the rich richer and poor poorer'.[666] Another HDP representative argued that the objective of this law is to solely attract foreign investors because the Turkish public has 'never walked past the stock-exchange in their lives, let alone buy stocks'. Hence, he concluded, the law will benefit the foreigners. [667] The CHP has also criticised the draft law for not being in in favour of the Turkish people.[668]

Despite the criticisms, the AKP government did not approve any changes to the articles of the draft law. Since the AKP held a parliamentary majority, the draft CML passed through parliament on 6th December 2012. The Deputy Prime Minister at the time, the AKP's Ali Babacan, exclaimed that 'With this draft law, we expect increased interest to the Turkish stock market from all over the world, since we want ISE to be the stock exchange for the wider geography not just for Turkey.'[669] This comment affirmed the comments from opposition party members that the draft CML provisions were intended to be beneficial for foreign investors instead of the Turkish people. Also, the draft law was prepared at a time when the power of labour was in continuous decline following the Turkish financial crisis. Therefore, it can be concluded that the new CML, along with the secondary legislation to be issued by the CMB, was designed with the interests of foreign capital in mind. The novelties to corporate governance of the new CML will be discussed in detail below.

3 History of Corporate Governance in Turkey

Turkey's acquaintance with the concept of corporate governance is fairly recent. Turkey has been a country 'where corporate governance reforms are underpinned by the liberalization of markets'.[670] Thus, according to Aysan, the late recognition of corporate governance has been attributed to 'the delayed development of the competitive liberal economy, private initiative, private enterprise and managements.'[671] Turkey has experienced heavy state involvement in its economic affairs and financial markets; Turkish laws have aimed to protect the value of the Turkish currency and a system of state- owned enterprises.[672] Even though the situation started to change substantially in the 1980s when the Turkish economy embarked on a rigorous

[666] TBMM, 'Minutes of the General Meeting' (06.12.2012) 202.
[667] TBMM, 'Minutes of the General Meeting' (05.12.2012) 80
[668] Ibid 82.
[669] Ibid 98.
[670] Ararat, '"Comply or Explain" Without Consequences' (n 69) 356.
[671] MA Aysan, 'Culture and Corporate Governance: The Turkish Case' in Güler Aras and David Crowther (eds) *Culture and Corporate Governance* (SRRN 2008) 124.
[672] Ibid 124-125.

liberalisation process, the state continued to be involved in many aspects of the economy. For instance, Ararat and Ugur, have commented that the under-development of corporate governance standards in Turkey was connected to the 'heavy involvement of the Turkish state in the economy.'[673] State involvement also resulted in family owned businesses becoming the dominant company structure in Turkey. During this period, businessmen used their connections to politicians to their advantage to create holding companies in various fields of activity; these companies later became 'the typical big business unit' in the Turkish company setting.[674]

Indeed, it is still the case in Turkey that most companies 'are characterized by concentrated ownership, in the form of family controlled and diversified business groups referred to as financial-industrial conglomerates'.[675] In such companies, family shareholders have maintained control through maintaining large proportions of the holdings or by pyramidal ownership structures.[676] This led to a situation where company management and day-to-day operations are conducted by family members. This type of business organisation has been reported to be reluctant to disclose their financials and be averse to any mergers and acquisitions.[677] In such company settings, corporate governance practices were not on the agenda of Turkish businesses for many years until the financial crisis in 2000 and 2001.

The debut of corporate governance phenomena in Turkey can be pinpointed to the aftermath of the 2000-2001 crisis, when the banking laws were reformed and the Banking Regulation and Supervision Agency was set up to regulate the banking practices more thoroughly.[678] Although these regulations only covered banks, they also ignited further developments in corporate governance regulations for non-bank companies.[679] The interest in corporate governance also arose because the OECD had published its first Principles of Corporate Governance in 1999, a year prior to the crisis in Turkey.[680] As discussed earlier, the OECD Principles have influenced the policies of many developing countries, particularly in line with the financial assistance provided by the IFIs. The debtor countries implemented these rules as implicit pre-conditions for attracting foreign capital. A year after the publication of OECD Principles, the principles were translated into Turkish by an affluent non-governmental business organisation in Turkey named TUSIAD (Turkish Industry and Business Association).[681] In the same year, TUSIAD

[673] Ararat and Ugur, 'The Turkish National System of Corporate Governance' (n 624) 260.
[674] I Demirağ and M Serter, 'Ownership Patterns and Control in Turkish Listed Companies' (2003) 11(1) Corporate Governance: An International Review 40, 41.
[675] Ararat, '"Comply or Explain" Without Consequences' (n 69) 358.
[676] Ibid. Also, see Ararat and Ugur, 'The Turkish National System of Corporate Governance' (n 624).
[677] Aysan, 'Culture and Corporate Governance' (n 671) 131.
[678] Ararat, '"Comply or Explain" Without Consequences' (n 69) 356.
[679] Ibid.
[680] OECD, 'OECD Principles of Corporate Governance' (1999) 3.
[681] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 29.

once again initiated the preparation of a codex of good practices in company management in a report called Corporate Governance Best Practices Codex: Structure and the Workings of the Board.[682] This report specified rules on the formation of the board of directors and aimed to achieve institutionalisation in terms of business practices.[683] The report's preface stated that the Codex aims to provide the first step in the development of corporate governance in Turkey and encourage further regulatory steps that would enable Turkey to be in compliance with the OECD Principles.[684] The report's annex also contains a table of the provisions of the Codex that correspond to the OECD Principles; this table clearly indicates the close similarity between the two texts.[685]

Aside from TUSIAD, the Corporate Governance Association of Turkey was established in 2003 as 'a non-profit organization aiming to develop and promote adherence to corporate governance standards and guidelines in Turkey.'[686] It organises conferences, working groups, and networking events with companies and individuals to 'share and exchange information, experience and knowledge about best practices in corporate governance'.[687] Finally, there is the Corporate Governance Forum of Turkey (CGFT), also founded in 2003 under the joint initiative of TUSIAD and Sabanci University in Istanbul. The CGFT was founded to create awareness of corporate governance mainly through conducting scientific research.[688] These efforts from the private sector helped to create awareness of corporate governance in Turkey.

The efforts from TUSIAD also found regulatory support from the CMB in 2003. The CMB, in line with 'the current practices worldwide', published its corporate governance principles as guidance for public joint-stock companies.[689] The CMB Principles consisted of four chapters: Shareholders, Transparency and Disclosure, Stakeholders, and Board of Directors. According to the CMB, these principles are based on the notions of equality, transparency, accountability, and responsibility which 'appear to be main (sine qua non) concepts in all international corporate governance approaches that are widely accepted'.[690] These principles are briefly elaborated by the CMB in the preface to its principles. Equality refers to 'the equal treatment of

[682] TUSIAD, 'Kurumsal Yönetim En İyi Uygulama Kodu: Yönetim Kurulunun Yapısı ve İşleyişi (Corporate Governance Best Practices Codex: Structure and the Functions of the Board) (December 2002).
[683] Karasu 'Novelties of the Turkish Commercial Code ' (n 156) 36.
[684] TUSIAD, 'Corporate Governance Best Practices Codex' (n 682) 11.
[685] Ibid Annex-1.
[686] Corporate Governance Association of Turkey, 'About Us' <http://tkyd.org/en/tkyd-about-us.html> accessed 20 June 2018.
[687] Ibid.
[688] 'Corporate Governance Forum of Turkey' <http://cgft.sabanciuniv.edu/about/background> accessed 21 July 2017.
[689] CMB, Corporate Governance Principles (2003) 7.
[690] Ibid 6.

share and stakeholders by the management in all activities of the company', transparency is understood as 'to disclose company related financial and non-financial information to the public in a timely, accurate, complete, clear, construable manner and easy to reach at low cost, excluding the trade secrets and undisclosed information.'[691] As the company is run by the board of directors, the accountability principle is viewed as the accountability of the board of directors. In this sense, accountability refers to 'the obligation of the board of directors to account to the company as a corporate body and to the shareholders.'[692] Responsibility is understood by the CMB as 'the conformity of all operations carried out on behalf of the company with the legislation, articles of association and in-house regulations together with the audit thereof.'[693] These principles intended to achieve 'sound corporate governance' practices which meant

> improvement of a country's image, prevention of outflow of domestic funds, increase in foreign capital investments, increase in the competitive power of the economy and capital markets, overcoming crises with less damage, more efficient allocation of resources attainment and maintenance of a higher level of prosperity.[694]

Although the principles were primarily devised for listed joint-stock companies, the CMB acknowledged that the principles can be used by all joint-stock companies.[695] The principles came out only a few years after the OECD Principles were first published in 1999. In fact, the CMB has openly acknowledged that the OECD Principles have been the departure point for preparing its own version of corporate governance guidelines. The introduction to the 2003 CMB Principles stated that 'primarily the "OECD Corporate Governance Principles" of 1999 together with the particular conditions of our country have been taken into consideration during the preparation of these Principles.'[696] The CMB's 2003 Principles were only advisory in nature and had no legal basis. Therefore, they were not binding and their implementation by the listed companies was optional.[697] The CMB Principles were essentially recommendations for good practice. However, the chairman of the CMB at the time stated that these practices would help attract foreign capital into Turkish companies: 'the proper implementation of corporate governance Principles is essential for the restructuring process of the Turkish capital markets and for attracting capital inflow into Turkey.'[698]

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[691] Ibid.
[692] Ibid
[693] Ibid
[694] Ibid 5.
[695] Ibid 2.
[696] Ibid 7.
[697] Ibid.
[698] Ibid, Preface.

Notwithstanding the importance placed on the application of the CMB Principles to attract foreign capital, the CMB did not issue binding corporate governance principles at the time, even though it had the authority to issue binding regulations through its by-laws and communiques.[699] The CMB Principles were not only non-binding; no explanation or justification was even required in the case of non-compliance. The reason the CMB may have refrained from making the application of these principles mandatory could be that there was no primary legislation that explicitly extended authority to the CMB to regulate the area of corporate governance. Since the CMB Principles did not have any legal basis or binding power in this period, even the listed companies had no corporate governance obligations to speak of. The CMB had only expressed its hope that some of these principles 'may be subject to "comply or explain" approach in medium and long term.'[700] Due to their voluntary nature, the CMB Principles of 2003 did not prove to be very effective and their implementation remained sparse.[701] However, they were an important step in the development of corporate governance laws in Turkey because they constituted the first regulatory attempts in the field of corporate governance.

In 2004, by the virtue of a CMB decision, public joint-stock companies with shares that were traded on an exchange were required to prepare Corporate Governance Compliance Reports to be published along with their annual reports, starting from 2005.[702] These companies had to report which of the CMB Principles they complied with and provide declarations explaining the reasons for non-compliance, if any. This way, the comply-or-explain approach to corporate governance regulation was adopted in Turkey for the first time. In the year following the abovementioned CMB decision (2005), a total of 276 companies (86% of listed public joint-stock companies) published their compliance reports, and 174 companies (63%) included detailed explanations.[703] However, only 48 companies (54%) disclosed whether the minority shareholders were represented in the management of the company.[704] Following the revisions of the OECD Principles in 2004, the CMB Principles were also been amended 2 years later in 2005. The revised version integrated the 2004 CMB decision into its Corporate Governance Principles and added the following:

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[699] Capital Markets Law No. 2499 (30.07.1981), Article 22 stated: 'The Board shall exercise its authority by establishing regulatory procedures and by making decisions in individual cases. The regulations and communiqués issued pursuant to regulatory procedures shall enter into force by being published in the Official Gazette of the Republic of Turkey.' (official translation)

[700] CMB, Corporate Governance Principles (2003) 7.

[701] M Ararat and BB Yurtoglu, 'Corporate Governance in Turkey: An Introduction to the Special Issue' (2006) 14(4) Corporate Governance: An International Review 201, 201-206.

[702] CMB, 'Weekly Bulletin No 2004/51' (10.12.2004) <http://www.spk.gov.tr/Bulten/Goster?year=2004&no=51>

[703] CMB, 'İMKB Şirketleri Tarafından 2005 yılında yayınlanan Kurumsal Yönetim Uyum Raporlarına İlişkin Genel Değerlendirme (Evaluation of the Corporate Governance Compliance Reports of ISE Companies in 2005)' <http://www.spk.gov.tr/Sayfa/Dosya/69> 3.

[704] Ibid.

> Unilateral declaration of the board of directors, which covers information about whether or not the Principles are being properly applied, if the Principles are not being applied, the reasons for such non-application and all possible conflicts of interest due to the improper adoption of the Principles, should be included in the annual report and disclosed to public, together with pertinent harmonization report, if any.[705]

In line with this addition to the revised version, the advisory and the soft law nature of the CMB Principles have shifted to a comply-or-explain approach. [706] This situation was to change in 2011 with a decree issued by the Council of Ministers.[707] The decree gave the CMB authority to determine corporate governance principles to be applied by the listed public joint-stock companies, to create a categorisation system amongst these companies, to impose mandatory application of certain principles to companies that fall within certain categories, and finally to enforce application of such principles through filing lawsuits. With the wide range of authority conferred by the decree, the CMB published consecutive communiques from 2011 onwards and included the revised CMB Principles as an annex to these communiques.

Another important development in terms of corporate governance came from the ISE's[708] establishment of a Corporate Governance Index (CGI), which came into effect on August 2007.[709] Accordingly, the companies that scored high corporate governance ratings would be included in the CGI and enjoy benefits such as a substantial reduction in listing fees and the prestige of being included in the index.[710] The CGI encourages companies to stay within the high corporate governance rating score range if they want to continue benefiting from the index. It also aims to incentivise other companies to improve their corporate governance standards to secure a good rating. The CGI initially included five companies, but includes 47 companies as of December 2018.[711] The number of companies scoring high corporate governance ratings has increased almost tenfold since it was established in mid-2007. Inclusion in the CGI increases the reputation of the company and is a determining factor for prospective foreign investors.[712]

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[705] CMB, Corporate Governance Principles (2003, amended 2005) 1.6.
[706] Karasu 'Novelties of the Turkish Commercial Code ' (n 156) 37.
[707] TBMM, Decree No. 654 (11.10.2011).
[708] Now named Borsa Istanbul (BIST), which is a combined name for the former ISE (the Istanbul Stock Exchange, the Istanbul Gold Exchange and the Derivatives Exchange.
[709] BIST, 'Corporate Governance Index' <http://www.borsaistanbul.com/en/indices/bist-stock-indices/corporate-governance-index> accessed 11 September 2017.
[710] Ibid.
[711] Public Disclosure Platform of Turkey, 'BIST Indices' <https://www.kap.org.tr/en/Endeksler> accessed 27 December 2018.
[712] G Cebeci and IG Özbilgin, 'Borsa İstanbul Bilişim Endeksinde Yer Alan Şirketlerin Kurumsal Yönetim ve Finansal Performans Açısından Değerlendirilmesi (Evaluation of the Companies Included in

To score the corporate governance ratings of listed companies, the CMB issued a communique regarding the rating agencies in the capital markets. The communique stipulated that the corporate governance ratings are to be conducted by independent agencies in line with companies' compliance with the CMB Principles.[713] The companies are scored in line with their corporate governance practices under four headings, similar to the CMB Principles, albeit with different weights attributed to each category. Accordingly, corporate governance practices under the Shareholders category constitute 25% of the score, practices under the Public Disclosure and Transparency category constitute 35% of the score, practices under the Stakeholders category constitute 15% of the score, and practices under the Board of Directors category constitute 25% of the score.[714] For a company to be included in the CGI, they must have an overall minimum score of 7 out of 10 and a minimum score of 6.5 for each category.[715] These ratings are an important determinant for investment decisions: 'from a global investor's perspective, CG ratings are seen as important proxies in assessing whether firms in emerging market countries follow corporate governance practices in line with international standards.'[716]

As previously discussed, the CMB Principles closely resemble the OECD Principles. Hence, the level of compliance with the CMB Principles also means the same level of compliance with the international standards. A similar practice has been adopted in another emerging market economy. Brazil's stock exchange has implemented special listing categories where companies are included in one of the four segments designated by the exchange based on the companies' liquidity, transparency, and corporate governance practices.[717] The most demanding segment is the Novo Mercado (New Market), where companies must meet requirements such as keeping a minimum free-float ratio of 25%, favour stock dispersion, offer more transparency, have a minimum number of independent directors, and issue only voting shares.[718] The Brazilian stock exchange's Nova Mercado initiative was established in 2000, which means that the practice

the Borsa Istanbul Information Technology Index in terms of Corporate Governance and Financial Performance)' (2015) 2(4) Gazi Üniversitesi Sosyal Bilimler Dergisi 47, 53.

[713] CMB, Communique on Corporate Governance Ratings and Rating Agencies VIII-40 (04.12.2003) Article 6.

[714] Corporate Governance Association of Turkey, 'I. Kurumsal Yönetim Ödülleri (1st Corporate Governance Awards)' (January 2011) <http://www.tkyd.org/TR/faaliyetler-kurumsal-yonetim-odulleri-i-kurumsal-yonetim-odulleri.html> accessed 7 August 2018.

[715] BIST, 'Corporate Governance Index' (n 709).

[716] S Gurarda, E Ozsoz and A Ates, 'Corporate Governance Rating and Ownership Structure in the Case of Turkey' (2016) 4(2) International Journal of Financial Studies 1, 1.

[717] PCR Leal, 'The Emergence of a Serious Contender: Corporate Governance in Brazil' in Christine Mallin (ed), *Handbook on International Corporate Governance* (2nd edn Edward Elgar 2011) 317.

[718] Ibid.

took off shortly after the OECD Principles were published.[719] Leal has commented that in Brazil, 'going public and listing in the traditional listing segment is a thing of the past, and probably unacceptable to most investors.'[720] He has concluded that although the boards in Brazil are still largely dominated by controlling shareholders, 'dispersion of capital is slowly increasing.'[721] There are similarities between the Brazilian experience and Turkish companies. Both countries' company structures are dominated by controlling shareholders, although Brazil is more advanced in terms of incentivising public companies to be listed in the higher corporate governance segment of its stock exchange. In contrast, listed companies in the Turkish stock exchange's CGI constitute around 15% of all the companies whose shares are being traded in the BIST.[722] It remains to be seen whether the listings under the CGI will increase in the future as more foreign investors dilute the stock market. Nevertheless, the creation of the CGI carries significance in terms of disseminating corporate governance practices in Turkey.

In sum, the corporate governance phenomenon has had a brief history in Turkey that began with the introduction of corporate governance rules in the banking sector after the financial crisis of 2000-2001.[723] Afterwards, due to the efforts of non-governmental organisations in Turkey, corporate governance soon found its place on the agenda of the regulators. This was also because the OECD had published its first Principles of Corporate Governance in 1999. Taking the OECD's text as inspiration, the CMB of Turkey published its own Corporate Governance Principles in 2003, which were non-binding guidelines for public joint-stock companies. The principles did not find much application in the family owned and controlled business organisations in Turkey. However, with the introduction of the Corporate Governance Compliance Reports' mandatory reporting requirements from 2005, corporate governance issues started taking centre stage in the business world.

On top of these developments, the ISE helped spread the principles via the establishment of a CGI and providing companies with incentives to score high corporate governance ratings. In fact, in terms of performance, it has been reported that between 2009 and 2017, the BIST 100 Index increased by 387% and the CGI increased by 444%.[724] This illustrates some link between

[719] Although Brazil is not a member of the OECD, it is classified as one if its 'key partners', see OECD, 'Members and partners' <http://www.oecd.org/about/membersandpartners/> accessed 14 December 2018.
[720] Leal, 'The Emergence of a Serious Contender' (n 717) 318.
[721] Ibid 328.
[722] As of December 2018, there are 327 listed companies whose shares are being traded on Borsa Istanbul stock exchange and 47 companies listed under CGI, see Public Disclosure Platform of Turkey, 'BIST Indices' <https://www.kap.org.tr/en/Endeksler> accessed 27 December 2018.
[723] TBMM, Law Amending the Banking Law No.4672 (12.05.2001).
[724] SAHA, 'BIST Kurumsal Yönetim Endeksi (BIST Corporate Governance Index)' (2017) <http://www.saharating.com/~saharati/bist-kurumsal-yonetim-endeksi/> accessed 23 July 2018.

the application of the CMB Principles and increased share price for Turkish listed companies. On the other hand, despite having a 'weak legal foundation'[725] for its corporate governance principles, the CMB's regulatory initiative can be considered a success. Since the launch of CMB Principles, foreign shareholders in ISE companies increased significantly, and some controlling shareholders sold their stakes in line with the rising demand for ISE listed stocks.[726] Nevertheless, the OECD's report on Turkey's corporate governance practices stated that there must be more improvements in the legal framework, especially for related party transactions, protection of minority shareholders, and board oversight of controlling shareholders.[727] The following sections examine the developments on corporate governance legislation with the enactment of a new CML in 2012, which authorises the CMB to regulate corporate governance matters for public joint-stock companies, thereby providing the CMB Principles with its much-needed legal basis.

4 Corporate Governance in the new Turkish Capital Market Law

It is important to clarify which forms of companies the provisions of the CML are applicable to. The provisions of the CML are applicable to the 'publicly-held corporations' which are, according to Article 3 of the CML, 'A joint stock corporation, the shares of which are offered to public or are deemed to be offered to public.'[728] The law further clarifies what constitutes *deemed to be offered to public*, in line with Article 16: 'Corporations the shares of which are traded on exchange and the shares of joint stock corporations with a shareholder number exceeding five hundred shall be deemed to be publicly-held.'[729] Therefore, the articles of the CML are applicable to all public joint-stock companies, regardless of whether they are listed or not.[730] The CML provisions are specifically applicable to the public joint-stock companies, whereas the provisions found in the TCC are applicable to all companies. The TCC also includes provisions on corporate governance, but as will be discussed in the next chapter, these are more general rules, and the CML provisions take precedence in terms of application for public joint-stock companies. Furthermore, the new TCC specifically confers upon the CMB the authority to regulate corporate governance-related issues. Article 1529 of the TCC states that the 'Capital Markets Board is authorized to determine corporate governance principles, rules of explanations

[725] Ararat, '"Comply or Explain" Without Consequences' (n 69) 356.
[726] Ibid 357.
[727] Ibid. See OECD, 'A Pilot Study' (n 159).
[728] CML Article 3/e.
[729] Ibid
[730] Ibid Article 16.

of executive board related to corporate governance and rules and results of rating of companies in aspect of corporate governance, in open joint stock companies.'[731]

This was not the case with the previous commercial code, which contained no references to the issue of corporate governance or the institution which would regulate it. With the new TCC and by the virtue of Article 1529, the CMB now has an explicit legal basis for being the sole authority regulating matters of corporate governance for public companies. On top of that, the new CML that entered into force shortly after the promulgation of the new TCC in 2012 further strengthened the 'monopoly'[732] of the CMB concerning its authority over corporate governance-related issues. In this regard, Article 17/1 of the new CML stipulates that

> In publicly-held corporations, the procedures and the principles regarding corporate governance principles, the content and publication of corporate governance compliance reports, the rating of compliance of corporations with corporate governance principles and the independent memberships of board of directors shall be determined by the Board [CMB].[733]

Along with this provision of the CML and the Article 1529 of the TCC, the CMB became the sole authority to determine corporate governance principles for public companies, avoiding any confusion. The reason for this is elaborated in the *Genel Gerekçe* (General Justification) of the TCC Article 1529; it is stated that the provision aims to ensure uniformity in corporate governance rules that would be applicable to public companies, thereby avoiding any confusion in practice regarding the applicability of these rules.[734]. The new TCC also allows for other public institutions to draft their own corporate governance rules concerning and limited to their own fields of activity. However, these regulations are also subject to the approval of the CMB.[735] According to the wording of this provision, the corporate governance regulations of public institutions other than the CMB can only pertain to detailed matters. An example of this can be found in the Banking Law, where Article 22 highlights the complementary character of its corporate governance regulations and stipulates that the Banking Regulation and Supervision Agency has the authority to regulate matters on corporate governance in line with the opinion of the CMB.[736] The purpose of this is to ensure that there is unity in the application of the

[731] TCC Article 1529(1) translated in Burçak Yazgı Özcan, 'A Legal Approach to Corporate Governance Structures in Central Banking' (Presentation) (The Central Bank of the Republic of Turkey 13.11.2014).
[732] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 32.
[733] CML Article 17.1.
[734] *TCC with Justifications* (n 104) 1194.
[735] Turkish Commercial Code No. 6762 (09.07.1956) Article 1529/2.
[736] TBMM, Banking Law No. 5411 (01.11.2005) Article 22.

corporate governance principles throughout public joint-stock companies and to avoid confusion for both companies and investors.

One of the most important reforms brought by the new CML are the mandatory corporate governance principles. Article 17/2 of the new CML gives the CMB authority to impose mandatory corporate governance principles for certain listed companies. Accordingly, the new CML explicitly allows the CMB to establish corporate governance principles; to provide categories for listed companies; and most importantly to decide which rules are to be mandatory for those categories as well as ensure compliance with these rules by various enforcement methods, including filing lawsuits.[737] This was a turning point for Turkish corporate governance laws. With the power granted by this article, the CMB has published subsequent communiques that regulate the matter in detail.

5 Capital Markets Board's Corporate Governance Regulations After the New Capital Markets Law

The CMB's corporate governance regulations preceded the promulgation of the new TCC and the CML. The CMB's 2003 Principles were not mandatory because they lacked any legal basis. Consequently, the CMB did not have any enforcement power to ensure the implementation of its principles. The only mandatory requirement from the 2005 revision was that the listed companies were required to publish their compliance with the CMB Principles in their annual reports. Other than this requirement, the CMB Principles remained a form of soft law. The soft law approach started to change towards the end of 2011 with the government Decree No. 654 that amended an article in the old CML, providing the necessary legal basis to the CMB for regulating the issue of corporate governance.[738] Shortly after the amendment came into effect, the CMB introduced the first shift from the comply-or-explain approach to the hard law approach.

In 2011, the CMB Communique on the Determination and the Application of Corporate Governance Principles IV-54 stipulated that the listed joint-stock companies (excluding banks) whose shares are traded in the ISE and included in the ISE-30 Index[739] were required to comply

[737] CML Article 17/2.
[738] TBMM, Decree No. 654 (11.10.2011).
[739] ISE-30 (now called BIST-30) stands for an index of 30 listed companies with the highest market cap and trade volume. See BIST Indices <https://www.borsaistanbul.com/en/indices> accessed 11 November 2018.

with some of the corporate governance principles stated therein.[740] Shortly after, the Communique on the Determination and the Application of Corporate Governance Principles IV-56 (Communique IV-56) followed, which replaced the previous one and provided that all listed companies under the ISE were within the scope of mandatory application, including the listed banks.[741] It also specified that listed companies under the categorisation provided by the CMB were required to implement certain corporate governance principles according to the group they belonged in.[742] Those listed companies were then obliged to update their articles of association and restructure their boards to ensure compliance with these new corporate governance obligations shortly after the publication of that communique.[743]

With each subsequent communique, the CMB increased the scope of applicability of its mandatory provisions. Some of the CMB Principles that gained mandatory status by the end of 2011 (with Communique IV-56) pertained to the convening of the general assembly;[744] transactions of controlling shareholders; board members; managers their families, and conflicts of interest;[745] the requirement for a majority vote at the general assembly meeting for certain transactions;[746] composition of the board of directors;[747] and formation of committees within the board.[748] The following section conducts a detailed analysis of the CMB Principles that have become mandatory and their significance to the research inquiry of this thesis.

The most important novelty brought by CMB Communique IV-56 was the categorisation of listed companies according to their 'systemic significance', which is measured through their 'market capitalisation' and 'market value of shares in free circulation', or the free-float.[749] The communique established three categories that consider the above-mentioned features of public companies:

[740] CMB, Communique on the Determination and the Application of Corporate Governance Principles IV-54 (11.10.2011).
[741] Communique on the Determination and the Application of Corporate Governance Principles IV-56 (30.12.2011).
[742] Ibid Article 5.2.
[743] Ibid Temporary Article 1.
[744] Ibid Principle 1.3.1, 1.3.2.
[745] Ibid Principle 1.3.7.
[746] Ibid Principle 1.3.10.
[747] Ibid Principles 4.3.1.-4.3.9.
[748] Ibid Principle 4.5.1.
[749] Ibid Article 2.

Category I	Market cap > TRY 3,000,000,000 Value of free-floating shares > TRY 750,000,000
Category II	Market cap > TRY 1,000,000,000 Value of free-floating shares > TRY 250,000,000
Category III	All other listed companies that are outside the scope of categories I and II, and companies listed and trading at the Watch List and Emerging Companies Markets.

Figure - 1

According to the categorisation illustrated above, the listed public joint-stock companies that have a market capitalisation above 3,000 million Turkish Liras (TRY) and free-floating shares valued above TRY 750 million are required to comply with all of the mandatory provisions contained in the CMB Principles that were annexed to Communique IV-56. Companies in the second category, meaning their market capitalisation is above TRY 1,000 million and they have free-floating shares valued above TRY 250 million, will not have to comply with all the mandatory provisions. For example, it is stated in the communique that the second paragraph of Principle 4.3.9 will not be applicable to the listed companies in categories II and III.[750] This principle stipulated that the board of directors must provide its list of independent board member candidates to the CMB, and that the CMB shall provide its dissenting opinion, if any, regarding the candidates on the list within 30 days to the company. In such cases, the candidate bearing the negative opinion shall not be elected as an independent director.[751] Accordingly, the affirmative opinion of the CMB as to the independence of the directors is prioritised mainly for the Category I companies, which have the most systemic importance according to the CMB categorisation. Finally, Category III is for all other listed companies that are left outside the scope of categories I and II as well as companies listed and trading at the Watch List and Emerging Companies markets. These companies are considered to be less vital to the systemic functioning of the stock market and are therefore generally exempt from most of the mandatory provisions.

[750] Ibid Article 5/4.
[751] Ibid.

In the event of non–compliance with the mandatory principles, the CMB has the authority to request injunction measures from the court to enforce compliance.[752] The CMB can also apply to the court to request that the non-compliance to be determined and for the annulment of a transaction that conflicts with the CMB Principles. In its application before the court, the CMB is required to include its suggestions on how to achieve compliance with its principles. However, this suggestion must not be detrimental to the regular activities of the company and should not clash with its articles of association.[753] This was a very bold step in the area of corporate governance because the independent institution of the CMB was granted enforcement powers in the form of court requests to annul company transactions to ensure compliance with corporate governance principles.

The CMB Communique IV-56 has been amended several times following its publication, and with each consecutive amendment, the scope of the mandatory principles has been extended further.[754] The CMB has advocated increasing the number of mandatory principles because it had observed that the companies that implemented the CMB Principles have had access to cheaper financing and therefore used their resources more efficiently.[755] Also, during the parliamentary deliberations over passing the draft CML, the government stated that 2012 had been an important year for winning the confidence of international investors because of the enactment of the mandatory application of corporate governance principles. [756] The government spokesman also stated that the most important aim of these regulations has been to restore investor confidence in the capital markets.[757] It can be observed that the CMB used its communiques to act ahead of the legislative body by laying down corporate governance regulations. As evidenced by the government's statements, the CMB's rule-making in the area of corporate governance has been welcomed by the government as an important step towards attracting foreign capital. This also indicates that the CMB is acting in line with the objectives of the legislator and there is no conflict between their policies.

[752] Ibid Article 5/10.
[753] Ibid Temporary Article 2.
[754] The CMB issued 5 communiques regarding the determination and the application of corporate governance principles in a 3-year period following the Communique IV-56, until the Communique on Corporate Governance in 2014.
[755] CMB, 'Seri: IV No: 56 Sayılı Kurumsal Yönetim İlkelerinin Belirlenmesine ve Uygulanmasına İlişkin Tebliğ Hakkında Basın Duyurusu (Press Statement on the Communique Serial: IV No: 56 on the Determination and Application of Corporate Governance Principles)' (30.12.2011) <http://www.spk.gov.tr/Duyuru/Goster/20111230/0>.
[756] TBMM, 'Genel Kurul Tutanağı (Minutes of the General Meeting)' (12.12.2011).
[757] Ibid.

The latest CMB communique regarding corporate governance was published in 2014, titled Communique on Corporate Governance II-17.1 (Communique on Corporate Governance).[758] This new regulation repealed all the former CMB communiques relating to corporate governance. The CMB announced that the necessity for a new communique on corporate governance arose from the promulgation of the new CML and the TCC. The CMB's communique revised its principles in line with the provisions of the two new legislation.[759] For example, to be in conformity with the provisions of the new TCC, the Communique on Corporate Governance introduced a requirement for the establishment of an investor relations department because it was already stipulated under the TCC.[760] In terms of the legal basis for the Communique on Corporate Governance, a provision was added to the communique to clarify that the CMB has the authority to regulate issues on corporate governance as per Article 17 of the new CML.[761] Overall, it can be concluded that the explicit reference to the communique's legal basis was intended to bring more credibility to the rule-making and enforcement capabilities of the CMB, particularly in terms of Turkish companies' perceptions of the application of the CMB Principles.

6 The Capital Market Board's Corporate Governance Principles

The latest version of the CMB Principles is published as an annex to the Communique on Corporate Governance. The CMB Principles follow a similar outline to the initial version in that it consists of four sections; Shareholders, Public Disclosure and Transparency, Stakeholders, and Board of Directors. In total, there are 97 corporate governance principles, of which 24 are mandatory for certain listed companies as per their systemic categorisation. Article 5 of the Communique on Corporate Governance lists the principles which the companies are liable to implement. These are all applicable for Group I category companies 'whose average market value is above TRY 3 billion and average market value in actual circulation is above TRY 750 million.'[762] The subsequent articles stipulate which mandatory principles will not be applicable for Group II and Group III companies. For example, Article 6 stipulates that 'The criteria stated under the principle numbered (4.3.4.) regarding the number of independent board member shall not be applied for the third group corporations'.[763] As discussed earlier, the

[758] CMB, Communique on Corporate Governance II-17.1 (03.01.2014).
[759] CMB, 'Kurumsal Yönetim Tebliği II-17.1 Basın Duyurusu (Press Statement on the Communique II-17.1 on Corporate Governance)' (03.01.2014) <http://www.spk.gov.tr/Duyuru/Goster/20140103/3>.
[760] Communique on Corporate Governance Article 11.
[761] Ibid Article 2.
[762] Communique on Corporate Governance Article 5/2.
[763] Ibid Article 6.

companies in Group III are considered to have the least systemic importance for their related sectors,[764] which is why their corporate governance obligations are less rigid.

The first section, Shareholders, contains four mandatory principles and 20 voluntary principles. In the Public Disclosure and Transparency section, there are six principles which are all voluntary. Under the Stakeholders section, there are 22 principles which are all voluntary. In the last section on the Board of Directors, there are 20 mandatory principles alongside 25 voluntary principles. I examine these principles in more detail below, focusing on the mandatory principles and their significance. I also discuss the reasons why none of the principles listed under the Stakeholders section are binding and their possible implications in practice.

a. Principles for Shareholders

The CMB Principles begin with rules concerning shareholders. These principles are categorised into the following sub-sections: Facilitating the exercise of shareholders rights, Shareholders' right to information, Shareholders' right to participate in the general assembly meetings, Voting rights, Minority rights, Dividend rights, and Transfer of shares. According to Article 5 of the Communique on Corporate Governance, listed companies are obliged to implement Principles 1.3.1, 1.3.5, 1.3.6 and 1.3.9 under the Shareholders section.[765] The Corporate Governance Communique also holds that listed companies 'shall be divided into three groups in accordance with their systemic significance considering their market values and the market values of the shares in active circulation.'[766] Group I companies are required to implement all mandatory principles listed in Article 5, which are the mandatory principles under the Shareholders section. Since there are no articles exempting the Group II and Group III companies, the mandatory principles concerning shareholder rights are applicable to all three categories of companies.[767] This signifies the importance attributed to these four mandatory principles because all the listed companies, even the ones in Group-III, are bound to implement these corporate governance principles.

[764] Justification for CML Article 17 in TBMM, 'Draft Capital Markets Law and the Report' (n 101).
[765] Communique on Corporate Governance Article 5.
[766] Ibid Article 5/2. See Figure-1 for an illustration of the CMB's categorisation system.
[767] Ibid: 'First group: Corporations whose average market value is above TRY 3 billion and average market value in actual circulation is above TRY 750 million. Second group: Corporations among those excluded from the first group, the average market value of which is above TRY 1 billion and average market value in actual circulation is above TRY 250 million. Third group: Corporations among those excluded from the first and second groups, the shares of which are traded on National Market, Second National Market and Collective Products Market.'

To begin with, Corporate Governance Principle 1.3.1 articulates the type of information that needs to be announced to shareholders prior to the convening of the general assembly meeting. This includes information such as the 'total number of shares and voting rights reflecting the current corporate structure'[768], 'changes in the management and activities of the corporation and subsidiaries thereof',[769] or changes to the company's articles of association.[770] The information listed above needs to be announced in the company website and in the Public Disclosure Platform (PDP).[771] There is also a deadline for submitting the listed information online; accordingly, the announcement should be made at least 3 weeks prior to the general assembly meeting.[772] This mandatory principle intends to provide investors with enough time to decide on the matters announced before the general assembly, thereby strengthening shareholders' rights and incentivising prospective investors.

The next mandatory principle concerns the facilitation of shareholder participation in the general assembly meetings. This principle requires that all shareholders be given equal opportunity to ask questions and express their opinions.[773] This principle aims to achieve the equitable treatment of all shareholders. The mandatory principle in 1.3.6 pertains to the shareholders who hold the control function in the company and therefore carries significance in the context of Turkish family-controlled companies. This principles aims for the disclosure of situations where controlling shareholders enter into transactions with related persons or become unlimited shareholders in another company operating in the same line of activity, which may lead to a conflict of interest. The mandatory principle stipulates that such situations should be disclosed and discussed in the general assembly meeting as a separate agenda item.[774] This principle seeks to prevent the expropriation of company assets by the majority shareholders who also hold control functions in the company. The last mandatory principle on shareholders stipulates that certain company transactions that constitute activity cessations or pertain to purchase or sale of assets or services whose value exceeds 10% of the total value of the assets require the approval of the majority of independent board members.[775] The significance of this principle lies in that approval from the majority of the independent board members is required

[768] CMB Principle 1.3.1 paragraph (a)
[769] CMB Principle 1.3.1 paragraph (b)
[770] CMB Principle 1.3.1 paragraph (d)
[771] 'Public Disclosure Platform (PDP) is an electronic system through which electronically signed notifications required by the capital markets and Borsa Istanbul regulations are publicly disclosed' in Public Disclosure Platform of Turkey, 'General Information' <https://www.kap.org.tr/en/menu-content/About-PDP/General-Information> accessed 6 November 2017.
[772] CMB Principle 1.3.1
[773] CMB Principle 1.3.5
[774] CMB Principle 1.3.6
[775] CMB Principle 1.3.9

for the material value transaction to go through, which increases the power of the independent members in the company.

In terms of minority shareholder rights, the non-binding Principle 1.5.1 states that 'Maximum diligence shall be paid for the exercise of minority rights.'[776] In terms of voting rights, the principles do not envisage a 'one share one vote rule' but rather advise that

> Privileges regarding voting rights should be avoided. In case there is a privilege in the voting right, the privileges in a feature to prevent the holders of publicly traded shares from being represented at the board of directors of the corporations shall in principle be revoked.[777]

Moreover, there is a special provision regarding foreign investors; to induce all shareholders to exercise their voting rights, cross-border voting is encouraged.[778] Another important point pertains to the transferability of the listed company shares; the principles explicitly state that 'Practices that would complicate the free transfer of the shares shall be avoided.'[779] It can thus be asserted that the aim of this principle is to ensure the free transferability characteristic of the company stock so as to sustain liquid stock markets.

In sum, the corporate governance areas that are considered important by the CMB are evident from its preference for mandatory principles. It is clear that shareholders' access to information, particularly to timely information prior to the convening of the general assembly meetings, is considered a prominent issue. The matters that must be disclosed are also stipulated in great detail. Also, all shareholders' rights to participate, ask questions, and have answers to their questions are safeguarded through a mandatory principle which all listed companies must to abide by. The aim of this provision is to prevent minority shareholders from being left out in general assembly meetings and provide them with the opportunity to be involved with company matters should they wish to do so.

The CMB also took into consideration the specificities of the family-owned and controlled ownership structure of Turkish companies while regulating the mandatory principles. The CMB Principles require material transactions by the controlling shareholders to be disclosed and discussed before the general assembly as part of a separate agenda item. Material value

[776] Ibid. Annex-1 Principle 1.5.1
[777] Ibid. Annex-1 Principle 1.4.2
[778] Ibid. Annex-1 Principle 1.4.1
[779] Ibid. Annex-1 Principle 1.7.1

transactions are also subjected to the approval of independent board members, increasing the power of independent members vis-à-vis the shareholders who hold control positions. In this way, the two mandatory principles provide safeguards for the minority shareholders against the controlling shareholders. The rest of the corporate governance principles under the Shareholders section are non-binding, although all listed companies are required to disclose their compliance with the rest of the principles in their Corporate Governance Compliance Reports.[780]

b. Principles on Public Disclosure and Transparency

The earliest mandatory rule laid down by the CMB with regards to disclosure and transparency was its 2004 requirement for public joint-stock companies to publish a Corporate Governance Compliance Report. The initial corporate governance principles that were published by the CMB in 2003 also included a section on disclosure and transparency, which included provisions of a soft law nature. The 2014 revised CMB Principles still contain optional principles listed under the Public Disclosure and Transparency section. However, their application is recommended in accordance with the comply-or-explain method. Yet, Eminoğlu has asserted that one of the main reasons why corporate governance rules emerged in Turkey is because of the shareholders' need for more transparency.[781]

It is true that disclosure and transparency constitute the cornerstones of corporate governance. Thus, one could argue that they should have been regulated as mandatory principles. However, the CMB Principles under this section indicate that the provisions are covered by other binding legislation. For instance, the first principle under Public Disclosure and Transparency is the requirement for a corporate website;[782] the initial version of the new TCC included an article that required all companies to create a website that was accessible by everyone.[783] The article also listed detailed information that needed to be included in the company website. However,

[780] According to Article 8/1 of the Communique on Corporate Governance: 'Annual [company] reports shall include information as to whether principles of corporate governance set forth in the annex of this Communiqué are implemented, if not, it shall include a reasoned explanation with this regard and explanations as to whether the corporation has an amendment plan in the future within the framework of such principles in respect of the conflict of interest arising from the non-compliance to these principles and governance implementations of the corporation. In case there is a significant amendment within the term on these explanations, such amendments shall be included within the interim activity report.'
[781] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 43.
[782] CMB Principle 2.1
[783] Article 1524, Turkish Commercial Code No. 6102. It was provided that this Article would be effective as of July 1, 2013, giving companies time to comply with this obligation.

the article was later amended,[784] and its scope was narrowed down to include only the companies which were subject to independent audits as per Article 397 of the TCC.[785] Accordingly, a Council of Ministers decision will determine which companies are subject to an independent audit. [786] In all the decisions of the Council of Ministers, listed companies have been classified as subject to independent audits and hence must have a company website. Therefore, the non-mandatory CMB principle regarding the company website merely provides recommendations as to the additional content of the website. Another novelty for Turkish corporate governance laws was the CMB principle that required companies to disclose their financial statements in English and Turkish through the PDP.[787] Moreover, Principle 2.1.4 stipulated that the information on the company website needs to be prepared in foreign languages, which is 'in completely same content with the Turkish version' to be used by foreign investors.

To sum up, the difference between the CMB Principles and the TCC articles on public disclosure and transparency is that the latter is legally binding while the CMB Principles are not. It can be concluded that the CMB did not see the need to indicate the company website as a mandatory principle because it is already a requirement under the TCC. The CMB Principles instead set forth what is to be included in listed companies' websites:

> Shareholding structure of the corporation, names, number and ratio of shares, and the privilege of the real person shareholders who own more than 5% shareholding cleared from indirect relations and cross ownership relations shall be disclosed by being updated at least in every 6 months.[788]

The contents for listed companies' websites are regulated with more detail because the company website serves the function of ensuring that the information reaches shareholders and investors who are physically distant from the company. In sum, the principles on Public Disclosure and Transparency may not be mandatory but due to the articles of the new TCC, they are in fact binding on listed companies.

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[784] Article 34, 'Türk Ticaret Kanunu ile Türk Ticaret Kanununun Yürürlüğü Ve Uygulama Şekli Hakkinda Kanunda Değişiklik Yapilmasina Dair Kanun' (Law Regarding the Changes to the Turkish Commercial Code) No. 6335, published in the Official Gazette numbered 28339 on June 30, 2012.
[785] The reason for this change was elaborated in the parliamentary discussions; a CHP parliamentarian expressed that the company website requirement was disadvantageous to small and medium sized companies, who mostly do not have the capacity to create a website both financially and technically. TBMM Proceedings of June 26, 2012. 847
[786] Article 397 of the Turkish Commercial Code No. 6102
[787] Principle 2.1.3
[788] Principle 2.1.2

c. Principles for Stakeholders

In In the revised CMB Principles annexed to the Corporate Governance Communique, the stakeholders are defined as: 'persons, institutions or interest groups that are related with the achievement of goals or activities of the corporation such as employees, creditors, clients, suppliers, syndicates, several non-profit organisations.'[789] The first principle on stakeholders states that the company must protect the rights of the stakeholders that are guaranteed by the relevant laws and those rights provided by the contracts between the stakeholder and the company.[790] The provision's reference to 'relevant laws' means the specific laws that protect the rights of certain stakeholders such as consumers or employees.[791] The next principle is about the stakeholders whose rights are not protected by any relevant laws or when there is no contract between that stakeholder and the company:

> In case the rights of the stakeholders are not protected by the relevant legislation and reciprocal contracts, the rights of the stakeholders shall be protected within the framework of bona fides principles and within the capabilities of the corporation.[792]

In other words, stakeholder protection is left to the goodwill of the company when the stakeholder has not entered into a contractual relationship with the company and is outside the scope of any special legislation. In practice, companies usually use general language in their Corporate Governance Compliance Reports to the effect that they are taking all measures to ensure that their stakeholders are protected.[793]

Another important principle for stakeholders pertains to the participation of stakeholders in company management. The relevant principle starts by stating that models that support stakeholder participation in management, particularly employee participation, 'shall be developed in a manner not to hinder the activities of the corporation'.[794] Hence, before the

[789] Principle 3.1.1.
[790] Ibid
[791] 'Tüketicinin Korunması Hakkında Kanun' (Consumer Protection Law) No. 6502, published in the Official Gazette numbered 28835 on November 28, 2013; 'İş Kanunu' (Labour Law) No. 4857, published in the Official Gazette numbered 25134 on June 10, 2003
[792] Principle 3.1.1.
[793] For instance, Arcelik A.S., a company listed in the Corporate Governance Index and is in Group-I in line with CMB's Communique on Corporate Governance, in its 2017 Corporate Governance Compliance Report states that its management regularly organizes Retailer Meetings to listen to their problems, as well as creating a supplier web portal in which they can communicate their concerns to the management. However, there is no mention under this principle's explanation of the stakeholders who do not contract with the company such as the society or the environment. The widely-held perception is that those stakeholders are considered under social responsibility projects. <http://www.arcelikas.com/sayfa/641/Kurumsal_Yonetim_Ilkeleri_Uyum_Raporu>
[794] CMB Principle 3.2.1

principle even suggests that the stakeholders should take part in management decisions, it states that such engagement should not obstruct the company's operations. If employees take part in management activities, this will mean spending time on management functions that are outside of their usual work scope. This can be interpreted as hindering company activities due to lost time regarding the employees' normal shift hours. The company can therefore claim that any model with employee engagement in management would hamper its operations and create additional costs. This provides a convenient justification for the company to refrain from implementing this principle.

In terms of other legislation, there is limited scope for employee participation in Turkey. The initial draft of the Turkish Labour Law contained provisions that enabled employee representation for information and consultation purposes. However, before the draft code was adopted, such provisions were removed from its text 'because government representatives, trade unions and employer associations had jointly rejected the proposal in 2003'.[795] The only remaining provision in the Labour Law is the article that allows the formation of Annual Leave Committees that include employee representatives.[796] Another form of employee participation in management can be found in the Occupational Health and Safety Law, which envisages the establishment of an occupational health and safety committee that includes employee representatives.[797] However, the scope of this committee's activities are very limited. In practice, when the companies in the CGI are examined, the only instance of a company with some form of employee participation in management was Aselsan A.S.[798] According to the Stakeholders section of Aselsan's Corporate Governance Compliance Report, an employee representative shall attend the company's BoD meetings at least once a year.[799] However, it should be noted that Aselsan is in the defence industry, and 74% of its shares are owned by the Turkish military. Similar practices of employee engagement in boards are not found in other private listed companies in Turkey.

[795] Ozcure G, Eryigit N and Demirkaya H, 'The influence of the European Union employee participation system and related acquis on companies operating in Turkey' (2009) 1 South-East Europe Review 95. 101

[796] Article 60, Labour Law No. 4857, published in the Official Gazette numbered 25134 on June 10, 2003. Accordingly, the article authorizes the Ministry of Labor and Social Security to determine the rules on the establishment of the Annual Leave Committee with its regulations. The related regulation entitled 'Yillik Ücretli İzin Yönetmeliği', Article 15 stipulates that in workplaces with over 100 employees, a committee composed of the employer or its representative and two employee representatives shall be established. Article 16 states that the Annual Leave Committee is responsible for discussing employees' leave requests, preparing annual leave schedules, listening to employee comments and complaints regarding annual leave.

[797] Article 22, 'Is Sagligi ve Guvenligi Kanunu' (Occupational Health and Safety Law) No.6331, published in the Official Gazette numbered 28339 on June 30, 2012.

[798] A.S. refers to 'Anonim Sirket', which means Joint-stock Company.

[799] From company reports published in PDP (Public Disclosure Platform) in <https://www.kap.org.tr/tr/bist-sirketler>

On the other hand, another CMB Principle provides that 'With respect to the significant decisions which affect stakeholders, opinions of the stakeholders shall be taken.'[800] The principle does not provide any details or further guidance of how the opinion of the stakeholders should be taken or whether it encompasses stakeholders in a broader sense. The Corporate Governance Compliance Reports of the companies listed in the CGI indicate that most companies demonstrate their compliance with this principle with practices such as employee satisfaction surveys, suggestion surveys, or internet portals for leaving comments and feedback.[801] Therefore, this principle is not implemented by companies in practice because there are no formal procedures for consulting stakeholders, and there is no evidence to indicate that these surveys and online comments from employees are considered in decision-making.

Overall, the ambiguity of the principles under the Stakeholders section make them impractical and futile because it is not clear how these principles would be applied by the company. Furthermore, the company's compliance would only be measured by the subjective criterion of what the company believes it does for the stakeholders. Also, none of the principles under the Stakeholders section are mandatory. These principles stand merely as good practices recommended to companies under the comply-or-explain approach. Most companies have reported high levels of compliance with the principles for stakeholders, albeit with very general and unsatisfactory explanations.[802]

d. Principles for the Board of Directors

The board of directors is arguably the most important organ of the company for implementing corporate governance.[803] It is for this reason that the principles regarding the board of directors constitute the most detailed section and contains the most mandatory rules.[804] The most mandatory rules are contained under the sub-sections Structure of the Board and the Board Committees. According to the Communique on Corporate Governance, the companies categorised under Group I are required to implement all of these mandatory principles in full.

[800] CMB Principle 3.2.2.
[801] 'Kurumsal Yönetim İlkeleri Uyum Raporu (Corporate Governance Principles Compliance Report)' (Anadolu Grubu 2017); 'Kurumsal Yönetim İlkeleri Uyum Raporları (Corporate Governance Principles Compliance Reports)' (Arçelik AŞ 2017); 'Kurumsal Yönetişim İlkeleri Uyum Raporu (Corporate Governance Principles Compliance Report)' (Doğuş Otomotiv 2017) published in the Public Disclosure Platform of Turkey (PDP) website <https://www.kap.org.tr/tr/bist-sirketler> accessed 9 August 2018.
[802] CMB and EBRD, 'Türkiye'deki Halka Açık Şirketlerin Kurumsal Yönetim Yapıları ve Uygulamaları Hakkında Araştırma Raporu (Report on the Corporate Governance Structures and Practices of Public Companies in Turkey)' (June 2018).
[803] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 20.
[804] The mandatory principles under the Board of Directors section are: '(4.2.6.), (4.3.1.), (4.3.2.), (4.3.3.), (4.3.4.), (4.3.5.), (4.3.6.), (4.3.7.), (4.3.8.), (4.5.1.), (4.5.2.), (4.5.3.), (4.5.4.), (4.5.9.), (4.5.10.), (4.5.11.), (4.5.12.), (4.5.13.), (4.6.2.) and (4.6.3.)', in Communique on Corporate Governance Article 5.

The principles under this section start by stating that the BoD 'shall conduct its activities in a transparent, accountable, fair and responsible way',[805] which refers to the corporate governance principles of transparency, equality, accountability, and responsibility.[806]

There is a non-binding principle which stipulates that the roles of the chairman of the BoD and the CEO or general manager shall be 'explicitly' separated: 'No one in the corporation shall be delegated with limitless decision-making authority.'[807] This principle serves 'as a method of ensuring an appropriate balance of power, increasing accountability and increasing the capacity of the board for independent decision making.'[808] An OECD Report has found that the chairman and the CEO roles are indeed separated in most listed companies in Turkey; however, the CEO position is commonly held by a member of the BoD.[809] Although the principle for the separation of the chairman and the CEO roles is voluntary, there is a mandatory principle which requires that if the chairman and the CEO are the same person, this must be disclosed with justifications on the PDP. However, a study conducted in 2018 has reported that amongst all the listed companies where the chairman and the CEO roles were gathered in a single person, only 22% of the companies disclosed their justifications despite the mandatory principle.[810] In an analysis of the boards of listed companies in Turkey, Yurtoglu has noted that most of the BoDs are dominated by the owner's family members, and the boards 'are in the first place an internal mechanism of control reinforcing the owners' influence on the company.'[811] Therefore, even though this principle is mandatory, that makes little difference because the independence of the chairman is ambiguous in Turkish companies.

The sub-section on the Structure of the Board includes mostly binding principles (80%).[812] The first mandatory principle requires that the listed companies shall have at least five board members.[813] This principle aims to ensure that there are enough directors for the subsequent formation of board committees, which are also regulated as mandatory corporate governance principles. Also, the majority of the BoD must be composed of non-executive directors

[805] CMB Principle 4.2.1.
[806] CMB, Corporate Governance Principles (2003) Preface.
[807] CMB Principle 4.2.5
[808] OECD, 'OECD Principles of Corporate Governance' (1999) 42.
[809] OECD *Corporate Governance Factbook 2017* (n 88) 102.
[810] CMB and EBRD, 'Report on the Corporate Governance Structures and Practices of Public Companies in Turkey' (n 802) 24.
[811] BB Yurtoglu, 'Ownership, Control and Performance of Turkish Listed Firms' (2000) 27(2) Empirica 193, 209.
[812] CMB and EBRD, 'Report on the Corporate Governance Structures and Practices of Public Companies in Turkey' (n 802) 22.
[813] CMB Principle 4.3.1.

(NEDs).[814] Amongst those NEDs, there shall be independent directors who must constitute at least 1/3 of the BoD.[815] This mandatory principle does not apply to listed companies belonging to Group III.[816]

In terms of the independence criteria, CMB has established a strict set of rules in 10 mandatory paragraphs.[817] These criteria include objective and subjective criteria such as the board members having adequate education, knowledge, and experience.[818] The independent board member should also be able 'to maintain his/her objectivity in conflicts of interests between the corporation and the shareholders, to have strong ethical standards, professional reputation and experience to freely take decisions by considering the rights of the stakeholders.'[819] Although this is a mandatory principle that requires the independent members to be capable of considering stakeholders' rights, it does not require directors to consider stakeholder interests per se. Another principle on this topic is the non-mandatory rule that requires the BoD to establish internal control systems 'which may reduce to minimum the effects of the risks on stakeholders of the corporation, *mainly on shareholders*'.[820] The wording of the principle indicates that shareholder interests are prioritised over other stakeholders' interests in terms of risk management in the company. Therefore, although stakeholder interests are mentioned throughout the principles, they are effectively side-lined by other prevailing interests.

The election of the independent members is also stipulated as a lengthy process. The nomination committee will evaluate the candidates' independence as per the criteria set forth in the CMB Principles and submit its evaluation report to the BoD for approval.[821] The candidate is also required to submit a written declaration of independence along with this report. The BoD is then required to prepare the list of independent candidates and forward it to the CMB for approval. If the CMB disapproves of a candidate, that candidate cannot be elected to the BoD. The CMB approval process is not applicable to listed companies under Groups II and III.[822] If the director's independence is revoked, they shall resign.[823] Considering the number and detail of the

[814] CMB Principle 4.3.2. The Principle clarifies the meaning of non-executive as: 'the person who does not have any administrative duty other than being a board member or any executive unit subsidiaries to himself/herself and is not involved in the daily work routine or ordinary activities of the corporation.'
[815] CMB Principle 4.3.3 and 4.3.4.
[816] Communique on Corporate Governance Article 6.
[817] CMB Principle 4.3.6
[818] CMB Principle 4.3.6/c
[819] CMB Principle 4.3.6/e
[820] Emphasis added. CMB Principle 4.2.3.
[821] CMB Principle 4.3.7
[822] Communique on Corporate Governance Article 5/5.
[823] CMB Principle 4.3.8

mandatory principles listed under this sub-section, the importance attributed to the independence of board members is clear.

The CMB Principles require the establishment of an Audit Committee, an Early Detection of Risk Committee, a Corporate Governance Committee, a Nomination Committee, and a Compensation Committee.[824] Each committee shall have at least two members and the majority must be non-executive directors. Also, the chairman of the committees must be an independent board member.[825] Finally, as a mandatory principle, the CEO cannot be in any committee.[826] The Corporate Governance Committee shall be responsible for determining compliance with corporate governance principles and provide advice to the BoD on how to improve the implementation of principles.[827] The Nomination Committee is endowed with the duty of selecting candidates for the board and for management.[828] In line with the provisions of the TCC, the CMB Principles also require the listed companies to establish an Early Detection of Risk Committee, which will be responsible for detecting any risk early on 'which poses a threat to the existence, development and continuation of the corporation.'[829]

As for the issue of pay, although the BoD has the final say in the remuneration of the board members and executive managers, the Remuneration Committee provides its advice 'considering the long-term targets of the corporation.'[830] It is mandatory for the remuneration principles to be in writing and be submitted for shareholder's approval in the general assembly. The principles must also be disclosed on the company website.[831] It is also a mandatory principle that when determining the remuneration of independent directors, 'payment plans such as dividend, stock options or payment options based on the corporation's performance shall not apply.'[832] The principle adds that the pay level should be adequate to maintain the independence of the director.

In terms of female representation on the BoD, the relevant CMB Principle states that the company

[824] CMB Principle 4.5.1
[825] CMB Principle 4.5.3. The principle further dictates that in the case there are two members in the committee, both shall be non-executive members.
[826] CMB Principle 4.5.4
[827] CMB Principle 4.5.10
[828] CMB Principle 4.5.11
[829] CMB Principle 4.5.12
[830] CMB Principle 4.5.13/a
[831] CMB Principle 4.6.2
[832] CMB Principle 4.6.3

> shall determine a target rate provided that it is not less than 25% and a target time for membership of women in the board of directors and form a policy for this target. The Board of directors shall annually evaluate the progress in respect to achieving this target.[833]

However, this provision has not been regulated as a mandatory principle. A recent study has found that female representation on boards is still very low in Turkey: the ratio of women on boards in only 11%.[834] There are initiatives from non-governmental organisations to increase female representation on boards. On March 2017, the CGFT launched the 30% Club initiative in Turkey.[835] The Steering Committee Chair of the 30% Club Turkey, Melsa Ararat, stated the following:

> Despite encouraging regulations by the Capital Markets Board, this ratio [the ratio of women on boards and in executive management in public companies] is still quite low and progress is sluggish. […] The members of the 30% Club, who are the CEOs and presidents of the leading companies in Turkey, state that the presence of women in decision-making mechanisms is indispensable for prudent business management. Their attitude will compel others to recognize subconscious predispositions and question them, which will in turn send a positive message to international investors about BIST companies.[836]

This statement illustrates that the incentives for increasing female representation on boards are once again aimed at attracting foreign investors to the Turkish stock market.

The vast number of mandatory principles regarding the BoD imposes arduous compliance requirements on listed companies, especially for those that belong to Group I. These principles' implementation are especially imperative because in the case of non-implementation, the CMB is now 'authorized to take decisions providing fulfilment of the compliance liability and fulfil the relevant transactions ex officio'.[837] Indeed, since the CMB's Communique on Corporate

[833] CMB Principle 4.3.9
[834] CMB and EBRD, 'Report on the Corporate Governance Structures and Practices of Public Companies in Turkey' (n 802) 22.
[835] 'The 30% Club launched as a campaign in the UK in 2010 with a goal of achieving a minimum of 30% women on FTSE-100 boards' in '30% Club' <https://30percentclub.org/> accessed on Aug 1, 2018.

[836] 'Sabancı University Corporate Governance Forum launches the Turkish program of the 30% Club' Gazete SU (March 2017) <https://gazetesu.sabanciuniv.edu/en/2017-03/sabanci-university-corporate-governance-forum-launches-turkish-program-30-club>.
[837] Communique on Corporate Governance Article 7. It can be observed that the CMB recently imposed administrative fines to companies for breach of the Communique on Corporate Governance or the CMB

Governance was published in 2014, listed companies have created Board Committees and elected independent board members in line with the criteria in the CMB's mandatory principles. A recent survey has indicated that 98% of the companies included in the study have implemented the mandatory principles on Board Committees, and 99% have implemented the principles on the structure of the board that stipulate requirements for independent members.[838] These developments signal an important step towards professional boards in listed companies in Turkey.

7 Conclusions

Turkish capital market legislation has come a long way since the first Commercial Code for the establishment of a joint-stock company was enacted in 1855 during the Ottoman era. These companies' shares were first traded in the unorganised secondary markets, and government bonds were issued for European investors, which eventually led an organised exchange appearing by 1866. Because this exchange experienced turbulence and was dominated by the foreigners in the country, after the proclamation of the Republic of Turkey, the new parliament enacted laws to strengthen state control over the capital markets. Until the 1960s, Turkish capital markets did not play an active role in the economy because of the laws that restricted foreigners from trading in the Turkish stock exchange and imposed state controls on the movement of foreign exchange. This was to change along with the liberalisation process of the Turkish economy that started in the 1950s and gained full momentum in 1980s due to the government's Stability Programme, which was designed in line with the IMF's designated objectives for the economy. The first CML was enacted in 1981, followed by the establishment of the CMB. The CMB possessed the authority to issue detailed secondary legislation regarding the capital markets. In 1985, the ISE was established, although the number of its public offerings and market capitalisation remained at low levels in comparison with other exchanges globally. To increase the attractiveness of the Turkish stock market, a new CML was enacted in 2012.

Along with the promulgation of the new CML, the CMB Principles, which had a soft law nature since 2003, have been imbued with binding power. The CMB has in turn provided that some of its principles would be mandatory for certain listed companies in accordance with their systemic importance. The categorisation by the CMB considers the market capitalisation and market

Principles, see CMB, 'İdari Para Cezaları (Administrative Fines)' <http://www.spk.gov.tr/SiteApps/IdariYaptirim/ IdariParaCezalari> accessed 6 August 2018.

[838] The survey included 70 listed companies that constitute 81% of the total market capitalisation of BIST by the end of 2015. See CMB and EBRD, 'Report on the Corporate Governance Structures and Practices of Public Companies in Turkey' (n 802) 23.

value of shares in free circulation. Hence, the listed companies under Group I are considered to have the most systemic importance for the functioning of the markets and therefore are required to implement all of the mandatory corporate governance principles. The Group II and III companies are exempt from some of the mandatory principles. The most mandatory rules in the CMB Principles are in the Board of Directors section. During the parliamentary proceedings, however, the provisions of the new CML were criticised by opposition party members for giving too much power and discretion to the CMB.[839] This is particularly the case regarding the independent board members; the CMB can appoint an independent board member to the company if the company fails to comply with the mandatory principles.[840] Hence, the CMB can have a direct say in the election of the board members of the listed companies. It can be concluded that the regulator wanted to make sure its mandatory corporate governance principles were complied with, even if that means stepping into the affairs of private businesses.

There are also mandatory principles listed under the Shareholders section of the CMB Principles. These principles are related to the convening of the general assembly meetings. A recent study has found that Turkish listed companies have demonstrated a high level of compliance with the mandatory shareholder principles.[841] In the same way, although the principles under the Public Disclosure and Transparency section are non-binding, most of the companies were in compliance.[842] Under the Stakeholders section, which also contains non-binding principles, the highest level of compliance was observed with the Ethical Rules and Social Responsibility principle and the Human Resources Policy principle.[843] However, the explanations under the compliance reports' Stakeholder section were not detailed and often repetitive.[844] Also, even the companies listed in the CGI (that score a high corporate governance rating) had Corporate Governance Compliance Reports that were filled with generic

[839] TBMM, Sermaye Piyasası Kanunu Tasarısı ile Plan ve Bütçe Komisyonu Raporu (Draft Capital Markets Law and the Report of the Planning and Budget Commission)' (18.06.2012) 47.
[840] Communique on Corporate Governance Article 7/3. Indeed, the CMB has done this in the past and appointed new BoD members to the telecom company Turkcell as the current members failed to comply with the corporate governance principles. Capital Markets Board of Turkey. 'Turkcell İletişim Hizmetleri A.Ş.'ye ilişkin duyuru' (2013) <http://www.spk.gov.tr/Duyuru/Goster/20130815/2> accessed on Aug 6, 2018.
[841] CMB and EBRD, 'Report on the Corporate Governance Structures and Practices of Public Companies in Turkey' (n 802) 15. The study found that all Group-I companies have implemented the mandatory principles under the Shareholders section of the CMB Principles.
[842] Ibid 19; CMB Principle 2.2.
[843] Ibid 21; (CMB Principle 3.5 Ethical Rules and Social Responsibility principle compliance level 99%, and Principle 3.3 Human Resources Policy of the Corporation, compliance level 92%)
[844] Ibid 20.

explanations and stakeholder interests were only mentioned in the context of social responsibility projects.[845]

The CMB has drafted the principles on Stakeholders so that they imply that only the rights provided by other laws or by reciprocal contracts with the company should be protected. This view resonates with the mainstream corporate governance model, which views the company as a nexus of contracts.[846] From the nexus of contracts perspective, the company is 'a set of contracts among factors of production, with each factor motivated by its self-interest.'[847] This argument implies that each constituent has freely contracted with the company, and the resulting arrangements are an outcome of that bargaining. Thus, stakeholder rights are considered to be adequately protected through their contracts with the company. Otherwise, as per the laissez-faire economics' freedom of contract principle, self-motivated individuals would not contract with the company in the first place.[848] This viewpoint, however, neglects reality by assuming that every stakeholder has equal bargaining power. The CMB Principles have also neglected this reality. Hence, aside from the basic legal rights provided by special laws and corresponding contracts, the CMB Principles on stakeholders do not substantially protect stakeholder interests.

In sum, the enactment of the recent CML and the subsequent communiques issued by the CMB have resulted in a partial departure from the soft law regulation of corporate governance in Turkish law. Some of the principles, mostly regarding the BoD, have been made mandatory for listed companies. For the rest of the principles, the comply-or-explain approach remains, where listed companies must report their compliance levels under their Corporate Governance Compliance Reports. Overall, the CMB Principles appear to be designed to facilitate a change in the structure of listed company boards in Turkey, which are currently dominated by controlling families. The objective is a transformation towards professional boards that consist of non-executive and independent board members having authority over important board decisions. The overall policy behind these corporate governance regulations seems to be the curbing of the power of controlling shareholders over minority shareholders, thereby providing the necessary safeguards for current and prospective foreign investors in the Turkish stock market.

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[845] For example, in Pegasus Hava Taşimaciliği Anonim Şirketi Kurumsal Yönetim İlkelerine Uyum Raporu <http://www.pegasusyatirimciiliskileri.com/tr/kurumsal-yonetim/kurumsal-yonetim-ilkelerine-uyum-raporu> accessed on 24 July 2018.

[846] See AA Alchian and H Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62(5) Am Econ Rev 777, 778; Fama, 'Agency Problems and the Theory of the Firm' (n 11) 290; Jensen and Meckling, 'Theory of the Firm' (n 10) 306.

[847] Fama, 'Agency Problems and the Theory of the Firm' (n 11) 289.

[848] Easterbrook and Fischel, 'The Corporate Contract' (n 234) 1418.

CHAPTER V – Turkey's Corporate Governance Framework Part - II: Turkish Commercial Code

1 Introduction

The corporate governance provisions found in the new TCC constitute the second pillar of Turkey's corporate governance framework. This chapter's discussions complement the previous chapter, where corporate governance rules for public joint-stock companies found in capital market legislation were explored in depth. The articles of the TCC are designed as general rules applicable to all companies, not just public joint-stock companies.[849] In fact, the TCC states that its general provisions shall apply to joint-stock companies that are subject to special legislation on matters that are not regulated in these special laws.[850] Thus, the corporate governance rules stipulated under the TCC are lex generalis, unlike the articles of the CML and the subsequent CMB communiques. Nevertheless, the new TCC, which came into effect on July 2012, also brings important changes to corporate governance of the public joint-stock companies. In exploring these changes, the chapter includes both the backdrop to the reform process which led to the overhaul of Turkish company law and a black-letter account of the new code's provisions on corporate governance. In doing so, the chapter aims to provide the complete picture of the methods used in the development of Turkey's current corporate governance framework.

The first part of the chapter contextualises the reform process that led to the enactment of the new TCC. Most of the changes occurred in the part of the commercial code that deals with commercial companies.[851] The changes introduced new legal structures into Turkish company law such as the single member company,[852] online general assembly and board meetings,[853] and the first use of the term 'corporate governance'.[854] Before examining these innovations, the

[849] For the different types of companies allowed under Turkish company law see page 145.
[850] TCC Article 303. This Article refers to joint-stock companies regulated with special laws such as public joint-stock companies, which are subject to Capital Markets Law, or the banks which are subject to Banking Law.
[851] Book 2 of the TCC is on commercial companies. TCC Articles 329 -563 regulate matters on joint-stock company
[852] TCC Article 338 allows the formation of single member limited company or single member joint-stock company, whereas in the old commercial code the formation of a joint-stock company required at least five members. (Old TCC Article 277)
[853] TCC Article 1527. According to Article 1527/5, online general assembly meetings are mandatory for listed joint-stock companies.
[854] TCC Article 1529 is entitled Corporate Governance Principles (the Turkish term used for corporate governance in the TCC is 'kurumsal yonetim'). Although in literature different terms such as 'kurumsal yonetisim', 'yonetisim' or 'iyi yonetisim' are sometimes used; in S Gönen and E Yürekli, '6102 Sayılı

chapter starts with a brief introduction to the Turkish legal system. Then, it examines the reasons behind the annulment of the previous commercial code, herein referred to as the 'old TCC', which was in force since 1957.[855] The chapter examines the legislators' justifications for revising the commercial code, which are laid out in detail in the new TCC's *Genel Gerekçe* (General Justification). The review of the *Genel Gerekçe* will be supplemented by legal scholars' views, particularly those of Ünal Tekinalp, who headed the law committee that was responsible for drafting the new commercial code.

Within this context, I also briefly explore the issue of Turkey and the EU relations, since the legislators have acknowledged EU membership as a main driving force behind the TCC reforms.[856] I examine the discussions on corporate governance at the EU level. I analyse the 'EU Approach to Corporate Governance'[857] to determine the theoretical underpinnings of the EU perspective on corporate governance. I also point out the areas where the new TCC has followed EU precedence in terms of corporate governance. After exploring the EU's impact on the new legislation, I then analyse the articles of the new TCC on corporate governance in detail from a black-letter perspective. [858] The focus of the analyses is on the improved shareholder rights, with particular stress on how some of these new provisions purport to strengthen the position of the minority shareholders or outside shareholders vis-à-vis the controlling owners. Finally, I examine the new TCC's articles on company stakeholders.

2 The Backdrop of the New Turkish Commercial Code

The Turkish legal system is part of the continental European system, where laws are codified in the form of legislation, which constitute the most important source of law.[859] As the legislators are regarded as the sole law-making authority, case law is not considered to be a source of Turkish law, and even though the judges may resort to judicial precedents, these are

Türk Ticaret Kanunu Açısından Kurumsal Yönetim İlkelerinin Değerlendirilmesi (Evaluation of the Corporate Governance Principles as per the Turkish Commercial Code No.6102)' (2016) 2(4) Journal of Accounting, Finance and Auditing Studies 129, 131.

[855] Turkish Commercial Code No. 6762 published in the Official Gazette numbered 9353 and dated July 9, 1956.

[856] *TCC with Justifications* (n 104) 64.

[857] This term is originally used in Global Corporate Governance Forum and International Finance Corporation, 'The EU Approach to Corporate Governance: Essentials and Recent Developments' (February 2008).

[858] Due to the extent of the reforms introduced by the new TCC, it has not been possible to discuss every corporate governance related article under this chapter. The focus will be on the provisions concerning minority shareholders.

[859] In the Anglo-American common law system uncodified laws prevail and the sources of law are mainly derived from 'customary principles and judicial precedents', in A Guriz, 'Sources of Turkish Law' in Tugrul Ansay and Don Jr Wallace (eds), *Introduction to Turkish Law* (6th edn, Wolters Kluwer 2011) 1.

not binding in any way.[860] Prior to the Republic of Turkey, the Ottoman Empire's laws were mainly derived from Islamic law and customs. However, along with the *Tanzimat Edict* of reforms that took place from 1839 onwards,[861] secular laws in the area of civil law were introduced by the Sultan. These secular laws were mainly inspired by the French legal system.[862] For instance, in 1850, the 'Kanunname-i Ticaret' (Commercial Code) was adopted by the Ottoman Empire, which was a direct translation of the French Commercial Code of 1807.[863]

After the proclamation of the Republic of Turkey in 1923, Islamic laws were abandoned because secularism had been defined as one of the key pillars of the new republic.[864] Radical legal reforms that were based on several European countries' laws were introduced; for example, the Turkish Civil Code that was enacted in 1926 was based on the Swiss civil code, the Turkish Penal Code of 1926 was based on the Italian criminal code, and most legislation on administrative law was influenced by French public law.[865] The adoption of Europe-based legislation into Turkish laws led to 'a profound change in the social life of Turkey' and indicated the ambitions of Mustafa Kemal Ataturk, the founder of modern Turkey, to Europeanise the country. [866] To that end, Ataturk introduced further radical reforms such as abolishing state religion, adopting the European (Gregorian) calendar and the Latin alphabet, setting the official holiday to Sunday (instead of the Islamic holiday Friday), and giving women the right to vote and be elected in 1934.[867] Overall, Turkish policy has long been inclined towards Westernisation, which has been realised through the adoption of European laws.

In terms of law-making, the Turkish parliament, which is called the Turkish Grand National Assembly (TBMM), has the sole authority to enact laws in Turkey.[868] The President of the

[860] Ibid 14.
[861] The edict of 'Tanzimat' (1839) and the later edict of 'Islahat' (1856) are 'usually considered the beginnings of the constitutionalist movement in the Empire. Legally, these documents were no more than a unilateral declaration and recognition by the Sultan of certain basic human rights for his subjects, including security of life, honour, property, abolition of tax farming (iltizam), fair and public trial of persons accused of crimes and the equality of all Ottoman subjects irrespective of religion' in E Ozbudun, 'Constitutional Law' in Tugrul Ansay and Don Jr Wallace (eds), *Introduction to Turkish Law* (6th edn, Wolters Kluwer 2011) 19-20.
[862] F İpekel Kayali and MR Korkusuz (eds), *Turkish Private Law* (Seçkin 2018) 37.
[863] Özbirecikli M, 'Türkiye'de Ticaret Kanunlarında Denetim Anlayışı Üzerine Bir İnceleme (An Investigation on Audit Concept in the Commercial Codes in Turkey)' (2013) (4) Accounting & Financial History Research Journal 152, 153.
[864] Ozbudun, 'Constitutional Law' (n 861) 33.
[865] Guriz, 'Sources of Turkish Law' (n 859) 9-10
[866] Ibid 9.
[867] SF Özkan, 'Turkish-EU Relations and the Prospects for Turkey's Accession' (2001) 13 LBJ Journal of Public Affairs 43, 44.
[868] Article 7 of the Turkish Constitution states: 'Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This power shall not be delegated.' For the official English translation see; <https://global.tbmm.gov.tr/docs/constitution_en.pdf>.

Republic must promulgate the draft laws adopted by the parliament.[869] Following the promulgation, laws come into effect either on the specified date stipulated in the legislation, or usually on the day of publication in the Official Gazette.[870] The first commercial code after the establishment of the Republic was enacted in 1926 and was based on the German commercial code.[871] This legislation was later replaced with a new Commercial Code in 1957, which was prepared by the German legal scholar Ernst E. Hirsch and based on the Swiss private law.[872] The Commercial Code of 1957 governed all aspects of commercial life and company law in Turkey for over 50 years. However, its provisions have been criticised to be outdated and lagging behind international developments, thus hindering the inflow of foreign investment.[873]

Preparatory works for drafting a new commercial code took off in December 1999, when the Ministry of Justice set up a commission (the Commission) composed of officials from the ministry, academicians, the Court of Cassation (the Turkish high court *Yargitay*) judges, and representatives from various organisations.[874] The Commission was headed by legal scholar Tekinalp. After 5 years of discussions and preparations, the Commission changed 1,100 out of 1,535 articles of the former commercial code.[875] In November 2005, the draft TCC was sent to the parliament for review. As per procedure, it was first discussed in the TBMM's sub-commissions, then approved in 2007 to be sent to the TBMM General Assembly for enactment. However, due to the country-wide general elections that took place in 2007, the enactment of the draft TCC was postponed.[876] Finally, the draft code was approved by the members of parliament in the General Assembly in 13 January 2011. After promulgation by the President of Turkey, the new TCC was published in the Official Gazette on 14 February 2011. The new

[869] Article 89 of the Turkish Constitution.
[870] The Official Gazette in Turkish is called 'Resmi Gazete', it is published daily in Ankara, except for holidays, and contains announcements regarding laws, regulations, decrees and other official announcements. If there are no specific provisions in the laws regarding their effectual date, the laws will come into effect forty-five days after their publication in the Official Gazette, Guriz, 'Sources of Turkish Law' (n 859) 12-13.
[871] TBMM, Turkish Commercial Code No. 865 (29.05.1926) in Union of Turkish Bar Associations, *Türk Ticaret Kanunu Tasarısı Toplantıları I-II-III (Meetings on Draft Turkish Commercial Code)* (Türkiye Barolar Birliği Yayınları 2008) 4-5.
[872] TBMM, Turkish Commercial Code No. 6762 (09.07.1956); EE Hirsch, ' İsviçre Hukukunun Yeni Türk Ticaret Kanununa Tesiri (The Influence of Swiss Law on the New Turkish Commercial Code)' (Şevket Müftügil tr) (1956) 119(4) Zeitschrift für Handelsrecht 157.
[873] Can, 'Thoughts on the Draft Turkish Commercial Code' (n 593).
[874] These representatives were from Turkish Bar Association, Turkish Notary Association, Capital Markets Board of Turkey, Turkish Accounting Standards Board, Banking Regulation and Supervision Agency and Union of Chambers and Commodity Exchanges of Turkey, in *TCC with Justifications* (n 104) 86-87.
[875] G Aras (ed), *Yeni Türk Ticaret Kanunu'nun Finans ve Muhasebe Uygulamalarına Etkisi (The Impacts of the New Turkish Commercial Code on Finance and Audit Procedures* (İSMMMO 2011) 23.
[876] B Doğrusöz, O Onat and FT Toralp (eds), *Gerekçe, Karşılaştırmalı Maddeler, Komisyon Raporları, Önergeler ve Karşılaştırmalı Tabloları ile Türk Ticaret Kanunu (Turkish Commercial Code with Justifications, Article Comparisons, Commission Reports, Proposals and Tables)* (Türkiye Odalar ve Borsalar Birliği 2011) 2-3.

TCC stipulated that it would enter into force on the 1st of July 2012.[877] However, once the new TCC was published in the Official Gazette, some of its provisions became subject to heavy criticism from the business world.[878] Therefore, before the legislation came into effect in July 2012, the parliament passed another law in June 2012 to amend certain articles of the initial draft code.[879]

The reasons for drafting a new commercial code in Turkey have been elaborated in detail by legislators in the *Genel Gerekçe*. One of the main reasons was Turkey's aspirations of becoming an EU member state.[880] Aside from the influence of the EU, the *Genel Gerekçe* also notes that Turkey must be a part of the international markets and thus requires a commercial code that includes the structures, institutions, and rules of international markets.[881] It adds that Turkish companies 'have to be the competitive, active and dependable actors of these international markets.'[882] Finally, technological developments, particularly the use of internet becoming common in every aspect of daily life, have been reiterated as necessitating inclusion in the new commercial code provisions.[883] These general points are further elaborated; *Genel Gerekçe* begins by laying out the developments that rendered the old commercial code obsolete. These developments which 'directly'[884] affected the reform process are listed as follows:

> major events took place during the second half of the twentieth century, including the creation of the EEC/EU as well as regional unions such as the EEA and NAFTA, the creation by the latter of substantial rules and supranational legal regimes, the fact that, starting from mid-sixties the concepts of free market and competitive economy gained wide currency in all countries and that these concepts figure among the Copenhagen

[877] However, the new TCC also stated that certain provisions would enter into force one year later in 1st of July 2013, so that companies would have time to prepare their structures to be in conformity with the new articles. For instance, this was the case for the new requirement imposed on capital companies to have a company website as per TCC Article 1524.
[878] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 61; Gönen and Yürekli, ' Evaluation of the Corporate Governance Principles' (n 854) 130.
[879] TBMM, Law Amending the Turkish Commercial Code No. 6335 (30.06.2012).
For instance, the article prohibiting shareholders becoming indebted to the company was present in the initial draft. In the context of Turkish business culture, most owners tend to think that the assets of the company are their own and usually resort to getting loans from their own company. The initial provision in the draft was intended to put a stop to this customary practice. But due to the pressure from the business lobbies, the aforementioned prohibition did not make it to the final version of the TCC. See TCC Article 359. Another example to the amendments to the initial draft in line with the business pressures was regarding the mandatory website requirement for all capital companies as per Article 1524. With the later amendment, the scope of the article was narrowed down to cover only certain capital companies, which were subject to independent audit in line with TCC Article 397/4.
[880] *TCC with Justifications* (n 104) 64.
[881] Ibid 65.
[882] (Own translation) Ibid.
[883] Ibid.
[884] Exact phrase used in the *Genel Gerekçe* in *TCC with Justifications* (n 104) 63.

> criteria, […] the fact that e-commerce fundamentally effected the commerce as well as the calling of, the participation and voting in BoDs and GMs […].[885]

The *Genel Gerekçe* also states that these global developments have affected many countries' legislation, especially the EU member states,[886] but that the old TCC failed to keep up with its European counterparts.[887] Thus, it asserts that the creation of a new commercial code is the only way to bridge this gap.[888] The rest of the *Genel Gerekçe* text examines the developments in certain European countries' commercial codes individually. There is specific reference to the Cadbury Report of the United Kingdom.[889] Also, the Sarbanes-Oxley Act in the United States is indicated as a factor that influenced the drafting of the new TCC.[890] Yet, the section that mentions US regulations is limited to one paragraph only, and most of the *Genel Gerekçe* deals with the specific EU regulations which the draft TCC provisions have been based upon. Therefore, the next section discusses the extent to which Turkey's aspirations of becoming an EU member have affected the new TCC's corporate governance reforms.

3 The Influence of EU on the New Turkish Commercial Code

a. Introduction

The harmonisation of Turkish laws with the EU's 'acquis communautaire', otherwise known as the EU acquis,[891] took off once Turkey was granted applicant status for EU membership at the Helsinki European Council Summit in 1999.[892] Yet, as legislators have noted, it was only after 2005 when the EU accession negotiations officially began that Turkey was placed under an

[885] *Genel Gerekçe* para. B.I.2 translated in Kayali and Korkusuz (eds), *Turkish Private Law* (n 862) 237.
[886] In fact, it has been noted that the commercial laws of the EU Member States have changed on an average of 64 times in the last 50 years, in K Özkorkut (ed), *Impacts of the Draft Turkish Commercial Code (DTCC) on Capital Markets from an EU Perspective International Conference* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2010) 401.
[887] *TCC with Justifications* (n 104) 64.
[888] Ibid.
[889] Ibid 69.
[890] Ibid 70. In particular, certain objectives of the Sarbanes-Oxley Act have been referred to, such as; increasing the scope of the responsibility of company boards, increased transparency, strengthening the powers of public supervisory bodies and independent authorities, eliminating the conflict of interest between company management and auditors and improving auditing standards.
[891] The 'acquis communautaire' is 'the body of common rights and obligations that is binding on all the EU member states. […] Candidate countries have to accept the acquis before they can join the EU and make EU law part of their own national legislation. Adoption and implementation of the acquis are the basis of the accession negotiations' in European Commission, 'European Neighbourhood Policy And Enlargement Negotiations' <https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/acquis_en> accessed 28 June 2017.
[892] 'Briefing No 7: Turkey and Relations with the European Union' (European Parliament, 10.02.2000) <http://www.europarl.europa.eu/enlargement/briefings/7a1_en.htm> accessed 19 September 2018.

obligation to implement the body of EU acquis.[893] Nevertheless, the new TCC's draft was already sent to the parliament for approval in 2005 and was prepared with the objective of full compliance with the EU regulations.[894] The Turkish Bar Association has criticised this move as premature and asserted that EU law is still developing in areas of commerce. Thus, it was too early to revamp primary legislation such as the commercial code in its entirety before the EU laws on the relevant matters have gained permanence, or before Turkey's EU membership is confirmed.[895] Despite the criticisms, the new TCC provisions are largely based on the EU acquis, especially in terms of its regulation of company law. This can be explained by Turkey's inclination towards Westernisation. Indeed, throughout the *Genel Gerekçe*, the legislators provide a lengthy list of the EU resources which have been utilised in the preparation of the new TCC's articles on company law.[896]

Membership in the EU has been desired both by Turkish politicians and the public due to the expected material benefits and also because 'for large segments of Turkish society, EU membership was sought as the final confirmation of Turkey's European credentials, a quest that dated (at least) to Ataturk and foundations of the Turkish Republic.'[897] Indeed, even before the creation of the European Economic Community (EEC), Turkey 'chose Western Europe as the model for its new secular structure'.[898] To that end, Turkey has aspired to join the EU for over half a century; Turkey applied to join the EEC in 1959, which is 1 year after the establishment of the EEC.[899] In 1964, an Association Agreement was signed,[900] followed by the establishment of a customs union in 1995 between the EU and Turkey, which was viewed to be the final phase

[893] *TCC with Justifications* (n 104) 64.
[894] Doğrusöz, Onat and Toralp (eds), *Turkish Commercial Code with Justifications, Article Comparisons, Commission Reports, Proposals and Tables* (n 876) 2-3.
[895] Türkiye Barolar Birliği (Turkish Bar Association), *Türk Ticaret Kanunu Tasarısı Toplantılari I-II-III* (Türkiye Barolar Birliği Yayınları 2008). 20. Turkish Bar Association argues that instead, changes in certain provisions or secondary legislation could have been undertaken.
[896] *TCC with Justifications* (n 104) 113-114. Accordingly, on company law, the new TCC has utilised various EU directives, regulations, recommendations and reports, which are listed as the influences on the new commercial code.
[897] F Cengiz and L Hoffmann (eds), *Turkey and the European Union: Facing New Challenges and Opportunities* (Routledge 2014) 196.
[898] 'History of Turkey- EU Relations', Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs <https://www.ab.gov.tr/111_en.html> accessed on 15 September 2018.
[899] 'History of Turkey- EU Relations', Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs <https://www.ab.gov.tr/111_en.html> accessed on 15 September 2018. Even though Turkey's application to the EEC was denied, 'the ensuing negotiations resulted in the signature of the Agreement Creating An Association Between The Republic of Turkey and the European Economic Community (the 'Ankara Agreement') on 12 September 1963. This agreement, which entered into force on 1 December 1964, aimed at securing Turkey's full membership in the EEC through the establishment in three phases of a customs union which would serve as an instrument to bring about integration between the EEC and Turkey.'
[900] 'Agreement creating an association between the European Economic Community and Turkey' (OJ L 217, 29.12.1964) and Additional Protocol (OJ L 293, 29.12.1972), available at http://ec.europa.eu/enlargement/pdf/turkey/association_agreement_1964_en.pdf

of the Association Agreement. Although Turkey had applied for EU membership in 1987, it was not until December 1999 before Turkey was granted candidate status at the Helsinki Summit of the European Council.[901] Following this progress in Turkey and EU relations after several decades of passivity, Turkey prepared a pre-accession strategy and a National Programme that envisages an action plan for aligning Turkish legislation with the EU acquis.[902]

Since the beginning of the 2000s, before the accession negotiations formally began, Turkey has been implementing numerous reforms in its economic, legal, political, and social landscape which were 'spurred in large part by EU conditionality'.[903] These reforms were undertaken in the form of 'chapters' drawn out by the European Commission (EC).[904] There were also annual progress reports produced both by Turkey and the EC to monitor progress in terms of compliance with the Copenhagen criteria,[905] which refers to the accession criteria for EU membership that are imposed on candidate countries. The 2011 Progress Report confirmed that Turkey has made considerable progress in the area of company law due to the promulgation of the new TCC in the same year. This development has been perceived by the EU as 'a key element in accession negotiations in this chapter.'[906] Furthermore, in the 2018 Progress Report, the EC concluded that 'Turkey is well advanced in the area of company law' and highlighted Turkey's 'ability to assume the obligations of membership'.[907] Thus, overall, since the EU has recognised that Turkey has conformed with the EU acquis on company law, it can be concluded that the TCC's corporate governance provisions are also in line with the EU's approach on corporate governance.

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[901] 'Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States. […] An accession partnership will be drawn up on the basis of previous European Council conclusions while containing priorities on which accession preparations must concentrate in the light of the political and economic criteria and the obligations of a Member State, combined with a national programme for the adoption of the acquis. Appropriate monitoring mechanisms will be established. With a view to intensifying the harmonisation of Turkey's legislation and practice with the acquis, the Commission is invited to prepare a process of analytical examination of the acquis.' Helsinki European Council 10 And 11 December 1999 Presidency Conclusions. 12 <http://www.europarl.europa.eu/summits/hel1_en.htm> accessed on 17 April 2017

[902] National Programmes for the Adoption of the Acquis (NPAA) <http://www.ab.gov.tr> accessed on 10 April 2017

[903] Cengiz and Hoffmann, *Turkey and the European Union* (n 897) 195.

[904] There are 35 chapters categorised under the EU acquis, and in the case of Turkey, 15 chapters have been opened, one chapter provisionally closed, and 14 chapters blocked for political reasons. The Company Law Chapter contains provisions on corporate governance.

[905] 'The accession criteria, or Copenhagen criteria (named after the European Council meeting in Copenhagen in 1993), are the essential conditions all candidate countries must satisfy to become a member state.' See <https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en> accessed on 18 August 2017

[906] European Commission, 'Staff Working Paper: Turkey 2011 Progress Report SEC (2011) 1201 final' (12.10.2011) 60.

[907] European Commission, 'Staff Working Paper: Turkey 2018 Report SWD (2018) 153 final' (17.04.2018) 7.

b. The EU's Approach to Corporate Governance

The efforts to regulate corporate governance at an EU level started in September 2001, when the EC appointed The High-Level Group of Company Law Experts (the Group)[908] to provide recommendations regarding the modernisation of company law and corporate governance in the EU. In November 2002, the Group released its final report, titled A Modern Regulatory Framework for Company Law in Europe.[909] The report section on 'Corporate Governance – Shareholders' indicates the Group's perspective on the proper objective of corporate governance regulation:

> In a proper system of corporate governance, shareholders should have effective means to actively exercise influence over the company. […] shareholders are the residual claimholders (they only receive payment once all creditors have been satisfied) and they are entitled to reap the benefits if the company prospers and are the first to suffer if it does not. Shareholders need to be able to ensure that management pursues - and remains accountable to - their interests. Shareholders focus on wealth creation and are therefore, in the Group's view, very suited to act as 'watchdog' not only on their own behalf, but also, in normal circumstances, on behalf of other stakeholders.[910]

The use of residual claimant arguments for justifying shareholder entitlement to control over company management is similar to the justifications used by the proponents of the mainstream corporate governance model.[911] While admitting that the shareholders only focus on wealth creation, the Group asserts that the managers are accountable to shareholders alone, and that they must pursue shareholder interests. This view chimes with the agency problem posed by the law and economics movement and hence the shareholder primacy theory of corporate governance. In sum, the expressions used in the Group report evidence their disposition towards the mainstream model of corporate governance.

Following the Group's report, the EC responded in May 2003 by publishing a communication titled Modernising Company Law and Enhancing Corporate Governance in the European

[908] The members of the Group are as follows: Chairman: Jaap Winter, José Maria Garrido Garcia, Klaus J. Hopt, Jonathan Rickford, Guido Rossi, Jan Schans Christensen and Joëlle Simon; in European Commission, 'Report of The High-Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe' (04.11.2002).
[909] Ibid.
[910] 'Report of The High-Level Group of Company Law Experts ' (n 908) 47.
[911] See Chapter 3.3.b.

Union—A Plan to Move Forward.[912] It stipulated the reasons why company laws and corporate governance in the EU must modernised; such as the need to make the most of the internal market, the integration of capital markets, the maximisation of the benefits of modern technologies, enlargement, and the need to address the challenges of the recent financial scandals.[913] Regarding the last point, the EC referenced the corporate scandals of the United States and the subsequent Sarbanes-Oxley Act:

> Corporate governance is indeed an area where standards are increasingly being set at international level, as evidenced by the recent developments observed in the United States. […] In many areas, the EU shares the same broad objectives and principles of the Sarbanes-Oxley Act.[914]

Also, the communication highlighted the key policy objectives to be strengthening shareholder rights and protecting creditors, especially in the context of listed companies.[915] The EC also laid out an EU Action Plan which used the Cadbury Report to define corporate governance as 'the system by which companies are directed and controlled.'[916] Instead of devising an European code of corporate governance, the EC noted that it took the OECD Principles as a reference point.[917] However, it also noted that

> A self-regulatory market approach, based solely on non-binding recommendations, is clearly not always sufficient to guarantee the adoption of sound corporate governance practices. Only in the presence of a certain number of made-to-measure rules, markets are able to play their disciplining role in an *efficient* way.[918]

After asserting that the voluntary corporate governance principles were inadequate for ensuring sound practices, the report highlighted the necessity of binding regulation for markets to work efficiently. This statement indicates that the EU's approach to corporate governance is broadly based on the neoliberal law and economics scholarship that advances the shareholder primacy theory of corporate governance and insists on its efficiency. Indeed, even at the forefront, the

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[912] European Commission, 'Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward' COM (2003) 284 final (21.05.2003).
[913] Ibid 7.
[914] Ibid 5.
[915] Ibid 8.
[916] Ibid.
[917] Ibid 12. The Report states that 'the Commission notes that corporate governance is now at the forefront of the activities of the OECD, which recently decided to revise its corporate governance principles of 1999 with the aim of adopting a modernised version of these principles in 2004. The Commission is taking an active part in this exercise.'
[918] Ibid.

EC's choice of the Cadbury definition for corporate governance reflects the underlying agency theory and the Anglo-American roots of its approach. The issues of corporate governance have not only been of legal importance to the EU; they also carried political significance. As the EU Commissioner at the time Frits Bolkestein put it, 'Company law and corporate governance are right at the heart of the political agenda, on both sides of the Atlantic. That's because economies only work if companies are run efficiently and transparently.'[919] This statement corresponds to the arguments of the shareholder primacy advocates, who claim that the other models of corporate governance will eventually 'convergence toward a single, standard model'.[920] The 'standard model' refers to the mainstream model of corporate governance derived from the Anglo-American market-based system. Hansmann and Kraakman attribute this tendency to converge in Europe to the recent shift of power 'away from workers and the state and, increasingly, away from dominant shareholders' to the shareholder class.[921] This point illustrates the impact of class relations and power struggles that underlie the EU's corporate governance standards, which has been discussed in depth in Chapters 2 and 3. In sum, it can be concluded that the EU approach to corporate governance is based on the mainstream model. However, the EU recommends that these rules should also be binding in EU member states and candidate countries. Thus, the EU provides specific directions on corporate governance which the EU member states and particularly candidate countries such as Turkey should adopt as conditions of EU membership.

Indeed, when Turkey's accession negotiations with the EU formally began in October 2005, Turkey was obliged to transpose the objectives envisaged by the Group's report and the subsequent EC communication Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward into its company law framework.[922] To that end, Turkey drafted the new TCC provisions within the framework of EU company law. For instance, the new TCC introduced single-member limited liability and joint-stock companies as per the 12th Council Directive.[923] In terms of corporate governance, the *Genel Gerekçe* admits that the main source of influence has been the Group's report, especially regarding the mandatory website requirement, online meetings and voting, and the provisions on group companies.[924] Hence, it can be asserted that the new TCC has adopted the EU approach to corporate governance for the purpose of securing EU membership. The EU's

[919] Frits Bolkestein has been the European Commissioner for Internal Market and Services between 1999 – 2004, quoted in 'The EU Approach to Corporate Governance (n 857) 3.
[920] Hansmann and Kraakman (n 12) 439.
[921] Ibid 453.
[922] *TCC with Justifications* (n 104) 85.
[923] 12th Council Company Law Directive 89/667/EEC (1989) OJ L 395, mentioned in *TCC with Justifications* (n 104) 91.
[924] *TCC with Justifications* (n 104) 85.

perception of corporate governance, as evidenced by its official texts, are largely based on the Anglo-American variant and the mainstream corporate governance model. Thus, this approach has been indirectly transposed into Turkish corporate governance laws by conforming with the EU acquis. To explore this issue in more detail, the particular corporate governance reforms introduced with the new TCC will be examined in the following section.

4 Corporate Governance Reforms in the New Turkish Commercial Code

In general, provisions relating to company law and corporate governance rules are regulated by the TCC.[925] The rules that pertain to company law are governed by the second book of the TCC, namely Book Two: Commercial Companies. Sub-section four of this book covers the joint-stock companies, which includes most of the provisions on corporate governance. As per Turkish company law, there are five types of commercial companies allowed under the TCC: the collective company, the commandite company,[926] the limited liability company, the joint-stock company, and the cooperative company.[927] The collective and the commandite companies are referred to as partnerships, whereas the limited liability company and the joint-stock company are called capital companies.[928] The most commonly used types of companies in Turkish business practice today are the limited liability company and the joint-stock company. As of July 2018, there were 775,390 limited liability companies and 125,975 joint-stock companies registered in Turkey.[929]

The joint-stock companies are classified into two groups: publicly held or public joint-stock companies and closely held or private joint-stock companies. Turkish law distinguishes between the public joint-stock company and the listed joint-stock company. Once a joint-stock company's shares are admitted to trade on the exchange, the company becomes classified as a listed company. However, joint-stock companies with more than 500 shareholders but without shares traded on the exchange are also regarded as public joint-stock companies. This point has been criticised by the legislators during the drafting the new TCC, who stated that classifying the company as public should not depend on the number of shareholders but rather the company

[925] There are special laws on certain types of companies; for example, banks are governed by the Banking Law No. 5411 (01.11.2005).
[926] The commandite company is regulated under TCC Article 304 and is also referred to as limited partnership. Accordingly, in the commandite company there are two types of partners; one with limited and one with unlimited liability who conduct a business under a commercial name.
[927] TCC Article 124. The cooperative company, although considered to be a commercial company, is not regulated under the commercial code but instead by the Turkish Cooperatives Law No. 1163.
[928] Ibid.
[929] Republic of Turkey Ministry of Trade, 'Monthly Data Bulletin' (July 2018) <http://risk.gtb.gov.tr/data/5a536e56ddee7d1fa8b6c100/A.pdf> accessed on 18 September 2018.

being listed on the exchange.[930] Therefore, while the old TCC used the term 'public joint-stock company', the new TCC abandoned that definition and instead provided that a joint-stock company can either be closely held or listed.[931]

It should be highlighted that the most important changes in the new TCC pertain to the joint-stock company, particularly the listed joint-stock company.[932] In fact, the legislators have pointed out that the reforms included in the TCC can be referred to as the 'joint-stock company reforms' due to extent of changes in that area.[933] The legislators have further added that the entire section of the commercial code on joint-stock companies was almost re-drafted from scratch.[934] Regarding this, the *Genel Gerekçe* has noted that the reason for such extensive reforms has been the increased importance of corporate governance for listed companies within the last two decades.[935]

The *Genel Gerekçe* has elaborated that corporate governance is founded upon four principles: transparency, fairness, accountability, and responsibility.[936] Accordingly, transparency means the public disclosure of information relating to the company. This principle is not limited to making information available to only shareholders; it also includes making such information available to 'all actors of the capital markets'.[937] Fairness corresponds to the equal treatment principle, which means the equal treatment of not only shareholders but also all stakeholders, including society, in the running of the company.[938] The accountability principle refers to clarity in management decisions, the management being able to justify its decisions on valid grounds, and the professionalism of management. Responsibility is defined as company executives discharging their duties as stipulated by the laws and articles.[939]

According to Tekinalp, the legal scholar who led the commission in charge of drafting the new TCC, these four principles constitute the 'corporate governance philosophy' of the new TCC.[940] He adds that the TCC has a 'concretization' purpose; in other words, the aim of making these corporate governance principles 'a part of the theoretic and dogmatic system of Turkish

[930] *TCC with Justifications* (n 104) 90.
[931] Ibid. Also see justifications for TCC Articles 329/1 and 338/1 where the term 'listed joint-stock company' is used instead of 'public joint-stock company'.
[932] K Özkorkut (ed), *Impacts of the Draft Turkish Commercial Code (DTCC) on Capital Markets from an EU Perspective International Conference* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2010) 3.
[933] *TCC with Justifications* (n 104) 90.
[934] Ibid.
[935] Ibid 84.
[936] Ibid.
[937] Ibid.
[938] Ibid
[939] Ibid.
[940] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 635.

company law'.[941] What this means is that the TCC neither includes a separate chapter on corporate governance nor introduces a codex of corporate governance principles. Instead, the lawmakers have chosen to incorporate its 'corporate governance philosophy' as founded on four pillars (transparency, fairness, accountability and responsibility) into various articles of the TCC.[942] In other words, the lawmakers chose not to form a catalogue of corporate governance standards but instead 'integrated the corporate governance philosophy homogenously into the foundations of the code and from thereon to reflect this basis in the code's articles.'[943]

For instance, the transparency principle is envisaged throughout the TCC articles on mandatory website requirements, electronic publishing of books and announcements, and online general assembly and board meetings. Fairness is reflected in articles that pertain to the restriction of privileged shares or that restrain shareholders from becoming indebted to the company. Accountability is regulated under the provisions for internal and external audits in line with international standards. Responsibility is regulated under the TCC through prohibitions on board members transacting with the company, competing with the company, or becoming indebted to the company.[944] By referring to the concretisation of these corporate governance principles, Tekinalp meant that the new TCC has strengthened the applicability of these rules by providing them with a legal basis.[945] Although most corporate governance rules under the TCC are regulated under the section on joint-stock companies, the legislators have encouraged their adoption by all company types as a form of best practice.[946]

Tekinalp has noted that the starting point of corporate governance regulation can be attributed to the need to protect the investors and to elevate the position of shareholders within the company.[947] He has added that shareholders constitute the most important element of the company; without them, neither the management nor the stakeholders can exist. Thus, he has explained that new TCC has adopted this shareholder centrality in its approach to corporate governance.[948] According to him, although the new TCC accepts shareholders as its departure point, it does not view corporate governance solely as a mechanism to deal with the agency problem between shareholders and managers. Instead, the new commercial code goes beyond the 'singularity of interests' of shareholders and adopts a broad approach of considering

[941] Ibid.
[942] Ibid.
[943] (Own translation) Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 61.
[944] Kayali and Korkusuz (eds), *Turkish Private Law* (n 862) 247.
[945] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 636.
[946] *TCC with Justifications* (n 104) 84.
[947] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 636.
[948] Ibid.

stakeholder interests in terms of *transparency*.[949] Therefore, Tekinalp has claimed that the new TCC has a pluralist approach to corporate governance.[950] However, the pluralist approach of the new TCC only seems to be applicable in terms of the transparency tenet of corporate governance because stakeholder interests are not considered in other corporate governance areas. The fact that the stakeholder interests are restricted to transparency is compatible with the new TCC's overall corporate governance approach because, as Tekinalp has admitted, the draft code has placed 'shareholder value' at its core.[951]

5 Shareholder Rights in the New Turkish Commercial Code

a. Introduction

The rights that derive from share ownership endow investors with the power to extract returns from their investment and provide protection against self-interested managers, majority owners, or controlling owners.[952] Some of these shareholder rights include the right to attend general assembly meetings, the right to vote, the right to dividends, the right to information, and so on. In *Genel Gerekçe*, the legislators have stated that the new commercial code has improved the rights of shareholders in line with the necessities of modern company law.[953] They have added that these changes cannot be solely attributed to compliance with the EU acquis, but rather 'the changing dynamics of the listed companies'.[954] To that end, the new TCC has strengthened the position of the shareholders through various means, which are grouped under eight categories by the legislators:[955]

1- The list of shareholder rights has been enhanced: the new TCC not only keeps all the rights provided to shareholders in relation to ownership, management, control, and audit in the old commercial code but also introduces new ones such as the right to request a special audit[956] and the right to equal treatment.[957]

2- New grounds have been provided for filing derivative lawsuits; for example, in the case of unlawful exercise of control by the parent

[949] Emphasis added. Ibid.
[950] Ibid 637.
[951] Ibid 639.
[952] Yurtoglu, 'Ownership, Control and Performance of Turkish Listed Firms' (n 811) 198.
[953] *TCC with Justifications* (n 104) 93.
[954] (Own translation) *TCC with Justifications* (n 104) 90.
[955] Ibid 93.
[956] TCC Article 438.
[957] TCC Article 357.

company, the shareholders of the dependent company can file a lawsuit against the controlling company to claim compensation or the purchase of their shares.[958]

3- The new TCC has facilitated the exercise of certain shareholder rights. For instance, it introduced the institutional proxy system to make it easier to vote.[959]
4- The available tools for transparency have been increased; the mandatory company website[960] is an example.
5- Privileges in voting rights have been restricted.[961]
6- The limitations on the transferability of registered shares have been freed from arbitrariness and ambiguity.[962]
7- Obligations to notify the related authorities have been stipulated in cases such as when a shareholder reaches a certain percentage of shareholding.[963]
8- Finally, the board of directors has been assigned the duty to make a statement or issue a report on certain issues; for instance, in group companies, the board of the dependent company is required to produce a report on inter-company relations[964] or a corporate governance evaluation report.[965]

The above categorisation was provided by the legislators in the *Genel Gerekçe* as a broad outline of how shareholder rights have been enhanced in the new TCC. Aside from this list, the legislators have also pointed out that the most important problem for the company general assemblies has been the 'power gap', which occurs when shareholders refrain from participating in general assembly meetings. The result of this power gap is that one group gains control of

[958] TCC Article 202/2: 'Shareholders who have cast negative votes against the GA resolution and had them recorded in the minutes of this resolution in connection with transactions such as merger, division, conversion, termination, issuing securities and important amendments to articles of association initiated through application of control and without any clear reasonable grounds concerning the dependent company, or who have objected in writing to the board resolution on the same and similar subjects, can request from the court that their damages be compensated by the controlling enterprise, or their shares be purchased at stock exchange value if possible.' Translation from PricewaterhouseCoopers (PwC), 'New Turkish Commercial Code: A Blueprint for the Future' (2011) <https://www.pwc.com.tr/en/publications/ttk-assets/pages/ttk-a_blueprint_for_the_future.pdf> 87.
[959] TCC Article 428-429
[960] TCC Article 1524 and 1527.
[961] TCC Article 479. Accordingly; a maximum of 15 voting rights can be allocated to one share, except in cases where the court decides there is as a valid reason to assign more voting rights.
[962] TCC Article 493 and 495.
[963] TCC Article 198.
[964] TCC Article 199.
[965] TCC Article 357/1/f and 1529.

the company.[966] As a solution, the legislators have noted it is important to facilitate active shareholder participation in company management by increasing the impact of the shareholders' vote, and the way to achieve this is through ensuring shareholder democracy.[967]

Indeed, shareholder democracy has been assigned utmost importance in the new TCC's regulation of shareholder rights. On this point, the *Genel Gerekçe* has noted that the reforms on joint-stock companies have been influenced mainly by the principle of shareholder democracy.[968] Accordingly, shareholder democracy 'aims to increase shareholder value and the effectiveness of shareholder vote, increase interest in general assemblies, and to overcome the "absence of power" which arises out of the unwillingness to participate.'[969] The absence of power here refers to shareholder passivity, which is when the shareholders of widely held companies become uninterested in the decision-making process, and the control function is exercised either by managers or controlling shareholders. In the Turkish business setting, however, companies are predominantly controlled by owner families, which may lead to a conflict of interest between them and the outside shareholders. This conflict is considered to be a type of agency problem: the non-controlling shareholders are the principals, and the controlling owners are the agents. Thus, corporate governance rules in such settings try to ensure that the outsiders are not expropriated by the controlling shareholders.[970] The provisions in the new TCC were drafted with this particular characteristic of Turkish companies in mind, which is evidenced by the extensive list of rights provided to minority shareholders and the curbing of majority shareholders' power in other instances. Hence, while the *Genel Gerekçe* has provided that all shareholder rights are augmented and that the rules on ensuring shareholder democracy work to the benefit of all shareholders, the ultimate effect of the new TCC provisions on corporate governance is the strengthening of the role of minority shareholders vis-à-vis the controlling shareholders.

b. The Principle of Equal Treatment

One of the important innovations in the new TCC for strengthening the rights of shareholder is the principle of equal treatment.[971] This principle was already established within Turkish legal doctrine and by the High Court;[972] however, these are not primary sources of law in the Turkish

[966] *TCC with Justifications* (n 104) 80-81.
[967] Ibid 95.
[968] Ibid.
[969] Ibid (Own translation).
[970] Kraakman and others, *The Anatomy of Corporate Law* (n 13) 20.
[971] *TCC with Justifications* (n 104) 91.
[972] C Eminoğlu, 'Anonim Şirket Pay Sahipleri Açısından 'Eşit Şartlarda Eşit İşlem' İlkesi (The Principle of Equal Treatment Under Equal Terms Regarding Shareholders of Joint Stock Companies)' (2015) 1

legal system. With the new TCC, the equal treatment principle has been provided with a legal basis within primary legislation. According to the TCC, the principle of equal treatment means that all shareholders under equal terms shall be treated equally.[973] The legislators clarify that the principle of equal treatment is only provided for shareholders.[974]

The legislators have noted that this provision reflects the principle prescribed in Article 42 of the European Council Directive 77/91/EEC,[975] which states that, 'For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position.' [976] In fact, the wording of the TCC article is very similar to that of the EC's. The same principle is stipulated by the OECD Principles under the title The Equitable Treatment of Shareholders, where it is advised that 'The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and *foreign shareholders*.'[977] The OECD provision specifically mentions the need to ensure the equitable treatment of minority shareholders and foreign shareholders. The provision further states, 'Minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly'[978], which refers to the companies with controlling shareholders. Although the principle of equal treatment is regarded as a right for all shareholders, in practice, it is particularly beneficial for the minority shareholders. The legislators have reiterated this by asserting that the aim of this provision is to provide a legal barrier to arbitrary decisions by the company organs against the minority shareholders.[979] In a similar manner, Eminoğlu has noted 'that this principle will serve the prevention of abuse of majority power and the strengthening of shareholder democracy in joint-stock companies.'[980] Guney has also asserted that this principle is an important tool to protect the minority shareholders against the majority shareholders or against the board, which is controlled by the majority.[981] This principle has been endowed with so much importance that a further article of the TCC has provided that any decision of the board that is contrary to this principle shall be deemed be void.[982]

Ticaret ve Fikri Mülkiyet Hukuku Dergisi 79. Some examples of the Turkish Hight Court *Yargıtay* decisions are: Yargıtay 11. HD, 20.03.2007, E. 2005/13567, K. 2007/ 4688; 11. HD, 06.10.1997, E. 1997/5583, K. 1997/6609.

[973] (Own translation) TCC Article 357.

[974] Justification for TCC Article 357.

[975] Ibid.

[976] Second Council Directive 77/91/EEC (1976) OJ L 26.

[977] Emphasis added. OECD, 'OECD Principles of Corporate Governance' (2004) 20.

[978] Ibid.

[979] Justification to TCC Article 357.

[980] Eminoğlu, 'The Principle of Equal Treatment Under Equal Terms ' (n 972) 79.

[981] GN Akdağ, 'Anonim Şirketlerde Eşitlik İlkesi (Equality Principle in Joint-Stock Companies)' (2014) 18(3-4) Gazi Üniversitesi Hukuk Fakültesi Dergisi 115, 121.

[982] TCC Article 391.

The principle of equal treatment is regarded as an important tenet of corporate governance regulation. As Eminoğlu has noted, the equal treatment principle is a reflection of the corporate governance principle of fairness.[983] However, it should be stressed that the principle does not mean absolute equality; it refers to proportional equality.[984] Thus, for instance, the principle of equal treatment can be constrained in the case of preferential shares where a privilege regarding dividends, liquidation, pre-emptive rights, or voting is granted to a certain share through the company's articles of association.[985] In legal doctrine, it is accepted that granting of share privileges does not infringe on the principle of equal treatment.[986] The principle merely places a restriction on the company board's decision-making in terms of considering all shareholders under the same terms equally.[987] Therefore, it provides safeguards against the board decisions that favour the majority or the controlling shareholder. This way, as Karasu has argued, the principle also attempts to give confidence to the prospective investors.[988] In sum, this provision mainly strengthens the position of minority shareholder against the controlling shareholders.

c. Representation of Shareholders in the General Assembly

Shareholders in a company mainly exercise their powers through voting in the general assembly. Eminoğlu has noted that it is in the general assembly meetings 'where the shareholder democracy materialises.'[989] Indeed, the TCC has stipulated that shareholders use their rights regarding company affairs by participating in the general assembly meetings.[990] The new TCC has introduced several provisions to ensure that all shareholders attend the general assembly meetings and effectively use their right to vote so that they can impact the company's decision-making process. These provisions aim to prevent shareholder passivity and encourage shareholders to become involved in the company decision-making process to fill the power gap in Turkish listed companies.[991]

According to the legislators, shareholder representation is the first problem that stands in the way of achieving shareholder democracy.[992] The old TCC did not contain any provisions on the

[983] Eminoğlu, 'The Principle of Equal Treatment Under Equal Terms ' (n 972) 80.
[984] Akdağ, 'Equality Principle in Joint-Stock Companies' (n 981) 123.
[985] TCC Article 478.
[986] Akdağ, 'Equality Principle in Joint-Stock Companies' (n 981) 123.
[987] Ibid 125.
[988] Karasu 'Novelties of the Turkish Commercial Code ' (n 156) 45.
[989] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 84.
[990] TCC Article 407.
[991] *TCC with Justifications* (n 104) 80-81.
[992] Ibid 95.

terms of representation of shareholders in the general assembly; the issue had been addressed through the provisions found in the Turkish Law of Obligations. These provisions led to confusion in practice regarding the proxy's mandate. As per the old TCC, shareholders had to show up in person or send an authorized representative; they could not attend or cast votes at the general assembly through electronic means.[993] Thus, during the regime of the old TCC, the exercise of shareholders' right to attend the general assembly meetings has mostly been ineffective in listed companies. On that point, the legislators have observed that 'the extent of the power gap is proportionate to the number of shares issued to the public.'[994] In other words, the more widely held a company, the greater the risk of shareholders not using their rights effectively. The legislators have noted that this constitutes an important risk for public companies in Turkey.[995] Thus, the new TCC envisaged new systems of representation to facilitate shareholder democracy and to allow shareholders to use their rights to participate in the decision-making more effectively and collectively to form opposition to the majority shareholders.

As per the new TCC, shareholders do not need to attend the general assembly in person. They can use a proxy to represent them at the general assembly meetings.[996] Moreover, this representative does not need to own shares in the company. In fact, the new TCC holds that any provision in the company's articles of association that require the proxy to be a shareholder shall be deemed invalid.[997] The new TCC provides two main types of representation for shareholders. The first is individual proxy and is regulated by the provisions of representation contained in the Turkish Law of Obligations.[998] The second one is collective proxy and has three sub-categories: institutional proxy, board proxy, and independent proxy. Individual representation has been augmented in the new TCC and now includes a new mechanism called consignee proxy.[999] This new article allows the person who has deposited the share physically or legally to represent the shareholder in the general assembly. For the representation to occur, the consignee must take instructions from the shareholder prior to each general assembly meeting.[1000]

[993] Old TCC Article 360.
[994] (Own translation) *TCC with Justifications* (n 104) 95.
[995] Ibid 95-.96.
[996] TCC Article 425.
[997] Ibid.
[998] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 73; TBMM, Turkish Law of Obligations No. 6098 (04.02.2011).
[999] TCC Article 429.
[1000] Ibid.

The key difference between the new TCC and the old TCC regarding the shareholder representation in general assembly lies in the introduction of institutional proxy, which is a type of collective proxy and is a system unique to Turkey.[1001] Accordingly, the institutional representative would issue a declaration announcing the direction they would take in the general assembly meeting, provide suggestions for issues concerning shareholders, and subsequently ask for representation rights from shareholders in line with their statement.[1002] Shareholders who are of the same opinion can thus organise under the roof of the same representative and have their voices heard in a collective manner. According to the legislators, this provision intends to fill the 'power gap' in the general assembly meetings that arises from a lack of shareholder participation.[1003] The institutional proxy is designed to act independently from the company management.[1004] The shareholders are not able to give ad hoc instructions to the institutional proxy but rather will be deemed to have accepted the proxy's stance as per their declaration at the beginning. In the words of the legislators, this innovation will serve to 'establish shareholder democracy and thereby encourage the formation of a management opposition hence form the basis for good governance on one hand, and on the other hand, it will help institutionalize the proxy system.'[1005] The end goal, as the legislators have added, is to create a legal system whereby shareholders can make informed decisions and use their rights effectively.[1006]

As a general rule, the representative does not need to own shares in the company, and the same principle applies to the institutional proxy. However, the institutional proxy is not allowed to ask for compensation in exchange for representing the shareholders.[1007] According to the legislators, this article merely devises a mechanism to encourage those who are willing to organise other shareholders with the same view on company management under one effective voice.[1008] In sum, the institutional proxy system allows for the otherwise ineffective minority shareholders to form opposition against the majority or the controlling owners.

Alongside the institutional proxy, the TCC provides two other types of representation: the board proxy and independent proxy. The board proxy refers to a person related to the company and proposed by the company management. This person gathers all the shareholders who wish to

[1001] Eminoğlu asserts that the system of institutional proxy is not even included in the reference legal text of TCC which is the Swiss code, in Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 76.
[1002] *TCC with Justifications* (n 104) 448-449.
[1003] Ibid.
[1004] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 76.
[1005] (Own translation) *TCC with Justifications* (n 104) 448.
[1006] Ibid.
[1007] TCC Article 428/3.
[1008] *TCC with Justifications* (n 104) 447-449.

vote in line with the recommendations and propositions of the management.[1009] If the company proposes such a proxy, it is also required by law to propose an independent person to act as a proxy alongside the board proxy.[1010] The difference between the two types of representation is that, as their name suggests, a board proxy will be a person who has a relation with the company, whereas an independent proxy will have no connection or contractual relationship with the company.[1011] The company shall announce the names of these two different types of representatives according to the companies' articles of association and shall publish those names on the company website.[1012] These representatives will issue a declaration stating the direction they will take on management issues and how they will vote. For both types of proxies, the shareholders are not able to give instructions to their representatives because once the shareholder has chosen a particular proxy, it will mean that they have accepted the stance provided in their declaration by default.[1013] The difference between these two types of proxies and the institutional proxy is important. The board proxy and the independent proxy have to be proposed by the company, whereas the institutional proxy can exist without any interference from the company. Hence, the institutional proxy is a shareholder initiative.[1014] The institutional proxy is intended as a safeguard option that ensures that shareholders have a collective representation opportunity in case the company does not propose a board proxy.

In sum, the new TCC provisions introduce three types of collective representation mechanisms which will increase the power of minority shareholders in general assembly meetings, who would otherwise be deemed ineffective. The TCC's system of representation illustrates the importance the legislators have accorded to the engagement in the company decision-making process by shareholders who are not part of the majority or controlling group. The legislators have argued that these new mechanisms will help rectify the supposed free-rider problem in Turkish listed companies and thereby enhance shareholder democracy further.[1015] That said, it can be observed that the legislators intend to use the TCC's new provisions on shareholder representation to empower minority shareholders in the general assembly meetings vis-à-vis the controlling owners.

[1009] TCC Article 428/1.
[1010] Ibid.
[1011] Justification for TCC Article 428, TCC states that what is meant by 'independent' proxy is to be decided by the courts and legal doctrine, in *TCC with Justifications* (n 100) 448. According to Eminoğlu, the independence here refers to a person who has no contractual relationship with the company such as a work contract or is not a shareholder of that company, in Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 80.
[1012] TCC Article 428/1.
[1013] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 79.
[1014] *TCC with Justifications* (n 104) 449.
[1015] Ibid 448.

d. Electronic General Assembly and Online Voting

The legislators have indicated on numerous occasions that the biggest problem for listed joint-stock companies is the 'power gap' due to the minority shareholders being usually unable to attend the general assembly meetings.[1016] The new TCC introduces the important corporate governance reforms of electronic general assembly meetings and online voting mechanisms to facilitate the active participation of outside shareholders in the company's decision-making process. Eminoğlu has asserted that regulating these mechanisms has been a necessary outcome of the globalisation phenomenon, which involves investors commonly investing in companies outside their national stock markets but are unable to participate in their decision-making process.[1017] He has added that the advancement of technology has made it no longer necessary for the shareholders to be physically present to convene a general assembly meeting.[1018]

According to the new TCC, general assembly meetings can be conducted electronically, as long as this is provided for in the company's articles of association.[1019] The relevant article also states that the details and implementation of the online general assembly shall be regulated through a communique which shall be issued by the Ministry of Customs and Trade.[1020] Accordingly, once the aforementioned communique enters into force, it will be mandatory for listed joint-stock companies to include electronic voting and online general assembly in their articles of association.[1021] Thus, in line with this new provision, listed companies are no longer able to only convene physical general assembly meetings. This requirement is an important step towards attracting minority investors, particularly foreign investors who reside in a foreign country because they would otherwise be unable to participate in company decision-making. In sum, although this provision is regulated as a general shareholder right, it will most likely benefit foreign shareholders.

e. Limitations on Privileged Shares

Privileged shares are thought to distort shareholder democracy, thus, 'limiting the issuance of privileged shares is a necessary component of the corporate governance approach'.[1022] The new TCC allows the issuance of privileged shares but introduces a limitation that each share can

[1016] *TCC with Justifications* (n 104) 80-81, 1193.
[1017] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 87.
[1018] Ibid.
[1019] TCC Article 1527.
[1020] TCC Article 1527/5; Ministry of Customs and Trade, Communique on Electronic General Assembly Meetings of Joint Stock Companies (28.08.2012).
[1021] Ibid.
[1022] (Own translation) Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 84.

only be granted a maximum of 15 votes.[1023] This limitation can be revoked only in two instances and with a court ruling.[1024] The first instance is where the company provides 'an institutionalization project' to the court, and the second is where there is valid ground to ask the court for such an exemption.[1025]

This provision is very interesting because the lawmakers make reference to the family owned or controlled structure of Turkish companies when justifying the article. Accordingly, 'the draft [code] has employed, as a legal policy, to ensure that the structures and the working order of Turkish joint-stock companies are removed from the family company model, and that they become institutionalized.'[1026] The legislators have also stated that institutionalisation requires professional management, and the privileged shares can play an important part in realising this goal. In fact, according to the legislators, the only reason why privileged shares are still allowed in the new TCC is because they facilitate institutionalisation.[1027] It has been argued that the legislators have used these articles to try to 'enforce' institutionalisation and professionalism on Turkish companies.[1028]

f. Principle of Mandatory Provisions

The new TCC has introduced a radical provision to Turkish company law by stipulating that a company's articles of association can only diverge from the articles provided in the TCC on joint stock companies if explicitly provided for.[1029] Tekinalp has stated that the objective of 'the mandatory provisions rule' is the protection of shareholders.[1030] This article indicates that companies are no longer able to resort to the principle of freedom of contract to draft articles of association that suit their interests while completely disregarding the rights of others. The legislators thus express their explicit preference for one principle over the other; the principle of freedom of contract is restricted to protect the interests of minority shareholders. The justification for this article states: 'In joint-stock company law today, individual shareholding rights as well the minority shareholder rights are undoubtedly limiting the scope of the principle

[1023] TCC Article 479/2.
[1024] Ibid.
[1025] The wording of TCC Article 479 stipulates that the company provides 'a project' to the court with its request to lift the 15-vote limitation. If and when it becomes apparent that the project no longer serves to the institutionalization of the company, or the valid ground is no longer there, the court can revoke its decision.
[1026] (Own translation) Justification for TCC Article 479.
[1027] Ibid.
[1028] G Kurt and G Demir, 'TTK Tasarisi'nda Profesyonellesme ve Vekalet Teorisi (Professionalism and Agency Theory in the Draft TCC)' (2006) (6) Hukuki Perspektifler Dergisi 60, 63.
[1029] TCC Article 340.
[1030] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 650.

of freedom of contract, which has been losing ground recently.'[1031] In line with this provision, the joint-stock company's articles of association must abide by the mandatory provisions stipulated in the TCC, and it is only possible to depart from these rules when explicitly allowed for. In particular, the mandatory provisions principle provides protection for the minority shareholders, who have been regarded as the weak party regarding the company's articles of association.[1032] The legislators have also noted that this provision may face criticism that it leaves little room for the will of the shareholders to construct their business rules or lead to 'one size fits all approach'. However, the explanation also states that this principle will prove to be useful considering the particular circumstances of Turkish company practice and will serve to strengthen the rule of law.[1033]

Hence, the TCC 'standardises' the joint-stock company's articles of association in Turkish company law.[1034] This standardisation attempts to eliminate prospective investors' fears that the majority may impose provisions in the company's articles that are contrary to the minority's interests. This not only aims to protect the minority shareholders, but also frees the prospective investor from the burden and costs of having to inquire after the articles of association of each company they are looking to invest in. Thus, the mandatory provisions principle effectively reflects the legislators' objective of incentivising outsiders to invest in Turkish listed companies. However, the freedom of contract is restricted to prevent the mere possibility of majority shareholders acting to circumvent minority interests through company articles. This in turn restricts the company's flexibility in its operations. The balance of competing interests contained in the mandatory provisions rule of the new TCC indicates that the legislators have preferred to strengthen the minority shareholder's interest over any other business concern or the power of the majority shareholders. Tekinalp has affirmed this stance by arguing that the minority shareholders are powerless against majority power, which distorts the fairness principle of corporate governance.[1035] Thus, to benefit the outsider shareholders and prospective investors, the new TCC has restrained one of the most important powers of the majority shareholders: the ability to alter the articles of association.

[1031] (Own translation) Justification for TCC Article 340.
[1032] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 650.
[1033] Justification for TCC Article 340.
[1034] R Karasu, '6102 Sayılı Türk Ticaret Kanunu'na Göre Anonim Şirketlerde Emredici Hükümler İlkesi (The Principle of Mandatory Provisions in Joint-Stock Companies According to the Turkish Commercial Code No. 6102)' (2012) 18(2) MÜHF-HAD 311.
[1035] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 650.

6 Provisions for Group Companies

The new TCC not only provides extended rights for the minority shareholders against the majority, but also aims to protect outside shareholders from the minority shareholders who hold control in group companies, which commonly is a feature in the Turkish corporate sector.[1036] The new TCC introduced detailed rules on 'group companies'[1037] into Turkish company law for the first time to adjust the legal rules to the realities of Turkey's business life.[1038] In this scenario, shareholders may retain the control of the affiliate companies through certain structures which allow them 'to exercise a degree of control over the corporation disproportionate to the shareholders' equity ownership in the company.'[1039] Indeed, shareholders can reduce their cashflow rights below their control rights and still hold on to control through structures such as shares with superior voting rights, pyramidal structures, or cross-shareholdings.[1040] In Turkey, most companies have cross-ownerships, pyramidal structures, and privileged shares.[1041] Thus, by regulating the joint-stock companies in line with the reality of group companies, the new TCC attempts to provide further rights to non-controlling shareholders against the shareholders who ultimately hold control.

In accordance with the TCC, a group company refers to structures where there are at least two companies, and each company is legally independent but is dependent on the parent company either financially or in terms of decision-making.[1042] Thus, in group companies, there is a dominant parent company and affiliate companies that are dependent on the parent company (known as the dependant).[1043] The new TCC provides three ways in which the direct or indirect control of the parent company can be established: holding a majority of the voting rights, articles of association that permit the selection of board members to form a decision quorum, or a contract that provides the majority of the voting rights in another company.[1044] However, these are not numerus clausus because the article accepts the presence of control in other ways, to be determined on a case-by-case basis.[1045] Finally, the article includes a legal presumption which states that in the case of a company owning the majority of the shares in another company or

[1036] YE Akdoğan and MA Boyacıoğlu, 'Corporate Governance In Turkey: An Overview' (2010) 24 Selçuk University Social Sciences Institute Journal 11, 18.
[1037] Group companies are referred to 'corporate group' in Anglo-American law, and as 'Konzern' in German law, in PwC, 'New Turkish Commercial Code: A Blueprint for the Future' (n 958) 12.
[1038] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 168.
[1039] OECD, 'OECD Principles of Corporate Governance' (2004) 35.
[1040] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 474.
[1041] Akdoğan and MA Boyacıoğlu, 'Corporate Governance In Turkey: An Overview' (n 1036) 18.
[1042] TCC Article 195.
[1043] TCC Article 195/4.
[1044] TCC Article 195/1.
[1045] Justification for TCC Article 195.

enough shares to take corporate decisions, then that company is presumed to be the controlling company.[1046]

Prior to the new TCC, companies in a group structure were treated as completely separate entities, leading to problems in terms of the rights of shareholders of the affiliate company. The old commercial code's approach of treating the affiliate company as a separate and independent entity from the parent company has been criticised because it conflicts with the corporate governance principles of fairness and accountability.[1047] On this point, the legislators have noted that

> the assumption that a joint-stock company is independent despite belonging to a group company is becoming more obsolete day by day. [...] To turn a blind eye to this reality means being unfair to the management, minority and small shareholders.[1048]

Thus, the new TCC contains extensive provisions regulating group companies and their disclosure requirements. These provisions have the explicit objective of protecting shareholders of the dependent company from the actions of the dominant company and the controlling shareholders. For Eminoğlu, the group company provisions of the new TCC constitute 'the most significant and material reflection of corporate governance approach in the commercial code'.[1049]

Accordingly, the main principle in the regulation of group companies is that the controlling company shall not use its dominant position to inflict loss on the dependent company.[1050] In determining the liability of the controlling company, there must be a loss incurred on the dependent company and a causal link with that loss and the act of the controlling company.[1051] Here, the determination of loss is interpreted broadly.[1052] For instance, it has been argued that 'there could be loss even in the absence of monetary damage, in the event a dependent company is instructed to provide collateral to secure an affiliate's debt, causing it to have reduced credit capacity for its own expansion needs.'[1053] If an act of the dominant company results in such a loss, it must offset the loss. If it fails to do so, any shareholder of the dependent company has

[1046] TCC Article 195/2.
[1047] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 645.
[1048] (Own translation) Justification for TCC Articles 195-209.
[1049] (Own translation) Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 167.
[1050] TCC Article 202.
[1051] T Cankorel, 'Shareholder Fiduciary Duties: A Review of Turkey's New 'Group of Companies' Regime in Light of Delaware Fiduciary Duty Law' (2015) 1(1) Turkish Commercial Law Review 61, 67.
[1052] Justification for TCC Article 202.
[1053] Cankorel, 'Shareholder Fiduciary Duties' (n 1051) 67.

the right to file a lawsuit requesting the loss to be compensated to the company.[1054] Under certain conditions, the minority shareholders of the dependent company can submit requests to the court that their shares be sold to the parent company, so they cease to become shareholders.[1055] Alternatively, they can request compensation if they have voted against a general assembly decision that inflicted a loss on the dependent company.[1056] This provision, according to Eminoğlu, reflects the shareholder democracy principle in practice: the shareholders have been given a considerable power to directly and indirectly affect the management of the group company.[1057]

The new TCC also requires the dependent company's board to produce an annual affiliate company report. This report must disclose group relations, including but not limited to transactions entered into with the group companies.[1058] Moreover, this report must disclose the losses caused by the parent company and clarify whether the losses have been compensated.[1059] Cankorel has stated that minority shareholders can use this report as a basis for filing a lawsuit.[1060] Moreover, rights provided to the shareholders of group companies are not limited to this report. For instance, shareholders of the parent company can request information from the general assembly regarding the affiliate company's financial position, assets, shareholders, managers and related persons, and so on.[1061] Additionally, the TCC also provides the shareholders of the dependent company with the right to request a special auditor.[1062] Overall, these provisions impose further disclosure requirements on group companies to strengthen the transparency of Turkish group companies, thus mainly protecting outside shareholders.

7 Provisions for the Board of Directors

In Turkish company law, the board of directors (the BoD or the board) is the representation and the management body of the company.[1063] The legislators have noted that the TCC's provisions on BoD have been affected the most by the corporate governance reforms.[1064] For example, the new TCC states that the joint-stock companies must have a BoD consisting of at least one person who is determined by the company's articles of association or appointed by the general

[1054] Ibid.
[1055] TCC Article 202.
[1056] Ibid.
[1057] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 168-169.
[1058] TCC Article 199.
[1059] TCC Article 199/3
[1060] Cankorel, 'Shareholder Fiduciary Duties' (n 1051) 71.
[1061] TCC Article 200.
[1062] TCC Article 207.
[1063] TCC Article 365.
[1064] *TCC with Justifications* (n 104) 81.

assembly.[1065] The single-member board is an innovation of the new code; the old commercial code required at least three directors to constitute the board.[1066] The new code also introduces voluntary insurance for companies to cover the losses incurred by the members of the board in fulfilling their duties.[1067] According to the legislators, although this is a discretionary mechanism, it is an important step towards bringing the Turkish companies' boards in line with the professional boards of the West.[1068] Aside from these specific changes, Tekinalp has also highlighted the TCC's reforms to the BoDs in the following areas: first, the new TCC regulates the board with consideration of group companies;[1069] second, it adopts the professional board approach; third, it establishes the separation of duties between the shareholders and the board; and fourth, it perceives the board to be the agent of all stakeholders and not only of the shareholders.[1070] Finally, the new TCC makes a distinction between the BoD members who have executive or management functions and those who have non-executive powers.[1071] According to Tekinalp, this distinction is reflected mainly in the provisions for the liability of the directors.[1072]

One of the most significant reforms to the BoD brought by the new TCC has been the acknowledgement of the separation between the duties of the board and the shareholders.[1073] According to previous established practice in Turkish companies, the general assembly usually took on duties of the board by using the company's articles of association to assign itself some of the board's powers.[1074] Because of this blur, the old commercial code required the board members to also be shareholders; if someone was elected to the board, they could not start duties until they owned shares in the company.[1075] The new TCC has abolished this requirement and has explicitly stated the list of exclusive and non-assignable duties as well as the responsibilities of the BoD in an attempt to separate the powers of the two company organs.[1076] Some of these non-assignable duties are the management of the company, determining the company's

[1065] TCC Article 359/1.
[1066] Old TCC Article 312.
[1067] TCC Article 361: 'If the damage incurred by the company through the fault of board members while performing their duties is insured at a price exceeding 25 percent of the company capital and the company is secured, in the case of public companies this matter shall be announced in the bulletin of the CMB and if the shares are listed on a stock exchange this shall also be announced in the stock exchange bulletin, and such matter shall be taken into account in the assessment of compliance with the principles of corporate governance.' Translated in PwC, 'New Turkish Commercial Code: A Blueprint for the Future' (n 958) 98-99.
[1068] Justification for TCC Article 361.
[1069] These provisions are previously discussed under Chaper 5.6.
[1070] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156). 639.
[1071] Ibid 639.
[1072] Ibid 640.
[1073] TCC Articles 374 and 375.
[1074] Justification for TCC Article 374.
[1075] Old TCC Article 312.
[1076] Justification for TCC Article 375.

management organisation, appointment and dismissal of managers, supervising the managers, and preparing the annual activity report and corporate governance statement and presenting them to the general assembly.[1077] As Eminoğlu has asserted, clarification of these exclusive rights and duties reflects 'the law maker's intention to move away from the understanding which perceived the board as the representative of majority shareholders.'[1078] Indeed, as Ararat notes, in Turkish companies, the members of the BoD are 'unilaterally nominated and elected by controlling shareholders and the boards are frequently dominated by members of the controlling family who occupy the board seats'.[1079] Thus, the established belief is that the controlling owners should be given more priority in management.[1080] In most Turkish holding companies, for instance, there is an informal structure called the 'executive committee' that is composed of the directors and members of the controlling shareholders. This committee makes the decisions for all affiliate companies.

In a similar manner, even if there is a CEO who is separate from the board chairman, there is the perception of a hierarchy of these two posts. The board chairman is perceived to be the representative of the dominant shareholder.[1081] In this context, dominant shareholders perceive the professionalism of the board to indicate a loss of their authority in the company.[1082] Thus, the new TCC aims to redress this issue. The articles of the new TCC on BoDs are in line with the legislators' overall objective to institutionalise the company and transform the BoD into a purely professional organ, instead of being composed of controlling owners. However, some articles regarding professional boards that were found in the initial draft of the new TCC have been revoked following pressure from business circles and the realisation of the impracticality of certain measures for Turkish companies.[1083] An example of this is the draft code's requirement that at least one-fourth of the board members must have received higher education.[1084] This requirement was taken out from the final version of the TCC prior to entering into force.[1085] Also, the independence requirement for board members is not regulated in the

[1077] TCC Article 375.
[1078] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 216.
[1079] Ararat, '"Comply or Explain" Without Consequences' (n 69) 359.
[1080] M Ararat and M Eroğlu, 'Yönetişim Kalitesi Açısından İcra ve Kontrol İşlevlerinin Ayrılığı ve Türkiye'deki Geleneksel Yapılanmaların Şirket Performansına Etkisi (Separation of Execution and Control Functions for Effective Governance and the Potential Effect of Structural Regularities in Turkey on Firm Performance)' (2017) 5(1) Kadir Has Üniversitesi Hukuk Fakültesi Dergisi 105, 124.
[1081] Ibid.
[1082] E Onbulak, 'Kurumsal Yönetim ve Türkiye Yansımaları' (2017) 1(72) Journal of Social Policy Conferences 101, 124
[1083] Speech of the AKP Parliamentarian Yilmaz Tunc, in TBMM, 'Minutes of the General Meeting' (26.06.2012) 850-851.
[1084] TCC Article 359/3 (initial draft)
[1085] TBMM, Law Amending the Turkish Commercial Code No. 6335 (30.06.2012).

new TCC. However, listed companies are subject to the CMB's mandatory corporate governance principle on having a minimum number of independent board members.[1086]

One important corporate governance reform of the new TCC is that it allows different shareholder groups and minority shareholders to be represented in the BoD.[1087] This provision did not exist in the old commercial code. Previously, although not stipulated by law, the Turkish High Court *Yargitay*, had allowed shareholder groups to be represented in the board under the term 'group privileges', but this privilege was not extended to minorities.[1088] Thus, the new TCC provision constitutes an important reform for minority shareholders' representation in the BoD. The related articles read as follows:

> Provided that it is stated in the articles of association, certain share groups, shareholders consisting of a certain group in terms of their qualities and nature, and minorities can be granted the right to be represented on the BoD. […] It is mandatory that the candidate nominated by the GA as a board member or who is a member of the group and the minority to whom the right to nominate is granted shall be elected absent fair cause to oppose that candidate.[1089]

According to the justification of the article, the privileged shares, for instance, can constitute a group to be represented at the board.[1090] The article also stipulates that the minority shareholders can be considered a group and thus be represented at the board.[1091] Once a candidate is put forth by a shareholder group or the minority shareholders, the general assembly is under the obligation to elect that nominee as a board member unless there are valid grounds for rejection of the candidate. The TCC article does not expand on what it means by 'valid ground'; however, the justification for the article states that this provision should be interpreted as being decided on a case-by-case basis and should be developed by the courts and jurisprudence.[1092] The article further indicates that the shares that are given representation rights in the board shall be regarded as privileged shares.[1093]

[1086] CMB Principle 4.3.4.
[1087] TCC Article 360.
[1088] Justification for TCC Article 360.
[1089] TCC Article 360 translated in PwC, 'New Turkish Commercial Code: A Blueprint for the Future' (n 958) 98.
[1090] Justification for TCC Article 360.
[1091] Ibid.
[1092] Ibid.
[1093] TCC Article 360/2.

Another of the TCC's reforms pertain to board members becoming indebted to the company. In the old commercial code, the board members and their relatives were prohibited from taking loans from the company. This was still the case in the first draft of the new TCC. However, by the final version, only the board members who do not own shares in the company were prohibited from becoming indebted to the company. In other words, board members who are also shareholders are allowed to take loans from the company. The purpose of this provision in its original form was to protect the minority shareholders against the controlling shareholders appropriating company funds for their personal use. This was due to the established perception in Turkish companies that company funds were equal to the funds of the controlling owner.[1094] Thus, the article in the initial draft of the TCC was aimed to eradicate this perception and bring Turkish boards one step closer to professional boards.[1095] Nevertheless, the initial draft was amended prior to the code entering into force due to pressure from business groups, which indicates that owner shareholders have significant influence over the legislators. Nevertheless, it can be argued that the legislators intended to use this provision to provide further rights to minority shareholders that strengthened their position in relation to the controlling shareholders.

The new TCC also makes a distinction between the executive and non-executive roles of the BoD. It does so by allowing the management function of the board to be delegated to a group or a member of the board, provided that this delegation is stipulated for in the company's articles of association.[1096] This affects the liability of the board members. According to the new TCC, if the board delegates the management function, the board members will not be held liable for the manager's actions insofar as they have acted diligently in the selection of the delegated management.[1097] This is a result of the new code's modification of directors' duties. The new TCC introduces the principles of duty of care and the duty of loyalty.[1098] The article reads, 'Board members and third parties delegated with management owes a duty of care of a diligent manager in discharging their duties, and a duty of loyalty in pursuing company interests.'[1099] In the old commercial code, board members' liability was subject to an objective standard of care of a 'prudent person'. However, because this provision was interpreted narrowly by the courts, the new law abandoned the prudent person standard.[1100] Instead, the new TCC used an objective

[1094] E Dedeağaç and O Sapan, *Anonim Şirketlerde Yönetim Kurulu ve Sorumluluğu (Joint-Stock Company Boards and Responsibility)* (Ankara Barosu 2013) 60.
[1095] S Karahan, 'Anonim Şirkete Borçlanma Yasağı ve 6335 Sayılı Kanun ile Getirilen Değişikliğin Sonuçları (Prohibition on Indebtedness to a Joint-Stock Company and the Effects of the Law No. 6335)' (November 2012) Yaklaşım Dergisi <http://www.ticaretkanunu.net/makale-24/>
[1096] TCC Article 367/1.
[1097] TCC Article 553/2.
[1098] TCC Article 369.
[1099] (Own translation) Ibid.
[1100] KA Oumer, 'Duty of Care and Loyalty While Running Joint Stock Companies Under the Turkish Commercial Code' (2018) 1 Yıldırım Beyazıt Hukuk Dergisi 153, 160-161.

criteria of a 'diligent manager', which the legislators have interpreted as follows: 'the board members shall make decisions in line with the business judgement rule, taking into account corporate governance principles'.[1101] The new TCC regulated the duty of loyalty for the first time. According to the above-stated article, the directors or third parties who have management functions owe a duty of loyalty to the company. The article's justification states that this duty requires the managers to put the company interests before any other personal interests, controlling shareholder interests, or any interests of third parties or relatives.[1102] The legislators have added that this provision intends to ensure the managers do not run the company in a manner that prefers the dominant shareholders' interests.[1103]

Determining the extent of the board members' liability is a vital aspect of corporate governance because it brings predictability and accountability for both the directors and the shareholders.[1104] The new TCC replaces the liability system of the old commercial code, which held the directors jointly and severally liable, and each director was individually held responsible for the entire loss.[1105] According to Tekinalp, the old provision went too far to protect the creditors.[1106] The new TCC introduces the differentiated liability system, which determines each director's liability separately.[1107] Accordingly, the directors and managers will be liable if they fail to discharge their duties as stipulated under the articles of associaton or in the law.[1108] The article clarifies that if the management function is delegated, the board will be released from liability.[1109] Thus, the new TCC adopts a 'no management function, no liability' approach.[1110] Tekinalp has stressed that the TCC's liability provisions acknowledge the separation between executive and non-executive directors.[1111] TCC's *Genel Gerekçe* has further noted that this separation brings Turkish companies' boards in line with the American board system.[1112] In terms of corporate governance reforms, this provision is also an attempt to shift away from owner-dominated boards towards professional boards.

[1101] Justification for TCC Article 369.
[1102] Ibid.
[1103] Ibid.
[1104] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 223.
[1105] Old TCC Articles 336-341.
[1106] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 643.
[1107] TCC Article 557. According to the differentiated liability system, the directors will be liable, not for all the loss, but for the loss they have caused by joint fault, where they will not be held liable to compensate the losses arising outside their fault.
[1108] TCC Article 553/1. This is a fault liability, it can be brought to the court by the company, the shareholders or the creditors.
[1109] TCC Article 553/2.
[1110] PwC, 'New Turkish Commercial Code: A Blueprint for the Future' (n 958) 48
[1111] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 640.
[1112] *TCC with Justifications* (n 104) 91.

Finally, the BoD has been given the exclusive and non-assignable duty to prepare the company's corporate governance statement as per the new TCC.[1113] Accordingly, the board is required to prepare and present the company's corporate governance statement to shareholders in the general assembly meeting. For Tekinalp, this provision enables the board to self-assess.[1114] Aside from this general provision that is applicable to all companies, the TCC also has a more specific provision that is applicable only to the public joint-stock companies. The provision provides that all matters relating to the corporate governance statements of these companies shall be determined by the CMB.[1115] Prior to the new TCC, the corporate governance compliance reports of companies prepared in line with the CMB regulations were ineffective; they only consisted of a few pages and were similar each year because they lacked any legal basis.[1116] The TCC provisions for the corporate governance statement attempt to tackle this issue. The legislators also granted sole authority to the CMB to determine the contents of such statements to ensure uniformity amongst the corporate governance statements of public companies.[1117] This provision ensures that the corporate governance reporting of public companies can be comparable with each other.[1118] However, a recent study examined the corporate governance statements of the 70 listed companies which constitute 81% of the market capitalisation of BIST in 2015 and found that the explanations in the statements were mostly vague and not open to any objective comparisons.[1119] Thus, despite the legislators' efforts to facilitate standardised corporate governance statements, the business practice remains far from that goal.

8 Minority Shareholder Rights

Majority rule prevails in the decision-making process of joint-stock companies.[1120] Unless a greater quorum is specified in the company's articles of association, Turkish company law provides that the general assembly meeting convenes with the presence of shareholders or their representatives who hold at least one-fourth of the company's capital.[1121] Subsequently, the TCC article states that the decision quorum is the majority of the votes of the shareholders who

[1113] TCC Article 375/f.
[1114] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 644.
[1115] TCC Article 1529.
[1116] Ararat, '"Comply or Explain" Without Consequences' (n 69) 356.
[1117] Justification for TCC Article 1529.
[1118] Ibid.
[1119] CMB and EBRD, 'Report on the Corporate Governance Structures and Practices of Public Companies in Turkey' (n 802) 5.
[1120] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 92.
[1121] TCC Article 418/1. Although the TCC provides that special quorums are required in certain instances such as on the decisions on amending the company's articles of association where shareholders representing at least half of the capital need to be present at the general assembly meeting, see TCC Article 421.

are present at the meeting.[1122] There are, however, instances when unanimity is required for decisions at the general assembly,[1123] or where the votes of the shareholders that represent at least 75% of the company's capital are required.[1124] In terms of listed companies, the TCC has a provision that requires that shareholders constituting at least one-fourth of the company's capital to be present at the meeting to take certain decisions, saving where a higher quorum is provided for in the company's articles of association.[1125] These decisions are as follows: 'a) Decisions on the amendments to the articles of association regarding the increase of the company capital or ceiling of the authorized capital; b) Decisions on mergers, divisions and type changes.'[1126] The decisions made by the votes of the majority of the shareholders in the general assembly will be binding not only for those who voted in favour, but also for the shareholders who voted against those decisions and even for the shareholders who did not attend the general assembly meeting.[1127] Hence, whoever holds the most number of votes to form a majority may decide on important company matters, such as approving the annual reports, distributing of dividends, and electing or removing the board members.

Majority rule in company decision-making has led to the owners who hold the majority of voting rights also becoming the controlling shareholders. It has long been argued that since shareholdings are widely dispersed among the public in large companies, control resides in the managers.[1128] In such large companies, the main corporate governance issue is about resolving the agency problem between self-interested managers and dispersed and small shareholders who do not possess enough shares to have any control function in the company.[1129] The corporate governance mechanisms to tackle this type of agency problem are usually found within the context of efficient markets.[1130] However, there is evidence that this type of company structure, which is mainly found in the American system, is the exception, and that most companies around the world typically have controlling shareholders.[1131] A controlling shareholder system leads to a range of agency problems that are different from the agency problems experienced in companies with dispersed shareholdings.[1132] In companies with controlling shareholders, agency issues arise due to the possible conflict of interest between the

[1122] TCC Article 418/2.
[1123] TCC Article 421/2.
[1124] TCC Article 421/3.
[1125] TCC Article 421/5.
[1126] TCC Article 421/5 translated in Kayali and Korkusuz (eds), *Turkish Private Law* (n 862) 244.
[1127] TCC Article 423.
[1128] Berle and Means, *The Modern Corporation and Private Property* (n 36).
[1129] Jensen and Meckling, 'Theory of the Firm' (n 10).
[1130] See Manne, 'Mergers and the Market for Corporate Control' (n 43).
[1131] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 474. The control is determined when a shareholder's voting rights in the firm exceed 20 percent, 476-477.
[1132] R Morck, D Wolfenzon and B Yeung, 'Corporate Governance, Economic Entrenchment, and Growth' (2005) 43(3) Journal of Economic Literature 655, 660.

majority shareholders in control and the minority shareholders due to the minority's 'rational expectation that this divergence of interest distorts corporate decisions to benefit controlling shareholders.'[1133]

It is argued that in the above setting, 'there is potential for abuse, for example in situations where controlling shareholders impose commercial conditions that go against the interests of the company as a whole and minority shareholders'.[1134] In terms of protecting minority shareholders' rights, market forces in Turkey are unable to discipline the controlling shareholders, which was previously coupled with the old commercial code's provision of weak legal rights to the minority in terms of sell-off and filing lawsuits.[1135] Thus, to remedy the agency problem associated with Turkey's company ownership structure, the new TCC introduced new minority rights and extended existing rights. For instance, in the case of group companies, to remedy the risks of abuse of the minority associated with cross-ownerships and pyramidal structures, the new TCC requires the affiliate company board to produce an annual report that discloses group relations to increase transparency in inter-group relations. Also, in terms of privileged shares, the new TCC limits each share to 15 votes,[1136] whereas the old commercial code did not impose any limit on the number of votes. Aside from these examples, it can be observed that, overall, the new TCC has given prominence to the protection of the minority shareholders. Eminoğlu has argued that one of the main goals of the TCC has not been to strengthen the rights of all shareholders; instead, it aimed to strengthen the rights of small shareholders.[1137] The rights of the minority shareholders under the new TCC indeed reveal the legislators' preference for protecting minority shareholder rights.

Minority rights are separate from individual shareholder rights because the former are granted to shareholders who represent a certain defined portion of the company capital.[1138] The provisions of the new TCC define minority shareholders as those shareholders who own at least 10% of the capital in closely held joint-stock companies and 5% of the capital in public joint-stock companies. There is, however, an exception to this rule. The shareholders whose shares' total nominal value exceeds 1 million Turkish Lira can also be granted the minority right to request special audits from a court.[1139] This exception is only limited to requesting special audits and does not apply to other kinds of minority rights under the new TCC. On the other hand,

[1133] Ibid 676.
[1134] Yüksel, 'Recent Developments of Corporate Governance' (n 90) 103.
[1135] Ibid.
[1136] TCC Article 479/2.
[1137] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 91.
[1138] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 94.
[1139] TCC Article 439.

there is a provision that allows the 10% and 5% requirements to be reduced via the company's articles of association in the case of the minority shareholder's right to request a general assembly to convene or to add an item to the agenda of the general assembly meeting.[1140] These are, however, the only instances when the TCC allows the minority percentage to be altered via the company's articles of association. This is because the new TCC clearly states that a company's articles of association can only deviate from the rules contained in the TCC if it is explicitly allowed, such as for the principle of mandatory provisions.

According to the *Genel Gerekçe*, the new TCC improves minority shareholder rights in three main ways as follows: [1141]

1- New exceptions have been introduced to the principle of abiding by the general assembly agenda.[1142]
2- The right to request special audits has been granted to the minority shareholders.[1143]
3- The introduction of a new set of minority rights such as the right to request the dissolution of the company[1144] or to file a lawsuit against the auditor examining the financial reports on the grounds of fair cause or breach of impartiality.[1145]

One important right granted to the minority shareholders is the right to request to convene the general assembly and add an item to the agenda. Accordingly,

> the shareholders comprising at least 5 percent of the share capital in public joint stock companies, along with their justifications and the requested agenda items in writing, can request from the board of directors to convene a general assembly meeting, otherwise if the general assembly meeting is already scheduled to add their requested items to the meeting agenda.[1146]

[1140] TCC Article 411/1.
[1141] *TCC with Justifications* (n 104) 94.
[1142] TCC Articles 364, 463, 438 and 440.
[1143] TCC Article 438 and 440.
[1144] TCC Article 531.
[1145] TCC Article 384/4.
[1146] Own translation from Article 411, TCC. I examine the issue of minority rights in light of public joint-stock companies, therefore I have used the minority percentage applicable to the public joint-stock company.

As explained above, this article is the only instance where the 5% ratio can be decreased through the company's articles of association. The article further states that the board shall convene the general assembly meeting 45 days from the date of the request at the latest. If the board fails to do so, the requesting shareholders will have the right to convene the meeting.[1147] The justification for this article mentions that the 45-day limitation ensures that the board does not delay the convening of the general assembly meeting and thereby render it ineffective in practice.[1148] This limitation is an important reform that was not available to minority shareholders in the previous commercial code. If the board rejects the minority shareholders' requests or does not give an affirmative answer within 7 days, the minority shareholders can apply to court to decide on the matter.[1149] In sum, with this provision, the new TCC facilitated the effective use of minority shareholder rights to convene the general assembly meetings and add items to the meeting agenda.

Another minority shareholder right provided by the new TCC is the right to request a special auditor.[1150] A special audit can be initiated by the request of the minority shareholders to clarify certain issues deemed necessary for the shareholder to exercise their shareholding rights. It is, however, necessary for that shareholder to have exercised their rights to information or examination prior to requesting a special auditor. The shareholders can use this right even if it is not included in the general assembly meeting agenda. Once the minority shareholders have requested a special auditor, it is up to the general assembly to decide on the request. If the general assembly accepts the request, then the company or any shareholder may ask the court to appoint a special auditor.[1151] If the general assembly rejects that request, then the TCC only allows the minority shareholders to apply to court to appoint a special auditor.[1152] This provision is the only instance of the law having added an extra provision regarding what constitutes a minority shareholder.

In addition to the general rule on determining the minority percentages, shareholders of public joint-stock companies whose shares have a total nominal value that exceeds 1 million Turkish Lira are also considered to be minority shareholders for the purposes of this article. The legislators have noted the inherent difficulty of large companies reaching such percentages and hence introduced the 1 million Turkish Lira rule so they can benefit from the rights provided to

[1147] Article 411/4, TCC
[1148] Justification to Article 411, TCC.
[1149] Article 412, TCC. The Article states that it will be the commercial court where the company has registered its address that will have jurisdiction over deciding such a matter and that the decision of the court in this matter shall be final, which means it cannot be appealed against.
[1150] Article 438, TCC
[1151] Article 438/2, TCC
[1152] Article 439, TCC

minority shareholders.[1153] Also, Eminoglu has argued that small shareholders can add up their shares' nominal values to reach the 1 million Turkish Lira requirement and use this right collectively.[1154] This is a major advantage afforded to minority shareholders by the new TCC because in the old commercial code, the special auditor was chosen by the decision of the general assembly.[1155] Thus, although such a minority right existed before, it was rendered ineffective in practice because the majority or controlling shareholders elected the auditor, who would conduct their duty in line with the majority shareholders' interests.[1156] Moreover, the minority shareholder had to fulfil onerous requirements to apply to court such as entrust the shares they held with a bank until the court had decided on the matter.[1157] This deterred most of the minority shareholders from challenging the decisions of the controlling shareholders in court, which made the old commercial code's provision for the appointment of a special auditor practically ineffective. Thus, the new TCC provision on this matter is expected to bring confidence to both existing minority shareholders and to prospective investors.[1158]

A related minority shareholder right is the right to request the dismissal of a current auditor and to appoint a new one.[1159] As a general rule, the general assembly appoints the auditor. In the case of group companies, the parent company's general assembly will appoint the auditor for the whole group of companies. However, in instances where the independence of the appointed auditor becomes questionable, and the minority shareholders have reasons to believe that the auditor is not acting objectively and can establish those reasons, the court will appoint a new auditor.[1160] Thus, the minority shareholders have been granted a very important right against the controlling or majority shareholders because they will be able to employ court challenges against the impartiality and fairness of the auditor appointed by the majority. Ultimately, the minority shareholders have been given the opportunity to remove an auditor and to replace it with an auditor deemed appropriate by the court.[1161]

[1153] Justification for TCC Article 438.
[1154] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 105.
[1155] Old TCC Article 348.
[1156] S Güven, '6102 Sayili Türk Ticaret Kanunu Çerçevesinde Anonim Sirketler Hukukunda Özel Denetim (Special Audit in Corporation Law, in accordance with Turkish Commercial Code No. 6102)' (2011) 7(2) Çankaya University Journal of Law 133, 134.
[1157] Old TCC Article 348.
[1158] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 105.
[1159] TCC Article 399/4/b.
[1160] TCC Article 399/4.
[1161] The article adds: 'In order for minority shareholders to file this action, they must have voted against the election of the auditor at the GA, had their opposing votes recorded in the minutes and been a shareholder for at least three months prior to the date of the GA at which the election was made.' TCC Article 399/5 translated in PricewaterhouseCoopers, 'New Turkish Commercial Code: A Blueprint for the Future' (2011).

Another minority shareholder right prescribed in the new TCC is the right to postpone the meetings on discussions of financial statements and related matters.[1162] This provision serves to provide more time to the minority, particularly outside shareholders, to examine the financial statements in detail. If minority shareholders need to adjourn the general assembly meeting, approval of the general assembly is not required; the meeting will be adjourned for 1 month by default. Under the old commercial code, a similar right was also provided, but the minority percentage required for both public and closely held joint-stock companies was 10%.[1163] The new TCC has differentiated the percentages for public companies and lowered the ratio to 5%, making it easier for small shareholders to exercise the right to postpone in public joint-stock companies.

There is another article in the new TCC that requires that the removal and election of the members of the BoD must considered in relation to the annual meetings on financial statements.[1164] The minority shareholders are thus granted a significant right that will allow them to adjourn the general assembly meetings where the future of the BoD is discussed. Making this power available to the minority shareholders will undeniably exert pressure on the rest of the shareholders and the board. The new TCC goes even further and adds that once the general assembly meeting on financial statements and related matters is adjourned, the minority shareholders can request a second adjournment.[1165] Eminoğlu has stated that this provision demonstrates the importance accorded to minority shareholders in the corporate governance context.[1166] Indeed, with the new provisions, the minority shareholders can apply greater scrutiny over crucial matters such as the removal and election of the board of directors, which strengthens their position vis-à-vis the controlling shareholders.

The new TCC introduced the minority right to file a lawsuit for the dissolution of the company on valid grounds. This right was introduced to protect the minority shareholders from the actions of the majority.[1167] This provision did not exist in the old commercial code. Moreover, the precedent of the Turkish high court *Yargitay* was that claiming valid grounds for the dissolution of the company could not be brought in court.[1168] On the other hand, the new TCC provides that

[1162] TCC Article 420.
[1163] Old TCC Article 377.
[1164] TCC Article 413.
[1165] TCC Article 420/2. According to the article, the member presiding the general assembly does not have the right to reject the request on this matter on the first time, however, in the second-time around, he/she has to decide whether there have been inadequate explanations on the minority shareholders' reservations.
[1166] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 107.
[1167] TCC Article 531.
[1168] H Çağlar and E Kaşak, 'Anonim Şirketin Haklı Sebeple Feshine İlişkin TTK M.531 Hükmünün Zaman Bakımından Uygulanması (Application in terms of date of Art. 531 Turkish Commercial Code

the minority shareholders can file a lawsuit requesting the dissolution of the company on valid grounds. What is considered a valid ground has not been prescribed by the TCC article. It is instead left to the discretion of the court and jurisprudence, according to the legislators.[1169] The justification for the article gave some examples from the practice in Switzerland, which was one of the influences on the article. Some examples of valid grounds include

> convening the general assembly unlawfully on numerous occasions, continuous violation of minority and individual shareholder rights, especially the obstruction of the right to information and examination, the company regularly making a loss and the steady decrease in the amount of dividends distributed.[1170]

To further dissect the wording of the justification, the minority shareholders have been effectively given the right to request dissolution of the company on the basis of most of the majority's decisions. The court will have the ultimate discretion to decide what constitutes a valid ground for dissolution. However, if the court determines there is a valid ground for dissolution, dissolution of the company is not the only possible outcome.

The legislators have expressed that even if the court decides that the minorities' grounds for requesting dissolution are justified, 'the survival of the company may sometimes make sense economically and rationally'.[1171] Thus, the court can make an alternative ruling. The article states that where the court has established the presence of a valid ground for company's dissolution, it may decide not to dissolve the company but instead make a ruling on the removal of the plaintiff shareholders from the company by paying them the real value of their shares, determined on the date of the ruling. This provision also allows the court to rule on any other remedy it deems appropriate to the case at hand.[1172] The legislators have listed some examples, for instance, the court can rule on mandatory dividend distribution or decide on partial dissolution of the company. The Turkish high court has made a recent ruling that the sale of a portion of the immoveable assets allocated to the use of a company's field of activity and the disagreement amongst members in a family company are valid grounds for the dissolution of a

Regarding Just Termination of Joint Stock Company)' (2016) 65(3) Ankara Üni Hukuk Fak Dergisi 659, 661.

[1169] Justification for TCC Article 531.

[1170] (Own translation) Ibid.

[1171] Ibid.

[1172] Ibid. Eminoğlu elaborates on other possible court rulings as distribution of dividend from a portion of profit reserves in one go or in instalments, or representation of the minority shareholders in the board of directors in Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 115.

company.[1173] More importantly, Turkish legal scholars are of the view that company resources being expropriated by the majority shareholders can be regarded as a valid ground.[1174]

The new TCC also increases the opportunities for the minority shareholders to be represented in the BoD. The TCC introduced a new rule to Turkish company law by according the right to representation in the BoD to certain groups and minorities. [1175] The previous commercial code provided that only certain shares could be granted representation on the board as privileged shares.[1176] With the new provision, 'this right shall be granted to certain share groups, shareholders forming a certain group with their common characteristic and qualification and minority groups.'[1177] Board members can be elected amongst certain shareholder groups or minorities if stipulated in the company's articles of association.[1178] These groups can be chosen as representatives and nominate candidates to the board. In both cases, the general assembly must elect the groups' representative unless it can prove there is a just cause or a valid reason against the candidate. However, the article states that such representatives cannot constitute more than half of the board. The representatives chosen in this way, however, cannot fulfil their duties by taking instructions from the groups or minorities who have chosen them.[1179] Otherwise, they would be acting contrary to their duty of loyalty to the company.[1180]

Overall, the new TCC provisions explored in this section provide far-reaching rights and protections to the minority shareholders with the objective of ensuring that the majority shareholders do not monopolise company decision-making. Eminoğlu has gone as far as to say that the provisions in the TCC 'even reach the level of positive discrimination for the benefit of minority [shareholders] at times.'[1181] Examples of these positive discrimination provisions include the right to request the convening of the general assembly or the right to add an item to meeting agenda, which provides a buffer against the abuse of the minority by the BoD and the

[1173] Yargitay 11. HD 2.6.2014, E. 2014/3669 K. 2014/10238, in F Nomer Ertan, 'Anonim Ortaklığın Haklı Sebeple Feshi Davası - TTK m. 531 Üzerine Düşünceler (Rightful Termination of Joint-Stock Company – Thoughts on TCC Article 531)' (2015) 73(1) Journal of Istanbul University Law Faculty 421, 427.
[1174] T Ayoğlu, 'Anonim Ortaklıkların Haklı Nedenle Feshi (Dissolution of Joint-Stock Companies on Valid Grounds' (2015) (78) Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 219, 228; Ü Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku (The New Law of Corporations)* (4th edn, Vedat 2013) 292.
[1175] TCC Article 360.
[1176] R Karasu 'Anonim Şirket Yönetim Kurulunda Belirli Gruplarin Temsil Edilme Hakki (Right to Representation of Certain Groups in the Board of Directors of Joint-Stock Companies)' (2016) (1) Ticaret ve Fikri Mülkiyet Hukuku Dergisi 31, 31.
[1177] Ibid.
[1178] However, since this will require a change in the company's articles of association, such change needs to be approved by shareholders constituting at least 75% of the total capital of the company in the general assembly voting as per TCC Article 421/3.
[1179] Karasu, 'The Right to Representation of Certain Groups in the Board of Directors' (n 1176) 32.
[1180] Ibid 33.
[1181] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 70.

majority shareholders. The new provisions not only protect the minority shareholders, but also convert them into an important factor in company management. All in all, the new TCC's provisions on minority rights aim to shift the power balance in the company in favour of the non-controlling shareholders, which brings Turkish company structures more in line with the dispersed Anglo-American corporate system.

9 Provisions for Stakeholders

The new TCC places the shareholder at the centre of its corporate governance reforms. Yet, Tekinalp has noted that one of the main corporate governance reforms of the new TCC pertain to the stakeholders.[1182] He has argued that the new TCC introduces the concept of the 'stakeholder' into Turkish company law for the first time, which he admits 'will bring a strategic depth to our legal system in terms of policy making and also pave the way for further sustainable reforms.'[1183] For Tekinalp, while the new TCC acknowledges shareholders as its starting point, it does not perceive corporate governance to be merely as a solution to the agency problem caused by the conflict of interest between the shareholders and the managers. Instead of focusing on the singular interest of the shareholder, the code approaches corporate governance from a broader angle; from a stakeholder's perspective.[1184] He has listed 'stakeholders' to be the employees, creditors, customers, suppliers, and prospective investors.[1185] More importantly, he has added that the TCC's stakeholder perspective only relates to the transparency aspect of corporate governance.[1186] This is also reiterated in the *Genel Gerekçe* of the TCC, which states that the transparency principle of corporate governance shall cover all stakeholders, not just the shareholders.[1187] One of the ways in which transparency is envisaged in a manner that would benefit stakeholders is the mandatory company website requirement, which provides stakeholders with an 'access right'.[1188] The access right refers to the right to access information and documents relating to the company such as the financial statements, audit reports, general assembly resolutions, and so forth. This right is further augmented by a right of action that allows stakeholders to file a lawsuit against the company when their access right is breached.[1189]

[1182] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 636.
[1183] (Own translation) Ü Tekinalp, 'Türk Ticaret Kanununun Kurumsal Yönetim İlkeleri Yaklaşımı: Somutlaştırma ve Hukukî Bir Kavram Durumuna Getirme (The Corporate Governance Approach of the Turkish Commercial Code: Reification and Legality)' (Conference Proceeding) (19.10.2006) 2.
[1184] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 636-637.
[1185] Tekinalp, 'Reification and Legality' (1183) 2.
[1186] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 637.
[1187] *TCC with Justifications* (n 104) 84.
[1188] Tekinalp, 'Reification and Legality' (1183) 2.
[1189] Ibid.

In light of the above explanations, it should be noted that the new TCC does not directly address the issue of stakeholder rights in a specific provision. According to the *Genel Gerekçe*, stakeholders are indeed recognised in the new code, but their rights seem to be confined to the transparency principle, which is only one corporate governance principle out of the four embodied in the new TCC.[1190] While Tekinalp has referred to the new TCC's 'pluralist approach' in terms of transparency, Eminoglu has argued that a pluralist approach would mean the consideration and protection of all stakeholder interests alongside the shareholder interests in the decision-making process.[1191] Here, the only stakeholder right that the new TCC recognises is the right to access information, which materialised in the form of a company website requirement[1192] and ensuring stakeholders' access to accurate information.[1193] These are the extent of the general stakeholder rights created by the new TCC's corporate governance reforms. The new code provides additional protections for a particular stakeholder, namely the creditors. For instance, in the case of group companies, the creditors have been given the right to file a lawsuit against the parent company regarding the compensation of the losses incurred by the dependant company.[1194] This provision gives the creditors the right to sue the company while the company is still solvent. Second, creditors can file a lawsuit against the board members or auditors on the basis of a failure to fulfil the statutory duties in the TCC.[1195] In the event of company mergers and divisions, the new code states that the impact of such mergers or divisions on the creditors and employees shall be elaborated in a report that is prepared by the management of the companies involved.[1196]

Aside from a few provisions that grant new rights to creditors, the new TCC does not improve stakeholder rights per se. The legislators have asserted in the *Genel Gerekçe* that 'shareholder rights and their efficacy regarding important and structural decision-making should be augmented'[1197], but there is no corresponding statement for strengthening stakeholder rights. Yet, the legislators have noted the increasing global trend for stakeholders to be included in the scope of the equal treatment principle.[1198] The legislators have added that 'this social expansion is becoming more and more evident each day'.[1199] Despite acknowledging the increasing

[1190] Four pillars of the TCC's corporate governance philosophy are: Transparency, fairness, accountability and responsivity, in *TCC with Justifications* (n 104) 84.
[1191] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 267.
[1192] TCC Article 1524.
[1193] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 637.
[1194] TCC Article 202/1/c.
[1195] TCC Articles 553-554. Also, in PwC, 'New Turkish Commercial Code: A Blueprint for the Future' (n 958) 49.
[1196] TCC Articles 147/2/i-j and 169/2/g-h.
[1197] (Own translation) *TCC with Justifications* (n 104) 84.
[1198] Ibid.
[1199] (Own translation) Ibid.

importance of stakeholders in corporate governance, the legislators have excluded this approach in Turkish company law. This has been reiterated by Tekinalp, who had stressed that the new TCC placed shareholder value at the core of its provisions.[1200] Thus, the statements of the legislators and the provisions of the new code indicate that the TCC has indicated a clear preference for the shareholder primacy theory of corporate governance over a pluralist approach.

The involvement of employees in management through participation in the company boards has been recognised in certain European jurisdictions, such as Germany's co-determination system.[1201] Moreover, in many European countries, the national corporate governance systems require inclusion of the employee voice in the company.[1202] Indeed, employee representation is also envisaged in various EU regulations.[1203] Nevertheless, employee participation in management has not been regulated in the TCC. Historically, employee participation was provided for in the Turkish Labour Law of 1936, which included provisions allowing employees to take part in management.[1204] The Law on Trade Unions in 1963 replaced the provisions on employee participation in management with the institution of union representatives, thus limiting the scope of employee representation to those companies with unions.[1205] After the economic liberalisation policies of the 1980s, employee representation was abolished in its entirety, and union representation was allowed in companies only under certain conditions. Under the current laws, the employees are granted the right to be informed in cases of collective redundancy, when the union representative may enter into discussions with employers over the measures to prevent the redundancy or its effects.[1206] Other employee representation provisions are also found scattered amongst various Turkish labour law regulations.[1207] Aside from these indirect representation rights, the TCC has been silent on the matter, and the new TCC did not include any reforms on employee representation in the company. On the other hand, the CMB Principles encourage companies to increase stakeholder involvement in management, particularly employee involvement. However, these are only applicable to listed companies and are not mandatory principles.

[1200] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 639.
[1201] In the co-determination system, the BoD has a dual structure, where employee representatives are placed at the supervisory board along with the shareholder representatives elected by the general assembly. See Pendleton and Gospel, 'Corporate Governance and Labor' (n 516) 56-57.
[1202] A Naciri, 'EU Corporate Governance System' in A Naciri (ed), *Corporate Governance Around the World* (Routledge 2008) 338.
[1203] Such as the Council Directive 2001/86/EC (2001) OJ L 294.
[1204] Alemdar HO, 'Avrupa Şirketinde İşçinin Yönetime Katilma Hakki (Employee Involvement in the European Company)' (Thesis, Dokuz Eylul University 2008) 61.
[1205] Ibid 62.
[1206] TBMM, Labour Law No. 4857 (10.06.2003) Article 29.
[1207] For examples in the Labour Law No. 4857 (10.06.2003); Occupational Health and Safety Law No.6331 (30.06.2012).

One of the new TCC's reforms for employees is the article that provides them with the opportunity to become shareholders of the company via 'conditional capital increase'.[1208] This employee right did not exist in the old commercial code. Moreover, there is a limitation on the shareholder's pre-emptive rights to purchase new shares in favour of the employees. Accordingly, one of the valid grounds for limiting the shareholder's pre-emptive right is the employees' right to join the company.[1209] However, these articles cannot truly be considered to be stakeholder rights because they give employees the possibility to gain shareholder status, which transforms them from a mere stakeholder to an owner-employee. Therefore, it can be concluded that these reforms are not augmenting stakeholder rights per se. On the other hand, the new code includes protection measures for the employee in the case of company restructuring. For instance, the TCC requires that the legal and economic effects of company mergers and divisions on employees must be explained in a report that is prepared by the boards of the companies involved.[1210]

In Turkish legal doctrine, the public has also been recognised as a stakeholder of the company.[1211] Eminoglu has stated that this perception brings a social function to the responsibility pillar of the corporate governance philosophy of the new TCC.[1212] Tekinalp has also acknowledged that 'social responsibility' constitutes one of the founding pillars of the new commercial code, not only for listed companies but for all Turkish companies.[1213] Indeed, the articles of the new TCC that aim to protect the public interest indicate that the code has accepted the public as a company stakeholder. One example of this is the provision that gives the Ministry of Customs and Trade the right to file a lawsuit for the annulment of the company. The provision empowers the Ministry to inspect the activities of companies.[1214] If the Ministry determines that a company is involved in an activity, transaction, or any preparation that is contrary to public order, it can file a lawsuit requesting the company's annulment within a year.[1215] For this provision to take effect, however, there must be a clear breach of public order.[1216] For example, a company producing medicine that is detrimental to public health would be considered a breach

[1208] TCC Article 467/1. Accordingly, the employees, as well the creditors, can acquire the nominal shares through capital increase and their right to do so cannot be obstructed via restricting these shares' transferability.
[1209] TCC Article 591/2.
[1210] TCC Articles 147/2/j and 169/2/g.
[1211] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 309; Pulaşlı, *Corporate Governance* (n 153) 92.
[1212] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 267.
[1213] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 635.
[1214] TCC Article 210/1.
[1215] TCC Article 210/3.
[1216] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 312.

of public order.[1217] However, it has been argued that there is the risk that the Ministry is a political body and may act with political motivations when filing a company annulment lawsuit.[1218] Overall, although this article protects the public interest regarding company operations, it allows companies to conduct activities that fall short of illegality.

10 Conclusions

The new TCC brought extensive changes to Turkish company law, mainly to joint-stock companies. Whereas the provisions of the CML and the subsequent CMB communiques constitute the specific legislation applicable solely to public joint-stock companies, the articles of the TCC contain general provisions that complement the rules on public companies. One of the most important reforms was the introduction of the term 'corporate governance' to Turkish company law for the first time, alongside various articles that contain corporate governance rules. Moreover, the new TCC explicitly authorises the CMB to establish mandatory corporate governance principles for public joint-stock companies. The main ramifications of these developments are as follows. First, the corporate governance phenomenon has been acknowledged in a primary piece of legislation, thereby ingraining it in the Turkish legal system. Second, the CMB's corporate governance principles have been given a legal basis, thus strengthening the CMB's enforcement capability.[1219] Additionally, due to the under-development of Turkish capital markets and the subsequent absence of effective market forces, it has been argued that such corporate governance rules had to be secured legally and not left to the initiative of companies.[1220]

Indeed, the overhaul of the commercial code was a necessity. This was elaborated on by the legislators in detail in the *Genel Gerekçe*. Some of the factors that led to the new code are global developments such as market liberalisation, increased competitiveness, globalisation, and technological advancements.[1221] However, the main driving force behind the legal reforms, especially in company law, was Turkey becoming a candidate for EU membership.[1222] Turkish

[1217] O Can, 'Gümruk ve Ticaret Bakanlığı'nın Ticaret Şirketlerinin Feshini İsteme Davasında Bir Yıllık Süreye İlişkin Anayasaya Aykırılık Sorunu TTK m. 210/f. 3 (The Problem of Constitutionality in the Lawsuits Filed by the Ministry of Customs and Trade on the Dissolution of Company TCC Article 210/para. 3)' (2015) 31(4) Banka ve Ticaret Hukuku Dergisi 111, 116.
[1218] M Yasan, 'Türk Ticaret Kanunu m. 353'e Göre Fesih Davasının Gümrük ve Ticaret Bakanlığı Tarafından Açılabilmesinin Ticaret Hukuku Prensipleri Çerçevesinde Değerlendirilmesi (Evaluation of TCC Article 353 on the Lawsuits Filed by the Ministry of Customs and Trade on the Dissolution of Company)' (2013) 71(2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 449, 471.
[1219] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 635.
[1220] Akdoğan and MA Boyacıoğlu, 'Corporate Governance In Turkey: An Overview' (n 1036) 27.
[1221] *TCC with Justifications* (n 104) 63-65.
[1222] Ibid 64.

scholars have acknowledged that the EU accession process has been one of the most influential factors shaping the new TCC.[1223] For instance, Ararat and Ugur have stated that adjustments to commercial law had 'the explicit objective of aligning it with the European directives on company and capital market laws'.[1224] Indeed, the *Genel Gerekçe* in combination with Turkey-EU relations and the timing of the legal reforms indicate that the main objective of the new TCC has been the alignment of Turkish company laws with the EU acquis. Certain EU-level reports have been identified as references for the new TCC.[1225] These reports indicate the shareholder-centric undertone of the EU approach to corporate governance through their use of residual claimant justifications for pursuing shareholder value and their reliance on the agency theory. These arguments resonate with the Anglo-American variant of corporate governance instead of the continental European approach to corporate governance which contains a 'logic of intermediation' between various stakeholders.[1226] Instead, the EU documents suggest conformity to the mainstream model of corporate governance; in fact, they make explicit reference to the OECD Principles.[1227] Although Tekinalp has denied that the new TCC's corporate governance reforms are based on any specific codex such as the OECD's,[1228] by adopting the EU's perspective on the issue, shareholder interests inevitably become prioritised over other stakeholder interests. This brings Turkey's corporate governance laws closer to the mainstream model rather than creating a unique corporate governance system as was intended.

The corporate governance reforms of the new TCC have found domestic backing because the business community, trade unions, and most political parties backed all efforts towards EU membership. These bodies hoped that membership would bring EU financial aid, increased foreign investment, and overall economic growth to Turkey.[1229] Thus, most of the new company law provisions were able to pass through parliament and subsequently come into effect even though they were controversial regarding current business practices and the ownership structure of Turkish companies.[1230] Scholars even praised the new TCC for adopting an 'innovative and reformist approach, departing from conventional approaches and historical legacies that have been in force for more than 50 years'.[1231] Some of the profound changes which the new TCC

[1223] Ararat and Ugur, 'The Turkish National System of Corporate Governance' (n 624) 263; Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 59.
[1224] Ararat and Ugur, 'The Turkish National System of Corporate Governance' (n 624) 263.
[1225] *TCC with Justifications* (n 104) 85; European Commission, 'Report of The High-Level Group of Company Law Experts' (n 908); European Commission, 'A Plan to Move Forward' (n 912).
[1226] Aglietta and Rebérioux, *Corporate Governance Adrift* (n 400) 56.
[1227] European Commission, 'A Plan to Move Forward' (n 912) 12.
[1228] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 638.
[1229] Özkan, 'Turkish-EU Relations' (n 867) 49.
[1230] Some of the articles of the draft TCC were amended prior to entering into force with the Law Amending the Turkish Commercial Code No. 6335 (30.06.2012).
[1231] Ararat, Suel and Yurtoglu, 'Sustainable Investment in Turkey' (n 80) 15.

brought include introducing the equal treatment principle, abolishing the requirement for board members to own shares in the company, allowing the general assembly to be held electronically, enabling online voting, facilitating the use of shareholder participation rights through new forms of representation, and allowing minority shareholders to be represented at the BoD.

While preserving shareholder primacy as the starting point of Turkey's corporate governance regulation, the particular TCC provisions indicates that the new code seeks to protect the rights of minority shareholders specifically. Rules such as the equal treatment principle aim to empower outside shareholders in Turkish family-owner dominated companies despite being presented as a general shareholder right. Similarly, the extensive provisions on group companies purport to strengthen the position of the minority shareholders of the affiliate company against the controlling majority. These articles share the same objective with the OECD Principles, which particularly seek to strengthen the rights of the 'minority and foreign shareholders'.[1232] The result is that the new TCC curtails the existing power and influence of the family owners who control Turkish listed companies in favour of the outside shareholders.

[1232] OECD, 'OECD Principles of Corporate Governance' (2004) 20.

Chapter VI – Assessment of Turkey's Corporate Governance Framework

1 Introduction

This chapter incorporates the previous theoretical and black-letter research into a set of critical analyses. The first aim of this chapter is to determine whether the new Turkish corporate governance framework has conformed to the mainstream model of corporate governance. Second, it analyses the reasons and implications for adopting a hard law approach to the regulation of corporate governance in Turkey. Subsequently, the chapter discusses the possible implications of Turkey's adoption of mainstream corporate governance laws, particularly for the ownership structure of its listed companies. The chapter concludes with the consequences of a transformation in the ownership structure of listed companies for stakeholders and society at large.

The OECD has published a report entitled Corporate Governance in Turkey: A Pilot Study (the Pilot Study) in 2006.[1233] This report 'assesses on an OECD Principle-by-Principle basis the extent to which the OECD Principles have been implemented in Turkey'.[1234] The Pilot Study is an accurate indicator of the reasons that led to certain reforms in corporate governance laws. Moreover, the study carries significance in terms of being the 'first of its kind for a member country'[1235] in which the OECD has evaluated the compliance level of a country's corporate governance framework with its principles.[1236] Using the Pilot Study as a reference, I examine Turkey's new corporate governance framework to determine the degree to which it has adopted the OECD recommendations on corporate governance. The timing of the Pilot Study allows for such analysis because it was published in 2006, which is when the groundwork was laid for the new legislation that constitutes Turkey's new corporate governance framework. Moreover, the Pilot Study demonstrates the importance the OECD accords to ensuring that Turkey adapts to the mainstream corporate governance model. In fact, Turkey's corporate governance reforms have been given so much emphasis that the most recent version of the OECD Principles have

[1233] OECD, 'A Pilot Study' (n 159).
[1234] Ibid 7.
[1235] Angel Gurría (OECD Secretary-General), 'Corporate Governance in Turkey' (Istanbul, 17.10.2006) <http://www.oecd.org/turkey/corporategovernanceinturkey.htm>.
[1236] It should be highlighted that the OECD report 'A Pilot Study' was published in 2006, hence it based its evaluation of Turkey's compliance with the OECD Principles of Corporate Governance 2004. The OECD Principles have been revised since then, however, since the legal framework constituting Turkey's corporate governance framework has been revamped prior to the publishing of OECD Principles of 2015, the chapter uses the OECD Principles of 2004 for reference.

been adopted at the 2015 G20 meeting in Turkey.[1237] This move could be interpreted as a symbolic affirmation of Turkey's alignment of its corporate governance laws with the OECD Principles. Therefore, the findings under this section illustrate the influence of the OECD in shaping national corporate governance frameworks in emerging markets.

2 Compliance with the Mainstream Model? A Review of the Pilot Study

a. Introduction

In Turkey, a corporate governance codex was drafted for the first time when the CMB published its Corporate Governance Principles in 2003. This initiative used the OECD Principles of 1999 as reference.[1238] In 2004, the OECD reviewed its principles; the CMB then revised its principles and published an amended version of the CMB Principles in 2005.[1239] Thus, the OECD Principles constitute the 'cornerstone' of corporate governance standards in Turkey.[1240] Nevertheless, because the CMB Principles were soft law and not backed by any legal sanction other than the comply-or explain obligations imposed on listed companies, prior to the enactment of the new TCC and the CML it was observed that companies were not 'eager or conscious about the implementation of these principles'.[1241]

During the period between the CMB publishing its soft law principles and whilst the preparations for drafting the new TCC and CML were ongoing, the OECD published the Pilot Study in 2006. The principal aim of the Pilot Study was to investigate the implementation levels of the OECD Principles in Turkey. The report examined the totality of the 'corporate governance framework', which includes 'legislation, regulations, rules, standards, codes, principles, business practices and systems, such as the judicial system'.[1242] Thus, the purpose of this section is not to merely compare the OECD Principles with the CMB Principles; it seeks to consider the overall corporate governance framework in Turkey to grasp the extent to which Turkey has conformed to the mainstream model as depicted by the OECD.

[1237] OECD, --'G20 Leaders endorse G20/OECD Principles of Corporate Governance' (16.11.2015) <https://www.oecd.org/daf/ca/g20-leaders-endorse-g20-oecd-principles-of-corporate-governance.htm> accessed 15 October 2018.
[1238] CMB, Corporate Governance Principles (2003) 7.
[1239] CMB, Corporate Governance Principles (2003, amended 2005).
[1240] Akdoğan and MA Boyacıoğlu, 'Corporate Governance In Turkey: An Overview' (n 1036) 12.
[1241] Ibid.
[1242] OECD, 'A Pilot Study' (n 159) 7. Since this research analyses the Turkish corporate governance laws, other areas assessed in the Pilot Study such as the judicial system is not examined under this section.

It should be noted that the 2006 Pilot Study is based on the OECD Principles of 2004.[1243] The Pilot Study notes that in assessing implementation levels with the OECD Principles, the draft Methodology For Assessing The Implementation of the OECD Principles of Corporate Governance (the Methodology) [1244] was used as guidance. Accordingly, the Methodology is

> intended to underpin an assessment of the implementation of the Principles in a jurisdiction and to provide a framework for policy discussions. The ultimate purpose of an assessment is to identify the nature and extent of specific strengths and weaknesses in corporate governance, and thereby underpin policy dialogue that will identify reform priorities leading to the improvement of corporate governance and *economic performance*.[1245]

It is further noted that 'the Methodology like the Principles treats countries consistently, despite their widely different institutional structures and traditions'.[1246] The stated objective of the Methodology and its treatment of various' countries' corporate governance frameworks reveals the underlying raison d'etre of the OECD Principles to be the conversion of all national systems to a standard model with a sole focus on economic performance. Indeed, the Methodology has admitted this by hinting that 'This feature is intended to facilitate a discussion about different remedies for similar problems and the *transferability of experience between jurisdictions*'.[1247]

The Pilot Study employs a similar structure as the OECD Principles by assessing Turkey's implementation levels under six broad headings. Each of these headings constitute an aspect or a general principle of corporate governance: Ensuring the Basis for an Equitable Corporate Governance Framework,[1248] The Rights of Shareholders and Key Ownership Functions, The Equitable Treatment of Shareholders, The Role of Stakeholders in Corporate Governance, Disclosure and Transparency, and The Responsibilities of the Board. In the OECD Principles, each of these areas is regulated with a main principle, followed by ancillary sub-principles. The Pilot Study examines each of these principles and sub-principles to assess the degree to which they are implemented in Turkish practice, laws, regulations, and enforcement capabilities of the related authorities. It assigns an assessment to that corporate governance area as either Fully Implemented, Broadly Implemented, Partly Implemented, Not Implemented, or Not Applicable.

[1243] OECD, 'OECD Principles of Corporate Governance' (2004).
[1244] OECD, 'Methodology For Assessing The Implementation of the OECD Principles of Corporate Governance' (2007).
[1245] Emphasis added. Ibid 8.
[1246] Ibid 9.
[1247] Emphasis added. Ibid 9.
[1248] In the OECD Principles of 2004, this first principle is titled 'Ensuring the Basis for an Effective Corporate Governance Framework'.

According to the Methodology, '[t]he assessment would cover not just the assessed strengths and weaknesses of individual principles but also indicate how they serve to determine the operation and efficiency of the overall corporate governance system'.[1249] In sum, the Pilot Study grades the Turkish corporate governance framework's conformity with the OECD standards and recommends how to make changes to the framework for full compatibility with the OECD standards.

The first corporate governance area analysed under the Pilot Study is Ensuring the Basis for an Equitable Corporate Governance Framework. Prior to its assessment of the specific OECD Principles' implementation, the Pilot Study first notes that the 'over-arching Principle' in this first area is the promotion of transparent and efficient markets that are consistent with the rule of law.[1250] It adds that, overall, the assessment practice involves 'the corporate governance framework's completeness, coherence and integrity, as well as a consideration of whether it promotes efficiency'.[1251] The OECD bases its assessment on the neoliberal assumption of efficiency and takes a critical approach to the existing Turkish corporate governance framework, mainly due to its ownership structure and the resultant lack of disclosures to outside shareholders. At the same time, the Pilot Study applauds the CMB for adopting corporate governance practices similar to those advanced by the OECD Principles, regarding them as 'an admirable effort to provide more detailed guidance to companies about how to improve their practices while raising the domestic and international communities' expectations about corporate governance practices in Turkey'.[1252] Although the findings of the study are merely suggestive, the legal reforms that have followed indicate that the Turkish policymakers have indeed taken up the recommendations of the OECD's Pilot Study and rectified the legislation's 'lacking' areas in corporate governance.

b. Ensuring the Basis for an Equitable Corporate Governance Framework

The Pilot Study starts with the first corporate governance principle, Ensuring the Basis for an Equitable Corporate Governance Framework.[1253] The related OECD principle reads as follows: 'The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among

[1249] OECD, 'Methodology' (n 1244) 17.
[1250] OECD, 'A Pilot Study' (n 159) 8.
[1251] Ibid.
[1252] Ibid 16.
[1253] It should be noted that in the OECD's 2004 Principles, this principle is entitled 'Ensuring the Basis for an Effective Corporate Governance Framework'. In the Pilot Study, the title of this principle is slightly altered and instead of the word 'effective', 'equitable' is used.

different supervisory, regulatory and enforcement authorities.'[1254] The annotations to the OECD Principles elaborate that to ensure that an effective corporate governance framework is in place, 'it is necessary that an appropriate and effective legal, regulatory and institutional foundation is established upon which all market participants can rely in establishing their *private contractual relations*'.[1255] This principle highlights the contractual nature of market relations and clearly indicates its theoretical underpinnings.

The first ancillary principle listed under this heading pertains to the development of a corporate governance framework that impacts the 'overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and efficient markets'.[1256] The second principle states that 'The legal and regulatory requirements that affect corporate governance practices in a jurisdiction should be consistent with the rule of law, transparent and enforceable'.[1257] Under this principle, the OECD has noted that while corporate governance principles may be formulated in voluntary codes, 'they might leave shareholders and other stakeholders with uncertainty concerning their status and implementation'.[1258] With this statement, the OECD has suggested that there is a need to regulate corporate governance with legislation rather than soft law. The other ancillary principles listed herein are within the scope of responsibilities and enforcement capabilities of the related authorities in a jurisdiction.[1259] The Pilot Study has assessed the Turkish corporate governance framework to have 'Partly Implemented' all the principles under this heading. The areas where Turkey fell short are focused around the CMB's enforcement capability and the lack of disclosures, especially concerning the issues posed by the concentrated ownership of Turkish companies.

The Pilot Study notes that while transparency is improving in Turkey in relation to 'financial reporting', 'accessibility of company disclosures', 'basic information about share attributes and the largest direct shareholders', 'basic information about boards and senior management', and 'stakeholder policies', the corporate governance framework still has not fully conformed with the OECD standards.[1260] One main reason for the assessed lack of implementation under this heading is the lack of information disclosed, particularly 'relating to *the sensitive topics* of ownership and control, actual decision-making processes and structures, related party

[1254] OECD, 'A Pilot Study' (n 159) 17.
[1255] Emphasis added. OECD, 'OECD Principles of Corporate Governance' (2004) 29.
[1256] Ibid Principle I-A.
[1257] Ibid Principle I-B.
[1258] Ibid 30.
[1259] Ibid Principles I-C and I-D.
[1260] OECD, 'A Pilot Study' (n 159) 10.

transactions, self-dealing and the effectiveness of internal controls'.[1261] In terms of the disclosure of 'sensitive topics', the main concern seems to be the disclosure of related-party transactions.[1262] According to the OECD; 'Related parties can include entities that control or are under common control with the company, significant shareholders including members of their families and key management personnel.'[1263] On this point, the study has warned that the 'variability in companies disclosure practices limits to some extent the effectiveness of some formal enforcement mechanisms and remedies and makes it more difficult for market forces to operate'.[1264] More particularly, the Pilot Study has noted that following its survey of market participants, it found that there was 'selective disclosure'; information was only disclosed between company groups and to controlling shareholders by the board members and executives.[1265] The message is that minority shareholders were not given access to the same level of information as the controlling shareholders in Turkey.

The new corporate governance legislation has attempted to significantly remedy this situation by bringing stringent rules to the approval and disclosure of related party transactions. The new CML has provided that the detailed rules on related party transactions are to be established by the CMB.[1266] The CML also states that a majority of the independent board members' approval is required for the implementation of the relevant board decision on related party transactions.[1267] If the board does not grant approval for the related party transaction, a public disclosure of the matter and the approval of the general assembly is required to proceed with the transaction. When the general assembly is deciding on the related party transaction, the parties to the transaction and the persons related to them are prohibited from voting. Furthermore, the CML article has provided that any decision of the BoD or the general assembly that pertains to related party transactions that do not follow the procedures stipulated in the article shall be invalid.[1268] Related party transactions are also regulated in detail under the CMB's Communique on Corporate Governance. The CMB Principles stipulate that any related party transaction 'shall be included in the agenda as a separate item for providing detailed information at the general assembly meeting on the matter and recorded in the minutes of the

[1261] Emphasis added. Ibid 10.
[1262] Ibid 11-12.
[1263] OECD, 'OECD Principles of Corporate Governance' (2004) 52. What is considered a related-party transactions is generally decided on a case-by-case basis, however, some common forms are 'transactions involving the sale or purchase of goods, property or assets, provision or receipt of services or leases, transfer of intangible items, provision, receipt or guarantee of financial services, assumption of financial or operating obligations, purchase of equity or debt or establishment of joint ventures' in OECD, 'Guide on Related Party Transactions in the MENA Region' (2014) 7.
[1264] OECD, 'A Pilot Study' (n 159) 12.
[1265] Ibid.
[1266] CML Article 17/3
[1267] Ibid.
[1268] Ibid.

meeting'.[1269] This principle constitutes a mandatory CMB Principle. The disclosure requirements on related party transactions thus have been aligned with the OECD's expectations.

The Pilot Study also mentioned Turkish companies' lack of implementation of the CMB Principles. The OECD notes that

> some companies appear to have taken the position that, if a particular corporate governance practice is not compulsory, they are not obliged to disclose any information about why they have not implemented it, despite the existence of a 'comply or explain' requirement.[1270]

Indeed, Turkey initially adopted a soft law approach with the CMB Principles of 2003. Later on, the principles required listed companies to disclose their level of compliance with the principles or reasons for non-compliance in their annual reports. The CMB conducted a survey in 2004 to assess the listed companies' level of compliance with its principles.[1271] The survey found that aside from the companies included in the ISE-30 Index, most of the listed companies' annual reports provided sparse information regarding the implementation of corporate governance principles.[1272] The Pilot Study has noted that the reason for this may be that 'the penalties for non-compliance with the CMB Communiques are relatively low […] and, therefore, do not appear to have a sufficient deterrent effect'.[1273] The OECD thus concludes that this can make it difficult for 'interested persons' such as prospective investors 'to determine whether or not a particular company is meeting expectations'.[1274] Subsequently in 2011, prior to the enactment of the new CML and TCC, the CMB acted in advance to publish a communique that made certain CMB Principles mandatory for the companies listed in the ISE-30 Index.

In the following years, the CMB increased the scope of applicability of its mandatory principles with each consecutive communique it published. This was mainly because the two primary sources of Turkish law, the new CML and TCC, both explicitly granted exclusive authority to the CMB to set corporate governance standards and enforce compliance with its principles for listed companies. The new TCC also contained a provision enabling the CMB to set corporate

[1269] CMB Principle 1.3.6.
[1270] OECD, 'A Pilot Study' (n 159) 16.
[1271] CMB, 'Kurumsal Yönetim Uygulama Anketi Sonuçları (Results of the Corporate Governance Implementation Survey)' (2004) <http://www.spk.gov.tr/Sayfa/Dosya/68> accessed 14 July 2018.
[1272] Ibid 24-25.
[1273] OECD, 'A Pilot Study' (n 159) 16.
[1274] Ibid 17.

governance principles for all public companies, determine the rules regarding the BoD's disclosures on the matter, and distinguish the rules for rating companies' corporate governance practices.[1275] The related article states that the CMB has exclusive authority on this matter. Hence, when the other public entities are establishing corporate governance rules applicable to their specific line of activity, they must obtain approval from the CMB.[1276] In sum, the CMB's authority over corporate governance has been clearly defined and further augmented with the power to sanction the non-implementation of its corporate governance principles. On this point, the Pilot Study states,

> While the OECD Principles and draft Methodology do not specifically recommend that regulatory authorities possess particular enforcement powers, they do recommend that authorities have sufficient, effective enforcement powers to ensure that, in combination with other incentives for good governance and deterrents to misconduct, the outcomes advocated by the OECD Principles are achieved in the jurisdiction.[1277]

The recent legal reforms on corporate governance have indeed strengthened the CMB's rule-making and enforcement powers. The result is that there is now a strict legal regime that imposes liabilities on listed companies to implement mandatory corporate governance principles. Indeed, following the changes in legislation, the CMB acquired the authority 'to take sanctions that range from legal warnings to legal prosecution'.[1278] In the case of non-compliance with the mandatory CMB Principles, the CMB is 'empowered to determine the breach, ask courts for precautionary legal measures, and file a lawsuit for the execution of the related corporate governance principles'.[1279] Following the enactment of the new laws, the CMB has indeed increasingly used its enforcement powers to ensure compliance with its corporate governance principles. In 2016, the CMB charged 16 listed companies with an administrative fine for non-compliance with its Communique on Corporate Governance.[1280] Far fewer companies were charged in previous years, which indicated a change in the CMB's stance and determination to ensure the implementation of its mandatory principles. In sum, the new corporate governance framework addresses the issues raised by the OECD in terms of ensuring not only that Turkey's corporate governance framework conforms to the standards drawn by the OECD, but also that they are also enforced by the related authorities.

[1275] TCC Article 1529/1.
[1276] TCC Article 1529/2.
[1277] OECD, 'A Pilot Study' (n 159) 23.
[1278] OECD, 'Supervision and Enforcement in Corporate Governance' (2013) 77.
[1279] Ibid.
[1280] CMB, 'Annual Activity Report' (2016) <http://www.spk.gov.tr/Sayfa/Dosya/1271>.

c. The Rights of Shareholders and Key Ownership Functions

The OECD Principles of 2004 include principles on shareholder rights under two headings: The Rights of Shareholders and Key Ownership Functions and The Equitable Treatment of Shareholders. The Rights of Shareholders and Key Ownership Functions states its overarching principle as follows: 'The corporate governance framework should protect and facilitate the exercise of shareholders' rights.'[1281] According to the OECD, this principle 'covers what are *agreed to be fundamental shareholder rights* to ensure the integrity and *efficiency* of equity markets'. [1282] To realise the objective of ensuring basic shareholder rights, the principles also include detailed ancillary principles listed under this heading, such as the shareholders' 'right to influence the corporation (voice), the right to information, the right to sell or transfer shares (exit) and the right to participate in the profits or earnings of the corporation (economic rights)'.[1283] The Methodology further elaborates: 'Shareholders rights to influence the corporation (voice) centre on certain fundamental issues such as the election of board members, or other means of influencing the composition of the board'.[1284] Shareholder rights, particularly in terms of influencing the decision-making process, are an important component of the OECD Principles because the shareholders are accorded prominence amongst the other constituents of the company in the mainstream model. These shareholder rights are labelled as 'agreed upon' fundamental rights in the OECD document. Hence, these rights are accorded the status of universal values, which leaves no room to question their legitimacy. Moreover, the end goal of securing such shareholders rights appears to be achieving efficient markets, which once again indicates the neoliberal tendencies of the OECD Principles.

The Pilot Study has noted that an assessment of Turkey's implementation levels under The Rights of Shareholders and Key Ownership Functions also requires, inter alia,

> the extent and quality of disclosures about capital structures that enable some shareholders to exercise a degree of control disproportionate to their equity ownership interest; the efficiency and transparency of markets for corporate control; whether institutional investors acting in a fiduciary capacity are encouraged to make informed use of their shareholder rights and effectively exercise their ownership functions; and whether shareholders are able to consult each other on issues concerning their basic rights.[1285]

[1281] OECD, 'OECD Principles of Corporate Governance' (2004) Principle II.
[1282] Emphasis added. OECD, 'Methodology' (n 1244) 35.
[1283] Ibid.
[1284] Ibid.
[1285] OECD, 'A Pilot Study' (n 159) 26.

In terms of compliance with the fundamental shareholder rights listed in the OECD Principles, the Pilot Study has found that Turkey has differing implementation levels for each of the subsidiary principles. For instance, 'shareholder's right to obtain relevant and material information on the corporation on a timely and regular basis' is graded as Fully Implemented. However, the section has also noted that 'the only matter considered under this OECD Principle is whether or not companies use internal or procedural mechanisms to impede shareholders or their representatives from obtaining relevant company information or documents without undue delay or cost'.[1286] Thus, Turkey's full compliance with this principle seems to be the result of the limited scope of assessment. Indeed, the other sections that examine this principle in detail have noted Turkey's implementation level as Partly Implemented.[1287]

Another sub-principle that was assessed as Fully Implemented was the 'shareholders' right to participate and vote in general shareholder meetings'.[1288] Although Turkey's corporate governance laws seem to be in compliance with OECD standards on this matter, the Pilot Study criticises a provision in the old commercial code which required the shareholders of bearer-shares to block their shares at least 1 week before the convening of the general assembly meeting.[1289] According to the OECD, 'These requirements make it more costly for shareholders to exercise their rights, since they must give up their freedom to sell their shares in the week before the meeting if they wish to exercise their voting rights.'[1290] The new TCC has removed this requirement and prohibited such share-blocking prior to the convening of the general assembly.[1291] This development is evidence that the new legal reforms on corporate governance have closely followed the recommendations contained in the Pilot Study. This new legal provision further enhances shareholder rights and makes it easier for outside shareholders to attend general assembly meetings, thus increasing their impact on company governance.

On the other hand, the Pilot Study has highlighted various areas under this general principle on shareholder rights to require further improvement. One such area pertains to the shareholders' 'right to participate in, and be informed on, decisions concerning fundamental corporate changes, such as extraordinary transactions, including the transfer of all or substantially all the assets, that in effect result in the sale of the company'.[1292] The Pilot Study has assessed this area

[1286] Ibid 28-29.
[1287] Ibid 34-39.
[1288] Ibid 29.
[1289] Old TCC Article 360.
[1290] OECD, 'A Pilot Study' (n 159) 29.
[1291] TCC Article 415/4.
[1292] OECD, 'A Pilot Study' (n 159) 33.

to be Partly Implemented. The old commercial code, which was in force when the Pilot Study was published, required shareholder approval only in the case of company dissolution, and the CMB imposed detailed disclosure requirements for the mergers of public companies.[1293] The corporate governance framework at the time did not impose an obligation to obtain shareholder approval for other types of extraordinary transactions. The CMB Principles, however, did recommend that public companies' articles of association should provide that such significant transactions should be decided upon in general assembly meetings and that shareholders should be encouraged to participate in this decision-making process.[1294] Since the CMB Principles of 2005 were soft law, this provision did not impose any obligations on companies. Indeed, a survey conducted by the CMB found that less than 1% of the listed companies included in the survey implemented this recommendation.[1295] The Pilot Study has also noted Turkish companies have a 'prevalence of transactions involving the transfer of significant amounts of assets (or the transfer of most of the interests in significant amounts of assets, e.g. through leases) to related parties on terms that did not represent fair value'.[1296] The Pilot Study noted the related party transactions undertaken by the controlling shareholders to be a primary concern, which highlights the complexity of such transactions and the difficulty of holding these persons to account.[1297] Overall, the OECD assessed the shareholders' right to participate in significant decisions to be Partly Implemented.

The recent legal reforms have rectified the weak points of Turkey's corporate governance framework in this area. The CMB has made the related principle mandatory; significant transactions such as the asset or service purchases or sales that exceed the threshold stipulated in the CMB Principles require a majority of the independent board members' approval. If the board decision is not taken with unanimity, the matter must be publicly disclosed. If the majority of the independent board members did not grant approval, the transaction must be publicly disclosed and further subjected to shareholders' approval at the general assembly meeting.[1298] Moreover, the new TCC introduced further disclosure requirements for intra-group transactions.[1299] This development in Turkish laws was anticipated by the OECD, which has stated that 'Proposed amendments to the TCC relating to company groups […] are expected to increase transparency regarding intra-group transactions and restrict opportunities for abuse of

[1293] CMB, Communique on Mergers I-31 (14.07.2003, amended 19.12.2009).
[1294] CMB, Corporate Governance Principles (2003, amended 2005) 18.
[1295] OECD, 'A Pilot Study' (n 159) 33.
[1296] Ibid.
[1297] Ibid.
[1298] CMB Principle 1.3.9. is a mandatory principle.
[1299] TCC Articles 195-209.

controlled companies' minority shareholders.'[1300] Indeed, the main objective of the legislators in providing stringent rules for group companies was to protect the minority shareholders of group companies from the expropriation of the company assets through transactions of the owner or controlling shareholders of the parent company.[1301] Overall, the changes in Turkey's corporate governance framework on this matter have followed the OECD guidance and accordingly provided additional protection measures for the non-controlling shareholders. This is in line with the actual objective of the mainstream corporate governance model, which is to increase the powers of the non-controlling shareholders.

Another partly implemented area concerning shareholder rights is the right to 'be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting'.[1302] The Pilot Study has noted that

> in light of the early deadlines for share blocking and delivery of proxies before meetings, a concern arises whether shareholders currently have sufficient time to evaluate the information provided about agenda items before making a decision about whether or not exercise their voting rights.[1303]

Although the old commercial code provided a 2-week notice period for announcing the ordinary general meetings, the OECD has found that 'a number of investors commented that companies do not consistently meet the compulsory two-week deadline for sending relevant materials to shareholders'.[1304] The CMB Principles, on the other hand, provided for the longer deadline of a 3-week period to inform the shareholders of listed companies.[1305] However, the CMB Principles did not have binding power at the time. This point was rectified when the CMB adopted the hard law approach in making its certain corporate governance principles mandatory. Subsequently, such information must be announced on the company website and through the PDP at least 3 weeks prior to the meeting.[1306] The importance of timely and advance disclosure of the general assembly meeting date and the agenda items are considered to be vital for the outside shareholders to attend the decision-making process and make informed decisions. With the new mandatory principle, the listed companies must abide by the minimum 3-week notice

[1300] OECD, 'A Pilot Study' (n 159) 34.
[1301] Justification for TCC Articles 195-209.
[1302] OECD, 'A Pilot Study' (n 159) 34.
[1303] Ibid.
[1304] Ibid 35.
[1305] CMB, Corporate Governance Principles (2003, amended 2005) 14.
[1306] CMB Principle 1.3.1 is mandatory principle.

period and must announce the required information online, which is a crucial tool for facilitating foreign shareholder participation. Thus, it can be seen that this requirement is another example of how the new legal framework attempts to draw global investors into the Turkish stock markets by providing them further opportunities to be involved in companies' decision-making.

One of the ancillary principles under this heading concerns the controlling ownership structure of Turkish companies. The related OECD Principle reads, 'Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed.'[1307] Such arrangements are listed as pyramid structures, cross-shareholdings, or shares with different voting rights, which the OECD believes 'can be used to diminish the capability of noncontrolling shareholders to influence corporate policy'.[1308] Pyramidal structures in family controlled companies and cross-ownerships between company groups are common features of the Turkish corporate sector.[1309] Moreover, the use of privileged shares, which are those 'shares in which superior rights compared to ordinary rights are vested', is also widespread amongst Turkish companies.[1310] Thus, there is the risk that these mechanisms 'create a potential for the expropriation of minority shareholders by the controlling families'.[1311] The OECD does not recommend the prohibition of such arrangements altogether. However, it does require detailed disclosure of such instances to shareholders, 'given the capacity of these mechanisms to redistribute the influence of shareholders on company policy'.[1312] On this point, the Pilot Study has found that the existing corporate governance framework in Turkey did not have sufficient disclosure requirements: 'Companies do not, however, have to disclose which shareholders hold either multiple voting shares or shares with nomination privileges, nor do they have to disclose their percentage ownership interest in such shares.'[1313] For instance, the CMB Principles, which were voluntary at the time, required listed companies to publish in their annual reports an 'ownership structure table showing the controlling shareholder(s), as released from any indirect and cross-ownership relations'.[1314] Nonetheless, the Pilot Study has found that companies do not disclose this information consistently.[1315]

Therefore, the OECD Principle requiring disclosure of ownership and control structures has been assessed as Partly Implemented. The Pilot Study has added that the proposed amendments

[1307] OECD, 'OECD Principles of Corporate Governance' (2004) Principle II-D.
[1308] Ibid 35.
[1309] Akdoğan and Boyacıoğlu, 'Corporate Governance In Turkey: An Overview' (n 1036) 18-19.
[1310] Ibid 19.
[1311] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 70.
[1312] OECD, 'OECD Principles of Corporate Governance' (2004) 36.
[1313] OECD, 'A Pilot Study' (n 159) 39.
[1314] Capital Markets Board of Turkey (CMB), 'Corporate Governance Principles (Amended)', (2005). 31
[1315] OECD, 'A Pilot Study' (n 159) 39.

to the TCC will improve disclosures in this area, particularly the proposed provisions on group companies.[1316] Moreover, the CMB has introduced an obligation for listed companies to prepare their annual reports in line with the International Financial Reporting Standards (IFRS), beginning from January 2005.[1317] The OECD expects this development to improve disclosures to some extent in this area.[1318] Indeed, the Methodology has also stated that the 'disclosure of capital structures is so fundamental that the criterion does not foresee a voluntary disclosure requirement'.[1319] To that end, the corporate governance reforms have made such disclosures compulsory to a significant extent. Nevertheless, the Pilot Study asserts the following:

> Even with these reforms, however, some gaps in disclosure practices are likely to remain and it could still remain difficult for interested persons to easily and quickly acquire an understanding of the structure of ownership and control of a company.[1320]

This statement appears to be the OECD criticising the ownership structure of Turkish companies. With the proposed reforms, Turkish corporate governance laws become aligned with the OECD Principle on this area; yet, the Pilot Study demonstrates concern over the presence of such structures in Turkey. From a broader perspective, this hints at the OECD Principles' preference for the dispersed ownership found in the Anglo-American corporate governance model over a corporate structure with majority or controlling shareholders.

d. The Equitable Treatment of Shareholders

The next general principle concerning shareholder rights is The Equitable Treatment of Shareholders, which is the third chapter of the OECD Principles.[1321] The overarching principle is as follows: 'The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.'[1322] On this point, the Pilot Study has noted that the assessment of this principle involves determining, inter alia, whether the corporate governance framework effectively 'deters the abuse of power by insiders'.[1323] While certain ancillary principles under this heading such as 'within any series of a class, all

[1316] Ibid 41. For a discussion of the new TCC's provisions on group companies see Chapter 5.6.
[1317] CMB, Communique on Principles Regarding Financial Reporting XI-25 (15.11.2003).
[1318] OECD, 'A Pilot Study' (n 159) 39.
[1319] OECD, 'Methodology' (n 1244) 51.
[1320] OECD, 'A Pilot Study' (n 159) 41.
[1321] OECD, 'OECD Principles of Corporate Governance' (2004) Principle III.
[1322] Ibid.
[1323] OECD, 'A Pilot Study' (n 159) 49.

shares should carry the same rights' are marked as Fully Implemented,[1324] others, particularly in relation to the minority shareholders, have been assessed as Partly Implemented. In fact, the Pilot Study includes a section that is lengthier than usual that discusses how the Turkish corporate governance framework has not conformed with minority shareholder rights and protections. The Pilot Study notes that 'a survey of Turkish companies found that that corporate governance principles aimed at protecting minority shareholders are the least widely implemented in Turkey'.[1325] Thus, the Pilot Study has stated that market participants in Turkey have concerns regarding the existing corporate governance framework's effectiveness in ensuring the equitable treatment of all shareholders.[1326]

The OECD Principle states that 'Minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting directly or indirectly, and should have effective means of redress'.[1327] The Pilot Study has found this principle to be Partly Implemented in Turkey. It has noted that the remedies available to minority shareholders when their rights have been violated are arduous and costly, which usually deters the shareholders from pursuing redress.[1328] The old commercial code included several minority rights and protections, such as the right to request a special auditor.[1329] However, using this right was subject to certain procedures. First, the general assembly had to approve the appointment of the special auditor before the minority shareholders or the company could apply to the court to have an auditor appointed. Furthermore, the minority shareholders who request the auditor must have had their shareholdings for at least 6 months prior to making such request at the general assembly meeting.[1330] In case the general assembly did not approve the minority shareholders' request, they could submit a direct request to the court to appoint a special auditor. However, they must deposit the fees for the appointment of the auditor with the court in advance.[1331]

The minority shareholders were also provided with the rights to call the convening of the general assembly meeting or add an item to the meeting agenda under the old TCC.[1332] The minority shareholders could apply to the court if their call to convene a general assembly meeting was

[1324] Ibid.
[1325] Ibid 50.
[1326] Ibid 43.
[1327] OECD, 'OECD Principles of Corporate Governance' (2004) Principle III.A.2.
[1328] Ibid.
[1329] Old TCC Article 348. Some of the other minority rights included in the old commercial code are; Article 356: the right to request that an internal auditor look into the minority shareholder's complaint and investigate the matter; Article 341: the right to request from the general assembly to file a lawsuit against the directors for their liability; Article 377: the right to request the postponement of approving company's financial statements for a minimum of one month.
[1330] Old TCC Article 348/2.
[1331] Ibid.
[1332] Old TCC Article 366.

not undertaken by the board in a reasonable time, but they must deposit their shares within a bank in order to file that lawsuit.[1333] Moreover, if the court dismisses the minority shareholders' request and determines that they have acted in bad faith, they would be liable to pay all the fees and damages incurred by the company.[1334] The Pilot Study has reviewed the existing legal framework and found that although there are certain minority rights in place, these 'require shareholders to incur significant out-of-pocket costs or opportunity costs, relative to the value of their investment, in order to initiate an inquiry process'.[1335] Thus, the Pilot Study has concluded that the laws under the old commercial code were ineffective because they deter minority shareholders from pursuing their rights and related remedies.

The new TCC provisions have significantly remedied these concerns by according extensive rights and protections to minority shareholders in line with the OECD's findings.[1336] For instance, the right to appoint an independent auditor has been freed from any formalities; if the request of the minority shareholders is not approved by the general assembly, the minority shareholders can apply to court without having to deposit their shares or pay any sort of fees in advance. Also, the minority shareholders can request to convene the general assembly meeting or request to add an item to the meeting agenda, and if the board does not convene the general assembly within 45 days of the request, the minority shareholders can convene the meeting by themselves.[1337] Thus, unlike the old commercial code, the board has been provided with a pre-determined time frame of 45 days to fulfil the request of the minority shareholders. The new commercial code also removed the need to resort to court if the meeting was not been convened. Each of these legal developments corresponds to the criticism put forward by the OECD in its Pilot Study, which indicate the likely influence the Pilot Study has had on the drafting of the new commercial code.

Another sub-principle under this heading states that 'Impediments to cross border voting should be eliminated.'[1338] This principle has been assessed to be Broadly Implemented. The Pilot Study has indicated that while foreigners have the same voting rights as domestic shareholders, 'some practical obstacles exist for foreign investors.'[1339] Accordingly, 'The principal problem they face relates to the amount of time available to review meeting documents, decide whether or not to exercise voting rights and make the necessary arrangements to do so.'[1340] On a related

[1333] Old TCC Article 367.
[1334] Ibid.
[1335] OECD, 'A Pilot Study' (n 159) 51.
[1336] For a discussion of the new TCC's minority shareholder rights, see Chapter 5.8.
[1337] TCC Article 411.
[1338] OECD, 'OECD Principles of Corporate Governance' (2004) Principle III.A.4.
[1339] OECD, 'A Pilot Study' (n 159) 54.
[1340] Ibid.

point, the Pilot Study has also criticised Turkey's implementation level regarding the sub-principle: 'Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders. Company procedures should not make it unduly difficult or expensive to cast votes.'[1341] As per the existing legislation at the time, shareholders were required to have their shares blocked 1 week prior to the general assembly meeting. This necessitated the foreign investors traveling to Turkey in advance to make the necessary arrangements to attend in person or to assign a proxy.[1342] The OECD has added that although the same challenges exist for domestic investors, 'distance exacerbates the problem for foreign investors.'[1343] The Pilot Study has recommended that the introduction of mandatory electronic voting procedures for listed companies would rectify the issue.[1344] Subsequently, the new TCC has stipulated that companies can conduct general assembly meetings online and allowed for the possibility for electronic voting if it is provided in the articles of association.[1345] The related CMB Principle states, 'Any actions that may complicate the use of voting rights must be avoided. Each shareholder should be given the opportunity to exercise his/her voting right, including cross border voting, in the most appropriate and convenient manner.'[1346] Although the aforementioned provisions do not impose a mandatory requirement on companies to conduct online meetings or allow electronic voting, the Ministry of Trade published a regulation in 2012 which permits electronic voting and imposes the obligation on all listed companies to conduct their general assembly meetings online.[1347]

Overall, the annotation to the OECD Principle has highlighted that 'Management and controlling investors have at times sought to discourage non-controlling or foreign investors from trying to influence the direction of the company.'[1348] Although the Pilot Study did not mention that controlling shareholders have engaged in such restrictive practices in Turkish companies, it has criticised the existing corporate governance framework:

> It can be somewhat difficult for shareholders to obtain access to relevant information about shareholder meetings in sufficient time to make an informed decision about

[1341] OECD, 'OECD Principles of Corporate Governance' (2004) Principle III.A.5.
[1342] Old TCC Article 360; S Altaş, 'Anonim Şirket Genel Kurul Toplantılarına İliskin Usul ve Esaslar (Principles and Procedures on Joint-Stock Company General Assembly Meetings)' (2010) Çözüm 113; OECD, 'A Pilot Study' (n 159) 54.
[1343] OECD, 'A Pilot Study' (n 159) 54.
[1344] Ibid 55.
[1345] TCC Article 1527.
[1346] CMB Principle 1.4.1.
[1347] Ministry of Customs and Trade, Communique on Electronic General Assembly Meetings of Joint Stock Companies (28.08.2012).
[1348] OECD, 'OECD Principles of Corporate Governance' (2004) 44.

whether or not to attend the meeting and then complete the necessary formalities to participate in the meeting within the deadlines required or permitted by law.[1349]

However, the recent legal reforms have significantly addressed the OECD's concerns by introducing a compulsory online general assembly meeting and electronic voting. Indeed, the Pilot Study has anticipated this development and stated that once such legal changes are in effect, 'a Fully Implemented assessment would likely be appropriate.'[1350] This development illustrates how the new Turkish corporate governance regime has been shaped in accordance with the OECD Principles. Moreover, although online meetings and electronic voting would benefit both foreign and domestic shareholders, the Pilot Study has focused particularly on the benefits for foreign shareholders. In fact, the report has admitted that 'to date, very few shareholders other than controlling shareholders or foreign institutional investors have demonstrated an interest in attending meetings.'[1351] Since controlling shareholders are usually located where the meetings take place and are closely involved in the management of their companies,[1352] the new provisions seem to be introduced solely to advance the interests of the foreign investors.

e. The Role of Stakeholders in Corporate Governance

The OECD Principle on stakeholders states the following: 'The corporate governance framework should recognise the rights of stakeholders *established by law or through mutual agreements* and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.'[1353]

The OECD only recognises that the rights of stakeholders that are guaranteed by laws or private contracting. This is clear evidence of the mainstream corporate governance model, which is based on the contractual model of the company. Since contracts with the stakeholders such as employees are regarded as 'voluntary and unanimous agreement among affected parties',[1354] the protection afforded to such stakeholders is limited by what is provided through that contract. In this approach, the underlying power disparity between the parties to the contract is masked by depicting the contract as mutually agreed upon between equal parties. Thus, corporate

[1349] OECD, 'A Pilot Study' (n 159) 55.
[1350] Ibid.
[1351] Ibid.
[1352] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 76.
[1353] Emphasis added. OECD, 'OECD Principles of Corporate Governance' (2004) Principle IV.
[1354] Easterbrook and Fischel, 'The Corporate Contract' (n 234) 1428.

governance mechanisms need only protect the rights of stakeholders insofar as stipulated in the relevant contracts and laws.

Also relevant is the OECD Methodology's definition of stakeholders as 'resource providers to the corporation including employees, creditors and suppliers.'[1355] Stakeholders such as the public or the environment are omitted from the scope of the definition because they have no contractual relationship with the company. The OECD has admitted this stance by expressing that 'the principle recognises that the relationship [with stakeholders] is often contractual.'[1356] In the annotations to the OECD Principle of 2004, the OECD has asserted that corporate governance is about encouraging stakeholders in the company to 'undertake economically optimal levels of investment in firm-specific human and physical capital.'[1357] This statement has acknowledged that stakeholders' investments are firm-specific and suggests that these should be 'economically optimal', which means efficient. This ties stakeholders to the company to which they have made firm-specific contributions, which further reduces their bargaining power.

The Pilot Study has been the least critical in assessing Turkey's corporate governance framework for stakeholders. Most aspects of this principle have been either rated as Fully Implemented or Broadly Implemented. This can be interpreted as the OECD's unwillingness to recommend any improvements to the rights of stakeholders. At the forefront, the Pilot Study has noted that, 'It has been a long-standing tradition for many Turkish companies and their controlling families to pursue philanthropic initiatives that benefit the communities in which the companies operate.'[1358] In contrast with the OECD definition, the CMB Principle defined stakeholders as

> any person, entity or party, who have an interest in the operations and reaching the targets of the company. These parties may be persons/groups who have a binding contractual agreement with the company; or it may be persons/groups *who have no binding contractual agreement* with the company.[1359]

It should, however, be highlighted that the CMB Principle quoted above was amended in 2005. The initial version stated that the company's corporate governance system must protect the rights of stakeholders as established by law or other rights which have not been provided by

[1355] OECD, 'Methodology' (n 1244) 73.
[1356] Ibid.
[1357] OECD, 'OECD Principles of Corporate Governance' (2004) 46.
[1358] OECD, 'A Pilot Study' (n 159) 63.
[1359] CMB, Corporate Governance Principles (2003, amended 2005) 35.

law. After the changes in 2005, the same principle read as follows: 'The corporate governance framework should recognise the rights of stakeholders established by law or through any other mutual agreement.'[1360] The CMB thus mimics the 2004 OECD Principle, which illustrates how Turkish corporate governance principles have come closer to the mainstream model.

Also, according to the Pilot Study, the principle which states that 'companies should foster wealth creating cooperation among stakeholders to enhance their companies' competitiveness and profitability' is a 'novel concept' for Turkish companies.[1361] The wording of this statement suggests that the recognition of stakeholders is encouraged as far as it increases the company's profitability. On this point, the OECD has regarded the CMB Principles as 'a welcome first step that encourages companies to develop mechanisms that facilitate investment by stakeholders in firm-specific human capital.'[1362] The approval of the CMB Principles by the OECD is an affirmation that the Turkish corporate governance framework has started to conform with the mainstream model.

On the issue of stakeholder rights as established by law, the Pilot Study has asserted that 'the OECD Principles do not focus on whether particular standards protecting the interests of stakeholder groups have been introduced.'[1363] Instead, they focus on whether the stakeholder rights as provided by law are respected and enforced by the authorities, whether the mutual agreements are respected by the company and finally the availability of remedies to stakeholders when their legal rights are violated.[1364] The Pilot Study has concluded that there are various Turkish laws that confer rights on different groups of stakeholders, and that: 'In light of the limited available data and given the complexity of the issues involved, the [OECD] Secretariat concluded that it was inappropriate to express a view' on the issues listed above.[1365] Thus, this principle has been assessed as 'Fully Implemented/Not Assessed' by the Pilot Study. That the OECD perceives the protection of stakeholder rights to be a mere formality is evident from its admissions that it is not concerned with the introduction of standards for stakeholders and that it only assesses whether laws and private contracts have been respected in public companies and that they have been enforced by authorities.

Another issue under the Stakeholders heading concerns the participation of stakeholders in company governance. The related OECD Principle stipulates that 'Performance-enhancing

[1360] Ibid 37.
[1361] OECD, 'A Pilot Study' (n 159) 63.
[1362] Ibid.
[1363] Ibid.
[1364] OECD, 'A Pilot Study' (n 159) 63.
[1365] Ibid.

mechanisms for employee participation should be permitted to develop.'[1366] The wording of the principle denotes that the only employee participation mechanisms which should be developed are those that 'enhance performance', thus linking employee participation in governance to efficiency and profitability. The Methodology provides some examples of these performance-enhancing corporate governance mechanisms, such as employee stock ownership plans or other 'profit-sharing mechanisms'.[1367] These arrangements, however, serve to align the interests of employees with those of shareholders because employee interests become tied to the profit-maximisation objective of the company. Thus, such mechanisms do not advance stakeholder rights per se. While the OECD has noted that arrangements such as stakeholder representation on boards are not mandatory, 'there should be no legal barriers to their adoption if the principle is to be assessed as fully implemented.'[1368] On this point, the Pilot Study has found that the 'corporate governance framework in Turkey does not appear to inhibit companies from developing, in consultation with employees, performance-enhancing mechanisms for employee participation.'[1369] The Pilot Study contains a list of examples in Turkish practice such as companies developing human resources policies or fostering a collaborative work environment where regular meetings with employees are held and training is provided. Thus, the Pilot Study assesses Turkey to have fully implemented the absence of legal barriers to the adoption of performance-enhancing mechanisms.[1370] In sum, this indicates that an assessment of full compliance can be easily obtained from the OECD by merely mentioning some soft practices that do not truly resemble employee participation.

On a related note, the next ancillary principle states, 'Where stakeholders participate in the corporate governance process, they should have access to relevant, sufficient and reliable information on a timely and regular basis.'[1371] This principle pursues stakeholders rights only in relation to their right to information. The new TCC adopted a similar approach to the OECD. This approach only considers stakeholder rights in terms of the transparency pillar of corporate governance. The remaining principles of accountability, responsibility, and fairness, which the Turkish legislators have deemed to be the founding pillars of corporate governance, seem to have limited applicability, if any, to stakeholders.[1372] Under the Turkish corporate governance framework, stakeholders do not need to be included in company governance. The only provision on this matter is the non-binding CMB Principle, which states that 'The company should

[1366] OECD, 'OECD Principles of Corporate Governance' (2004) Principle IV.C.
[1367] OECD, 'Methodology' (n 1244) 76.
[1368] Ibid 75.
[1369] OECD, 'A Pilot Study' (n 159) 64.
[1370] Ibid.
[1371] OECD, 'OECD Principles of Corporate Governance' (2004) Principle IV.D.
[1372] *TCC with Justifications* (n 104) 84.

establish mechanisms and models to encourage participation of the stakeholders in the management of the company while giving priority to employees and not hindering company operations.'[1373]

Despite the similar wording in the CMB Principle and the related OECD Principle, the Pilot Study deems the principle to be Broadly Implemented in Turkey. The assessment fell short of full implementation due to criticism over the level of disclosure.[1374] This illustrates how stakeholder rights are considered solely in terms of disclosure and how the OECD promotes mechanisms that grant stakeholders roles in governance only to the extent that they contribute to the company's performance. These mechanisms are thus merely means to an end. Hence, companies are freed from any obligation to pursue stakeholder interests because these ancillary principles remain best practices in which 'a clear distinction is drawn between ethical and societal concerns and commercial objectives of companies'[1375] and where the best practice is conceived as tying the former to the latter.

f. Disclosure and Transparency

The OECD Principle on disclosure and transparency reads as follows: 'The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.'[1376] According to the principle's annotations; 'A strong disclosure regime that promotes real transparency is a pivotal feature of market-based monitoring of companies and is central to shareholders' ability to exercise their ownership rights on an informed basis.'[1377] It adds that transparency and disclosure allow shareholders to assess the 'stewardship of management'.[1378] Thus, this principle is central to the monitoring of managers by the shareholders, which is an agency issue present in systems of share dispersal but not in countries with concentrated ownership structures.

The Methodology has explained that the intended outcome of this general principle is transparency, which is, inter alia, central to the 'the accountability of the company to its shareholders.'[1379] However, the company's accountability to its stakeholders is omitted from

[1373] CMB, Corporate Governance Principles (2003, amended 2005) 37. The latest version of the CMB Principles are in the Communique on Corporate Governance, which has similar wording.
[1374] OECD, 'A Pilot Study' (n 159) 66.
[1375] Dine and Koutsias, *The Nature of Corporate Governance* (n 5) 18.
[1376] OECD, 'OECD Principles of Corporate Governance' (2004) Principle V.
[1377] Ibid 49.
[1378] Ibid.
[1379] OECD, 'Methodology' (n 1244) 81.

this statement. Indeed, it adds that 'Experience in countries with large and active equity markets shows that disclosure can be a powerful tool for influencing the behaviour of companies and for protecting investor.'[1380] Here, the OECD seems to hint that its ideal model is a system with developed capital markets and dispersed shareholdings because it advocates rules that function within that system. The OECD has further suggested that the underlying aim of this principle is achieving efficiency because 'insufficient or unclear information may hamper the ability of the markets to function, increase the cost of capital and result in a poor allocation of resources.'[1381] To determine the type of information to be disclosed, the OECD has provided the 'material information' criterion: 'information whose omission or misstatement could influence the economic decisions taken by users of information'.[1382] The OECD has also added that the disclosure requirement should not place unreasonable administrative costs or burdens on the company.

Company objectives are one of the types of material information that must be disclosed as per the OECD Principle:[1383] 'In addition to their commercial objectives, companies are encouraged to disclose policies relating to business ethics, the environment and other public policy commitments.'[1384] The related CMB Principle has also recommended that 'the company's position with respect to the defined strategic objectives' is disclosed in listed companies' annual reports.[1385] Although the Turkish framework on this principle is in conformity with the OECD Principle, the Pilot Study has criticised the practices of Turkish companies with regard to the disclosure of objectives. The OECD was not concerned with the companies' level of disclosure; instead, they were keen to emphasise that the CMB Principles

> do not specifically encourage companies to describe their non-commercial objectives, disclose the proportion of their profits allocated to such activities where such amount might be considered relevant to investors or explain how decisions are made about which non-commercial objectives the company pursues.[1386]

The reason why this was concerning is related to the Pilot Study's finding that 'large number of Turkish companies also appear to pursue some non-commercial objectives (principally philanthropic ones)'.[1387] Hence, information about the resources allocated to such non-

[1380] Ibid.
[1381] OECD, 'OECD Principles of Corporate Governance' (2004) 49.
[1382] Ibid 50.
[1383] Ibid Principle V.A.2.
[1384] Ibid 50.
[1385] CMB, Corporate Governance Principles (2003, amended 2005) 30.
[1386] OECD, 'A Pilot Study' (n 159) 72.
[1387] Ibid.

commercial activities is considered to be material and may affect investment decisions. Although the CMB Principles recommend that companies disclose their social responsibility and ethical policies, these recommendations are non-binding.[1388] Therefore, the Pilot Study has refrained from declaring Turkey has fully conformed to this principle and instead assessed it as 'Broadly Implemented'. These explanations lead to the conclusion that the OECD is not interested in whether companies pursue any social or ethical objectives. It is more concerned with whether this 'material information' are disclosed so as to allow investors to make informed decisions.

In the new corporate governance framework, the CMB Principles under the Public Disclosure and Transparency heading are non-binding principles. The regulator left these principles outside the scope of mandatory application. Also, under the Stakeholders heading, there is another non-mandatory principle which states that 'The operations of the corporation shall be carried out in accordance with the ethical rules disclosed to public via the corporate website'.[1389] Although the CMB Principles do not require companies to disclose their non-commercial activities, the new CML obliges public company boards to prepare an annual report detailing company activities, decisions, and 'their economic and social consequences'.[1390] This CML provision thus conforms to the outcomes intended by the aforementioned OECD Principle. Accordingly, listed companies' annual reports must now include information on their non-commercial activities and the economic and social impacts of those activities.

From the OECD's perspective, such non-commercial activities 'may be important for investors'. [1391] Thus, for instance, if the company deems its social commitments to be 'material information' which can affect investment decisions, they must be disclosed. However, as Dine and Koutsias have argued, this kind of disclosure will only work if all investors are assumed to take an ethical approach.[1392] For example, an activity that is environmentally unfriendly but is unlikely to deter prospective investors may be withheld because disclosure requirements under the OECD Principles are expected not to place 'unreasonable burdens or costs' on the company.[1393] Hence, this ancillary principle on disclosure does not 'improve public understanding of the structure and activities of enterprises, corporate policies and performance with respect to environmental and ethical standards, and companies' relationships with the

[1388] CMB, Corporate Governance Principles (2003, amended 2005) 40.
[1389] CMB Principle 3.5.1.
[1390] CML Article 130/5.
[1391] OECD, 'OECD Principles of Corporate Governance' (2004) 50.
[1392] Dine and Koutsias, *The Nature of Corporate Governance* (n 5) 20.
[1393] OECD, 'OECD Principles of Corporate Governance' (2004) 51.

communities in which they operate' as stipulated by the OECD.[1394] Instead, it can be argued that this principle intends to ensure that Turkish companies disclose their philanthropic activities in detail so that external investors can apply pressure regarding the costs of such activities.

The OECD Principles also consider 'major share ownership and voting rights' to be material information that must be disclosed.[1395] According to the OECD, 'One of the basic rights of investors is to be informed about the ownership structure of the enterprise and their rights vis-à-vis the rights of other owners.'[1396] This becomes more crucial where companies are dominated by controlling shareholders 'which may be individuals, family holdings, bloc alliances, or other corporations acting through a holding company or cross shareholdings [that] can significantly influence corporate behaviour.'[1397] In these companies, 'the primary governance issue is how outside shareholders can prevent the controlling shareholder from extracting excess benefits through self-dealing or disregard the economic rights of minority shareholders.'[1398] Thus, the disclosure of such information works to the benefit of outside shareholders. This principle has been assessed by the OECD to be Partly Implemented. The Pilot Study has reported that the existing capital market legislation in Turkey requires the annual disclosure of 'substantial' share ownership in public companies but criticises that this is 'well below' the controlling ownership threshold.[1399] It adds: 'Although the CMB Principles encourage publicly held companies to provide information about company group structures and significant cross-shareholdings, very few companies provide detailed information.' [1400]

Moreover, the Pilot Study has noted that the prevalence of group companies in Turkey makes it more difficult to understand ownership structure. The OECD has asserted that 'group structures might be used to transfer resources to the detriment of minority shareholders'[1401] and hence expects countries to provide improved disclosures on group companies. Turkey's new corporate governance framework has significantly addressed these concerns. The CMB's Communique on Material Events Disclosure requires listed company boards to disclose 'information, events and development which may affect the value or price of securities or the investment decisions of investors.'[1402] Accordingly, changes in ownership or voting rights

[1394] Ibid 49.
[1395] Ibid Principle V.A.3.
[1396] Ibid 51.
[1397] Ibid 12.
[1398] Magdi and Chamlou, 'Corporate Governance: A Framework for Implementation' (n 455) 4-5.
[1399] OECD, 'A Pilot Study' (n 159) 73.
[1400] Ibid.
[1401] OECD, 'Methodology' (n 1244) 84.
[1402] CMB, Communique on Material Events II-15.1 (23.01.2014) Article 1.

which exceed the listed thresholds stated in the communique as well as the changes in management control must be disclosed to public.[1403] On the other hand, the new TCC has introduced detailed disclosure provisions regarding group companies.[1404] In sum, the new framework has followed the OECD guidance in introducing stringent disclosure requirements for the transparency of ownership structures of Turkish companies, which work in favour of the outside shareholders.

g. The Responsibilities of the Board

The overarching OECD Principle regarding the BoDs states that 'The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.'[1405] Its ancillary principles recommend, inter alia, that the corporate governance framework should ensure the boards 'are accountable to the company and its shareholders', 'treat all shareholders fairly', and 'are able to exercise objective, independent judgment on corporate affairs'.[1406]

The annotations to the OECD Principle explain that 'the board is chiefly responsible for monitoring managerial performance and achieving an adequate return for shareholders.'[1407] This statement reflects the agency theory and the primacy of shareholder interest, which form the basis of the mainstream model. Indeed, it is openly acknowledged in the Methodology that 'the board's role is to contain the *agency problem* associated with professionally managed, public companies.'[1408] Thus, this OECD Principle is based upon an Anglo-American corporate governance system that is characterised by professionally managed companies with dispersed outside shareholders. Under this system, the board has a vital role in corporate governance because they are directly elected by the shareholders to oversee the management of the company.[1409] Subsequently, the OECD has placed significant importance on ensuring Turkey's

[1403] Ibid Article 12: 'Changes in Capital Structure and Management Control': ' If and when direct or indirect shares or voting rights of a natural person or legal entity or of other natural persons or legal entities acting together with that natural person or legal entity in the capital of a publicly traded issuer reach or fall below 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67% or 95%, the disclosure obligation is performed by the said persons […] the disclosure obligation is performed by the said founder.'
[1404] TCC Articles 195-209. For the provisions on group companies under the new TCC, see Chapter 5.6.
[1405] OECD, 'OECD Principles of Corporate Governance' (2004) Principle VI.
[1406] OECD, 'A Pilot Study' (n 159) 97.
[1407] OECD, 'OECD Principles of Corporate Governance' (2004) 58.
[1408] Emphasis added. OECD, 'Methodology' (n 1244) 105.
[1409] S Peck and W Ruigrok, 'Hiding Behind the Flag? Prospects for Change in German Corporate Governance' (2000) 18(4) European Management Journal 420, 424.

corporate governance framework conforms to the principles under this heading. This is evidenced by the detailed and lengthy assessment of this section under the Pilot Study.

In particular, the report highlights various discrepancies and issues regarding the implementation of this principle. The report attributes these problems to Turkey's controlling ownership structure. Almost all of the ancillary principles were marked as Partly Implemented, which indicates an overall lack of alignment of the Turkish corporate governance framework with the OECD Principle regarding the responsibilities of the board. That being said, the Pilot Study has found that 'there was very little systematic data available analysing how the boards of Turkish, publicly held companies actually operate.'[1410] Thus, the report has added that their assessment relied upon an examination of the relevant standards, publicly available company documents, and surveys conducted 'through interviews with informed market participants, including company representatives and their advisers.'[1411]

As per the Methodology, the most important sub-principle on the responsibilities of the board is that 'Board members should act on a fully informed basis, in good faith, with due diligence and care and in the best interests of the company and its shareholders.'[1412] This principle stipulates the fiduciary duties, namely the duty of care and the duty of loyalty of the directors. Accordingly, 'The duty of care requires board members to act on a fully informed basis, in good faith, with due diligence and care.'[1413] Regarding the duty of care, the Pilot Study notes that the existing corporate governance framework in Turkey is in good standing, which is expected to further improve with the new TCC provision that articulates the exclusive duties and responsibilities of the board.[1414] The problematic area is the duty of loyalty, which unlike the duty of care was not prescribed in the old commercial code. The Pilot Study has found that in Turkey,

> many board members and managers perceive that their primary duty of loyalty is to the shareholder who appointed them and that, secondarily, they consider the interests of the corporate group as a whole as reflected in the controlling shareholders' wishes. […] Likewise, they might not ask themselves whether or not the controlling shareholders' instructions are consistent with the interests of the company or shareholders generally.[1415]

[1410] OECD, 'A Pilot Study' (n 159) 97.
[1411] Ibid.
[1412] OECD, 'Methodology' (n 1244) 106.
[1413] OECD, 'OECD Principles of Corporate Governance' (2004) 59.
[1414] OECD, 'A Pilot Study' (n 159) 98.
[1415] Ibid.

Indeed, in Turkey, boards usually act as an 'advisory board' for the controlling shareholders, particularly for the owner families.[1416] Accordingly, market participants have stressed that 'many board members perceive their primary duty of loyalty to the controlling shareholders who appointed them and generally do not take into account the minority shareholders' reasonable interests.'[1417] The legal framework at the time did not explicitly provide that the boards owed any duty of loyalty to all shareholders. However, for the OECD, the duty of loyalty is considered to be of 'central importance' to the principle of the equitable treatment of shareholders.[1418] The problem is further exacerbated by the prevalence of group companies in the Turkish context. The Methodology has argued that 'company groups often lead to some significant weakening of the duty of loyalty for board members to their specific company if they are also obliged to follow group strategies.'[1419] It has further noted that the prevalence of controlling shareholders 'further serves to confuse to whom the duty is due.'[1420]

Nevertheless, the Pilot Study has highlighted the ongoing corporate governance reform initiatives as positive developments in this area; these initiatives have 'started influencing the perceptions of some board members, executives and controlling shareholders. […] [and] have started deepening the understanding among some key decision makers in companies of what these duties mean in practice.'[1421] Indeed, to address these concerns, the new TCC brought in extensive rules to ensure that the boards of group companies are not perceived independently. More particularly, the new TCC requires that the board of the controlling company compensates any losses incurred by the controlled company due to its actions. Hence, by placing a duty of loyalty on the boards of controlling companies, the new corporate governance framework attempts to protect the minority shareholders of the dependent company. The new TCC also explicitly stipulated the board's duty of loyalty for the first time.[1422] The new provision of the TCC holds that the board members' duty of loyalty requires them to 'put the interests of the company before their interests, the interests of majority holders or shareholders or any third party and their relatives.'[1423] The new TCC also introduced the principle of equal treatment as a main shareholder right.[1424] Additionally, the new TCC lists the non-assignable duties of the board, which is intended to prevent controlling shareholders from crossing over the duties of

[1416] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 99.
[1417] OECD, 'A Pilot Study' (n 159) 100.
[1418] OECD, 'OECD Principles of Corporate Governance' (2004) 59.
[1419] OECD, 'Methodology' (n 1244) 108.
[1420] Ibid.
[1421] OECD, 'A Pilot Study' (n 159) 99.
[1422] TCC Article 369.
[1423] Oumer, 'Duty of Care and Loyalty While Running Joint Stock Companies' (n 1100) 165.
[1424] TCC Article 357.

the board and exercising certain board functions themselves.[1425] The aforementioned changes in legislation can be interpreted as the government attempting to restrain the controlling owners' influence over the boards in Turkey.

On the other hand, the CMB also introduced specific rules to limit controlling owners' control over the boards. For instance, regarding the OECD Principle on boards being 'able to exercise objective independent judgement on corporate affairs', the OECD states 'there should be a sufficient number of non-executive directors'.[1426] The Pilot Study has found that the existing CMB regulations did provide for a part of the board to be composed of non-executive, independent directors. However, there has been limited compliance amongst listed companies because these rules were non-binding.[1427] The report has attributed the lack of implementation to difficulties in finding 'experienced, knowledgeable and independent candidates' as well as the family owners' unwillingness to give up their control over the boards.[1428] Thus, to rectify this situation, the CMB Principles made almost all its principles on BoDs mandatory. In fact, most mandatory principles are contained under this heading.[1429] For instance, the CMB Principle stating that 'a majority of the members of the board of directors shall consist of members who do not have an executive duty' is mandatory.[1430] Moreover, it is now required that at least one thirds of the listed company boards to be composed of independent directors.[1431] The CMB Principles further provide stringent and 'qualitative' independence criteria which are binding on listed companies.[1432]

The issue of independence has been accorded so much importance in the new corporate governance framework that the CMB is now required to confirm the independence of the board candidates prior to subjecting them to the general assembly for approval.[1433] The principles have been further strengthened by the provisions of the CML and the corresponding enforcement authority has been provided to the CMB. Accordingly, if listed companies fail to implement the mandatory CMB Principles within the timeframe provided, the CMB is authorised to

[1425] Eminoğlu, *Corporate Governance in the Turkish Commercial Code* (n 154) 177-178.
[1426] OECD, 'OECD Principles of Corporate Governance' (2004) Article VI.E.1.
[1427] OECD, 'A Pilot Study' (n 159) 110.
[1428] Ibid.
[1429] Communique on Corporate Governance Article 5.
[1430] CMB Principle 4.3.2. The CMB defines non-executive board member under this article as 'the person who does not have any administrative duty other than being a board member or any executive unit subsidiaries to himself/herself and is not involved in the daily work routine or ordinary activities of the corporation.'
[1431] CMB Principle 4.3.4. According to Principle 4.3.3, the independent directors are 'among the non-executive board members who have the ability to fulfil their duties impartially.'
[1432] CMB Principle 4.3.6.; OECD, 'Supervision and Enforcement in Corporate Governance' (2013) 80.
[1433] CML Principle 4.3.7.

> appoint ex officio independent members of board of directors in required number that is necessary for the board of directors to convene and to take resolution […] the new board of directors shall fulfil the required amendments at the articles of association to provide the compliance to the mandatory principles of corporate governance.[1434]

In sum, the CMB now has the authority to directly appoint independent directors if listed companies fail to implement the binding corporate governance principles regarding the constitution of the board.[1435] With these new rules, 'Turkey became one of the few countries where (outside the banking sector) public authorities are involved in the appointment process of independent directors.'[1436]

Turkey's new corporate governance legislation has significantly addressed the issues raised in the Pilot Study regarding the other principles assessed under the heading: The Responsibilities of the Board. For example, even though the old CMB Principles required listed companies to establish a corporate governance committee within the boards, this principle was not very effective due to its voluntary nature. In a survey, the CMB found that only 18% of the listed companies it had examined had established a corporate governance committee in 2004.[1437] Therefore, the new CMB Principles listed the establishment of a corporate governance committee as a mandatory principle.[1438]

Another relevant issue pertains to directors' pay. The Pilot Study has advised that companies should link board remuneration to performance and disclose these practices in the annual report. It has also noted that very limited information is disclosed on directors' performance and remuneration in Turkey.[1439] The new CMB Principles address this by requiring listed companies to disclose their remuneration policies of the board members and executives on the company

[1434] CML Article 17; Communique on Corporate Governance Article 7/3.
[1435] One well-known instance, where the CMB has used its authority concerns the leading mobile operator company Turkcell. The holding company of the family-owners (Cukurova Group) held the majority of the shareholdings in Turkcell and wanted to hold onto control against the second largest shareholder (Telia Sonera). The two shareholder had a disagreement over a possible sale of shares from Cukurova Group to TeliaSonera, since the family owners did not want to lose their dominance over the board. Thus, the shareholders could not reach an agreement over the election of independent directors, which stalled the general assembly meetings for the next coupleof years, until the CMB stepped in 2013 to elect the independent board members to Turkcell ex officio. This decision of the CMB was announced in CMB, 'Turkcell İletişim Hizmetleri A.Ş.'ye ilişkin duyuru (Press Statement on Turkcell Communication Services)' (15.08.2013) <http://www.spk.gov.tr/Duyuru/Goster/20130815/2>. Also, for a detailed timeline of event see Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 36-38.
[1436] OECD, 'Supervision and Enforcement in Corporate Governance' (2013) 79.
[1437] OECD, 'A Pilot Study' (n 159) 103.
[1438] CMB Principles 4.5.1. and 4.5.10.
[1439] OECD, 'A Pilot Study' (n 159) 103.

website.[1440] The CMB has also required listed companies to establish a remuneration committee, which would submit its recommendations on the remuneration policies of directors and executives 'considering the achievement level to the criteria used in remuneration'.[1441] However, these principles are at odds with the business practices in Turkey. The Pilot Study has noted that a 2005 survey demonstrated that 'only 4% of listed companies compensated board members on the basis of company performance.'[1442]

Moreover, directors in Turkey do not commonly expect to receive any compensation for having a seat on the board; they are usually only paid a small attendance fee.[1443] In fact, nearly half of the listed companies noted that they do not make any payments to their board members.[1444] If the board members are compensated, these payments are generally fixed at the legal minimum wage, which is not related to performance.[1445] Disclosure of executive remuneration is not a common practice amongst Turkish companies.[1446] Even when remuneration is linked to performance, that is usually measured by subjective criteria.[1447] These practices result from established business customs and mentality; since boards are mainly composed of the relatives of the shareholders, they usually do not expect any sort of compensation as directors.[1448] Even if the directors claimed to be independent, they were likely to be connected with the controlling shareholders because they were elected by those shareholders.[1449] The reforms make it mandatory for at least one-third of the listed company boards to include independent directors who will be determined by strict independence criteria, subject to further approval by the CMB. Overall, the CMB's mandatory rules constitute radical reform that is likely to change the way boards operate in Turkey. As the OECD notes, these developments will help 'raise expectations' regarding the board's professionalism.[1450]

In sum, Turkey's new corporate governance framework introduces reforms to protect the rights of minority shareholders in individual and group companies vis-à-vis the controlling owners with regard to the BoDs. The reforms explicitly provide that the board has a duty of loyalty towards all shareholders, thereby imposing liability on board members who fail to fulfil this

[1440] CMB Principle 4.6.2.
[1441] CMB Principle 4.5.13.b.
[1442] OECD, 'A Pilot Study' (n 159) 105.
[1443] Ararat, Orbay and Yurtoglu, 'The Effects of Board Independence in Controlled Firms ' (n 97) 38.
[1444] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 104.
[1445] Ibid.
[1446] Ibid 103.
[1447] Ararat and Eroğlu, 'Separation of Execution and Control Functions' (n 1080) 121
[1448] OECD, 'A Pilot Study' (n 159) 104.
[1449] Ararat, Orbay and Yurtoglu, 'The Effects of Board Independence in Controlled Firms ' (n 97) 37.
[1450] OECD, 'A Pilot Study' (n 159) 112.

duty to the minority shareholders.[1451] Moreover, the fairness principle is strengthened by law through the principle of equal treatment of shareholders provided for in the TCC. These changes are further supplemented by the mandatory CMB Principles, which define rigid independence criteria and require boards to be mainly composed of non-executive directors. These changes place the boards in an equal position in relation to all shareholders while curbing the controlling shareholders' influence over the board members. This is in line with the mainstream corporate governance model, which seeks to propagate a system in which all shareholders are equally distant from the boards of the companies they invest in.

h. Conclusions

The Pilot Study is an essential reference point to assess whether the Turkish legislators have taken up the OECD's instructions to shape Turkey's corporate governance framework in line with the mainstream model. The Secretary General of the OECD at the time asserted the following: 'As long as the authorities and business community remain committed to pursuing international best practices, we can be confident that the remaining weaknesses in Turkish corporate governance will be addressed soon.'[1452] The subsequent legal reforms significantly addressed the areas that had been identified by the OECD as requiring 'improvement'.[1453] Shareholders are placed at the core of the new corporate governance legislation, and stakeholder rights are only acknowledged in terms of transparency. Extensive rules and binding principles have been introduced to compensate for the presence of controlling owners. For example, rules that facilitate professional boards, rules that facilitate further disclosures, or the equitable treatment principle. These rules carry significance in countries like Turkey, where the presence of controlling owners constitutes a risk for global investors because it 'diminishes the ability of outside actors and institutions to impose checks and balances'.[1454] In sum, it can be concluded that the new Turkish corporate governance framework has conformed to the mainstream model as advanced by the OECD Principles.

[1451] Under the previous TCC, the minority shareholders had a derivative claim against board members in cases where they fail to fulfil their duties, but shareholders could only file this claim on behalf of the company where a damage has been caused to the whole company. Thus, the minority shareholders did not have a personal claim if the board members treated them unfairly or did not fulfil their duty of loyalty towards them. With the new TCC, the minority shareholders can sue the boards themselves for personal damages to be compensated. For a further discussion on this, see Cankorel, 'Shareholder Fiduciary Duties' (n 1051).
[1452] OECD Secretary-General Angel Gurría, Corporate Governance in Turkey (October 17, 2006). <http://www.oecd.org/turkey/corporategovernanceinturkey.htm> accessed on 12 November 2017.
[1453] OECD, 'Methodology' (n 1244) 8.
[1454] Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South' (n 70) 10.

3 Implications of the New Corporate Governance Framework

a. Analysing the Shift to Mandatory Corporate Governance Principles

Prior to analysing the implications of the new legal framework, it is first necessary to assess the switch to hard law regulation of corporate governance and the reasons for that change. That assessment is necessary because that shift in regulatory style is likely to facilitate the consequences discussed under the subsequent sections of the chapter. The following section discusses the possible reasons for the CMB to adopt the hard law approach to its corporate governance principles.

In 2011, the CMB Communiques obliged certain listed companies to implement some of its formerly voluntary corporate governance principles.[1455] Thereafter, consecutive regulations of the CMB increased the scope of its mandatory principles to cover more listed companies. As elaborated in detail previously, the CMB Principles are very similar to the OECD Principles. Both regulators and scholars have acknowledged that the OECD Principles have been the main source of influence behind Turkey's corporate governance principles.[1456] Nevertheless, with the 2011 amendments, the CMB Principles have deviated in form from the 'non-binding, principles-based approach' which has been advocated as best practice by the OECD;[1457] Indeed, while admitting 'that there is no single model of good corporate governance', the OECD has also suggested that the corporate governance rules should be sufficiently flexible to allow companies to adapt their corporate governance practices as they see fit to remain competitive.[1458] In fact, the OECD has warned that going beyond the comply-or-explain approach risks the rules becoming too prescriptive.[1459] This stance contradicts Turkey's move to use hard law to regulate its corporate governance practices. Thus, the reasons behind the move to hard law should be further explored to understand what the binding corporate governance principles strive to achieve.

The most discernible explanation for the move to hard law lies in the ownership structure of Turkish companies and the particular challenges it poses for the minority investors. Turkish

[1455] CMB, Communique on the Determination and the Application of Corporate Governance Principles IV-54 (11.10.2011). This communique obliged the companies listed in the ISE-30 Index to implement certain CMB Principles, with the exception of banks.
[1456] CMB, Corporate Governance Principles (2003) 7; Akdoğan and Boyacıoğlu, 'Corporate Governance In Turkey' (n 1036) 11; Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 60.
[1457] Bill Witherell, 'The Revised OECD Principles of Corporate Governance: A Management Roadmap For Healthy, Well-Governed Companies' (OECD 2004) 3.
[1458] Preamble. OECD, 'OECD Principles of Corporate Governance' (1999).
[1459] OECD, *'Corporate Governance: A Survey of OECD Countries' (2004)* 11.

companies are characterised by concentrated ownership structures which have a prevalence of controlling owners who are founding family members.[1460] The OECD has stated that its 'Principles focus on governance problems that result from the separation of ownership and control'[1461], which is a distinct feature of the Anglo-American corporate system with a dispersed ownership. The central corporate governance problem under this system results from the supposed agency relationship between the shareholders and management. The shareholders are principals who delegate their decision-making power to management, who are their agents.[1462] The relationship is predicated on the agent's promise that it will act in the principal's best interest by maximising shareholder wealth.[1463] The agency or the 'moral hazard problem' 'arises when there is a divergence between the interests of the two parties and it is prohibitively difficult, or costly, for the shareholders to ensure that managers are indeed running the company in their best interests.'[1464] Thus, 'good' corporate governance mechanisms ensure that there is effective monitoring of the agents so that they pursue the principal's interest.[1465] On the other hand, in emerging markets such as Turkey, where the separation of ownership and control has not fully materialised due to concentrated ownership, the agency problem turns into a 'principal-principal' problem between controlling and minority shareholders.[1466] This causes its own set of corporate governance issues and corresponding mechanisms. Although the OECD Principles' Preamble does recognise the existence of the principal-principal conflict,[1467] the rest of the Principles are designed to function within a dispersed ownership system. In such a system, the presence of controlling owners is perceived to be an inherent threat that should be restricted as much as possible.[1468]

The OECD Principles are founded on the 'separation of ownership and control' thesis;[1469] the principles use corporate governance rules to try to resolve the problems generated by this separation. Hence, the principles are unsuitable to provide solutions to the corporate governance

[1460] Ararat, Orbay and Yurtoglu, 'The Effects of Board Independence in Controlled Firms ' (n 97) 11.
[1461] OECD, 'OECD Principles of Corporate Governance' (2004) 12.
[1462] Jensen and Meckling, 'Theory of the Firm' (n 10).
[1463] A Keay, 'Ascertaining The Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71(5) The Modern Law Review 663, 667.
[1464] Peck and Ruigrok, 'Hiding Behind the Flag?' (n 1409) 421.
[1465] OECD, 'OECD Principles of Corporate Governance' (2004) 11.
[1466] MW Peng and S Sauerwald, 'Corporate Governance and Principal-Principal Conflicts' in Wright, Mike and others (eds), *The Oxford Handbook of Corporate Governance* (OUP 2013) 658; MN Young and others, 'Corporate Governance in Emerging Economies: A Review of the Principal–Principal Perspective' (2008) 45(1) Journal of Management Studies 196, 197.
[1467] OECD, 'OECD Principles of Corporate Governance' (2004) 12. 'In some jurisdictions, governance issues also arise from the power of certain controlling shareholders over minority shareholders.'
[1468] Ibid; 'As owners of equity, institutional investors are increasingly demanding a voice in corporate governance in some markets. Individual shareholders […] may be highly concerned about obtaining fair treatment from controlling shareholders and management.'
[1469] Berle and Means, *The Modern Corporation and Private Property* (n 36).

issues of Turkey. Indeed, the existence of controlling owners removes the issue of securing managerial accountability to shareholders.[1470] For instance, the OECD Principle's assignment of the vital role of monitoring company management to independent and non-executive board members is rendered ineffective in the context of Turkish companies. Anecdotal evidence has demonstrated that independent directors in Turkish companies rarely question the decisions of management due to their loyalties to the controlling-owners who elected them.[1471] This finding indicates that the independent board members are not effective monitors of management in Turkey, in contrast to what has been advocated by the OECD. Moreover, studies have found that the presence of independent directors negatively affects performance in Turkish companies,[1472] demonstrating that this practice inflicts extra costs on companies instead of improving performance.[1473] Nonetheless, the CMB not only based Turkish corporate governance principles on the OECD standards, but also made some of these principles mandatory.

Prior to the reforms, the difficulty in implementing the CMB Principles arose from their voluntary nature; they were binding only to the extent of the comply-or-explain approach. Accordingly, listed companies were only required to publish statements on whether they implemented the CMB Principles or explain their reasons for not implementing those rules. As per a 2004 survey conducted on listed companies within the ISE-100 Index,[1474] the CMB has found that these reports were not in line with the Corporate Governance Compliance Report format required by the CMB and instead consisted of short and standard explanations with no details.[1475] Ararat has noted in 2011 that the Corporate Governance Compliance Reports of listed companies were still unsatisfactory because they only consisted of a few pages and were almost the same each year.[1476] It is clear that Turkish listed companies were reluctant in implementing the voluntary corporate governance principles.

[1470] PL Davies, 'The Board of Directors: Composition, Structure and Powers' (OECD 7-8 December 2000) 3.
[1471] Ararat and Eroglu, 'Separation of Execution and Control Functions for Effective Governance and the Potential Effect of Structural Regularities in Turkey on Firm Performance' (n 1080) 114.
[1472] Ararat, Black and Yurtoglu, 'The effect of corporate governance on firm value and profitability' (n 158); Ararat, Orbay and Yurtoglu, 'The Effects of Board Independence in Controlled Firms ' (n 97) 36.
[1473] Ararat and Eroglu, 'Separation of Execution and Control Functions for Effective Governance and the Potential Effect of Structural Regularities in Turkey on Firm Performance' (n 1080) 114.
[1474] ISE-100 Index (now called BIST-100 under the new name) is composed of the listed companies with highest market capitalization and trade volume.
[1475] CMB, 'Payları İMKB'de İşlem Gören ve Ulusal 100 Endeksine Dahil Olan Şirketlerin Kurumsal Yönetim Uygulamalarına İlişkin Değerlendirme (Evaluation of the Corporate Governance Practices of Listed Companies in the ISE-100 Index' (2004) <http://www.spk.gov.tr/Sayfa/Dosya/461> accessed 7 October 2018.
[1476] Ararat, '"Comply or Explain" Without Consequences' (n 69) 356.

Ararat has argued that the shortcomings of the comply-or-explain approach are due to the weak legal foundation of the CMB Principles and the Turkish companies' ownership structure.[1477] Turkey has a civil law background which is characterised by an 'insider system of ownership and control structure where the majority of the company shares are held by family, business groups, and the state.'[1478] In this setting, non-controlling shareholders are faced with the potential abuse or cheating by the controlling shareholders, which deters prospective outside investors from becoming minority stakeholders in Turkish companies. Ates et al. have also noted that

> The existence of such tight family control may not be a problem in countries with effective regulations and laws for protecting minority shareholders, but it may pose challenges in an emerging market setting like Turkey where protection of minority shareholders are not as strong.[1479]

A strong legal framework is thus a prerequisite for the protection of minority shareholders in countries with concentrated ownership structures. La Porta and others have demonstrated the link between ownership patterns and the level of investor protection in a country; acccordingly 'ownership concentration is a consequence of poor legal protection of minority shareholders.'[1480] They have also noted that weak legal protections would deter outside investors from owning equity in those countries' stock markets.[1481] Thus, in the case of Turkey, it can be argued that a soft law approach to corporate governance has not provided prospective investors with sufficient confidence to own small stakes in listed companies.

The conclusion that can be drawn from the above findings is that the shift to hard law was not intended to address the corporate governance issues faced in Turkish companies. Instead, as Yamak and Ertuna have argued, the main motivator appears to be attracting foreign capital.[1482] Indeed, according to the CMB, the new regulations that facilitate mandatory application 'were made in order to adopt the corporate governance principles in our markets as we [the CMB] see them as an important milestone in the improvement process of our markets'.[1483] Thus, binding legal rules were required to attain this objective, especially in terms of protecting minority shareholders. This shift also demonstrates the undesirability of concentrated ownership and

[1477] Ibid 355-356.
[1478] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 116.
[1479] Gurarda, Ozsoz and Ates, 'Corporate Governance Rating and Ownership Structure' (n 716) 2.
[1480] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 511.
[1481] R La Porta and others, 'Investor Protection and Corporate Governance' (2000) 58(1) Journal of Financial Economics 3, 24.
[1482] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 60.
[1483] CMB, 'Annual Activity Report' (2012) <http://www.cmb.gov.tr/Sayfa/Dosya/88>.

controlling owners for attracting foreign investors. Cheffins has suggested that 'policy-makers in countries where corporate governance is organised on an "insider/control-oriented" basis should strive to create the correct regulatory environment.'[1484] Turkey seems to have followed this advice; it introduced a new corporate governance framework with binding primary legislation and mandatory principles to restrain the power of controlling owners. Writing prior to the corporate governance reforms, Ararat and Ugur have commented that 'the statutory CG standards in Turkey have improved, but highly concentrated ownership structures and the inadequacy of the enforcement framework would continue to constitute serious obstacles'.[1485] This finding anticipated two things. First, rectifying the inadequacy in implementation through hard laws. Second, the need to overcome the ownership structure of Turkish companies.

On the other hand, binding corporate governance principles are not necessary in countries with diffused ownership structures because there are other mechanisms in place to protect outside investors, such as the market for corporate control or monitoring by the institutional investors. As Cheffins has asserted, 'strong corporate law is probably not a necessary condition for a corporate economy dominated by widely held companies.'[1486] Such substitutive governance mechanisms provide assurance to outside investors that their rights are adequately protected even though they own small stakes. However, this is not the case in the Turkish setting. The situation is exacerbated because the 'government has a central role in the allocation and enforcement of property rights where favouritism takes a leading role.'[1487] These factors present substantial risks for the minority shareholders and deter prospective investors from entering the Turkish stock market. Therefore, using hard law to regulate corporate governance in Turkey is not only justified but also essential to attract outside, mainly (mainly foreign) investors and to facilitate stock market development. Indeed, La Porta and others have concluded that for the principal-principal agency problem to be reduced, legal reforms needed to be considerably 'radical'.[1488] They have added that 'Corporate governance reform must circumvent the opposition by these [controlling shareholder] interests.'[1489] The new Turkish corporate framework appears to have followed this reasoning by imposing mandatory CMB Principles on listed companies and including further minority protections in corporate governance legislation. These measures were taken to 'circumvent' the power of the controlling families to benefit outside shareholders.

[1484] BR Cheffins, 'Corporate Law and Ownership Structure: A Darwinian Link' (2002) 25(2) University of New South Wales Law Journal 346, 351.
[1485] Ararat and Ugur, 'The Turkish National System of Corporate Governance' (n 624) 259.
[1486] Cheffins, 'A Darwinian Link' (n 1484) 352.
[1487] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 117.
[1488] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 512.
[1489] La Porta and others, 'Investor Protection and Corporate Governance' (n 1481) 24.

Another important factor regarding the switch to hard law pertains to the de facto binding character of the mainstream corporate governance principles. As discussed earlier, the OECD Principles constitute the corporate governance module of the ROSCs as stipulated by the IFIs. Although the stated objective of the ROSCs is 'to develop and disseminate international standards to promote the stability of the global financial system'[1490], Soederberg argues that they effectively function as benchmarks to assess whether 'emerging markets play by the rules dictated by the powerful translational financial capitals.'[1491] Therefore, the corporate governance standards that make up the mainstream model not only represent a certain class' interest, but also place constraints on national policy making. The implementation of the OECD Principles may be promoted as best practices, but they have an implicit binding power. If a country deviates from the standards under the ROSCs, it sends negative signals to investors. This risks capital flight, investment strikes, and possible downgrades from global credit rating agencies.[1492] These actions have important ramifications for a country, especially for emerging markets like Turkey, whose economies are largely dependent on foreign capital. In fact, the OECD projects that the reliance of the Turkish economy on foreign capital will reach 25% of GDP by the end of 2018.[1493] Thus, as Ireland has asserted, 'in practice it is near compulsory for states who wish to retain their credibility with foreign investors.'[1494] Additionally, while the IMF has confirmed that the ROSCs are voluntary, it adds that 'when ROSCs are published, they can help potential investors to better evaluate the investment climate'.[1495] Overall, the ROSCs have an inherent disciplinary nature.

Subsequently, the ROSCs are used to pressure governments to stay in line with the conditionality agreements in return for financing from the IMF. This was evident in 2001 when Turkey was recuperating from a national financial crisis. The IMF extended further credit accompanied with the conditionality of 'good governance in the public and private sectors'.[1496] In its responding Letter of Intent, the Turkish government noted that it 'is fully committed to pursue these goals and stands behind all the measures and polices detailed in the letter.'[1497] Following the Turkish government's promise, the CMB published its Corporate Governance

[1490] The WB, 'Reports on the Observance of Standards and Codes' (n 52).
[1491] Soederberg S, 'On the Contradictions of the New International Financial Architecture: Another Procrustean Bed for Emerging Markets?' (2002) 23(4) Third World Quarterly 607, 608.
[1492] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 138.
[1493] OECD, *OECD Economic Surveys: Turkey* (July 2018) 231.
[1494] Ireland, 'Financialization and Corporate Governance' (n 252) 3.
[1495] IMF, 'Standards and Codes: the IMF's Role' (IMF Issue Brief, April 2001) <https://www.imf.org/external/np/exr/ib/2001/042701.htm> accessed 5 October 2018.
[1496] IMF, 'Press Release: IMF Approves Augmentation of Turkey's Stand-By Credit to US$19 Billion' (15.05.2001) <https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr0123> accessed 13 November 2018.
[1497] IMF, 'Letter of Intent of the Government of Turkey' (03.05.2001) <https://www.imf.org/external/np/loi/2001/tur/02/> accessed 25 September 2017.

Principles in 2003 for the first time. This development was significant because at the beginning of the 2000s, Turkey was the only OECD member country that did not have a corporate governance code.[1498] Nevertheless, due to the voluntary nature of the CMB Principles and the apparent mismatch between the principles and the established business practices in Turkey, listed companies were not 'enthusiastic' about implementing them.[1499] From this perspective, mandatory corporate governance principles seem to be necessary for the Turkish government to keep its 'promise' to ensure the implementation of good governance practices in the private sector. In sum, the move to a hard law approach to regulate corporate governance illustrates the policy constraints placed on the Turkish government by the IFIs. The next section discusses the possible consequences from this new legal framework.

b. Implications for the Ownership Structure

The prevalent company ownership structure in a country is an important determinant of corporate governance 'because the presence or absence of a controlling shareholder affects substantially the way in which, and the ends toward which, a corporation will be governed.'[1500] Indeed, there has been extensive research on the connection between particular ownership structures and the corresponding corporate governance mechanisms in different countries.[1501] As noted earlier, countries with widely dispersed companies tend to have better shareholder protection mechanisms.[1502] The main examples of this are the United States and the United Kingdom, where ownership concentration and large shareholders are less prevalent; hence, shareholdings are diffused and extensive legal protection for investors exists.[1503] In a later study, La Porta and others have found evidence that 'strong investor protection is associated with effective corporate governance, as reflected in valuable and broad financial markets, dispersed ownership of shares, and efficient allocation of capital across firms.'[1504] They have also noted that in the absence of adequate investor protection, outside investors 'face a risk, and sometimes near certainty, that the returns on their investments will never materialize because the controlling shareholders or managers expropriate them'.[1505] Thus, legal systems which do not

[1498] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 60.
[1499] Ibid 60-62.
[1500] LA Bebchuk and MJ Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52(1) Stanford Law Review 127, 133.
[1501] Claessens, Djankov and Lang, 'The Separation of Ownership and Control' (n 95); La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31); La Porta and others, 'Investor Protection and Corporate Governance' (n 1481); Shleifer and Vishny, 'A Survey of Corporate Governance' (n 18).
[1502] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 496.
[1503] Shleifer and Vishny, 'A Survey of Corporate Governance' (n 18) 769.
[1504] La Porta and others, 'Investor Protection and Corporate Governance' (n 1481) 24
[1505] Ibid 4.

provide strong minority shareholder protection are said to inhibit active stock markets.[1506] According to this line of research, the lack of strong investor protection and ownership concentration are impediments to share dispersion and hence stock market development

The ownership structure is also an important dimension of the debates over whether various corporate governance regimes will eventually converge into a superior model. The competing systems are usually classified as the market-centric and dispersed ownership model (the outsider model) versus the concentrated ownership model with controlling shareholders and less-developed capital markets (the insider model).[1507] The neoclassical economic theory asserts that 'one unique and efficient corporate governance model emerges as all other inferior models are selected out and fade'[1508] due to the link between the efficiency of corporate governance and performance. Such transformation is understood 'in terms of globalization-driven, neoliberal convergence.'[1509] On this point, Dignam and Alanis have noted that 'the shareholder supremacy scholarship has been influential in framing the rules upon which the process of globalizing capital markets has been based.'[1510] Moreover, increasing globalisation has led to the anticipation that 'companies in different countries will tend to adopt corporate governance practices consistent with free capital markets and geared toward maximizing shareholder value.'[1511] Charreaux has pointed out that because efficiency depends on the availability of shareholder protection against expropriation by controlling shareholders, the corporate governance systems of countries with dispersed ownership models are perceived to be more efficient.[1512] Similarly, although Hansmann and Kraakman have argued that the shareholder-oriented model of corporate law 'does not logically privilege any particular ownership structure', they have also argued that controlling shareholders may not always 'wish to

[1506] JC Coffee, 'Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1999) 93(3) Nw U L Rev 641, 644.
[1507] The terminology 'outsider' and 'insider' system is used to describe these two different corporate governance patterns. The outsider system refers to the Anglo-American, market-based model of corporate governance, whereas the companies in insider system countries, mainly found in Continental Europe, are dependent on banks, rather than the markets for financing. A third classification is also provided as 'family-based' system of the Asian companies. In T Clarke (ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (Routledge 2004) 11. Turkey's corporate system can be classified in between the insider and the family-based system; for the purposes of this research, I have referred to Turkey as having an insider system in line with the classification provided in Yurtoglu, 'Ownership, Control and Performance of Turkish Listed Firms' (n 811).
[1508] Dignam and Galanis, *The Globalization of Corporate Governance* (n 61) 154.
[1509] T Clarke (ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (Routledge 2004) 13.
[1510] Dignam and Galanis, *The Globalization of Corporate Governance* (n 61) 393.
[1511] MF Guillen, 'Corporate Governance and Globalization: Is There Convergence Across Countries' in Thomas Clarke (ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (Routledge 2004) 224.
[1512] G Charreaux, 'Macro Theories of Corporate Governance' in A Naciri (ed), *Corporate Governance Around the World* (Routledge 2008) 40.

maximize their financial returns'; thus, the presence of such structures leads to inefficient results.[1513] In sum, convergence towards the outsider model is advocated on the basis of economic efficiency arguments which are underpinned by the shareholder value maximisation purpose of the company.

On the other hand, there are opposing views that claim that certain factors would prevent ownership and corporate governance structures from becoming uniform through convergence. Roe's political determinants argument has illustrated how the socio-democratic traditions of the continental European countries would prevent convergence towards an outsider ownership model.[1514] Also, Bebchuk and Roe have provided 'path dependence' arguments to explain that 'the corporate structures that an economy has at any point in time are likely to depend on those that it had at earlier times.'[1515] Despite the 'powerful forces of globalization and efficiency', the ownership structure and governance patterns have persisted due to these path-dependencies.[1516] Rhodes and Apeldoorn have also noted the possible reluctance of the domestic elites to undermine their dominant position in the company, thereby impeding convergence.[1517] Finally, other scholars have noted the relationship between corporate governance, culture, and national identity to be an important factor and questioned the validity of convergence arguments.[1518]

From a different standpoint, whilst not opposing the convergence claims, La Porta and other's law and finance theory (or the 'law matters' theory) has argued that 'the quality of legal protection of shareholders helps determine ownership concentration.'[1519] Their main contention has been that 'weak laws actually make a difference'.[1520] Accordingly, concentrated ownership creates a cost for the company in the form of difficulties in raising external finance because minority shareholders fear expropriation by the controlling owners and managers, which hampers economic development. This seems to suggest, as Cheffins has noted, 'that legislation should be enacted that will allow investors to feel sufficiently comfortable to purchase tiny stakes in widely held companies.'[1521] In other words, the law-matters theory claims that laws that provide strong investor protection reduce the possibility of the expropriation of the

[1513] Hansmann and Kraakman (n 12) 461.
[1514] MJ Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (OUP 2003).
[1515] Bebchuk and Roe, 'A Theory of Path Dependence' (n 1500) 169-170.
[1516] Ibid.
[1517] M Rhodes and BV Apeldoorn, 'Capital unbound? The transformation of European corporate governance' (1998) 5(3) Journal of European Public Policy 406, 418.
[1518] See Dine and Koutsias, *The Nature of Corporate Governance* (n 5); Licht AN, Goldschmidt C and Schwartz SH, 'Culture, Law, and Corporate Governance', vol 25 (2005).
[1519] R La Porta and others, 'Law and Finance' (1998) 106(6) Journal of Political Economy 1113, 1151.
[1520] Ibid.
[1521] Cheffins, 'A Darwinian Link' (n 1484) 351.

minority, thereby facilitating share dispersal and ultimately economic growth. Cheffins has summed this up as follows:

> The law matters thesis dovetails neatly with the proposition that a switch towards the American approach would be beneficial. Again, a key implication of the thesis is that a suitable legal regime constitutes the crucial bedrock which underpins a system of ownership and control dominated by widely held companies.[1522]

In sum, this theory not only connects strong investor protection laws and economic development,[1523] but also seems to suggest that an appropriate legal framework can facilitate convergence between the ownership structures towards the outsider model. Regarding this point, empirical research to evaluate the impact of legal reforms on Italian ownership structure has concluded that strengthening the legal protection of shareholder rights is indeed associated with increased dispersed ownership.[1524] In a similar way, this section of the chapter argues that the recent reforms on corporate governance laws in Turkey are likely to impact the ownership structure of its listed companies.

The Turkish private sector has been shaped by state-based allocations.[1525] The state plays an important role in the economy: both as an owner and by allocating resources to private companies.[1526] The result is that having connections within the government is an important factor for running a business in Turkey. This factor has also been associated with the resulting concentrated ownership structure because the owners must actively manage their company's relationship with the state by being in charge.[1527] Thus, listed companies in Turkey are generally established as corporate conglomerates in the form of family-controlled groups.[1528] A study in 2001 has demonstrated that almost 80% of the listed companies had families as ultimate owners.[1529] The situation has not changed much since then; family ownership and control is still a prevalent feature of business groups in Turkey, where most of the large conglomerates are family-owned.[1530]

[1522] Ibid.
[1523] La Porta and others, 'Law and Finance' (n 1519) 1152.
[1524] F Cuomo, A Zattoni and G Valentini, 'The Effects of Legal Reforms on the Ownership Structure of Listed Companies' (2013) 22(2) Industrial and Corporate Change 427, 452.
[1525] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 5. For a detailed analysis of the development of Turkish economy and the private sector, see AH Bayar, 'The developmental state and economic policy in Turkey' (1996) 17(4) Third World Quarterly 773.
[1526] Yurtoglu, 'Ownership, Control and Performance of Turkish Listed Firms' (n 811) 196
[1527] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 72.
[1528] OECD, 'Supervision and Enforcement in Corporate Governance' (2013) 70.
[1529] OECD, 'A Pilot Study' (n 159) 154.
[1530] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 73.

The state has often provided support to family-owned business groups through various means such as easy access to financing from state banks.[1531] A private bank usually constitutes a part of the group in the holding structures.[1532] The banks owned by group companies and the access to cheap credit through state-owned banks have reduced Turkish companies' need for financing through the capital markets. For instance, in 1998, only 3.12% of listed companies had a free-float ratio[1533] of 70% or more, which rose to just 9% in 2006.[1534] Also, a more recent OECD report in 2013 found that only 12% of the largest Turkish companies were listed.[1535] In sum, the corporate sector in Turkey has remained mainly bank-based.[1536] Subsequently, it has been noted that one of the key weaknesses of Turkish companies is being over-leveraged to domestic banks.[1537] Also, the Turkish economy has been characterised by low domestic saving rates.[1538] The limited domestic savings were kept in local and foreign deposits instead of capital markets instruments.[1539] This was coupled with the limited availability of foreign direct investments (FDI) and highly volatile external portfolio investments.[1540] These factors hampered the role and development of the capital markets in Turkey. Indeed, even though Turkey is one of the fastest growing economies globally with an annual GDP growth rate of 7.4% in 2017,[1541] its capital markets remain thin in comparison to other countries with similar levels of development.[1542] This has also been the case for Turkey's primary stock market, BIST, which has remained underdeveloped; its market capitalisation as a percentage of GDP has been relatively low in comparison to other OECD countries.[1543]

In countries where domestic savings are limited such as Turkey, reliance on foreign capital as a source of finance for companies becomes vital.[1544] Thus, Turkish policy makers have turned

[1531] Ibid 72.
[1532] Yurtoglu, 'Ownership, Control and Performance of Turkish Listed Firms' (n 811) 196.
[1533] The term 'free-float' represents the percentage of a company's stock registered with the Capital Market Board of Turkey and available for trading by the public. As per the CMB, free-float refers to the 'market values of the shares in active circulation' in Communique on Corporate Governance.
[1534] OECD, 'A Pilot Study' (n 159) 146.
[1535] OECD, 'Supervision and Enforcement in Corporate Governance' (2013) 70.
[1536] B Eres, 'Capital Accumulation and the Development of a Financial System: The Turkish Example' (2005) 37(3) Review of Radical Political Economics 320, 321.
[1537] Rauf Gonenc, 'Improving the quality of business investment in Turkey' (OECD, 13.07.2018) <https://oecdecoscope.blog/2018/07/13/improving-the-quality-of-business-investment-in-turkey/> accessed 1 November 2018.
[1538] D Rodrik, 'The Turkish Economy after the Global Financial Crisis' (2012) 1(1) Ekonomi-tek 41, 57.
[1539] M Ararat and M Ugur, 'Corporate Governance in Turkey: An Overview and Some Policy Recommendations' (2003) 3(1) Corporate Governance International Journal of Business in Society 58, 62.
[1540] Ibid 58.
[1541] OECD, *OECD Economic Surveys: Turkey* (July 2018) 15.
[1542] The WB, 'Turkey's Transitions' (n 78) 22.
[1543] OECD, 'Supervision and Enforcement in Corporate Governance' (2013) 71.
[1544] C Leuz, KV Lins and FE Warnock, 'Do Foreigners Invest Less in Poorly Governed Firms?' (2008) 23(3) The Review of Financial Studies 3245, 3246.

their attention to attracting foreign investors for stock market development and economic growth. The TUSIAD has also highlighted the necessity of foreign capital inflows for economic development.[1545] However, one issue with relying on foreign investors for capital is that Turkish companies are subject to high costs of financing that are greater than their international competitors due to the high-risk premium associated with investing in Turkey.[1546] On this point, Ararat and Ugur have noted that macroeconomic instabilities have undermined the credibility of the Turkish government both in terms of rule-setting and enforcement,[1547] which have contributed to increasing the risks associated with investing in the Turkish stock market. Likewise, the WB has noted that the largest obstacle for progress in Turkish capital market development lies in addressing the 'credibility' aspect of the state because Turkey is a country with a history of macroeconomic instabilities.[1548] However, foreign ownership in Turkish listed companies has 'significantly increased' since the CMB first launched its corporate governance principles.[1549] As previously discussed, strong investor protection is crucial for attracting foreign investors in a stock market dominated by concentrated ownership and controlling owners. Thus, foreign investor presence in the Turkish stock market is expected to further increase in line with the new corporate governance laws. The chart below illustrates the change in the number of foreign investors and their percentage of the total number of investors in the BIST over the years. [1550]

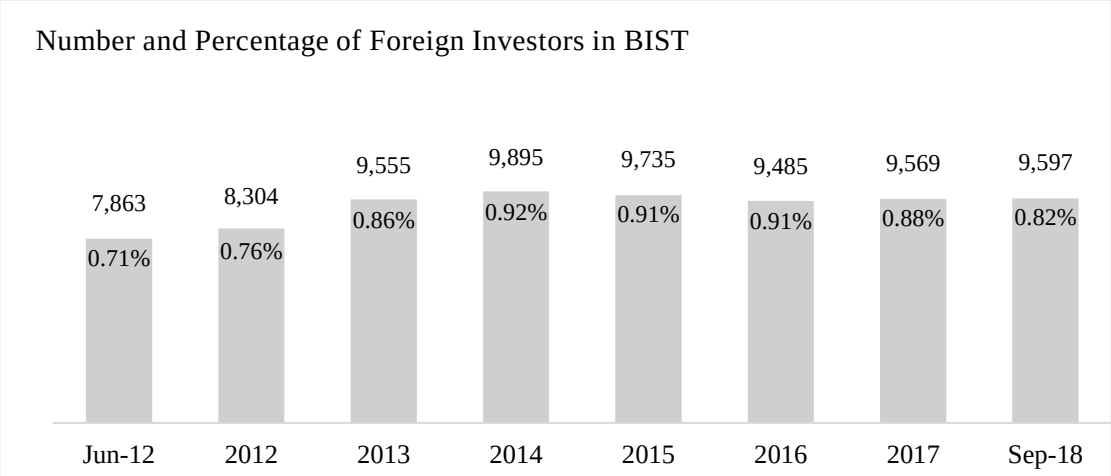

Figure - 2

[1545] TUSİAD, 'The Economy in Turkey in 2017' (2017) 4.
[1546] Gonenc, 'Improving the quality of business investment in Turkey' (n 1537).
[1547] Ararat and Ugur, 'The Turkish National System of Corporate Governance' (n 624) 260.
[1548] The WB, 'Turkey's Transitions' (n 78) 109.
[1549] Ararat, '"Comply or Explain" Without Consequences' (n 69) 357.
[1550] The data is compiled by the Central Securities Depository of Turkey (MKK) and Investor Relations Association under the title *Borsa Trendleri Raporu* (Exchange Trends Reports) at <https://www.mkk.com.tr/>. The first report was published in June 2012; therefore, the graph's dataset starts from this date. Figures represent the year-end, unless stated otherwise.

According to the figures above, there have been increases in foreign ownership of Turkish company stock over the years. This rise can be attributed to the strengthening of minority shareholder rights. The reforms started in 2011 with the CMB's Communique IV-54 which introduced mandatory corporate governance principles for the first time. This was followed by the promulgation of the new TCC in July 2012 and finally the new CML in December 2012. Although the effects of the new laws have yet to be documented in the literature,[1551] the above graph illustrates that the number of foreign investors substantially increased between 2012-2013, which corresponds to the period directly after the enactment of the legislation on corporate governance.

Nevertheless, the number of foreign investors still constitute a very small percentage of the total investors. Also, there was a sharp drop in the number of foreign investors in 2015. The United Nations Conference on Trade and Development (UNCTAD) has noted that international capital flows, particularly portfolio investments, turned negative due to the uncertainties in the global economy in 2015.[1552] Similarly, the decrease in the number of foreign investors in BIST has been attributed to the low risk appetite globally in 2015, which caused a significant outflow of foreign investment from Turkish companies.[1553] Although the number of foreigners constituted only a small percentage of all investors, their capital flight resulted in a considerable loss of 2.5 billion USD value from the BIST at the end of 2015. [1554] This indicates that the number of investors may in fact be a misleading figure. The table below demonstrates the foreign investors' share of the total market capitalisation (the total value of a listed company's outstanding shares in the stock market) and their share of the total trade volume over the same years as the above graph.[1555] The following figures reveal the importance of foreign investors for the BIST:

	Jun-12	2012	2013	2014	2015	2016	2017	Sep-18
% of Market Capitalisation	62%	66%	63%	64%	62%	63%	65%	62%
% of Trade Volume	19%	16%	20%	20%	22%	25%	25%	32%

Figure - 3

[1551] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 46.
[1552] UNCTAD, 'World Investment Report 2017: Investment and the Digital Economy' (2017) 12.
[1553] Central Depository Institution of Turkey, 'Borsa Trendleri Raporu Sayı: XIV (Exchange Trends Report No: XIV)' (October 2015).
[1554] Central Depository Institution of Turkey, 'Borsa Trendleri Raporu Sayı: XV (Exchange Trends Report No: XV)' (January 2016).
[1555] Market capitalisation is calculated by multiplying the total number of a listed company's outstanding shares with its current market price.

As can be observed from the table, even though the foreign investors are few in number relative to the domestic investors, foreign investors provide more than half of BIST's total market capitalisation. The significance of foreign investment as a source of financing for Turkish companies is not a new phenomenon; the percentage of foreigner investments in the BIST (formerly the ISE-Istanbul Stock Exchange) was 54.7% in 1997; this figure rose to 64% in 1999 and eventually decreased to 40.9% at the end of 2000 following the Turkish financial crises of 2000-2001.[1556] Thereafter, foreign ownership of the free-float steadily increased, which was likely to be due to the developments on corporate governance in Turkey. For example, after the CMB published its corporate governance principles for the first time in 2003, the percentage of foreigners who held outstanding shares rose from 43% in 2002 to 52.2% by the end of 2003 and 57% by 2004.[1557] By the end of 2012, which is when the corporate governance reforms were mostly enacted, the foreign investors comprised two-thirds of the free-float.[1558] This is a considerable increase from the figures in 2002, which is when corporate governance regulations were non-existent in Turkey.

According to the latest data obtained from the stock exchange, as of October 2018, foreign investors held 62% share in BIST total market capitalisation, which amounts to 199 billion Turkish Liras (or approximately 33 billion USD).[1559] This illustrates the interdependency of the Turkish stock market and the entire Turkish economy with foreign capital. For example, when foreign investors sold their shares and exited the market in 2015, the total value of the BIST fell by 30%.[1560] Similarly, when Turkey experienced political and economic volatilities during 2018, there was a net foreign investment outflow worth 2 billion USD in the first 9 months of 2018.[1561] These examples demonstrate that when the investment environment deteriorates in a country, foreign investors tend to promptly exit that market; this is also referred to as capital flight. As Gill has noted, financial capital is currently so mobile that it can react to any changes in a country's investment climate and government policies (or expected policies) much quicker than productive capital.[1562] The result of this is that large sums of money that are particularly vital for the emerging market's economy and companies flow to other markets that are more conducive to global investor interests.

[1556] ISE, '2010 Faaliyet Raporu (2010 Activity Report)' (2011) 10.
[1557] Ibid.
[1558] OECD, 'Supervision and Enforcement in Corporate Governance' (2013) 71.
[1559] Ibid. In the report, this figure was stated in Turkish Lira currency, therefore I made the exchange manually for ease of understanding, using the historical FX rate on the 1st October 2018 obtained from <www.xe.com>.
[1560] Central Depository Institution of Turkey, 'Borsa Trendleri Raporu Sayı: XV (Exchange Trends Report No: XV)' (January 2016).
[1561] Central Depository Institution of Turkey, 'Borsa Trendleri Raporu Sayı: XXVI (Exchange Trends Report No: XXVI)' (October 2018).
[1562] Gill, *Power and Resistance* (n 70) 110-111.

Due to the impact of global investors on the overall economy, their mobile character also works to discipline government policymaking. For example, global investors can influence the enactment of laws that are more suitable for the market and global capital.[1563] Indeed, Turkey experienced this scenario following the financial crisis of 2000-2001. Foreign capital pulled out of the stock market in 2001 following the volatilities experienced in the previous year, causing an outflow of over 10% of Turkey's GDP, triggering recession in the country.[1564] On the other hand, controlling shareholders, who are usually domestic families, do not have the same mobility and must withstand the economic turbulence their country goes through. The same is also true for stakeholders, especially labour, who do not have easy exit opportunities in times of distress. Thus, both the controlling owners and the stakeholders of listed companies must absorb the losses caused by the capital flight of global investors. Another point to note is that the share of foreign investors in BIST trade volumes reached 32% by mid-2018, which is the highest it has been since 2012.[1565] This signals the speculative nature of the foreign investors' equity trades; these investors benefitted from the volatilities in the market during a period of political instability to the detriment of Turkish companies. On this point, UNCTAD has noted that the high volatility of foreign portfolio investments due to their 'short-term cyclical nature and sensitivity to short-term developments' makes them an unreliable source of financing for developing economies.[1566]

In 2016, FDI to Turkey fell by 31% due to investors' concerns following the political instability caused by the failed coup attempt.[1567] However, as a prominent newspaper had announced, foreign purchases of BIST stocks 'quadrupled' the same year. Accordingly, by the end of 2016, there was a net foreign portfolio investment of 630 million USD into BIST.[1568] Immediately after in the first half of 2017, BIST experienced the highest net foreign investor inflow semi-annually in the last five years.[1569] This increase contradicts with UNCTAD's finding that external financial flows (which include foreign portfolio investments) to developing countries decreased in 2016 from previous years.[1570] The Turkish stock market during times of turmoil accords with the research, which demonstrates that global investors tend to have a risk appetite for investing in countries with economic and political instability due to the prospects of greater

[1563] Ibid 111.
[1564] Ararat and Ugur, 'Corporate Governance in Turkey: An Overview' (n 1539) 63.
[1565] Central Depository Institution of Turkey, 'Borsa Trendleri Raporu Sayı: XXV (Exchange Trends Report No: XXV)' (July 2018).
[1566] UNCTAD, 'World Investment Report 2017' (n 1552) 12.
[1567] Ibid 54.
[1568] 'Borsada yabancı alımı 4'e katlandı (Foreign stock purchases quadrupled)' *Sabah* (02.07.2017) <https://www.sabah.com.tr/ekonomi/2017/07/02/yabanci-alimi-4e-katlandi>
[1569] Ibid.
[1570] UNCTAD, 'World Investment Report 2017' (n 1552) 12. Note that Turkey is classified as a developing country by the UNCTAD.

financial gain.[1571] This appetite is an indicator of the speculative nature of foreign portfolio investments. In 2018, Turkey's bond credit rating, which 'indicates its credit-worthiness, and helps investors assess whether or not the debt will be repaid',[1572] was downgraded to 'junk' for the first time in over a decade by influential credit rating agencies such as Moody's and Standard & Poor's (S&P) due to the unpredictability of Turkey's policymaking.[1573] Nevertheless, the trade volume of foreign investors in the BIST reached a record 32% of the total trade volumes in 2018.[1574]

Indeed, foreign portfolio investment has an exploitative nature. As Hilferding notes, an 'export of capital' which creates value in the country in which it is invested is only possible when 'capital used abroad remains at the disposal of domestic capital, and the surplus value produced by this capital can be utilized by the domestic capitalists.'[1575] On the other hand, foreign investment in the stock market is inherently speculative. In fact, 'speculation is necessary to keep this market open for business at all times, and so gives money capital as such the possibility of transforming itself into fictitious capital.'[1576] For instance, between 2003-2007, foreign investors transferred earnings of almost 6 billion USD from investing in the Turkish stock market to other countries, thereby aiding other economies.[1577] This indicates that foreign investors are not interested in investing their profit back into Turkish companies or the economy. Thus, their speculation-oriented investment strategy makes the already unstable Turkish economy more volatile by subjecting it to the capital flight risk of global investors. The more Turkey's stock markets are dominated by foreign investment, the more its economy will be tied to pleasing global investors to prevent such capital flight. This makes Turkish policy solely dependent on fulfilling the requirements of the neoliberal capitalist order. The result is Turkey being exploited to create surplus for the few whilst externalising the costs onto the many.

[1571] E Clark and O Jokung, 'Risk Aversion, Wealth and International Capital Flows' (1998) 6(3) Review of International Economics 507. 513; A Jiménez, 'Political Risk as a Determinant of Southern European FDI in Neighboring Developing Countries' (2011) 47(4) Emerging Markets Finance and Trade 59, 71.
[1572] 'S&P cuts Turkey credit rating deeper into junk territory' *CNBC News* (17.08.2018) <https://www.cnbc.com/2018/08/17/sp-cuts-turkey-credit-rating-deeper-into-junk-territory.html>.
[1573] 'Turkey's credit rating slashed amid lira's 'extreme volatility' *The Telegraph* (08.17.2018) <https://www.telegraph.co.uk/business/2018/08/17/turkeys-credit-rating-slashed-amid-liras-extreme-volatility/>.
[1574] Central Depository Institution of Turkey, 'Borsa Trendleri Raporu Sayı: XXV (Exchange Trends Report No: XXV)' (July 2018).
[1575] R Hilferding, *Finance Capital: A Study of the Latest Phase of Capitalist Development* (2nd edn, Routledge 1981) 314.
[1576] Ibid 139.
[1577] 'Yabancı yatırımcı Türkiye'de iyi kazandı (Foreign investors made good profit in Turkey)' *Hürriyet* (27.02.2008) <http://www.hurriyet.com.tr/yabanci-yatirimci-turkiyede-iyi-kazandi-8322275>.

On the other hand, considering the highly volatile and unstable political and economic environment Turkey experienced during the last few years, that foreign investment to the BIST nonetheless continued to increase can be attributed to the new corporate governance laws. The new framework provides minority shareholders with greater protection and rights than the controlling shareholders. Thus, higher return opportunities from investing in an emerging market have been supplemented with strong shareholder protections, explaining the attractiveness of Turkish company stocks. Overall, the figures suggest that there may be a close connection between the corporate governance reforms in Turkey and the inflow of foreign capital, which accords with the findings of the 'law matters' thesis discussed earlier. To summarise, in countries with concentrated ownership, weak protection of shareholders leads to the risk of abuse of the minority by the controlling shareholders.[1578] In contrast, laws that provide adequate protection for minority shareholders also provide external investors with the assurance that their wealth will not be misappropriated, which stimulates external investments.[1579] As a consequence, improved minority protection may also facilitate a change in that country's ownership patterns in a 'desirable way'. [1580] 'Desirable' can be defined as the Anglo-American system that facilitates capital market development by supporting share dispersal, which is enabled by 'good laws' that protect minority shareholder interests and thus incentivise small investors.[1581] A dispersed ownership structure is also viewed as desirable because a liquid stock market backed by laws with strong minority protection, transparency, and the confidence that insiders will not expropriate investors' wealth is regarded as a prerequisite for economic growth.[1582]

That the value of foreign shareholdings in Turkish companies increased after the legal reforms on corporate governance has an implication for the ownership patterns in Turkey. It has been argued that even though policymakers are not able to change the ownership structures of companies, they can instead improve the legal protections provided to minority stockholders and achieve the same effect.[1583] Turkey's new corporate governance framework provides strong legal rights for minority shareholders and extends their sphere of influence within company decision-making. Implementation of the related corporate governance rules are secured through binding legal provisions and mandatory principles for listed companies instead of being left to

[1578] Claessens, Djankov and Lang, 'The Separation of Ownership and Control' (n 95) 82.
[1579] Talbot, *Progressive Corporate Governance* (n 9) 170.
[1580] Ibid.
[1581] Talbot, *Critical Company Law* (n 128) 108.
[1582] B Black, 'The Core Institutions that Support Strong Securities Markets' (2000) 55(4) The Business Lawyer 1565, 1565.
[1583] VL Crisóstomo and ID Freitas Brandao, 'The Ultimate Controlling Owner and Corporate Governance in Brazil' (2018) Corporate Governance: The International Journal of Business in Society <https://doi.org/10.1108/CG-01-2018-0043> 16.

the initiative of the private sector. Therefore, the increase of foreign investment to the BIST implies that the Turkish system now displays 'good law tendencies'[1584] because outside investors feel sufficiently assured that they may safely become minority shareholders. One anticipated outcome of these developments would be Turkey's gradual transformation from a concentrated model to a dispersed shareholding model. Indeed, neoliberalism perceives share dispersal to be the most efficient system for economic growth.[1585] This perspective resembles the arguments of convergence proponents such as Hansmann and Kraakman, who insist that controlling owners act as 'a barrier to the evolution of efficient ownership structures, governance practices, and corporate law.'[1586] Hence, it has been argued that wide share dispersal's supposed economic advantages would lead to it becoming the dominant ownership structure in a country over time.[1587]

My argument here is that the ownership structure of Turkish companies has been targeted not because of efficiency outcomes but for the imposition of the Washington Consensus' market-based restructuring on emerging economies' corporate systems so they will be based on shareholder value.[1588] As will be discussed in the next section, a stock market with a dispersed shareholding structure and its related institutions are more suitable to serve the interests of the global investor class than a system with controlling family owners. The concentrated ownership model does not allow global investors to penetrate domestic listed companies as is required for the capital's liquidity and mobility. On this point, the Institute of International Finance (IIF), which defines itself as 'the leading voice for the financial services industry on global regulatory issues',[1589] has warned Turkey that 'As long as the economy remains dominated by family companies whose majority stockholder values maximizing control rather than performance, overall levels of corporate governance may be difficult to improve.'[1590]

A recent study has argued that 'family control has a significant and negative impact on Turkish firms' CGR [Corporate Governance Rating] scores, suggesting that controlling stakes by a family are considered as unfavourable conditions from a corporate governance perspective in the case of Turkey'.[1591] The Corporate Governance Rating scores are measured by assessing

[1584] Talbot, *Critical Company Law* (n 128) 108.
[1585] Talbot, *Progressive Corporate Governance* (n 9) xxv.
[1586] Hansmann and Kraakman (n 12) 459.
[1587] Cheffins, 'A Darwinian Link' (n 1484) 371.
[1588] Gill, *Power and Resistance* (n 70) 150.
[1589] Institute of International Finance (IIF) <https://www.iif.com/about>.
[1590] IIF, 'Corporate Governance in Turkey - An Investor Perspective' (Equity Advisory Group, April 2005) 8.
[1591] Gurarda, Ozsoz and Ates, 'Corporate Governance Rating and Ownership Structure' (n 716) 12.

listed companies' compliance levels with the CMB Principles by independent rating agencies licenced by the CMB. The writers of the study have noted that

> Although corporate governance ratings may not truly reflect corporate governance quality, from a global investor's perspective, CGR ratings are seen as important proxies in assessing whether firms in emerging market countries follow corporate governance practices in line with international standards.[1592]

Finally, the writers have suggested that family control in Turkish companies must be reduced to improve corporate governance practices in Turkey.[1593] Another study conducted on Brazilian listed companies, which have similar characteristics to Turkish companies' ownership and control, found that: 'Dispersed firm control is associated with higher quality corporate governance practices signalling that the absence of powerful controlling shareholders is beneficial to corporate governance.'[1594] In sum, concentrated family ownership and control is seen as an impediment to company performance and *good* corporate governance, which is informed by the company's objective of maximising shareholder value.

Nevertheless, despite the increase in foreign ownership of Turkish company stocks, family owners have retained their share concentration. In fact, previous research has found that ownership concentration in listed companies has increased between 1999 to 2009.[1595] While the largest owners retained and even increased their concentration of shareholdings, the free-float (the percentage of dispersed shareholdings) also increased in the same period, which indicates that the holdings of block owners other than the largest shareholder decreased.[1596] As of the end of 2017, the free float ratio of the BIST reached 33%, which is an increase from 26% in June 2012.[1597] These figures indicate that the concentrated owners' holdings have not diffused enough to speak of a widely held stock market, thus illustrating that controlling shareholders are still dominant in the Turkish corporate landscape. Indeed, as of November 2017, out of the 20 companies listed in BIST with the highest market capitalisation, there was only one that had a free float ratio above 50%.[1598] This can be interpreted as reluctance on the part of family

[1592] Ibid.
[1593] Ibid.
[1594] VL Crisóstomo and ID Freitas Brandao, 'The ultimate controlling owner and corporate governance in Brazil' (2018) Corporate Governance. 15
[1595] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 70.
[1596] Ibid 70-71.
[1597] Exchange Trend Reports (June 2012) and Exchange Trends No: XXII (January 2018)
[1598] Garanti Bank, with only 50.07%. The data is retrieved from Central Securities Depository (MKK), 'Capital Markets Data Bank' <https://portal.mkk.com.tr/portal/> accessed 20 November 2017. The values are from the snapshot of the market as of November 2017.

owners with the largest holdings to give up control, while other smaller block holders may be selling their stakes with premiums in line with the increased demand.

Buğra has noted that due to the highly unstable business environment in Turkey, companies have significant incentives to remain in family control because the state-business relationships have an informal character which makes the transfer of control to outsiders inoperable.[1599] Moreover, she has commented that family owners are most likely to resist offering their shares to the public to avoid losing their control over the company.[1600] The largest owners' insistence on remaining in control may also signify a reaction to the recent corporate governance reforms; the owners may be concerned about losing their dominant position in the company. Nevertheless, the increase in share dispersal levels developed in parallel to the improvements in legal shareholder protection, which gained momentum from 2011 onwards. Comparing the free-float ratios from 2010 to the 2017 figures indicates that the 20 companies with the highest market capitalisation mostly increased their share dispersal in this 7-year period.[1601] In sum, it can be concluded that while most companies are increasing their level of free-float, they are generally averse to diluting the concentration of shares of the majority owners. On that point, the IIF has commented that changes of perceptions in Turkey 'is a challenging process, as it requires a wholesale change in the mindset of controlling shareholders who still cannot cope with the idea that company assets do not belong to them but to the company.'[1602] Thus, even though the pressures to accept share dispersal are intensifying, they may not be enough to persuade controlling owners in Turkish companies to let go of their controlling stakes.

Furthermore, Talbot has argued that for the ownership structure to become dispersed in a country, the government must also be in favour of such change. She has asserted that

> the conditions for this share dispersal must be a pro-shareholder political environment. Without this the wealthiest in society cannot be sure their interests will be pursued as a matter of course and will be obliged to maintain their majority stake.[1603]

The Turkish government, legislators, and the regulatory authorities have explicitly shown their pro-business and pro-foreign investment stance during the development process of the new

[1599] Buğra, *State and Business in Modern Turkey* (n 92) 28-29.
[1600] Ibid 205.
[1601] Central Securities Depository, 'Capital Markets Data Bank' (n 1598). This finding is with the exception of some listed banks The dataset above goes back to 2010 therefore the figures from 31 December 2010 are used for comparison.
[1602] IIF, 'Corporate Governance in Turkey - An Investor Perspective' (Equity Advisory Group, April 2005).
[1603] Talbot, *Critical Company Law* (n 128) 133.

Turkish corporate governance framework. Indeed, the AKP government has prided itself for taking on 'major structural reforms [which] have all contributed to the integration of Turkey's economy into the globalized world while also transforming the country into one of the major recipients of FDI in its region.'[1604] Furthermore, Bozkurt has argued that the AKP government, who has been in power since November 2002, has remained committed to a neoliberal agenda.[1605] The neoliberal policy orientation of the AKP is explicitly stated in its party charter through statements that note that it

> favors market economy […]; recognizes that the State should remain, in principle outside all types of economic activities […]; regards the privatization as an important vehicle for the formation of a more rational economic structure; believes that foreign capital […] will contribute to the development of the Turkish economy'[1606]

Although the extent and nature of the current government's policies is a research topic in its own right, it can be concluded that it has a neoliberal and pro-shareholder stance. Given the government's position and that its policies largely correspond to the interests of the Turkish business community,[1607] the domestic elites may not need to retain their majority holdings because their interests will be protected by the government in the case of share dispersal. This also helps explain why the domestic elites in control of the Turkish listed companies did not object to the corporate governance reforms although they facilitated the transfer of elites' control to outsiders.[1608]

If the raison d'etre of the Turkish corporate governance reforms is to materialise, a transformation to a dispersed ownership would be expected to occur as follows. Stronger legal protections for minority shareholders coupled with professional boards and management that are independent of the controlling owners will make Turkish company stocks more attractive for the outside investors. As per the 'law matters' thesis, this development would be because stronger protections have given investors the confidence to buy small stakes in a company. In turn; 'such confidence means that investors are willing to pay full value for shares made

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[1604] Presidency of the Republic of Turkey, Investment Office 'Economic Outlook' <http://www.invest.gov.tr/en-US/turkey/factsandfigures/Pages/Economy.aspx> accessed 23 November 2017.

[1605] U Bozkurt, 'Neoliberalism with a Human Face: Making Sense of the Justice and Development Party's Neoliberal Populism in Turkey' (2013) 77(3) Science & Society 372, 373.

[1606] AKP, 'Party Programme - The Economy' <https://www.akparti.org.tr/english/akparti/parti-programme#bolum_> accessed 11 November 2018.

[1607] T Dorlach, 'The Prospects of Egalitarian Capitalism in the Global South: Turkish Social Neoliberalism in Comparative Perspective' (2015) 44(4) Economy and Society 519, 536.

[1608] For a further analysis from a socio-cultural perspective on why family owners in Turkey would be reluctant to give up their control, see Buğra, *State and Business in Modern Turkey* (n 92) Chapter 4.

available for sale, which in turn lowers the cost of capital for firms that choose to sell equity in financial markets.'[1609] In fact, a similar effect was observed when Turkey experienced increased merger and acquisition activity after the 2001 crisis, which led to increased demand for Turkish stock. This resulted in controlling shareholders selling their stakes with very high premiums.[1610] Thus, as Cheffins has noted, in such a scenario 'most controlling shareholders will be content to unwind their holdings since the law will largely preclude them from exploiting their position.'[1611] Indeed, by obliging the formation of independent boards and professional management, new corporate governance laws aim to preclude controlling shareholders from influencing company decisions.

A second factor which will be discussed in the last part of the chapter is that independent boards are more likely to prioritise share price increases, unlike controlling owners who 'are likely to have a preference for retaining and reinvesting earnings over distributing them, even when it is inefficient to do so'.[1612] These factors will increase the demand for BIST listed stocks, which increases share price and result in companies offering more shares to the public. Subsequently, if the share prices reach a point whereby it makes more sense for controlling owners to sell rather than to hold onto control, this would facilitate the diffusion of large holdings. On this point, Roe has noted that 'mechanically smooth corporate law is important for a nation in facilitating diffuse ownership and investor protection.'[1613] He has added that when this is absent, family owners stay in charge to ensure they protect their own interests through holding majority shares. However, if their presence is replaced by management that would pursue shareholder interests as a whole by increasing shareholder value, there would no longer be a need for the owner families to remain in charge.[1614]

Indeed, after an increase in professional management, family members' control of the boards of Turkish listed companies has declined.[1615] On this point, Young and others have pointed out that 'it may be in the best interest of the firm's continued development for founders (or the founding family) to yield control'.[1616] As Hansmann and Kraakman have argued, the controller owners can capture greater economic gains by selling their shares at a premium; otherwise, if they stay in control, the only way to maximise their returns would be through self-dealing, for

[1609] Cheffins, 'A Darwinian Link' (n 1484) 350.
[1610] Ararat, '"Comply or Explain" Without Consequences' (n 69) 357.
[1611] Cheffins, 'A Darwinian Link' (n 1484) 350.
[1612] Hansmann and Kraakman (n 12) 460.
[1613] Roe, *Political Determinants of Corporate Governance* (n 1514) vii.
[1614] Talbot, *Critical Company Law* (n 128) 133.
[1615] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 76.
[1616] MN Young and others, 'Corporate Governance in Emerging Economies: A Review of the Principal–Principal Perspective' (2008) 45(1) Journal of Management Studies 196, 197.

instance.[1617] However, the authors have added that for the controlling owners to capture these economic efficiencies, 'the legal regime must offer means by which restructured firms can commit to good governance practices.'[1618] The new corporate governance framework provides exactly this purpose.

c. Implications for the Stakeholders

I have argued so far that the new Turkish corporate governance framework has adopted the mainstream model advanced by the OECD Principles, which resembles the rules and mechanisms found in the Anglo-American system of wide share dispersal. I have also discussed how laws with strong minority protection are able to facilitate a convergence of corporate governance systems and ownership structures in countries with controlling owners. In line with these discussions, I illustrated that the foreign ownership of Turkish company stocks has increased over time, and that the increase accords with the timing of the reforms in corporate governance laws in Turkey. This finding supports the 'law matters' theory, which argues that share dispersal in companies increases when a country strengthens legal protections for shareholders. If investors feel secure about becoming minority shareholders, this should positively impact stock prices. In turn, this provides incentives for companies to float a larger proportion of their shares and for block holders to diffuse their holdings due to the high premiums they would receive. This implies not only a transformation of the dominant ownership structure in Turkey to a wide-share dispersal model, but also the transfer of control from the owner families to outsiders.

In this last part of the chapter, I discuss the possible implications of a scenario where control of the family owners passes to professional management and independent boards under a share dispersal model. I contend that if shareholdings are diffused enough so that no group has control over the company, the management is more likely to solely pursue shareholder interests because they are responsible towards shareholders as a class and are not bound to consider any other interests under the mainstream corporate governance laws. On this point, Talbot has argued that general shareholder interest corresponds to 'short-term, profit maximising goals'.[1619] This management objective inherently excludes taking into account the interests of other stakeholders. On the other hand, while the presence of controlling shareholders has been criticised for their ability and incentives to expropriate value from minority shareholders,[1620]

[1617] Hansmann and Kraakman (n 12) 460-461.
[1618] Ibid
[1619] Talbot, 'Why Shareholders Shouldn't Vote' (n 192) 793.
[1620] Claessens, Djankov and Lang, 'The separation of Ownership and Control' (n 95) 82.

controlling shareholders may be better stewards for protecting the interests of stakeholders and society. While I refrain from making the bold assumption that the dispersed ownership model is detrimental for the stakeholders per se, I argue that in the Turkish context, controlling owners, especially family owners, are better placed to steer the company in line with long-term objectives and more amenable to considering stakeholder interests.

Theoretically, in a stock market with widely dispersed shares, wealth is not distributed amongst more people. By contrast, it becomes concentrated within a smaller segment of the wealthiest investors, thus exacerbating inequality. De Vroey has used a Marxist lens to expand on share dispersal in joint-stock companies as a stage in the process of socialising the means of production.[1621] Accordingly, the emergence of joint-stock companies had two interrelated consequences: 'firstly a functional differentiation between ownership and management and secondly, a dispersion of share ownership among the public, going alongside with a concentration of power into the hands of big stockholders.'[1622] On the first point, Marx has recognised the different roles performed by the capitalist in the production process to be 'money capitalist' and 'industrial capitalist'.[1623] He has explained that the 'profit of enterprise appears to him [industrial capitalist] as the exclusive fruit of the functions he performs with the capital […] in contrast to the non-activity and non-participation of the money capitalist in the production process.'[1624] However, Marx has stated that in both instances the profit accrued to the capitalist 'as a mere reward for capital ownership'.[1625] Nevertheless, he has perceived this 'functional differentiation' as 'a manifestation and a stage of the process of socialization of capitalist production.'[1626] Indeed, he has noted that when ownership and control are completely separated in joint-stock companies, the manager becomes a type of skilled labour, and the company's undertakings become a form of social undertaking, which indicates the abolishment of private capital in lieu of social capital.[1627]

Nevertheless, the separation of ownership and control that led to share dispersal did not socialise the capital as anticipated. Instead, as Ireland has argued, 'their immediate effect had been productively dysfunctional "financialisation".'[1628] Moreover, this separation allowed capitalists

[1621] MD Vroey, 'The Separation of Ownership and Control in Large Corporations' (1975) 7(2) The Review of Radical Political Economics 1.
[1622] Ibid 3.
[1623] Marx, *Capital Volume III* (n 160) 493.
[1624] Ibid 497.
[1625] Marx, *Capital Volume III* (n 160) 567.
[1626] Vroey, 'The Separation of Ownership and Control in Large Corporations' (n 1621) 3.
[1627] Marx, *Capital Volume III* (n 160) 567.
[1628] P Ireland, 'Corporate Schizophrenia: The Institutional Origins of Corporate Social Irresponsibility' in Nina Boeger and Charlotte Villiers (eds), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart 2018) 25.

to control the means of production by owning a smaller proportion of the total shares; as De Vroey has noted, 'Paradoxically, dispersion of stock thus favors the centralization of capital.'[1629] Hence, the dispersion of share ownership is not an obstacle to the concentration of control but an allocation of control in a smaller segment of the capitalist class.[1630] A dispersed ownership structure thereby enables a small but powerful class of global investors to gain control of various companies in different jurisdictions by holding only a small stake in each of these companies. This not only allows them to diversify their investment and reduce the risks they are exposed to from portfolio investments but also facilitates the accumulation of profit in the hands of a small group of the wealthiest, thereby worsening inequality. On this point, Ireland has examined the financial property ownership patterns in countries known for wide share dispersals such as the United States and the United Kingdom, illustrating that although share ownership has spread amongst the public, the distribution of wealth remained concentrated in a 'small, privileged elite'.[1631] Indeed, recent figures from the US are a case on point. In 2016, nearly 52% of the US households owned stocks, which indicates that share ownership is indeed widespread. [1632] Nevertheless, a study by Wolff has demonstrated that by 2016, the wealthiest 10% in the US owned 84% of the total value of stocks, which highlights the inequality and concentration of wealth.[1633] The US Federal Reserve has admitted that 'Families at the top of the income distribution saw larger gains in income between 2013 and 2016 than other families, consistent with widening income inequality.'[1634] Thus, Ireland has refuted the shareholder primacy norm's claim to benefit large segments of society who are shareholders.[1635] Instead, he has argued on point that 'the emergence of public shareholder class'[1636] has helped legitimise the pursuit of the shareholder wealth maximisation objective on a broader level by enabling capital and power to be concentrated in the hands of financial institutions that exert shareholder primacy worldwide.[1637] Indeed, the mainstream corporate governance model has played an important role in forming consensus worldwide that companies ought to be maximising profits for shareholders and that this is the only viable objective.

[1629] Vroey, 'The Separation of Ownership and Control in Large Corporations' (n 1621) 5.
[1630] Ibid 4-5.
[1631] Ireland, 'Shareholder Primacy and the Distribution of Wealth' (n 34) 52.
[1632] Board of Governors of the Federal Reserve System, 'Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances' (2017) 103(3) Federal Reserve Bulletin <https://www.federalreserve.gov/publications/files/scf17.pdf> 20.
[1633] EN Wolff, 'Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?' (2017) No. 24085 National Bureau of Economic Research Working Paper Series <http://www.nber.org/papers/w24085.pdf>
[1634] Board of Governors of the Federal Reserve System, 'Changes in U.S. Family Finances from 2013 to 2016' (n 1631) 1.
[1635] Ireland, 'Corporate Schizophrenia' (n 1628) 32; Ireland, 'Shareholder Primacy and the Distribution of Wealth' (n 34) 78.
[1636] Hansmann and Kraakman (n 12) 452.
[1637] Ireland, 'Shareholder Primacy and the Distribution of Wealth' (n 34) 69.

Thus, one of the main objectives of the mainstream corporate governance model is to create a system whereby the control of listed companies is transferred to global investors, so the latter can ensure the surplus value accrues back to them. As Soederberg has asserted, the imposition of the Anglo-American governance model on emerging markets economies aims to protect the interests of 'foreign capital' 'by placing greater emphasis on "shareholder value" than other variants of corporate governance'.[1638] Hence, corporate governance laws that are based on the mainstream model act as instruments to advance the interests of capitalists, particularly the global investor class. As Ireland has pointed out, 'the development of global standards of 'good governance' aimed principally at creating a sounder platform for further financialisation, holding out to compliant developing countries the promise of foreign capital and to Western investors the promise of new, secure investment outlets.'[1639] This has been necessary to ensure that foreign investors can influence where the company profits go. Unless the profit-maximising rationale is imposed on the company, there is the risk that domestic controlling owners may pursue objectives that reduce their wealth such as raising employee salaries and safety standards or making social investments. This explains the mainstream model's insistence on professional management and independent boards and rejects any majority influence over these bodies.

Harvey has noted that since control by the majority is regarded as 'a potential threat to individual rights', neoliberals prefer governance by 'experts and elites'.[1640] Indeed, if owners' majority holdings (and thus their control over the company) are diffused, their empty seats will be filled by outsiders to the company. The job security of professional management depends on how well they deliver shareholder expectations. If they fail to sufficiently maximise shareholder wealth, it will be possible to easily replace them because control will be vested in a dispersed group of shareholders whose only commonality lies in the expectation of high dividends and increases in their share price. In other words, company management will be operating for purely 'market goals', which refer to profit maximisation in line with shareholder interests.[1641] As Talbot has argued, under neoliberal corporate governance, maximising profit is promoted as 'the acme of managerial achievement', whereas long-term orientations or social concerns are not valued.[1642]

On the other hand, independent directors who are endowed with the duty to monitor executives to make sure shareholder interests are prioritised have another function under the mainstream model. Ireland has demonstrated how the 'outside', 'independent', or 'non-executive' directors

[1638] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 66.
[1639] Ireland, 'Law and the Neoliberal Vision' (n 316) 27.
[1640] Harvey, *A Brief History of Neoliberalism* (n 35) 66.
[1641] Talbot, *Critical Company Law* (n 128) 1.
[1642] Talbot, *Progressive Corporate Governance* (n 9) 225.

have been instrumental in disseminating the 'shareholder value culture' in boards in the UK.[1643] Thus, the independent directors play an important role in ensuring the shareholder-primacy mentality is rooted within the company. The significance of independent directors in the context of Turkey should also be viewed in this light. The recent reforms mandate that at least one-third of listed company boards must be composed of independent non-executive directors.[1644] Studies, however, have shown that the presence of independent directors has lowered the performance of Turkish companies.[1645] However, the primary function of independent directors in Turkish companies appears to be unrelated to their contribution to performance; instead, their main purpose is to curb controlling owners' influence over the boards. In 2006, when independent directors were not mandatory under the CMB Principles, the OECD had commented on the desirability of independent boards in Turkish companies:

> in many companies, the lead controlling shareholder, or shareholders, informally decide on nominees with very little or no input either from other board members or constituencies within the company. […] Although minority shareholders are not restricted from speaking up at meetings, they have limited power to influence the election of board members or cause board members to be removed.[1646]

This highlights the role assigned to the independent boards and their ability to further minority interests, which effectively means pursuing the singular objective of increasing shareholder wealth. Similarly, there is the fear that a board that is unresponsive to shareholders may pursue goals that are not in interests of the majority nor minority shareholders.[1647] Indeed, in the post-war era, company officials gained a degree of autonomy from the shareholders, which allowed them to use discretion to form a compromise between labour and the power of capital.[1648] Although it is highly doubtful that executives would act similarly under the neoliberal climate of the current business world, the mainstream governance model ensures that the boards are solely responsive to shareholders. In sum, in advocating a board composed of independent directors, the contemporary interpretation of independence seems to suggest independence from the controlling owners only. As long as the board acts in accordance with the shareholder primacy norm and for the common interests of the shareholders as a class, then they will have

[1643] Ireland, 'Financialization and Corporate Governance' (n 252) 21.
[1644] CMB Principles 4.3.2.-4.3.4.
[1645] Ararat, Black and Yurtoglu, 'The Effect of Corporate Governance on Firm Value and Profitability' (n 158); Ararat, Orbay and Yurtoglu, 'The Effects of Board Independence in Controlled Firms' (n 97); E Otluoğlu and SE Sarı, 'Board Independence And Financial Performance In Turkey: An Evidence On BIST 100' (2018) 16(2) Manisa Celal Bayar Üniversitesi Sosyal Bilimler Dergisi 99.
[1646] OECD, 'A Pilot Study' (n 159) 37.
[1647] Davies, 'The Board of Directors' (n 1470) 12.
[1648] Duménil and Lévy, *Capital Resurgent* (n 45) 14.

fulfilled the independence criteria. The same is true of professional management; as long as the dominant economic view in companies are informed by the neoliberal ideology and its extension of the mainstream corporate governance model, managers will only seek to maximise shareholder value.[1649]

On the other hand, the limited liability and the unrestricted transferability features of the joint-stock company form not only provide liquidity to the company share, but also grant shareholders the ability to diversify their investment.[1650] The dispersed ownership structure further enhances the mobile character of capital by creating opportunities for surplus creation across multiple locations without being tied down to a certain place or a production process. From a Marxist lens, dispersed ownership structure is seen as 'a means to mobilize the ever-increasing amount of capital needed for accumulation.'[1651] Indeed, the mobile character of the share coupled with the liberalisation and dispersal of stock markets have made it much easier for global investors to use near-instant transactions to enter and exit the company and the market. The priority accorded to shareholder interests in corporate governance is similarly justified on the basis that they are exposed to the greatest risk as residual owners. However, this argument is invalid because global investors are mainly institutional investors who reduce their risk by diversification.[1652] Overall, the availability and the ease of exit options from the company, facilitated through the specific characteristics of the joint-stock company, have further strengthened the power of the investor class compared to the stakeholders.[1653]

It is true that stakeholders cannot exit the company as easily as shareholders. Amongst the various stakeholders, creditors are generally accorded priority and protected by laws because they are regarded as 'crucially affected' by the limited liability of shareholders.[1654] The logic of the capitalist relations of production also protects creditors more than the rest of the stakeholders because creditors are the providers of capital. Other stakeholders such as the employees, suppliers, consumers, the environment, and the society in which the company operates are all bound with the company at varying levels but share the trait of having greater vested interests in the continuity of the business than the dispersed shareholders. Furthermore, they are all affected by how the company chooses to conduct business, and if they are harmed as a result of

[1649] Talbot, *Progressive Corporate Governance* (n 9) 2.
[1650] Kraakman and others, *The Anatomy of Corporate Law* (n 13) 10.
[1651] Vroey, 'The Separation of Ownership and Control in Large Corporations' (n 1621) 4.
[1652] J Williamson, 'Beyond Shareholder Primacy-The Case for Workers' Voice in Corporate Governance' in Nina Boeger and Charlotte Villiers (eds), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart 2018) 179.
[1653] Engelen, 'Corporate Governance, Property and Democracy: A Conceptual Critique of Shareholder Ideology' (n 74) 305.
[1654] Davies, 'The Board of Directors' (n 1470) 3-4.

company operations they usually have limited or no exit options. Controlling owners are similar to stakeholders in that they are tied to the company because they own large stakes or made contributions beyond the financial to the company. As Hilferding has noted, shareholders can recover their capital investment in the company at any time by selling their share or receiving dividends as long as they are in the position of 'money capitalist'.[1655] On the other hand, the industrial capitalists (the controlling shareholders in this case) cannot withdraw their capital as easily. In sum, while the global investors' downside is limited by the amount of their investment, the rest of the company constituencies must shoulder the responsibility and bear the negative consequences should the business go bankrupt.

The case for employees as a stakeholder group merits further discussion. Even though capitalism regards an employment contract as the outcome of a bargain amongst equal parties, in reality, employees usually cannot enforce their terms on the employer. The unequal bargaining power of the employee stems from the competitive labour market, which is a result of the neoliberal policies that shifted the government policy focus away from unemployment.[1656] The result is an abundant workforce that is ready to work whenever or under whatever conditions imposed by the employer. This has been made possible through the weakening of organised labour vis-à-vis capital, which ensures cheap labour.[1657] As a result, the exit options of employees are significantly restricted. They cannot easily leave the company they work for because their livelihood usually depends on it. Jobs have become extremely scarce in the competitive labour market; as Williamson has put it, 'few workers can simply leave one job and walk into another.'[1658] Also, employees generally commit themselves to a certain geographical location,[1659] which limits their pool of accessible jobs and exit opportunities. Finally, the employees will have invested their time and resources into acquiring skills and education specific to that company, which may not transferable.[1660] Hence, employees are placed in a relatively powerless position in the company that is exacerbated by the competitive and flexible labour markets. [1661] Indeed, the flexibility of labour is an important component of the reduction of the power of labour over capital in the neoliberal capitalist system. Neoliberalism has advanced the idea that employees are a 'mere factor of production' to create the norm of the 'disposable worker'.[1662] Similarly, the shareholder primacy proponents rely on a flexible

[1655] Hilferding, *Finance Capital* (n 1575) 108.
[1656] Duménil and Lévy, *Capital Resurgent* (n 45) 16; Stiglitz, *The Price of Inequality* (n 402) 76-78.
[1657] L Talbot, 'Capitalism: Why Companies are Unfit for Social Purpose and How they Might be Reformed' in Nina Boeger and Charlotte Villiers (eds), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart 2018). 107
[1658] Williamson, 'The Case for Workers' Voice in Corporate Governance' (n 1652) 179
[1659] Talbot, *Progressive Corporate Governance* (n 9) 132.
[1660] Ibid.
[1661] Harvey, *A Brief History of Neoliberalism* (n 35) 168.
[1662] Ibid 167-169.

workforce because they are concerned with reducing the cost of labour.[1663] This leads to greater exploitation of the worker but allows more surplus value to accrue to the shareholders, which is desirable for capitalist interests.

At the end of 2017, the unemployment rate of the total labour force in Turkey stood at 11.26%.[1664] This figure is very high compared with the OECD average of 5.78%, considering that Turkey is also included in the calculation of this average.[1665] Furthermore, the Prime Minister of Turkey has also commented that the Turkish economy is finding it hard to employ the increasing number of university graduates.[1666] Indeed, the unemployment figures for the young population aged between 15-24 reached over 21% by the end of 2017.[1667] Despite the stark picture, Turkey's labour market is not regarded to be competitive enough. According to the World Economic Forum's Global Competitiveness Index, Turkey ranks 111th out of 140 countries on the overall score for the competitiveness of its labour market. Unsurprisingly, the United States, which prides itself on its competitive economy, is indicated as the 'Best Performer' under this category.[1668] The lack of competitiveness of the Turkish labour market may be attributed to its corporate sector being dominated by family-owned companies and their commitments to employees and society.

It is also interesting to note that the unions in Turkey have kept quiet over the recent reforms of corporate governance. This could be attributed to the 2010-2012 passing of the new laws on unions and social insurance that were criticised heavily by the worker unions.[1669] The practical rules in these pieces of legislation may have diverted their attention away from the more detailed corporate governance provisions in CMB communiques onto the more practical rules contained in these laws. At the same time, another plausible explanation is the socio-cultural traits found in the Turkish business environment that dictates a steep hierarchy, subordinating the employees to their 'leaders'.[1670] As a result, employees feel they have no say in company decisions. This

[1663] Talbot, *Progressive Corporate Governance* (n 9) 136.
[1664] The WB, 'Unemployment, total (% of total labor force) (modelled ILO estimate)' (2017) <https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?contextual=default&locations=TR> accessed 8 November 2018.
[1665] Ibid.
[1666] Ö Özdemir, 'Türkiye'de üniversite eğitimi genç işsizliğini tetikliyor mu? (Does university education in Turkey trigger unemployment?)' *BBC News Turkish* (21.11.2017) <http://www.bbc.com/turkce/haberler-turkiye-42053683>.
[1667] Turkish Statistics Institute <http://www.tuik.gov.tr/HbGetirHTML.do?id=27697> accessed 18 July 2018.
[1668] World Economic Forum, ' The Global Competitiveness Report 2018' (Geneva 2018) 570.
[1669] Bozkurt, 'Neoliberalism with a Human Face' (n 1605) 386
[1670] S Fikret Pasa, H Kabasakal and M Bodur, 'Society, Organisations, and Leadership in Turkey' (2001) 50(4) Applied Psychology An International Review 559.

is also related to the predominant traits of paternalism and patriarchy in Turkish society, which lead to employees believing that the company owners will have their best interest in mind. [1671]

Indeed, it can be argued that family-controlled companies in Turkey, which account for the majority of listed companies, are better positioned than dispersed shareholders to consider the interests of their employees and other stakeholders. For several reasons, companies run by families tend to have greater incentives to pursue societal goals alongside their profit-making objective.[1672] For instance, Danielsen has noted that 'locally owned national firms might have more of a stake in things like the quality of the local environment, the strength of the local economy, the education and training of local labour pool and national economic development through capital reinvestment.'[1673] Also, family owners are generally located close to where the company operations take place. Due to this proximity, they have a close relationship with employees, suppliers, consumers, and society generally. Although it can be argued that the proximity factor has weakened due to the growth of multinational companies, this is not the case in Turkey; there are only 13 multinational companies owned by Turkish families,[1674] and the majority of family companies are still located in their area of operations.

On the other hand, outside shareholders usually have no physical connection or proximity to a company, which distances them from any moral obligation towards its stakeholders. As a result, outside investors may only lose a portion of their capital invested in the company, which is usually the extent of their concerns.[1675] This is particularly relevant when company operations pose a moral hazard for the environment that would directly affect the domestic owners that are located there and possibly their future generations but would not impact foreign investors.

[1671] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 54. These factors help explain some of the reasons why workers have not intervened in the corporate governance reform process in Turkey, although more specific factors in the broad context of union/worker and business relations merit an area of further research. On this topic, see U Çakmakçı and B Oba, 'The Role of Employer Unions in Hegemonic Struggle, Interest Representation and Promotion of Managerial Perspectives in Turkey' (2007) 49(5) Business History 695.

[1672] Despite this generalization, it cannot be claimed that all family companies will share this notion, corporate scandals towards profit maximization have occurred in various family-controlled companies, most recent example being the Volkswagen Group, which was found to have devised a software in order to cheat emission testings by the Untied States' Environmental Protection Agency. The Volkswagen Group is indirectly controlled by the Porsche and Piëch families.

[1673] D Danielsen, 'Corporate Power and Global Order' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 96.

[1674] İ Bigan, S Decan and B Korkmaz. 'How Turkish companies can become global successes' (*McKinsey*, November 2017) <https://www.mckinsey.com/industries/retail/our-insights/how-turkish-companies-can-become-global-successes> accessed 12 November 2018.

[1675] This is also true for when companies outsource their labour power, such as the case where Apple outsourced its labour to China in which the workers were employed in dangerous conditions; in R Bilton, 'Apple failing to protect workers' *BBC News* (18.12.2014) <http://www.bbc.co.uk/news/business-30532463>. When this incident was exposed, the investors were mainly concerned on how much the share price would decline as a result of these practices coming to light.

Additionally, family owners tend to regard themselves as the 'guardians of the firm's reputation'.[1676] Turkey is a case on point; its companies are usually represented by the last names of their owners, which creates reputational links with the company and family. This name recognition imbues the owner family with a stronger sense of responsibility and accountability towards the public, which can lead to a more stakeholder-oriented approach in governance.

Sociocultural traits have also been one of the main factors shaping corporate governance practices in Turkey.[1677] With respect to Turkish companies, the OECD has noted that 'families run their companies not just with profit interests in mind, but also with pride and commitment.'[1678] Buğra has conducted interviews with the owners of the largest companies in Turkey and found that family owners appear to lack confidence about the legitimacy of businesses that are undertaken solely for profit.[1679] Accordingly, Turkish businessmen are somewhat apologetic for their companies' success and often try to highlight their business' positive impact on the society.[1680] Moreover, business relationships in Turkey are generally built on trust within the company and in relationships with the stakeholders because family companies take pride in their social capital.[1681] Therefore, family companies in Turkey tend to act as 'social establishments' that build schools, universities, and hospitals for the public good.[1682] The family owned companies in Turkey are more akin to a public entity that serves society; however, a widely dispersed company, especially one that is owned by global investors, would no longer have the capacity or interest to treat stakeholders responsibly unless it serves the shareholders' interest by maximising profit.

The difference in ownership structures also reflects an important choice in terms of management's orientation. Villiers has argued that the hierarchical structure found in large dispersed companies replaces 'paternalistic corporate heads' who have a sense of responsibility to their society with 'more economically driven, more coldly rational' managers.[1683] This stance reflects the advantages of Turkish controlling owners as discussed above. Engelen has also noted that if a company is not widely dispersed and has controlling shareholders, it tends to

[1676] Cheffins, 'A Darwinian Link' (n 1484) 362
[1677] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 54.
[1678] OECD, *'Corporate Governance, Value Creation and Growth: The Bridge Between Finance and Enterprise'* (2012) 38.
[1679] Buğra, *State and Business in Modern Turkey* (n 92) 4.
[1680] Ibid.
[1681] OECD 'Corporate Governance, Value Creation and Growth' (n 1678) 39.
[1682] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 77.
[1683] C Villiers, 'Corporate Governance, Responsibility and Compassion: Why we should care' in Nina Boeger and Charlotte Villiers (eds), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart 2018) 153.

have long-term and integrated objectives instead of a speculative orientation.[1684] Cliff and Jennings have found that family owners are more committed and long-term oriented.[1685] Ireland has also argued that

> the rootedness and relative lack of mobility of this more 'committed' capital also enhances the status and bargaining position of non-shareholding groups, facilitating both a more relational and more stakeholder-oriented conception of the corporation – with longer term productive and strategic horizons – an a more 'welfarist' version of capitalism.[1686]

Indeed, in a recent survey, the executives of listed companies from countries with different ownership structures were questioned on their views of their companies' priorities. The results were as follows:

> In the UK and the US 70-80% of executives thought their companies' interests were essentially shareholder-oriented. In the case of France and Germany, those figures were about 20%, while 80% thought their companies' interests were aligned with stakeholders broadly speaking.[1687]

When companies are run by professional management, they tend to adopt a short-term approach and conduct risky activities to acquire the highest possible returns for shareholders and for themselves through performance-related compensation plans. This approach encourages management 'to neglect the long term and reap immediate benefit from short-term focused actions that may have long-term adverse consequences.'[1688] In the end, short-termism affects not only the shareholders and managers who pursue it but also the stakeholders, the economy, and society at large. This is clear from the recent global financial crisis.

Family controlled companies are also recommended because they provide better performance, especially due to their ability to reduce the agency problem as they have 'a monitoring advantage'.[1689] Accordingly, owner families maximise company value by diminishing agency

[1684] Engelen, 'Corporate Governance, Property and Democracy: A Conceptual Critique of Shareholder Ideology' (n 74) 308.
[1685] JE Cliff and PD Jennings, 'Commentary on the Multidimensional Degree of Family Influence Construct and the F-PEC Measurement Instrument' (2005) 29(3) Entrepreneurship Theory and Practice 341, 342.
[1686] Ireland, 'Financialization and Corporate Governance' (n 252) 22.
[1687] OECD 'Corporate Governance, Value Creation and Growth' (n 1678) 31.
[1688] C Helms, M Fox and R Kenagy, 'Corporate Short-termism: Causes and Remedies' (2012) 23(2) ICCLR 45.
[1689] OECD 'Corporate Governance, Value Creation and Growth' (n 1678) 38.

costs because 'the family's welfare is so closely linked to firm performance.'[1690] Gurarda Ozsoz and Ates have asserted:

> Family-owners acting as managers for a long time also tend to develop comparative advantage through capital increases and searching for new investment opportunities compared to other nonfamily managers aiming for short-term profits. Thus, […] long-term orientation of the family owner reduces agent cost and lead to better performance outcomes.[1691]

The OECD has provided empirical evidence from Swiss family companies to illustrate that they performed better than other companies.[1692] The 'superior performance of family firms' has been found to be particularly true in the case of emerging markets.[1693] Nevertheless, I do not argue that family controlled companies perform better than companies with dispersed ownership; my point is that they are better stewards for the interests of their stakeholders and do not solely focus on profit. In sum, the presence of 'soft factors'[1694] in the Turkish context and the sake of more stakeholder-oriented governance may justify preserving the family control of listed companies rather than professional management.

All in all, Turkey's new corporate governance framework is poised to convert to the wide-share dispersal model due to the increasing share of foreign investors in the BIST and the slow but steady increase in the free-float ratios of listed companies. These developments occurred alongside the increased legal shareholder protections that provide rights to minority shareholders that empower them over controlling owners. Furthermore, the imposition of the independence requirement on the majority of the board members signifies a change of control of listed companies from domestic families to professionals. This effectively means restoring global capital's power to discipline companies and subjecting management to pursuing the profit maximisation objective.[1695] In this setting, any costs are externalised onto 'dominated social classes and countries' in search of global capital's higher rate of return.[1696] From a Marxist lens, the imposition of the shareholder wealth maximisation agenda becomes possible

[1690] R Anderson and D Reeb, 'Founding-Family Ownership, Corporate Diversification, and Firm Leverage' (2003) 46(2) The Journal of Law & Economics 653, 658-659.
[1691] Gurarda, Ozsoz and Ates, 'Corporate Governance Rating and Ownership Structure' (n 716) 5.
[1692] 'Among listed companies on the Swiss Stock Exchange, about half are family companies and their performance from 1990 to 2005 was an astonishing 60% better than the rest of the companies' in OECD 'Corporate Governance, Value Creation and Growth' (n 1678) 38.
[1693] M Carney, 'Corporate Governance and Competitive Advantage in Family-Controlled Firms' (2005) 29(3) Entrepreneurship Theory and Practice 249, 251.
[1694] OECD 'Corporate Governance, Value Creation and Growth' (n 1678) 38.
[1695] Duménil and Lévy, *Capital Resurgent* (n 45) 185.
[1696] Ibid 191.

because the global investor class 'collectively holds shares of corporate ownership sufficiently concentrated to permit it to monopolize the power of assignment and disposition of the means of production and to use this power for its specific class interests, i.e. to produce and realize surplus-value.'[1697] Indeed, dispersed ownership does not mean the dispersal of wealth among more people; it means the concentration of power and wealth in the hands of a smaller and more prominent group of capitalists, which leads to further inequality.

4 Conclusions

The first part of the chapter analysed whether the mainstream model of corporate governance has been incorporated into Turkish laws through the recent reforms. The OECD Principles have been utilised as the reference point for the mainstream model because they represent the cornerstone of the neoliberal shareholder primacy model. The OECD Principles closely resemble the market-centric outsider model of wide share dispersal. Thus, the imposition of the mainstream corporate governance model on emerging markets 'acts to recreate the existing power structures of the neoliberal market-centric system.'[1698] This perspective makes clear the raison d'etre of the Turkish corporate governance reforms. Turkish companies are defined by an insider model where ownership and control are concentrated in owner families through group company structures. The adoption of corporate governance rules based on a different system that does not correspond to Turkish companies' particular challenges suggests that the reforms intended to create conditions that were favourable for the global investors. Because of this, Turkish companies were reluctant to implement the voluntary CMB Principles.[1699] Therefore, a stringent legal reform process was undertaken with the radical move of imposing mandatory corporate governance principles on listed companies to ensure they abided by the exigencies of the neoliberal mainstream model.

The OECD's Pilot Study has been instrumental in assessing whether Turkey has been successful in conforming to the mainstream model. This report was published during the drafting stage of the relevant legislation and is a roadmap to the IFI's expectations of Turkey because the OECD Principles constitute the corporate governance module of the ROSCs. The OECD has stated that its principles can be used by policymakers to develop legal and regulatory corporate governance frameworks which 'reflect their own economic, social, legal and cultural circumstances, and by market participants as they develop their own practices.'[1700] Talbot has argued that this stance

[1697] Vroey, 'The Separation of Ownership and Control in Large Corporations' (n 1621) 5.
[1698] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 153.
[1699] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 62.
[1700] Preamble. OECD, Principles of Corporate Governance 2004. 11

'represents a dialectical relationship between the ideal (neoliberal shareholder primacy) and the compromise (individual countries' cultural context), which is expressed in corporate governance codes.'[1701] However, instead of accepting Turkey's specific circumstances and ownership structure, the OECD has attempted to dictate its own corporate governance standards by using its Pilot Study to grade Turkey with scores that range from 'Fully Implemented' to 'Not Implemented'. Soederberg has argued that

> the OECD contradicts this sensitivity of national specificities by insisting not only that 'universal' standards exist, such as fairness, transparency, accountability and responsibility, but also that they can be applied across a broad range of legal, political and economic environments.[1702]

For instance, the OECD's 'universal' principle of fairness only refers to the equal treatment of minority and majority shareholders, whereas in the Turkish context, the controlling shareholders counterbalance the contingencies of neoliberalism and its dogma of shareholder value maximisation. These controlling shareholders provide a cushion for the stakeholders and society by ensuring that the listed companies not only work towards securing returns for investors through increased share prices and dividends but also contribute to society and the economy in manners other than the financial.

In sum, Turkish corporate governance laws have undergone extensive reforms aimed at strengthening the position of minority shareholders vis-à-vis the controlling owners and introducing mandatory principles to establish professional management and independent boards. Moreover, the reforms introduce rules specifically designed to facilitate foreign shareholder participation such as the requirement for online general assembly meetings and electronic voting for listed companies. These rules aim to increase the influence of foreign shareholders in company decision-making. Meanwhile, the shareholder primacy norm is maintained both in company law provisions and the CMB Principles. Within the CMB Principles, mandatory rules are found only under the 'Shareholders' and 'Board of Directors' headings. The mandatory principles under Shareholders and the relevant TCC articles seek to increase the involvement of non-controlling shareholders in decision-making by facilitating their access to information, right to representation, and right to elect board members. Binding rules for the BoDs ensure that independent directors are dominant in listed company boards to restrict the influence of family owners over the company.

[1701] Talbot, *Progressive Corporate Governance* (n 9) xx.
[1702] Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South' (n 70) 17.

All in all, the new corporate governance framework is thus a clear attempt by the legislators to reallocate the power from controlling owners to professional management that pursues the interests of dispersed shareholders. Since domestic investors constitute a small part of the outside shareholder base in the Turkish stock market, the laws effectively focus on foreign investors. Additionally, the reforms on corporate governance remain quiet on the issue of stakeholder rights; the CMB Principles on stakeholders are all non-binding. This accords with the bottom line of the mainstream model, which essentially lacks any 'social substance'.[1703] Overall, the chapter concludes that Turkey has indeed gone mainstream in the area of corporate governance by adopting the fundamentals of the OECD Principles.

Nevertheless, the prevalent ownership structure and the presence of controlling family owners have been perceived to be obstacles for securing the interests of global investors in Turkey. This is because ownership concentration prevents the development of stock markets, thus hindering the liquidity and mobility aspects of the company share. However, these features of the company share are necessary for the capitalists 'to increase their opportunities to search out surplus value by keeping their wealth as fluid as possible.'[1704] Investing in economically and politically volatile emerging markets provides investors with the opportunity to receive high returns on their capital, and a widely diffused stock market reduces their risk because the capital remains liquid. Second, when making portfolio investments, capitalists need the assurance that companies will only pursue the shareholder wealth maximisation objective. This objective requires externalising all costs onto stakeholders so that the return to investors can be maximised. Turkey's new corporate governance framework addresses both of these 'problems'. It has already led to an increase in the number and value of foreign holdings of BIST-listed shares, as is evident from the figures pre-and-post reforms. This indicates that the overhaul in corporate governance laws has created a more favourable investment environment for foreign shareholders. The value of foreign investor holdings in Turkish companies is expected to further increase as the implementation of the new rules becomes widespread over time.

These developments suggest that the corporate governance reforms targeted the concentrated ownership structure of Turkish companies. Indeed, dispersal of large block holdings accelerated once the new legislation on corporate governance was enacted. It is thus reasonable to assume that owner families with majority holdings will also start selling their stakes because incentives to hold on to control will be mostly removed. This is because of the laws limiting their influence

[1703] Talbot, *Progressive Corporate Governance* (n 9) 190.
[1704] Talbot, 'Why Shareholders Shouldn't Vote' (n 192) 800.

in the company and the possibility of receiving high premiums once Turkish stocks become more attractive for outsiders. This theoretical assumption is supported by the arguments presented in the 'law matters' theory, which is that increased legal protection of minority shareholders is conducive to the transformation to diffused ownership. Indeed, the findings of La Porta and others 'suggest that dispersion of ownership goes together with good shareholder protection, which enables controlling shareholders to divest at attractive prices.'[1705]

The 'law matters' theory supports the supremacy of the outsider model and the law reforms that focus on shareholder interests.[1706] Accordingly, the theory claims that 'under optimal conditions, the best arrangement for corporate enterprise is a widely held professionally managed firm.'[1707] This resonates with neoliberal ideology, which advances the view that 'economic efficiencies will necessarily result from the adoption of its ideal type of corporate governance of dispersed share ownership, fluid markets and a professional management charged with the pursuit of shareholder value.'[1708] However, I do not agree with the claims that corporate structures and governance models will eventually converge into a 'superior' model by the virtue of economic forces.[1709] Instead, I argue that this model is not an economic necessity but instead the result of an ideological project to assert the power of global capital in emerging markets, where corporate governance laws are used to serve a particular class interest. However, I do not insist that a transformation towards diffused ownership will definitely occur because there are a multitude of factors that can impede the convergence of ownership structures.[1710] Whether the Turkish corporate landscape will converge into a dispersed market-centric model remains to be seen.

Finally, the implication from the above arguments is that family owners will lose their controlling position in the company to professional management. This will align company objectives with the interests of dispersed shareholders because management under the mainstream model 'implicitly treats shareholders as a homogeneous group with identical interest',[1711] where that interest is the exclusive pursuit of profit. Hence, if companies are to distribute all earnings as dividends and follow short-term strategies to increase share price at all

[1705] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 496.
[1706] Dignam and Galanis, *The Globalization of Corporate Governance* (n 61) 143.
[1707] Cheffins, 'A Darwinian Link' (n 1484) 377.
[1708] Talbot, *Progressive Corporate Governance* (n 9) xxv.
[1709] Hansmann and Kraakman (n 12) 449.
[1710] These factors range from political traditions and path-dependency, to cultural factors specific to each country. For these discussions, see; Dine and Koutsias, *The Nature of Corporate Governance* (n 5); Bebchuk and Roe, 'A Theory of Path Dependence' (n 1500); MJ Roe, 'Political Preconditions to Separating Ownership from Corporate Control' (2000) 53(3) Stanford Law Rev 539; Roe, *Political Determinants of Corporate Governance* (n 1514).
[1711] Stout, 'The Toxic Side Effects of Shareholder Primacy' (n 15) 2012.

costs, they must underinvest in research and development, reduce output quality, lower the salaries and working conditions of their employees, and possibly cause harm to the environment. These measures risk the long-term sustainability of the company. This also deteriorates the company's relationship with its stakeholders because it becomes harder 'to attract dedicated employees, loyal customers, cooperative suppliers, and support from local communities'.[1712] Thus, an economy dominated by companies with dispersed shareholders is more likely to operate for the sole benefit of the global investor class alone and to the detriment of stakeholders and society at large.

Moreover, share dispersal does not foster economic growth and create equality in the society; instead, it leads to an 'increasing tendency for economic power in the corporation to be held by an increasingly smaller elite'.[1713] As Ireland notes, the shareholder primacy norm thus intends to promote 'the primacy of a small, privileged elite; the primacy of the wealthiest ten percent'.[1714] Therefore, the adoption of the mainstream corporate governance model in Turkey will benefit the wealthiest class of global investors by facilitating the penetration of the country's ownership and control structures to make Turkish companies, its stakeholders, and society more suitable for exploitation. From a broader perspective, as Talbot has summed up, 'investor capitalism mediated through dispersed shareholding and professional management simply clarifies the underlying dynamics of capitalism'.[1715]

[1712] Ibid 2016.
[1713] Talbot, *Critical Company Law* (n 128) 39
[1714] Ireland, 'Shareholder Primacy and the Distribution of Wealth' (n 34) 67.
[1715] Talbot, *Progressive Corporate Governance* (n 9) 219.

CHAPTER VII – Conclusions

1 Summarising and Restating the Arguments

The corporate governance laws of a country are of utmost importance for not just the companies but also the economy and everyone in society because the laws determine the allocation of the vast wealth produced by company operations. It is this power that the companies possess that engenders debates over the purpose of the company. The orthodox view holds that companies exist to maximise the wealth of their shareholders and thereby indirectly maximise aggregate social wealth. Others have argued that companies ought to have a broader goal of serving societal interests. These debates are unpinned by ideology, which shapes preferences for a particular model of corporate governance. Today, the neoliberal paradigm informs the corporate governance structures of many developed capitalist nations and beyond with its pretence of shareholder primacy and wealth maximisation as the sole purposes of the company. This model has become mainstream globally through international organisations' dissemination of its supposedly universal values across emerging markets. In this light, the thesis set out to analyse the reasons, methods, and implications of Turkey's adoption of the mainstream model of corporate governance along with its recent legal reforms.

The starting point of the reforms in Turkey has been its underdeveloped stock market and reliance on foreign capital. To attract foreign investors, Turkey has overhauled its company and capital markets legislation and issued various regulations to create a corporate governance framework suitable for the interests of the outside investors. Although the reform process has been portrayed as a necessary precondition for economic growth, this thesis demonstrated that it has instead been driven by IFIs through either the conditions stipulated in return for financial assistance or the imposition of corporate governance standards backed by the implicit threats of capital flight or investment strikes in cases of non-compliance. The latter has been assumed by the OECD Principles, which promotes an Anglo-American model of governance predicated on the neoliberal efficiency assumption of widely dispersed and liquid stock markets that subject managers to the shareholder primacy norm. As Soederberg has remarked, all mainstream theorisations 'speak on behalf of certain interests'.[1716]

[1716] Soederberg, *Corporate Power and Ownership in Contemporary Capitalism* (n 63) 47.

Indeed, the reason that the Anglo-American model became the mainstream variant, despite the fact that its corporate system is the exception around the world,[1717] cannot be solely attributed to these countries' economic performance.[1718] Instead, the explanation lies in an understanding of whose interests the mainstream model intends to serve. As the joint-stock company is a primary organisation of production in capitalist societies, this requires examination of the underlying dynamics and class relations in capitalism. To that end, this thesis employed a Marxist critical framework to analyse the raison d'etre of the Turkish corporate governance law reforms. This aspect of the research indicates its unique contribution to the legal scholarship on corporate governance in Turkey since previous studies on this topic have remained within the confines of black-letter research. Thus, the thesis has a transformative purpose because it questions the common-sense assumptions prevalent in the legal study of corporate governance instead of accepting its norms as a given. Although this thesis is limited to analysing the case of Turkey, its findings can be interpreted in the broader context of other emerging market nations and the role of law in promoting the neoliberal capitalist logic in these markets for advancing certain class interests.

Viewing law through a Marxist lens indicates that it reproduces the capitalist relations of production and thus becomes an apparatus to serve the interests of the dominant class in the society. Within this theoretical framework, Chapter 2 laid out the backbone of the analysis of how the legal 'reconceptualization of the company share'[1719] has allowed the capitalists to circumvent the production process and thereby assign liquidity and mobility features to capital, transforming it into 'money capital' en route to greater profit accumulation. The elaboration of this process helps to explain the mainstream corporate governance model's insistence on developed stock markets with widely dispersed shareholdings as a necessity for sustaining the circuit of money capital on a global level. On the other hand, certain legal constructs, such as the legal right to property, have been instrumental in concealing and commodifying the relations of production and the related power struggles. In particular, the private ownership of the means of production has enabled the capitalists to assert their dominance over the labour class. This view finds expression in corporate governance's misleading perception that 'shareholders own the company' or that 'shareholders own the capital' in the contractual model, thus justifying the primacy of shareholders in the company.[1720] Moreover, through contract laws, market

[1717] According to the research by La Porta et al. dispersed shareholding structure is found to be the exception, rather than the norm around the world. In La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31) 496.
[1718] In fact, Stout notes that 'far from having proven itself a governance cure, the increasing influence of shareholder value thinking in business law and practice has been accompanied by, if anything, a decline in American corporate and economic performance' in Stout, *The Shareholder Value Myth* (n 8) 105.
[1719] Ireland, 'The Conceptual Foundations of Modern Company Law' (n 181) 152.
[1720] Dine and Koutsias, *The Nature of Corporate Governance* (n 5) 63.

exchanges are assumed to take place between equal parties. However, these laws are a veil which projects formal equality but obscures the unequal power of the market participants. This point finds its most stark expression in employment contracts. Companies are able to command the terms of employment contract as a result of the asymmetry in bargaining positions and maintain that power throughout the employment relationship.[1721] Hence, the profit accruing to the capitalist is a result of the exploitation of labour and the externalisation of costs onto stakeholders, which is made possible by this power disparity.

In a similar vein, the mainstream corporate governance model that advocates for management to focus on maximising shareholder wealth is also a representation of the relative power of shareholders vis-à-vis the other company stakeholders. On an international level, the global investors appear to be a class unified under the common goal of receiving the highest possible return on their investments. Unlike controlling domestic owners, stakeholders, society, and even certain states, the position of global investors has been facilitated by the mobility of the company share, which provides global investors with easy exit options that allow them to dictate their demands to other groups. To this end, the neoliberal policies of deregulation, market, and capital liberalisation have enabled investor capitalists to gain cohesion on a global scale and provide further liquidity for them to wield their power.[1722] In this light, the neoliberal agenda can be seen as 'an attempt to capture the momentary historical gains of global and mobile capital and fix them institutionally'.[1723] In line with this agenda, mainstream corporate governance laws have played an important role in ensuring that global investors dictate how the company will be managed or how the profits will be allocated, thereby securing their position as the recipient of all surplus value.

Indeed, the historical narrative provided in Chapter 3 illustrates how the shareholder primacy theory managed to become the orthodoxy in corporate governance due to the relative power that capitalists gained over labour in line with the rise of neoliberal ideology. By elaborating on these developments, the chapter sought to shed light on the reasons that led Turkey to adhere to the mainstream variant in constructing its corporate governance framework. As Berle and Means have pointed out, by the post-war era in the United States, large companies were characterised by a separation of ownership from control.[1724] In the context of the United

[1721] JE Parkinson, *Corporate Power and Responsibility* (OUP 1993) 8.
[1722] BV Apeldoorn and ND Graaff, 'The Corporation in Political Science' in Grietje Baars and André Spicer (eds), *The Corporation: A Critical, Multi-Disciplinary Handbook* (Cambridge University Press 2017) 137.
[1723] U Beck, *Power in the Global Age: A new global political economy* (Kathleen Cross tr, Polity Press 2005) 4.
[1724] Berle and Means, *The Modern Corporation and Private Property (n 36*) 84.

Kingdom, Ireland has illustrated how this separation has been accompanied by the economic and legal transformation of the nature of the company share and the creation of a developed stock market through changes in law.[1725] Overall, the distancing of the shareholders from the company had the effects of undermining the shareholders' claims to company profits and transferring their control to the managerial class. Thus, the period between the post-war to the late 1970s has been defined as the managerial corporate governance era in the United States. During this time, the dominant view amongst policy-makers, businesses, and society was that public companies ought to pursue societal goals and that managers hence had a duty to consider a multitude of interests in running companies, including the public interest.[1726] This mentality reflected the social compromise between the capitalists and labour that had been achieved in the post-war climate, aided by the Keynesian economic and fiscal policies that elevated the position of labour by reducing unemployment as a primary policy goal. Yet, the deteriorating macroeconomic conditions from the late 1960s onwards not only weakened the position of labour but also cast doubts on the viability of the Keynesian model and managerial corporate governance. This backdrop created an opportunity to assert neoliberal policies with the objective of restoring the capitalist class' claims to revenues and power.[1727]

Subsequently, understandings of corporate governance were redefined by the reassertion of shareholder power and the managers' subordination to the shareholder interests.[1728] This was aided in part by the increasing power of institutional investors, with the result that shareholders collectively became much more influential in asserting their demands to management. The managers' performance criteria were tied down to share price, pay structures linked their interest directly with the shareholders', and there was an active market for corporate control. The result was a shift in perceptions from the managerial era, and the creed of shareholder primacy started to take centre stage in corporate governance. The shareholder-centric corporate governance model relied on various justifications to assert shareholder entitlement to having companies run in their interests. These justifications were broadly based on efficiency grounds or on the misleading perception that shareholders were the owners of the company. The law and economics scholarship prescribed corporate governance as an answer to the agency problem by aligning the interests of managers with those of shareholders so that the former could exclusively pursue shareholder wealth maximisation. The proponents of this solution attempted to reduce the complex set of corporate governance issues to a simple conflict of interest, thereby

[1725] Ireland, 'Capitalism without the Capitalist' (n 294); Ireland, 'The Conceptual Foundations of Modern Company Law' (n 181).
[1726] Dodd, 'For Whom Are Corporate Managers Trustees?' (n 255) 1156.
[1727] Duménil and Lévy, *Capital Resurgent* (n 45) 2.
[1728] Ibid 185.

concealing the power struggles found in corporate governance underlain by the competing interests of various company stakeholders.

Indeed, the law and economics scholarship excludes stakeholders other than shareholders from the scope of corporate governance due the claim that other stakeholders are sufficiently protected through their mutual contracts with the company. Neoclassical economic theory holds that a rational actor will only enter a bargain that will be to their benefit.[1729] The argument goes that because the company is a legal fiction composed of various contracts between the company and its constituents,[1730] only the shareholders as the residual risk-takers deserve to have their interests prioritised over others since their returns are not guaranteed.[1731] In contrast, the stakeholder theory is an alternative to the shareholder primacy norm and envisaged a corporate governance model where broader interests are taken into account in management considerations.[1732] Nevertheless, by the start of the 21st century, scholars had rigorously asserted shareholder primacy with its 'strong corporate management with duties to serve the interests of shareholders alone, as well as strong minority shareholder protections […] has established the ideological hegemony'.[1733]

Despite the claims that the triumph of the shareholder primacy theory has been secured by 'out-competing' other models of corporate governance,[1734] this thesis draws a different picture of how it was imposed on the rest of the world through IFIs to serve dominant capitalist interests, thereby becoming the corporate governance model that is globally mainstream. It demonstrates that this was a necessary process in implementing the objectives of the Washington Consensus agenda, which prescribed a market-based and shareholder-oriented restructuring of the corporate governance system of emerging markets to allow 'greater penetration of the region by foreign capital'.[1735] Moreover, the neoliberal policies sought to break through national conditions to impose their own objectives on other countries as global norms.[1736] In the area of corporate governance, the OECD Principles have been instrumental in marketing Anglo-American derived values into emerging markets in the form of universal standards.

[1729] Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 14) 14-15.
[1730] Jensen and Meckling, 'Theory of the Firm' (n 10) 308.
[1731] Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 14), Fama and Jensen 'Separation of Ownership and Control' (n 29); Fama, 'Agency Problems and the Theory of the Firm' (n 11).
[1732] Freeman and McVea (n 19) 197.
[1733] Hansmann and Kraakman, 'The End of History for Corporate Law' (n 12) 468.
[1734] Ibid.
[1735] Gill, *Power and Resistance* (n 70) 150.
[1736] Beck, *Power in the Global Age* (n 1723) 78-79.

Although the OECD Principles lack any binding power, they are implicitly coercive. This is firstly because a country's implementation of good corporate governance affects investors' decisions.[1737] Second, the international mobility of capital enables global investors to exit a country when the domestic market conditions no longer serve their interests. This shields the foreign investors from any losses but also compels countries to provide regimes suitable for the preservation of foreign capital flows. As Beck has emphasised, it is the 'threat of *non-invasion* of investors, or the threat of their withdrawal, that constitutes the means of coercion'.[1738] In turn, foreign capital-dependent countries are left with little autonomy to shape their national corporate governance laws. Viewed in this light, as Soederberg has argued on point, the OECD Principles conceal the ideological and biased nature of its governance rules by creating the illusion of 'consensus formation' amongst its members for the adoption of 'the Anglo-American variant' of corporate governance in national contexts.[1739]

The detailed analysis of Turkey's reform process presented in Chapters 4 and 5 illustrate the ways in which Turkish corporate governance laws have conformed to the mainstream model as instructed by the OECD. In general, the new legislation places shareholders at its core[1740] and accordingly introduces mechanisms to subject managerial discretion to shareholder interests. Although Turkish company law stipulates that management duties are to be performed in line with the company's interest,[1741] because the Anglo-American system is emulated in the overall corporate governance framework, the company's interest echoes the interest of shareholders as a class. Shareholders' interests are assumed to be share price increases and the distribution of dividends. Other stakeholders are considered only in terms of the transparency principle, and their rights are regarded as adequately protected through the relevant legislation and their private contracts with the company. Although the CMB has made certain corporate governance principles mandatory for listed companies, principles concerning stakeholders, such as their participation in management, are left as voluntary recommendations. This is in line with the mainstream model, which effectively side lines any consideration other than profit maximisation because they are considered to be costs to the company.[1742] Finally, even though the legislators have identified the main reason for the reforms in company law and corporate governance to be the EU accession process, it is clear that the EU's approach to the matter is

[1737] Mehmet Can Atacık and Michael Jarvis, 'Better corporate governance: More value for everyone' (The World Bank Institute 2006) 3-4.
[1738] Emphasis included in the original text. Beck, *Power in the Global Age* (n 1723) 52.
[1739] Soederberg, *The Politics of the New International Financial Architecture* (n 49) 140.
[1740] Tekinalp, 'The Corporate Governance Approach of the Draft Turkish Commercial Code' (n 156) 639.
[1741] TCC Article 369.
[1742] Dine and Koutsias, *The Nature of Corporate Governance* (n 5) 333.

similar to what the OECD perceives to be good governance, despite the different governance models adopted throughout the European nations.

Moreover, the OECD disregards national conditions and highlights the importance of minority shareholder protection as the benchmark of good corporate governance.[1743] In countries like Turkey, where the prevailing company structure is concentrated ownership, these rules seek to strengthen the position of outside shareholders against domestic controlling owners by reducing the latter's influence over the company in favour of the interests of foreign investors. Turkey's new legal framework has been constructed in this direction. The position of the minority shareholders vis-à-vis the controlling owners has been augmented with increased rights and protections as well as with provisions that limit the controlling owners' influence over boards of directors and the management. This is materialised through the introduction of principles such as the equal treatment of all shareholders into company law and rules that facilitate the exercise of minority shareholders' control rights. The new rules also envisage minority shareholders appointing board members and introduce special proxy arrangements allowing those shareholders to form a collective voice. Last but not least, the mandatory CMB Principles impose strict independent board member criteria on listed companies, which implies an anticipated power shift from owners to outsiders. This is because non-executive independent directors and professional management are the cornerstones of the Anglo-American corporate system, which allows these institutions to focus solely on shareholder wealth maximisation. Overall, the new laws curtail the power of controlling family owners in Turkish listed companies in favour of outside shareholders.

However, while Turkey has attempted to provide a legal framework suitable for minority shareholders, it imposed a set of rules which fail to address the corporate governance issues faced by its companies. An example of this would be the supposed 'power gap' caused by the uninterested shareholders in listed companies, which then required that the new corporate governance laws focus on ensuring shareholder democracy.[1744] To that end, the new TCC imposed an obligation on listed companies to hold general assembly meetings and voting through electronic means, which are specifically designed to increase the involvement of foreign investors in the companies' decision-making.[1745] The presence of controlling owners

[1743] OECD, *OECD Principles of Corporate Governance 2004* (Organisation for Economic Co-operation and Development 2004) 12
[1744] *TCC with Justifications* (n 104) 95.
[1745] TCC Article 1527. Between the period when the TCC came into effect in 2012 until the end of 2015, investors from 48 different countries have participated in the online general assembly meetings of Turkish listed companies, in Central Securities Depository of Turkey (MKK), 'E-Genel Kurul: Elektronik Genel Kurul Sistemi (E-General Assembly System)' <https://www.mkk.com.tr/tr/content/Yatirimci-Hizmetleri/e-GENEL-KURUL> accessed 24 November 2017.

and their active involvement in company affairs invalidate the claim that there is a power gap in Turkish companies. Indeed, the phenomenon of uninterested shareholders emerged due to the separation of ownership from control found in countries with dispersed shareholdings, which is not the case in Turkey. This point overtly reflects the misfit between the new corporate governance reforms and the circumstances surrounding Turkish companies. The reforms addressing the lack of shareholder involvement also serves two interrelated purposes: first, by claiming to maintain shareholder democracy, it provides greater opportunities for outside investors to influence the company management, thus incentivising minority ownership in Turkish companies. Second, it creates the perception that small investors have an input in the decision-making process, thereby refuting the claims that they are merely rentier shareholders and legitimatising their right to profit.[1746] Finally, it reveals that the transposition of Anglo-American corporate governance rules onto Turkish laws serves the interests of foreign investors that result from their desire to control the management of the companies that they invest in abroad. This has been made possible through the Turkish policy makers' restricted autonomy in the area of corporate governance due to the conditionalities imposed by IFIs in exchange for financial assistance. This interdependency helps explain why Turkey has chosen to implement a corporate governance model that contradicts its particular ownership and control structures.

In light of this analysis, the thesis indicated that certain outcomes arise from Turkey's adoption of the mainstream corporate governance model. It discussed that in addition to increasing the foreign ownership of Turkish company stocks, the new corporate governance laws will also impact the ownership and control structures of its listed companies. On this point, the law and finance theory, which effectively claims the economic superiority of the share dispersal model, also claims 'that the quality of legal protection offered to minority shareholders helps determine patterns of ownership and control'.[1747] The argument states that the presence of a strong legal framework that protects shareholders would incentivise outside investors because they would feel secure enough to own small stakes in companies with controlling owners.[1748] From this perspective, the anticipated outcome of the new corporate governance framework would be the increase of foreign investments in the Turkish stock market. This is in line with the explicitly stated objective of the legislator in undertaking the reforms.[1749] Indeed, an examination of data

[1746] See Ireland, 'Defending the Rentier' (n 265).
[1747] Cheffins, 'A Darwinian Link' (n 1484) 349.
[1748] La Porta, Lopez-De-Silanes and Shleifer, 'Corporate Ownership Around the World' (n 31); La Porta and others, 'Investor Protection and Corporate Governance' (n 1481).
[1749] TBMM, 'Minutes of the General Meeting' (06.12.2012) 188-189; CMB, 'Seri: IV No: 54 Sayılı Kurumsal Yönetim İlkelerinin Belirlenmesine ve Uygulanmasına İlişkin Tebliğ Hakkında Açıklama (Press Statement on the Communique Serial: IV No: 54 on the Determination and Application of Corporate Governance Principles) (10.11.2011) <http://www.spk.gov.tr/Duyuru/Goster/20111011/0>

on the value of foreign holdings of BIST listed stocks over the years both pre-reform and post-reform reveals that the new corporate governance laws have attracted more foreign investment. There has been an increased desirability of Turkish company stocks due to the new legal framework and a corresponding rise in their share prices, and companies are expected to float larger proportions of their shares while controlling owners will have greater incentives to sell their stakes with higher premiums. These trends signify a move towards a widely dispersed stock market.

Nevertheless, the thesis asserts that the possible convergence of the ownership structure does not imply an economically deterministic outcome. Instead, this outcome is the result of the relative power of the global investor class vis-à-vis the domestic owners, stakeholders, and states. This power ensures conditions that benefit them in cross-border markets. Accordingly, this thesis argues that the underlying motive of the reform process has been to facilitate a transformation of the concentrated ownership towards a widely diffused and liquid stock market, which is more conducive to serving the interests of the global investor class. This is because a system of concentrated ownership with controlling family owners largely prevents outsider influence or monitoring of management. This creates the risk for the non-controlling owners that the managers may pursue objectives other than shareholder wealth maximisation, such as environmental protection or increased employee benefits. In contrast, in a dispersed market setting, the managers are bound by market discipline to pursue shareholder interests alone, excluding other stakeholders' interests from the company's objectives. Moreover, the lack of share dispersion and thin markets hinder the liquidity and mobility functions of the company share. This is undesirable for the capitalists, or more precisely the global investors, since their accumulation of wealth from financial markets depends on the free circulation of capital across global investment outlets. It can thus be concluded that the new corporate governance laws reflect attempts to break the concentration of ownership of Turkish companies to 'recreate the existing power structures of the neoliberal market-centric system'[1750] that is found in countries such as the United States and the United Kingdom, in which capital is able to roam freely across borders in search of the highest surplus.

The thesis also argued that the anticipated transformation of the ownership structure would be followed by the transfer of control away from family owners to outsiders who are more likely to prioritise shareholder interests to the detriment of other stakeholders and society at large. This is because shareholders as a class are assumed to have the common objective of

[1750] Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South' (n 70) 23.

shareholder value maximisation.[1751] Shareholders with small stakes in the company are presumably motivated by the monetary gains of share ownership and generally not concerned with the well-being of the company's other stakeholders, the livelihood of society, or the preservation of environment. Thus, once management is freed from the constraints of controlling owners, they are beholden to this common objective alone. The argument becomes more significant since if control were passed to independent boards and professional management, their actions would be dictated by the prevalent neoliberal ideology, which subjects companies to the market's logic of profit maximisation at all costs. On the other hand, the control structure of the Turkish companies prevents the proper functioning of the mainstream model and the interests it seeks to serve because the family owners have broad discretion over the running of the company and the allocation of its revenues. Hence, the global investors' command over managerial decisions is largely restricted, which leaves companies room for manoeuvre to consider a wider range of interests.

Finally, the thesis argued that a widely diffused stock market signifies the concentration of power and wealth in the hands of a smaller group of global investors. This is because 'as the degree of share dispersal increases, effective control can be exercised with a decreasing proportion of the votes'.[1752] Despite Marx's anticipation that the joint-stock company would socialise the private ownership of capital, the dispersion of shares amongst the public instead socialised the capital within the capitalist class.[1753] In fact, while the form of capitalist production changed with the joint-stock company, its content remained capitalistic in nature.[1754] In turn, the mainstream corporate governance model helped to aggregate the profit arising from company operations into the hands of a particular capitalist class. This created the dominance of 'a privileged elite'[1755] or 'the minority of the opulent'[1756] vis-à-vis the rest of the society, leading to further inequality within and between nations.[1757]

This analysis reveals the raison d'etre of universalising corporate governance rules to be securing the interests of the global investors by aligning the priorities of companies globally with the former. This is particularly the case in emerging markets, where policy-making is

[1751] MW Peng and S Sauerwald, 'Corporate Governance and Principal-Principal Conflicts' (n 1466) 659.
[1752] Parkinson, *Corporate Power and Responsibility* (n 1721) 59.
[1753] Apeldoorn and Graaff, 'The Corporation in Political Science' (n 1722) 137.
[1754] Soederberg, *Corporate Power and Ownership in Contemporary Capitalism* (n 63) 83.
[1755] Ireland, 'Shareholder Primacy and the Distribution of Wealth' (n 34) 67.
[1756] Here, the author is referring to James Madison's quote on democracy that the primary responsibility of the government should be 'to protect the minority of the opulent against the majority', in N Chomsky, *Profit Over People: Neoliberalism and Global Order (Seven Stories Press 1999)* 47.
[1757] Development Finance International and Oxfam, 'The Commitment to Reducing Inequality Index' (Oxfam International July 2017); Torul O and Öztunalı O, 'On Income and Wealth Inequality in Turkey' (2018) 18(3) Central Bank Review 95.

effectively tied to maintaining the conditions suitable for foreign investors due to the state's dependency on the inflow of foreign capital. The case of Turkey illustrates that national corporate governance laws in emerging markets do not necessarily reflect the needs of the countries' economies, companies, or societies. Instead, the laws resemble the extent to which domestic circumstances can be stretched to accommodate the interests of global investors. However, these laws determine the allocation of rights and revenues in the company and thereby configure the power relations that underlie society. From a broader perspective, this epitomises how the corporate governance laws perpetuate the relative power of a certain capitalist class in maintaining the status quo under the capitalist mode of production.

In sum, the overarching aim of this research was to provide a critical analysis of the recent reforms of corporate governance laws in Turkey. The thesis tackled this objective by answering a number of subsidiary questions. The first question attempted to grasp the current hegemonic position of the shareholder primacy theory by illustrating the historical process by which it became the mainstream corporate governance model globally. The use of socio-legal methodology and a Marxist theoretical framework has enabled an understanding of the raison d'etre of standardising and exporting the Anglo-American variant of corporate governance rules abroad, which would not have been possible through solely black-letter research. The second sub-question examined whether the Turkish corporate governance framework was in conformity with the mainstream model. To that end, this thesis provided a descriptive account of the new legislation on corporate governance and Turkish corporate governance principles. Through this inquiry, it found that Turkey has indeed conformed with the mainstream model as propagated by the OECD Principles. The last research question explored the implications of the new corporate governance laws on Turkish companies' ownership and control structures. To that end, this thesis has demonstrated that the new laws will have implications beyond attracting foreign investors and are likely to change the structure of listed companies into a system of dispersed ownership. Next, it discussed the effects of the change of control of listed companies from family owners to diffused shareholders. Here, this research concludes that the incorporation of the mainstream corporate governance rules into Turkish laws will weaken the position of the domestic controlling owners in favour of global investors, leading companies to pursue the sole objective of shareholder wealth maximisation and to disregard any other interests. Ultimately, the thesis revealed how corporate governance laws can be utilised to serve certain class interests, such as those of the global investor class, to secure the interests and power of the capitalists vis-à-vis the rest of the society, particularly in emerging market nations.

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2 Possible Areas for Future Research

The breadth of the topic of corporate governance, especially from a multi-disciplinary perspective, necessarily leaves some interrelated issues open to further investigation. For instance, the scrutiny of external corporate governance mechanisms such as the market for corporate control and takeovers has been left outside the scope of this thesis' inquiry. This is because such mechanisms, which signify the presence of market discipline, are still inactive in the Turkish context.[1758] Thus, if and when the thesis' anticipated outcome of a widely diffused stock market materialises, the external governance aspects of the Turkish corporate governance framework could be analysed. On the other hand, this thesis' research question was approached from an international vantage point; it examined the dynamics of the relationship between an emerging market nation like Turkey and IFIs, and the relative power of the global investor class compared to that of other actors in the company. Further research can examine the extent to which domestic factors influence law making for corporate governance in Turkey.[1759] Aside from these areas that have been left outside the scope of the thesis due to focus and clarity considerations, I sketch two interesting guideposts for future research below.

First, a question that came to the fore while analysing the impacts of Turkey's new corporate governance laws was the extent to which these rules intended to create an 'ownership society' in Turkey. Investigating this claim is especially significant because the low domestic savings rate of Turkey has been criticized as a major impediment to its economic growth.[1760] Although the reform process and the new laws appear to be aimed at attracting foreign investors to the stock market, the strengthened minority shareholder rights may also affect the investment decisions of the general public. Yet, relying solely on corporate governance laws would not be sufficient to analyse this issue, and other related legislation such as pension reforms must be included in the scope of the research.[1761] Indeed, after the introduction of the private pension system legislation, the number of pension contributors in Turkey has increased from 15,245 in 2003 to over 6 million by 2016.[1762] Thus, research in this area would require examination of

[1758] Yamak and Ertuna, *A Primer on Corporate Governance* (n 83) 50; Yüksel, 'Recent Developments of Corporate Governance' (n 90) 103.
[1759] On this point, for instance, Gourevitch and Shinn argue that various interest groups in the United States have fought over the shaping of corporate governance laws such as inside and outside investors, employees, managers, reputational intermediaries like accountants, lawyers and so forth, in PA Gourevitch and J Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (Princeton University Press 2007) 2.
[1760] HM Ertugrul, PF Gebesoglu and BS Atasoy, 'Mind the gap: Turkish case study of policy change in private pension schemes' (2018) 18(2) Borsa Istanbul Review 140, 140.
[1761] For instance, in 2001 the private pension scheme was introduced in Turkey with the 'Private Pension Savings and Investment System Law No. 4632' (2001), later amended in 2016 with Law No. 6740
[1762] Ertugrul, Gebesoglu and Atasoy, 'Mind the gap: Turkish case study' (n 1760) 142.

various legislation and other vehicles such as tax concessions. Meanwhile, it has been argued that the pension reforms in Turkey have been largely shaped by the pressure from the IFIs.[1763] Thus, international political economy analysis should also be incorporated into such a study.

From a critical perspective, the attempts to converge the general public into the shareholders class through either pension funds or directing their personal savings into the stock market can be construed as attempts to align the interests of the general public with the shareholders to 'reinforce a culture of dependency'.[1764] As Soederberg has argued, this leads to the share-owning public having a 'strong stake in the preservation of a system that exploits them because the destruction of that system entails the destruction of their savings.'[1765] Ireland has stated that this point has 'considerable ideological and psychological significance, encouraging more and more people to think of themselves as middle class, and as having a vested interest, albeit a modest one, in the performance of the corporate sector, financial markets and fictitious capital.'[1766] On the other hand, the emergence of an ownership society also helps to legitimise the company's shareholder wealth maximisation purpose on a greater scale.[1767] Overall, this not only allows workers to transcend the class dichotomy of the capitalist versus labour,[1768] but also helps eradicate possible grounds for social conflict by equating the interest of share-owning general public with that of the shareholders.[1769] Nevertheless, as discussed in the final part of the thesis, widening the shareholder base only increases the power of a small group of the wealthiest investors globally, while leading to greater economic insecurity and inequality for everyone else.[1770] Ireland has summarised that 'These developments have blurred class divisions but done little to eradicate them.'[1771] In sum, the role of corporate governance laws and other related legislation in Turkey that incentivises the public to invest in the stock market is a fertile subject for further critical legal research.

Second, while the thesis examined the current state of the corporate governance laws in Turkey, it is also worth examining the possible alternative reforms to the mainstream model. Although, as Ireland has pointed out, even modest reforms in this area are expected to be resisted by the 'enormous power and influence of the financial oligarchy', issues such as employee

[1763] A Güleç, 'The Politics of Pension Reform in Greece and Turkey: International institutions as external determinants of adjustments' (2014) 14(1) Global Social Policy 72, 74.
[1764] Soederberg, *Corporate Power and Ownership in Contemporary Capitalism* (n 63) 25.
[1765] Ibid 15.
[1766] Ireland, 'Law and the Neoliberal Vision' (n 316) 12.
[1767] Ibid 13.
[1768] Hansmann and Kraakman, 'The End of History for Corporate Law' (n 12) 452.
[1769] J Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable 2005) 12.
[1770] Soederberg, *Corporate Power and Ownership in Contemporary Capitalism* (n 63) 159.
[1771] Ireland, 'Law and the Neoliberal Vision' (n 316) 21.

participation have already begun to remerge nonetheless.[1772] While it should be acknowledged that any alternative legal reform proposals and their applicability to the Turkish context require in-depth consideration, a plausible starting point would be to extend the CMB's mandatory corporate governance principles to include issues relating to stakeholders, such as a mandatory requirement for stakeholder participation in boards. Since the CMB Principles have limited applicability to listed companies, a similar provision could be added to the new TCC that would cover public and private companies. This is necessary for substantial changes in the way companies are run and more importantly for the redefinition of the power dynamics between the shareholders, stakeholders, and society.

Another possibility is to reformulate the directors' duties as stipulated under the TCC. The related provision in the new TCC states that directors or any person exercising managerial power have a duty of care and loyalty towards the company.[1773] However, the proper addressee of these duties remains contentious in Turkish legal scholarship.[1774] Although Tekinalp has suggested that the directors' duty towards the company means placing shareholder interests before their own or any other interests,[1775] the TCC provision on directors' duties remains ambiguous. This means that under neoliberal market pressures, directors would be inclined to prioritise shareholder interests. In the UK, for instance, directors owe their duties to the company, which is codified in law as the duty to 'promote the success of the company for the benefit of its members as a whole', and directors must consider a range of other interests in doing so.[1776] Accordingly, this formulation was 'carefully crafted so as to enshrine the existing doctrine of shareholder primacy whilst also providing some protection to the interests of wider stakeholders.'[1777] Thus, the 'enlightened shareholder value' of UK company law has not significantly deviated from the shareholder primacy norm.[1778] The UK example illustrates that any alternative reform proposals to the directors' duties must clearly define whom the directors owe their duties to and the hierarchy, if any, of their importance.

In fact, this shortcoming has been recognised by the policy-makers in the UK; the government has recently launched a consultation process on possible corporate governance reforms. In the Green Paper published on November 2016, the government proposed certain areas of reform, including, inter alia, 'a range of options for strengthening the voice of employees, customers

[1772] Ireland, 'Corporate Schizophrenia' (n 1628) 35.
[1773] TCC Article 369.
[1774] Oumer, 'Duty of Care and Loyalty While Running Joint Stock Companies' (n 1100) 156.
[1775] Tekinalp, *The New Law of Corporations* (n 1174) 280.
[1776] Companies Act (2006) Section 172.
[1777] Department for Business, Energy & Industrial Strategy (BEIS), 'Corporate governance: Fourth Report of Session 2016–17' (April 2017) 15.
[1778] Williamson, 'The Case for Workers' Voice in Corporate Governance' (n 1652) 174.

and other interested parties at boardroom level and building confidence that section 172 of the Companies Act 2006 is properly understood and applied.'[1779] During the consultation process, the Trades Union Congress (TUC) suggested an amendment to the wording of section 172 that makes 'promoting the long-term success of the company' as the primary aim of directors and states that they 'should be required to have regard to the interests of shareholders, alongside those of employees and the other stakeholder groups already included in section 172'.[1780] Another proposal was to require directors to give 'equal importance to all stakeholders' under this section.[1781] Despite these more progressive recommendations, the government eventually proposed the option of stronger reporting requirements to ensure that directors consider stakeholder interests as per section 172.[1782] While Prime Minister Theresa May initially proclaimed in her speech that announced the reform process that they were 'going to have not just consumers represented on company boards, but employees as well'[1783], this failed to materialise. Instead of mandatory worker representation on boards, the government concluded that such requirements should be implemented on a comply-or-explain basis.[1784] This reform process was followed by the Financial Reporting Council's (FRC) review of the UK Corporate Governance Code, resulting in the final version of the code being published in July 2018.[1785] The code provides for three methods of employee representation in the company, all of which are voluntary as per the adopted comply-or-explain approach.[1786]

[1779] Department for Business, Energy & Industrial Strategy (BEIS), 'Green Paper: Corporate Governance Reform' (November 2016) 38.

[1780] Trades Union Congress, 'Written evidence from the TUC (CGV0156)' Para. 2.7 <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Business,%20Energy%20and%20Industrial%20Strategy/Corporate%20Governance/written/42540.html> accessed 30 November 2018.

[1781] Department for Business, Energy & Industrial Strategy (BEIS), 'Corporate governance: Fourth Report of Session 2016–17' (April 2017) 16.

[1782] Department for Business, Energy & Industrial Strategy (BEIS), 'Corporate Governance Reform: The Government Response to the Green Paper Consultation' (August 2017) 31-32. This was in line with the BEIS recommendation, which acknowledged that 'there are insufficient incentives for directors to consider seriously the interests of other stakeholders' yet argued that this could best be achieved by 'more specific and accurate reporting' in BEIS, 'Corporate governance: Fourth Report of Session 2016–17' (April 2017) 17.

[1783] Theresa May, 'Speech: We can make Britain a country that works for everyone' (Birmingham, 11.07.2016) <http://press.conservatives.com/post/147947450370/we-can-make-britain-a-country-that-works-for>.

[1784] Department for Business, Energy & Industrial Strategy (BEIS), 'Corporate Governance Reform: The Government Response to the Green Paper Consultation' (August 2017) 34.

[1785] FRC, The UK Corporate Governance Code (2018). Moreover, a draft legislation was published in June 2018; The Companies (Miscellaneous Reporting) Regulations 2018 which came into effect as of January 1, 2019.

[1786] Accordingly, the proposed methods for the 'engagement of the workforce' are 'a director appointed from the workforce; a formal workforce advisory panel; a designated non-executive director' in FRC, The UK Corporate Governance Code (2018) 5.

On the other hand, more substantial reform proposals have been voiced recently in a report submitted to the UK Labour Party to assist with its policy making.[1787] The report urges the future Labour government to adopt a hard law approach in corporate governance to ensure the long-term success of British companies. The report included recommendations on, inter alia, the replacement of the 'comply and explain' approach with the 'comply or else' approach.[1788] The report stresses the 'need to democratise corporations' to mitigate short-termism 'based on co-operation and stakeholder representation at company boards'.[1789] Indeed, any reforms in the direction away from the shareholder primacy norm would require securing through legislation and not be left to voluntary regulation or the initiative of companies. In the managerial era, managers without any legal obligations were perceived to be capable of acting in the society's interest.[1790] However, under the current neoliberal system in which the dominant logic dictates that shareholder wealth maximisation prevails over all other concerns, any reforms to curtail shareholders' position must be executed through hard laws.

Overall, even though the UK government's recent corporate governance reforms seem to be incapable of achieving real change for stakeholder and societal interests, that reform proposals with such a sharp contrast with the mainstream model have been put forth in the UK signifies the extent of discontent with the status quo. This hints that maximising shareholder wealth does not maximise aggregate welfare, as has been argued by the mainstream corporate governance model.[1791] Moreover, it brings hope that counter reforms such as mandatory stakeholder representation on boards or requiring directors to pursue stakeholder interests on par with those of shareholders is a plausible prospect in Turkey. As Streeck has pointed out, since the return that investors expect through share ownership is not set in stone, 'investors may become more modest if they have no alternatives'.[1792] Nevertheless, a caveat must be made. Since Turkey is an emerging market economy, it is dependent on foreign capital for economic growth, particularly loans from the IFIs. Hence, when making policy choices on economically important issues such as corporate governance laws, it is important to consider the need to create suitable conditions both for sustaining the inflow of foreign investment and for abiding with the loan conditionalities imposed by lender intuitions. Thus, the proposed area of research would also require a multidisciplinary approach.

[1787] Prem Sikka and others, 'A Better Future for Corporate Governance: Democratising Corporations for their Long-Term Success' (September 2018).
[1788] Ibid 4.
[1789] Ibid 12.
[1790] Talbot, *Progressive Corporate Governance* (n 9) 54.
[1791] Jensen, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (n 14) 239.
[1792] Streeck, *The Delayed Crisis of Democratic Capitalism* (n 42) 23.

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