

Corporate Governance

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GETTING THE
DEAL THROUGH

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Sources of corporate governance rules and practices

1 Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance?

The New Turkish Commercial Code dated 13 January 2011 (Law No. 6102) (TCC) entered into force on 1 July 2012. The TCC has important objectives such as ensuring transparency, adopting corporate governance standards and introducing internationally accepted auditing and reporting standards.

In addition to the above, the laws, communiqués and principles governing corporate rules and practice are as follows:

- Law No. 6335 amending the TCC (the Amendment Code);
- the New Capital Markets Law dated 6 December 2012 (Law No. 6362) (CML) entered into force on 30 December 2012 replacing the Capital Markets Law dated 30 July 1981 (Law No. 2499);
- the Capital Markets Communiqué (the CMB Communiqué); and
- the Corporate Governance Communiqué dated 3 January 2014, serial II, No. 17.1 (CGC) and Corporate Governance Principles that are listed as annex 1 of the CGC (CGP).

According to the CGC, publicly held companies that have shares traded on the stock exchange are subject to the mandatory implementation of certain corporate governance principles.

2 Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder activist groups or proxy advisory firms whose views are often considered?

The Ministry of Customs and Trade is the regulatory body responsible for enforcing the TCC's provisions on corporations. The disputes arising from the TCC are mainly resolved before commercial courts.

The CML, CMB Communiqué and the CGP are enforced by the Capital Markets Board (CMB). The CMB is the regulatory and supervisory authority in charge of the securities markets in Turkey. The CMB is entitled to hand out administrative fines to companies or individuals in the event of non-compliance. In the event the conditions set forth under the CML and the relevant legislation occur, the public prosecutor may prepare an indictment upon the written request of the CMB.

As regards the associations whose views are often considered, two associations, namely the Capital Market Investors' Association (BORYAD) and the Turkish Industry and Business Association (TUSIAD), can be mentioned. TUSIAD was established in 1971 to represent the business world and BORYAD was established in 2001 to defend shareholder rights and promote investment.

Proxy advisory firms are expected to appear now that the TCC has come into force, as under the TCC there are legal grounds for them, especially to protect the rights of minority shareholders in public companies.

The rights and equitable treatment of shareholders

3 Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect directors?

According to the TCC, apart from specific exceptions (ie, appointment of the initial board members of companies by the articles of association (AoA), etc), the shareholders have exclusive authority to appoint or remove board members. However, according to the TCC, a temporary appointment must be approved during the next general assembly (GA) meeting. Article 408 of the TCC similarly determines the authority of the GA to appoint and dismiss board members. Accordingly, the GA is authorised to take decisions set forth under the law and the AoA. The same article also stipulates the non-transferable duties and authorities of the GA. Accordingly, privileges may be granted in respect of the election, nomination, release and dismissal of board members.

Under Turkish law, shareholders holding at least 10 per cent of the share capital of non-public companies and 5 per cent of the capital of public companies are defined as minority shareholders. The minority shareholders may:

- request the board to call an extraordinary GA to question the company's management and request that additional items be added to the agenda, (TCC, article 411); and
- ask the GA to appoint a special auditor to investigate and clarify certain issues even if it is not on the agenda. In order for shareholders to use this option, they must first exhaust their rights of information and examination. If the GA accepts this request, minority shareholders can request the commercial court to appoint a special auditor (TCC, article 438).

Further, all shareholders are entitled to request information and examination pursuant to article 1.2.1 of the CGP, which is applicable to public companies. This right cannot be limited or cancelled by the AoA or by a decision of the company.

In addition, any shareholder has the right to ask the GA to file a lawsuit for damages against board members or auditors, request to inspect the company's books and records and request information from the company's auditor (TCC, article 553, 554, 555).

As per article 620 of the TCC, the shareholder vote required to elect directors is the simple majority of the votes represented in the GA meeting, unless provided otherwise by law or the AoA. The necessary quorum for the GA meeting is the shareholders or their representatives corresponding to at least one quarter of the capital. If this quorum cannot be reached in the first meeting, no quorum is sought for the second meeting (TCC, article 418).

4 Shareholder decisions

What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

According to article 408 of the TCC, the GA has exclusive authority over:

- amending the AoA;
- releasing the auditors and the board of directors or holding them liable;
- appointing the members of the board of directors, determining their fees, term of duties, discharging and replacing them;
- appointing and discharging the auditor except for the cases set forth under the law;
- taking decisions regarding the financial statements, the annual report of the board of directors, savings on the annual profit, determination of the dividend and gain margin and including the injection of the reserve fund into the capital or into the profit to be distributed and deciding on the use of the reserve fund;
- deciding on the dissolution of the company except for the cases set forth under the law; and
- sale of a substantial part of the company.

In the event the conditions stated under the CML and the related legislation are met, some exclusive powers of the GA may be transferred to the board of directors. For example, if a company chooses the registered capital system, the share capital of the company can be increased upon the board of directors' resolution. Also, when it is permitted by the AoA, the board of directors may restrict the pre-emptive rights of shareholders (CML, article 18/5).

Under Turkish law, there are no matters that are resolved by a non-binding shareholder vote.

5 Disproportionate voting rights

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

As regards disproportionate voting rights, it should be noted that the TCC adopts the 'one share, one vote' principle. Accordingly, each share grants at least one voting right.

Pursuant to article 479 of the TCC, disproportionate voting rights may be granted to privileged shares. However, the voting privileges for private companies are limited to a maximum of 15 votes per share. This number can be increased only by a court decision for the sake of institutionalisation or due to a just cause. Thus, under the TCC regime, it is no longer possible to block a capital increase through the use of privileged shares. Further, privileged votes do not extend to resolutions regarding the amendment of the AoA of a company, or filing of discharge or liability suits.

Article 14/A of the former CML stated that, if permitted by the company's AoA, JSCs might issue and offer to the public non-voting shares by providing privileged dividends. The issuance of non-voting shares, their share of the capital, the nature of the privileges to be granted at the profit distribution for the share certificates representing these shares, the form, content and kind of shares, privileges other than those with regard to dividends, the principles of utilisation of such shares and requirements and procedures with regard to the public offering and sale of such shares were to be determined by the CMB. However, this article was abolished in the current CML.

6 Shareholders' meetings and voting

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting?

Article 1.3.1 of the CGP stipulates that the announcement regarding shareholders' meetings should be made at least three weeks in advance of the meeting on the company's corporate website and on the Public Disclosure Platform (PDP).

According to the TCC, shareholders are invited to the meeting as stipulated under the AoA, through an announcement published on the company's website (if the company is required to have a website) and in the Turkish Trade Registry Gazette. This announcement must be made two weeks before the shareholders' meeting (TCC, article 414).

Article 415 of the TCC stipulates the shareholders who are entitled to attend GA meetings. Accordingly, shareholders whose names are written in the attendance list prepared by the board of directors have the right to attend the GA meeting.

Article 437 of the TCC, regulating the right to examine and demand information, financial statements, consolidated financial tables, annual reports of the board, audit reports and suggestions of the board regarding the method of distribution of dividends are made available to the shareholders at least 15 days before the meeting.

Pursuant to the TCC, e-signatures can be used to prepare meeting documentation and meetings can be held electronically (TCC, article 1527).

The following requirements have to be met in order to vote online:

- the company must have a website allocated for this purpose;
- shareholders who wish to participate in the online shareholders' meeting must make such a request in advance;
- the fact that electronic platform tools are sufficient for efficient participation must be proved by a technical report and this report should be registered and published; and
- the identities of the online voters must be kept confidential.

The Ministry of Customs and Trade issued the Regulation on General Assembly Meetings of Joint Stock Companies held electronically, regarding the procedures of online shareholders' meetings, published in Official Gazette No. 28395 of 28 August 2012.

The shareholders acting by written consent without a meeting can be realised by meetings that are held electronically, as explained above.

7 Shareholders and the board

Are shareholders able to require meetings of shareholders to be convened, resolutions to be put to shareholders against the wishes of the board or the board to circulate statements by dissident shareholders?

Article 411 of the TCC stipulates that shareholders holding at least 10 per cent of the company's capital and for public companies, shareholders holding at least 20 per cent of the company's capital may request a general meeting from the board. If such a meeting has already been convened, then they have the right to request certain topics to be included on the agenda. If their request is not accepted by the board or not responded to within seven days, such shareholders have the right to apply to the commercial court to enforce their request.

According to article 446 of the TCC, the dissenting opinions of the shareholders must be recorded in the minutes of the shareholders' meeting to grant shareholders a right to claim invalidity of such decisions.

8 Controlling shareholders' duties

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action against controlling shareholders for breach of these duties be brought?

Under Turkish law, controlling shareholders do not have any specific duties to the company or to non-controlling shareholders. However, it should be noted that all controlling shareholders must exercise their rights by complying with good faith principles. Further, there are special provisions for minority shareholders.

9 Shareholder responsibility

Can shareholders ever be held responsible for the acts or omissions of the company?

According to the TCC, the shareholders' only liability against the company is their subscribed capital contribution. There is an exception to this rule in the case of tax and public debts of the company.

If the company does not pay tax or public debts, the shareholders will be liable. Other than this, the shareholders are not responsible for the acts or omissions of the company, unless such an act or omission results from the shareholders' own acts and has criminal elements.

Corporate control

10 Anti-takeover devices

Are anti-takeover devices permitted?

At present, share transfer restrictions are not permitted except for legal grounds determined under the TCC. However, the TCC introduces specific provisions regarding the restriction of share transfers through the AoA separately for limited liability companies (LLCs) and joint-stock companies (JSCs). Article 492 of the TCC requires JSCs to insert in their AoA the specific reasons why share transfers may be rejected. Reasons related to the nature of the shareholders' composition or the scope of the company's activities or the economic independency of the company are deemed as important grounds for rejection as per the TCC. This is not an exhaustive list, therefore shareholders will need to select and predetermine the grounds for share transfer rejections and be very specific about it, if they want this protection to be reflected in the AoA. Otherwise, limitations on share transfer will continue as a contractual obligation pursuant to the shareholders' agreement.

Article 493/1 of the TCC provides an escape clause for JSCs through the option to reject a share transfer, without basing its decision on the grounds explained above, by offering to acquire, at real value, the transfer shares itself or on behalf of its shareholders or a third party.

For shareholders to resolve on the transfer restrictions of registered shares, an affirmative vote of 75 per cent of the shareholders or their representatives is required (TCC, article 421/3).

In contrast to the JSCs, the TCC explicitly allows LLCs to limit share transfers based on pre-emptive purchase rights, call options or other ancillary or additional obligations by so providing for them in their AoA. Share transfers are subject to the approval of the board of partners and may be rejected without a just reason, unless otherwise stipulated in the AoA (TCC, article 577).

Given the differences between LLCs and JSCs, investors aiming to reflect the provisions of the shareholders' agreement to the AoA may prefer to incorporate an LLC, provided that the regulations in their field of activity allow this.

Any agreement between the JSC and a third party for the acquisition by that third party of the JSC's shares in lieu of the JSC itself or its affiliate or the parent company must comply with the terms set forth under articles 379 and 389 of the TCC. An agreement or obligation to this effect in violation of the terms of article 379 of the TCC will be invalid.

The TCC bans a JSC, a third party or the JSC's subsidiary acting for the JSC, or the JSC's subsidiary promising shares in its parent company, from undertaking to sell treasury shares (TCC, article 380/2).

11 Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Under the TCC, new shares are issued upon capital increases and this requires a shareholders' resolution. In public JSCs that adopt a registered capital system, capital can be increased without the approval of the shareholders thus new shares can be issued accordingly, within the registered share capital (TCC, articles 459 and 460). In addition, according to article 461 of the TCC, existing shareholders have pre-emptive rights to acquire newly issued shares in proportion to their shareholding. Pre-emptive rights of shareholders may be restricted by a decision of the shareholders' meeting.

The TCC has introduced two new systems regarding capital. First, there is the new registered capital system for private JSCs, which was previously available only for public companies. A private JSC can adopt the registered share capital system by a provision to this effect in its AoA. The AoA must indicate the aggregate ceiling of the capital and the time limit for the board of directors' authority to increase capital within that set limit, which cannot be longer than five years. The company may then increase its capital without going through the burdensome procedures of holding a GA meeting up to a predetermined ceiling (TCC, articles 459 and 460). The minimum capital requirement for a JSC adopting the registered capital system is 100,000 Turkish lira (TCC, article 332).

Second, as a financing method for JSCs, the TCC brings a conditional capital increase system, through which the company's creditors (such as holders of bonds or other debt securities) and employees may partake in its equity. The conditional capital increase is not triggered by new capital commitments of the shareholders, but through the exercise of exchange (conversion option) and pre-emptive rights by creditors and employees (TCC, article 463).

12 Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted, and if so what restrictions are commonly adopted?

The CMB prohibits the restrictions on the transferability of shares of a public company. Accordingly, the transfer of the shares must not be limited and other restrictions must not be imposed on the shareholders to prevent them from going public.

Further, pursuant to article 13(g) of the Quotation Regulations issued by Borsa Istanbul, a company is prohibited from including any share transfer restrictions in its AoA regarding the securities to be listed on Borsa Istanbul.

Article 490 of the TCC stipulates that fully paid, registered shares can be transferred without any restriction, unless otherwise provided by law or by the AoA. The transfers of bearer shares are subject to the transfer of possession.

13 Compulsory repurchase rules

Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

A share buy-back system that was already available for listed companies under capital markets legislation has been introduced by the TCC for JSCs, in exceptional cases. The conditions for the buy-back are as follows (TCC, article 379):

- authorisation of the board of directors by a shareholders' meeting;
- acquisition and pledge may be accepted on condition that the shares it will acquire in the future and the shares held by its subsidiary companies do not exceed 10 per cent of the company's authorised or issued capital;
- the shareholders' meeting can only delegate such authority for a maximum period of five years;
- the board of directors is required to state in the authorisation that these legal requirements have been fulfilled;
- the nominal value of the shares that will be accepted as an acquisition or pledge by the authority must be stated;
- the minimum and maximum limits of the consideration that will be paid for the shares must also be stated; and
- acquired shares must be fully paid-up. Shares so issued are stripped of any voting rights.

Further, article 385 of the TCC stipulates that shares acquired or accepted as a pledge in a way that is contrary to the principles set forth under the TCC shall be disposed of, or the pledge on them shall be released within six months from the date of their acquisition or acceptance as a pledge. Any specific procedure regarding selling off or disposing of the pledge has not been provided. The authority to sell off such shares is held by the board of directors, which shall perform its duty according to the principles of equality and public disclosure.

Similar principles apply to share buy-backs in LLCs as well. An LLC may acquire its own capital shares with two conditions (TCC, article 612):

- it must have the necessary equity that may be freely used to purchase these shares; and
- the nominal value of the shares to be purchased must not exceed 10 per cent of the total share capital.

Capital shares acquired in excess of this amount must be disposed of or redeemed through a capital reduction within a maximum period of two years (TCC, article 612/2).

The Communiqué on Share Repurchase (the Communiqué) issued by the CMB entered into force on 3 January 2014. According to the Communiqué, the board of directors must be authorised by the GA in

order for a publicly held company to repurchase its own shares. There is an exception to this rule where listed companies are allowed to repurchase the shares without the necessity of a GA authorisation, if such repurchase is necessary for the purpose of avoiding a probable and serious loss. A probable and serious loss is deemed to exist where the daily average price of shares is below the nominal value or has lost value over 20 per cent. Unless such circumstances are present, the only way for a listed company to repurchase its shares without a GA authorisation is to obtain the approval of the CMB.

The nominal value of the repurchased shares cannot exceed 10 per cent of the paid-in capital where the total value of the shares cannot exceed the total value of the resources subject to profit distribution. Repurchased shares may be kept for an indefinite period as long as they do not exceed the aforementioned limits. The shares repurchased in breach of the Communiqué must be sold within one year from the date of repurchase or else they will be amortised by way of capital decrease.

The maximum duration of the repurchase programme is three years for the companies listed on the stock exchange and one year for other publicly held companies, unless the repurchase programme does not foresee any specific duration.

The repurchase of shares is not permitted if there is any postponed disclosure process regarding internal matters or significant transaction that has not yet been disclosed to the public.

14 Dissenters' rights

Do shareholders have appraisal rights?

The TCC also provides categories of important reasons that allow JSCs to reject the transfer of registered shares under their respective AoAs. The company may choose not to approve the share transfer by claiming an important reason stated under the AoA, or to acquire the shares to be transferred on its or a shareholders' or any third party's behalf by offering nominal value of the shares to the transferee (TCC, article 493).

If the company prefers to use an escape clause, the nominal value of the shares must be offered to the transferee. There is no definite basis for how the nominal value of shares will be determined and the transferor may apply to court for a determination of the nominal value of the shares to be transferred. If the transferee is offered a nominal value and does not reject such value within one month of its acknowledgment, the acquisition offer will be deemed accepted. If the company remains silent for a period of three months from the date of the transferee's application for approval, it will be deemed that the company has approved the share transfer. As long as the company does not approve the share transfer, the ownership of shares will remain with the transferor together with all monetary and management rights (TCC, articles 493 and 494).

In addition, the TCC regulates an escape fund to be paid to shareholders in the event of a merger or change in the type of company. In this regard, if the shareholders disagree with a merger or change in the type of company, they have the right to sell their shares to the company at a fair value (TCC, articles 141, 183 and 202/2).

Moreover, the Communiqué on Common Principles of Significant Transactions and Retirement Rights issued on 24 December 2013 determines the extent of significant transactions and shapes the limits of voting rights and shareholders' retirement rights in publicly held companies. According to this communiqué, mergers, division transactions, change in the type of company or termination, along with other important transactions listed in article 5, require GA approval.

This communiqué details the provision regarding the retirement right in article 24 of the CML and determines the circumstances where the retirement right does not arise. In this respect, shareholders who voted against a significant transaction at the GA meeting and had their dissenting vote recorded in the minutes of that meeting will be able to sell their shares to the subject company.

According to this communiqué, it may be possible to abandon significant transactions where the total cost of the exercise of retirement rights exceeds the predetermined cost of the same or where certain shareholders, whose qualifications are specified beforehand, exercise the retirement right. Similar provisions are recognised for mandatory tender offers arising from a significant transaction. With a recent amendment (dated February

2015), in order to protect the rights and interests of investors, it has been provided that in case of a non-public company acquiring a publicly listed company, the controlling shareholders together with those acting with the controlling shareholders shall make a mandatory tender offer.

The responsibilities of the board (supervisory)

15 Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

Under Turkish law, the board structure for both listed and unlisted companies is one-tier.

16 Board's legal responsibilities

What are the board's primary legal responsibilities?

The principal duties of the board members are as follows:

- to act prudently and diligently when conducting business and performing their duties and the business of the company;
- to monitor and supervise the management and the business of the company to ensure that it is in compliance with principles of good faith, and for the interests of the company and its shareholders;
- to keep confidential the information obtained during and after the term of duty;
- to refrain from attending board meetings regarding their own interests or the interests of certain close relatives; and
- not to engage in transactions with the company unless the shareholders' meeting authorises the board for a maximum period of five years regarding the repurchase of shares.

In addition to the above the TCC sets forth the non-transferable duties of board members. The most important non-delegable and indispensable duties and powers of the board of directors are as follows (TCC, article 375):

- determining top-level management of the company and giving instructions in this regard;
- establishing the necessary system for financial planning to the extent required, and for accounting and finance audit;
- appointing and dismissal of managers and persons performing the same function and authorised signatories;
- high-level supervision of whether the persons in charge of management act in accordance with the law, the AoA, internal regulations and written instructions of the board;
- keeping the share book, resolution book of the board and the GA meeting and discussion register, preparation of the annual report and corporate governance disclosure and submission thereof to the GA, organisation of GA meetings, and enforcement of GA resolutions; and
- notifying the court regarding the company's state of excess of liabilities over assets.

It must be noted that neither of these duties and authorities of the board of directors can be delegated to a duly authorised representative, the company management, a committee, or the managers (TCC, article 367). The shareholders' meeting cannot seize or deprive these duties and authorities of the board of directors, or transfer them to the shareholders' meeting or the committees established under the provisions of the AoA. Similarly, the board of directors cannot waive such duties and authorities.

17 Board obligees

Whom does the board represent and to whom does it owe legal duties?

The board is responsible for the management and representation of the company (TCC, article 365). Pursuant to article 553 of the TCC, in the event that the board is liable in terms of their faults arising from the law and the AoA, then the board will owe legal duties to the company, to the shareholders and to the company's creditors.

18 Enforcement action against directors

Can an enforcement action against directors be brought by, or on behalf, of those to whom duties are owed?

According to the TCC, the company, its shareholders and its creditors are entitled to file indemnification actions against the board members to indemnify the damages that occurred due to their faults. Shareholders may initiate actions against the directors and request the indemnification of the damages that they directly incurred or request indemnification on behalf of the company for the damages that the company has incurred (TCC, article 553).

A voluntary insurance system for the damage incurred by the company through the fault of board members while performing their duties has been introduced by the TCC.

If the damage is insured at a price exceeding 25 per cent 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 (TCC, article 361).

With regard to the civil and criminal liabilities of board members, unlike the previous TCC, the TCC specifically regulates in a separate article the civil and criminal liabilities (TCC, article 553 and 562). If the board members do not comply with the obligations set forth under the law or under the AoA, they will be subject to civil and criminal liability.

19 Care and prudence

Do the board's duties include a care or prudence element?

According to the TCC, members of the board of directors and third parties in charge of management are under an obligation to act with care and in compliance with the rules of good faith (TCC, article 369).

20 Board member duties

To what extent do the duties of individual members of the board differ?

According to the TCC, it is possible for a legal person to become a member of the board of directors (TCC, article 359/2).

The TCC requires that a chairman and at least one vice chairman be appointed among the board members (TCC, article 366). It should be noted that the board members do not have any special duty that should be performed individually except calling for board meetings. Also, under Turkish law, the board members do not have specific duties assigned to them. However, by inserting a relevant provision to the AoA or regulating an internal regulation, the board can always assign different duties to its members. Therefore, each board member can be held to be authorised and liable for different business transactions and may have different specific duties in that regard. In the event the duties are not assigned, the management is performed by all board members (TCC, article 367).

21 Delegation of board responsibilities

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

According to the TCC, the board of directors can transfer all of the management rights of the company to one or more executive members or to a third party as the manager. However, at least one of the board members must be entitled to represent the company (TCC, article 370). In such an instance, the transferor party would have the same responsibilities that the board of directors had pre-transfer.

The CGP stipulates that if there is a delegation of authority among board members, it should be specifically stipulated under the activity report of the company (CGP, article 4.2.2).

An addition has been made to article 371 of the TCC, relating to the representative authority of companies, by the Omnibus Law No. 6552 adopted on 10 September 2014. Pursuant to the mentioned addition, the

board of directors may appoint non-representative members of the board of directors or persons bound to the company by a labour contract, as commercial representatives with limited authority or as other commercial assistants. This act of the board of directors and the powers and duties of the appointed persons shall be explicitly reflected in the internal directive issued in accordance with article 367 and such internal directive shall be registered and announced. This amendment has enabled companies to impose different kinds of limitations or categorisations for their representative authorities that could not be done by a signatory circular.

22 Non-executive and independent directors

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

Non-executive and independent membership structures are regulated mainly under the CGP and in certain CMB communiqués. Pursuant to the CGP, the majority of the board members should consist of non-executive members (CGP article 4.3.2) and some of these members should be independent board members (CGP, article 4.3.3). Since all members of the audit committee are independent board members (CGP, article 4.5.3), the audit committee comprises only non-executive members.

Additionally, the TCC also regulates the non-executive board members. Accordingly, members of the board may solely have non-executive powers provided that it is explicitly stated in the internal guidelines.

According to the CGP, the board must include the following:

- the majority of the board must consist of non-executive members;
- the total number of independent members shall not be less than one-third of the total number of members;
- in any case the number of independent members cannot be less than two; and
- a person who has been acting as a board member for more than six years within the past 10 years cannot be appointed as an independent board member (CGP, article 4.3).

Pursuant to the CGP, an individual not having any administrative duties within the company is defined as a non-executive member.

As per the definition of the independent member, the CGP sets forth specific requirements to be met by independent members (CGP, article 4.3.6).

Under Turkish law, non-executive or independent directors do not have different duties from the executive directors. It should be noted that, as a general principle, all members of the board are jointly and severally liable to the company, the shareholders and the creditors of the company for damage occurring due to the non-fulfilment of the duties stated in the law or the AoA, unless they prove that they did not commit any fault.

23 Board composition

Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition? Are there minimum and maximum numbers of seats on the board? How is the size of the board determined? Who is authorised to make appointments to fill vacancies on the board?

The TCC allows the board of directors to consist of just one member (real person or legal entity) assigned by the AoA or elected by the GA and the requirement that a member of the board of directors has to be a shareholder in the company has been abolished. In the event that a legal entity is elected as a member of the board of directors, a real person should be determined by the legal entity on its behalf and such a decision needs to be registered and announced with the trade registry (TCC, article 359).

In LLCs, the management and representation of the company may be left to a shareholder or non-shareholder person that has been elected as the manager. However, at least one of the shareholders must possess the right to management and representation of the company. If there is more than

one manager of the company, one of these managers must be elected as the chairman of the management board by the board of partners.

According to article 4.3.1. of the CGP, the total number of board members shall no fewer than five in any case. Regarding female members in the board, the company shall determine a target percentage no less than 25 per cent and a target time, and shall establish a strategy to reach these targets (CGP, article 4.3.9).

Article 363 of the TCC stipulates that in the case of a vacancy on the board, the board of directors shall temporarily choose someone who satisfies the legal conditions and presents it for the approval of the GA. The member chosen this way carries out their duties until the GA meeting and, if he or she is approved, he or she continues working until the end of the mandate of their predecessor.

24 Board leadership

Do law, regulation, listing rules or practice require separation of the functions of board chairman and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

Under Turkish law, it is possible for the same board member to hold both the titles of chairman and CEO. According to the CGP, the duties and authorities of the CEO and the chairman of the board must be specifically distinguished from each other and stipulated under the AoA. In addition, if it is decided that the CEO and the chairman of the board are one person instead of two separate persons, then this should be published on the PDP with its reasons (CGP, articles 4.2.5 and 4.2.6).

25 Board committees

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

According to article 25 of CMB Communiqué serial X No. 22 regarding the standards of independent audit in capital markets, it is required that, within the framework of the Corporate Governance Principles, the board appoints an audit committee constituting a minimum of two members of the board. In enterprises where it is not obligatory to establish an audit committee, the duties of the audit committee are fulfilled by the board of directors.

According to the CGP, an audit committee, a corporate governance committee, an early detection of risk committee, a nomination committee and a price committee must be formed. Regarding banks, only a corporate governance committee shall be formed. If the nomination committee and price committee cannot be formed, then the corporate governance committee will supersede the duties of such committees (CGP, article 4.5.1). Pursuant to the TCC, listed companies are under the obligation to constitute a committee that will be in charge of detecting and managing the risks in advance. In the event the auditor of the company deems it necessary, such a committee must also be formed by companies other than the listed ones. The committee submits an evolution report to the board every two months and informs the board of the problems and solutions. The report shall also be sent to the auditor (TCC, article 378).

26 Board meetings

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

Frequency of board meetings is regulated under article 390 of the TCC. Accordingly, the law does not require a minimum number of board meetings per year. Therefore, in practice, the board convenes a meeting when deemed necessary unless the AoA require a minimum number of board meetings. The CGP states that the board of directors convenes the meeting on a regular basis in order to fulfil their duties effectively (CGP, article 4.4.1).

27 Board practices

Is disclosure of board practices required by law, regulation or listing requirement?

The structure, members of the board, their term of office and remuneration of the members are determined in GA meetings and the minutes of

GA meetings are registered with the relevant trade registry and published in the Turkish Trade Registry Gazette.

In addition to the TCC, capital stock companies subject to auditing will be required to set up and maintain a company website within three months following the incorporation of the company, and must allocate part of the website to the announcements legally required to be made (TCC, article 1524) (see question 35).

28 Remuneration of directors

How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions between the company and any director?

Remuneration

According to the TCC, provided that the amount is determined by the AoA or the GA resolution, directors can be paid a remuneration (TCC, article 394).

The CGP stipulates that the remuneration of board members cannot be determined by taking into account the profit share, share options or the company's performance-related payment schedules and are announced to the public (CGP, article 4.6.3).

Length

There is no requirement as to the length of the service contract of the board members under the TCC. According to the TCC, board members can be appointed for a maximum term of three years and unless otherwise specified in the AoA of the companies, board members may be re-elected (TCC, article 362). The CGP also sets forth that the term for independent members is three years and that they may be re-elected (CGP, article 4.3.5).

Transactions between company and board members

In strengthening the arm's-length principle, the TCC prohibits a JSC from financing its shareholders and directors, aiming to preserve the company assets and protect the creditors of the JSCs. In this regard, a board member cannot conduct any transaction with the company in his or her or any other person's name without permission from the GA, otherwise the company can claim that the transaction is null and void. The counterparty cannot make such a claim (TCC, article 395).

In addition, in the case of a board member who is not a shareholder, his or her relatives including spouses, descendants, lineal ancestors and relatives by blood or marriage to (and including) the third degree, cannot be indebted in cash to the company. The prohibition provided for board members includes guarantees as well. In other words, the company cannot provide surety, guarantee or security for the persons listed above, undertake their liability or take over their debts. Otherwise, the creditors of the company can start execution proceedings directly against these people for the debt of the company in the amount for which the company is liable (TCC, articles 393 and 395).

If the related-party transaction principle is violated, a judicial fine will be imposed on the shareholder or board members (TCC, article 562).

Also, shareholders cannot become indebted to the company unless the debt arises from their due capital commitments and the company's profit together with the legal reserves do not meet the company's losses for the previous years (TCC, article 358). In LLCs, the same principles apply only for partners of the company (TCC, article 644).

In addition, according to article 1.3.6 of the CGP, majority shareholders, members of the board and their relatives (spouse, direct offspring or relatives up to the second degree by blood or by marriage) are obliged to provide information in the GA about the transactions that may be competing with the company or its affiliates. Also, according to article 1.3.10 of the previous CGP, the approval of the shareholders' meeting was required for significant transactions, namely transferring or renting out all or a significant portion of company assets, establishing rights in rem on all or significant amounts of company assets, granting concessions to third parties or changing the scope and subject of already provided concessions, acquiring or renting significant amount of assets and delisting from Borsa Istanbul. Unless the decision of a shareholders' meeting is not required by the relevant board for the execution of such a transaction, affirmative votes from the majority of independent directors are required. If this is not achieved, the transaction will be submitted to the approval of the shareholders'

meeting. In such a case, the reasoning of the independent directors will be disclosed to the public, notified to the CMB and explained to the shareholders in the next general meeting. Article 1.3.9 of the current CGP provides the same rule, by elaborating the definition of 'significant transactions'. Accordingly, when the ratio between the value of the purchase or sale of assets and services, as well as the transfer of obligations and similar transactions, and the value of the company exceeds 10 per cent, the mechanism described above has to be implemented.

If the above transactions fall under the category of related-party transactions, those parties shall not vote in the relevant GA meeting. Accordingly, there is no minimum meeting quorum requirement for the approval of the above transactions (CML, article 29/6).

Also, as per article 21(1) of the CML, in the case of transactions with another enterprise or individual with whom there is a direct or indirect management, administrative, supervisory, or ownership relationship, publicly held joint-stock corporations, collective investment undertakings and their subsidiaries shall not damage their profits or assets by engaging in deceitful transactions by applying a price, fee or value clearly inconsistent with similar transactions with unrelated third parties, market practices or principles of commercial prudence and honesty. According to article 4 of Communiqué serial IV, No. 41 regarding the principles to comply with in the JSCs subject to the CMB communiqués, transactions had to be evaluated by an independent evaluation body in compliance with the requirements of the CMB if the amount of the transaction was equal to 5 per cent of the buyer's assets.

29 Remuneration of senior management

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions between the company and senior managers?

According to the TCC, the board shall review the remuneration of the key executives and include the information in the activity report of the board of directors. However, there is no regulation that affects the remuneration of senior managers (TCC, article 516/2).

According to the CGP, remuneration of the senior management must be prepared in a written form and submitted for the approval of the shareholders. The remuneration paid to the board members and the key executives and all other benefits to be provided to them are disclosed to the public through the activity reports. It is essential to disclose the remuneration for each of them. In the event specific disclosure is not made, at the very least a separation must be made between the key executives and board members. The remuneration policies of the company must be published on the company's website (CGP, article 4.6.2).

30 D&O liability insurance

Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

A voluntary insurance system for the damage incurred by the company through the fault of board members while performing their duties has been introduced by the TCC. If the damage is insured at a price exceeding 25 per cent 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 (TCC, article 361).

31 Indemnification of directors and officers

Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

There is no regulation preventing a company from indemnifying a director or officer against liabilities, but it should be noted that such indemnification claims are not common and have not been tested in the courts.

Update and trends

Besides several amendments to the CMB Communiqués, one of the most prominent developments in corporate governance regulation was the amendment of the TCC dated 10 September 2014, which has been strictly interpreted and followed by certain trade registries. According to the dominant practice of the trade registries based on the amended article 371 of the TCC, the adoption of a special internal directive is required where company officers are granted limited authorisation. Companies that want to grant limited authorisation shall first amend their AoA to enable the board of directors to assign their duties and authorisations through an internal directive. Then the board of directors must pass a resolution adopting the internal directive and such resolution must be registered. Lastly, another board of resolution must be passed and registered, appointing the signature authorities as per the internal directive. The signature circular can be issued once these three resolutions and accompanying documents are registered before the trade registry.

32 Exculpation of directors and officers

To what extent may companies or shareholders preclude or limit the liability of directors and officers?

As stated in question 21, the liabilities of board members can be restricted by delegating his or her duties to other board members or managers. However, the board members have a continuing duty to observe the acts and actions of the third parties to whom liabilities are delegated. The restriction on authority of representation is not effective against third parties in good faith, however, the restrictions that are registered and announced in relation to limiting authority of representation solely to the business of the headquarters or to the exercising thereof jointly are valid. In addition, they still have the duty to prudently and diligently delegate the responsibilities to persons who are qualified enough and supervise them (TCC, article 371).

As per the addition to article 371 of the TCC, explained under question 21, the board of directors shall be liable jointly and severally towards the company or third persons for any damages caused by the commercial representatives with limited authority or other commercial assistants appointed pursuant to an internal directive.

33 Employees

What role do employees play in corporate governance?

According to the TCC, employees do not have a specific duty in terms of corporate governance. However, under the CGP, employees are also listed as stakeholders and companies must ensure that the rights and benefits of the stakeholders are protected (CGP, article 3.1.1).

Disclosure and transparency

34 Corporate charter and by-laws

Are the corporate charter and by-laws of companies publicly available? If so, where?

The AoA of a company and any amendments thereto must be registered in the relevant trade registry and announced in the Turkish Trade Registry Gazette as of its incorporation. Further, the AoA of a company that is obliged to launch a website (see question 35) is also announced on the company website. According to the CGP, the AoA of a company must also be published on the company's website (CGP, article 2.1.1).

35 Company information

What information must companies publicly disclose? How often must disclosure be made?

With the TCC, each capital stock company subject to independent audit is obliged to maintain a company website within three months following the incorporation of the company and must allocate a specific part of the website to making the announcements legally required (TCC, article 1524).

Pursuant to the relevant provision of the TCC, companies that are subject to the independent audit must be determined by the Council of Ministers. The Council of Ministers issued this decision on 19 December 2012 (the Decision Regarding the Determination of the Companies to be subject to an Independent Audit (the Decision), which has been revised by the Council of Ministers decision dated 14 March 2014.

As per article 3 of the Decision, companies that fulfil at least two of the three conditions below together with their affiliates, subsidiaries or by themselves for two consecutive account periods shall be subject to the independent audit.

These conditions are:

- companies with aggregate assets amounting to 75 million or more Turkish lira;
- companies with annual net sale revenues amounting to 150 million or more Turkish lira); and
- companies with 250 or more employees.

In addition to the above, the Amendment Code has narrowed the scope of the announcements to be made by the companies on their websites and has regulated that the announcements legally required to be made must be announced on the website, as well as having introduced certain time periods for publication of the commercial papers and documents, which are required to be published on the website of a company.

Companies that do not launch a website within three months as of the date the TCC entered into force will be subject to a judicial fine of between 100 and 300 days, and authorised bodies of companies that do not allocate part of the website to public information within the same period of time will be subject to a judicial fine of up to 100 days (see question 27) (TCC, article 562/12).

Hot topics

36 Say-on-pay

Do shareholders have an advisory or other vote regarding executive remuneration? How frequently may they vote?

According to the CGP, a written remuneration policy should be submitted to the shareholders during the GA meetings and discussed as a separate agenda article to give them the opportunity to air their views and suggestions in relation to the remuneration policy that applies to members of the board of directors and key executives. The remuneration policies of public companies are announced on their websites (CGP, article 4.6.2).

37 Proxy solicitation

Do shareholders have the ability to nominate directors without incurring the expense of proxy solicitation?

According to the TCC, shareholders are authorised to nominate directors without soliciting a proxy (TCC, article 428/2).

Further, pursuant to the relevant provision of the CML (article 30/4), the principals and procedures of using votes by proxy and proxy solicitation are determined by the CMB. The Communiqué on Proxy Voting and Proxy Solicitation, which entered into force on 24 December 2013, regulates the rules and principles concerning the proxy voting in GA meetings of publicly held companies, proxy solicitation and conclusion of proxy voting contracts. Besides new formats as to the paperwork, with the enactment of the communiqué application to the CMB for proxy solicitation is no longer deemed as an obligation in order to speed up the process. In the event that persons who do not have control over management of a company and attempt to solicit proxies, then the board of directors of the respective company will be entitled to solicit proxies through their representatives. Obligation to vote by a written voting procedure in GA meetings conducted in physical environment is limited to solicited proxies.

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