

**AMENDMENTS IN RELATION TO JOINT STOCK COMPANIES  
INTRODUCED BY  
TURKISH COMMERCIAL CODE NUMBERED 6102**

This article briefly sets out some of the changes in relation to joint stock companies introduced by Turkish Commercial Code numbered 6102 (“N-TCC”), majority of articles of which will come into force on 01 July 2012. We believe these changes will significantly impact practice<sup>1</sup>.

### **1. Joint Stock Companies with a Single Shareholder**

The requirement provided for under Article 277 of the Turkish Commercial Code numbered 6762 (“O-TCC”) that there should be a minimum of five founding shareholders in order for a joint stock company to be established is abandoned in N-TCC. Under O-TCC, it was also a requirement to maintain the mentioned number of founding shareholders during the entire existence of the joint stock company. Furthermore, under Article 338 of N-TCC, one or more founding shareholders is required to be present in order for a joint stock company to be incorporate but it has also been made possible to establish a joint stock company with a single shareholder. This amendment will significantly help investors who presently have difficulty in finding at least five shareholders in order to establish a joint stock company.

The single shareholder of a joint stock company can be a real person, a legal entity, a public company or another company.

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<sup>1</sup> In this memo, currently applicable Turkish Commercial Code numbered 6762, which will remain in force until 1 July 2012, is referred to as “O-TCC”. The new Turkish Commercial Code, substantial part of which will come into force on 1 July 2012, is referred to as “N-TCC”.

In the event that the company is established by more than one founding shareholder and then the number of its shareholders decreases to one, the board of directors must be notified within seven days in this respect and the name, place of residence and citizenship of the single shareholder of the joint stock company must also be registered and announced by the board of directors at the Trade Registry within seven days of the mentioned notification to the board of directors. In the event of failure of the single shareholder to notify the board of directors or failure of the board of directors to make the abovementioned registration and announcement at the Trade Registry, the single shareholder and the board of directors shall be liable for any damages which will arise in consequence.

It is possible for a joint stock company established with a single shareholder to change type, to demerge or merge with another company.

### **2. Board of Directors**

Pursuant to Article 312 of O-TCC, it was a requirement to be a shareholder in the company in order to become a board member. In the event that persons, who are not shareholders, are elected as board members, their term of office could only commence after they became shareholders.

On the other hand, the N-TCC does not bring any requirement for the persons which will be appointed as board members to also be shareholders.

The requirement under O-TCC that the board of directors must consist of a minimum of 3 members has also been abandoned in N-TCC. On the other hand, a new requirement has been introduced by Article 359 of N-TCC, according to which at least one member who is authorised to represent the company must reside in Turkey and must be a Turkish citizen. The mentioned provision which was not included in O-TCC is of great significance particularly for foreign capital companies existing in Turkey. In our experience, majority of foreign capital companies appoint as board members non-Turkish persons who do not even reside in Turkey. Accordingly, it would be appropriate to ensure compliance upon the occurrence of the conditions stipulated in the new provision with respect to existing companies and take it into consideration while establishing the board of directors of the companies to be incorporated following N-TCC coming into force.

In the event that a legal entity is elected as board member, a real person appointed by such legal entity to attend meetings and vote on behalf of the legal entity shall also be registered with the Trade Registry and shall also be announced on the company's website.

Contrary to O-TCC, N-TCC introduced a requirement that at least one fourth of members of the board of directors shall have a higher education qualification. However, this requirement does not apply to board of directors with a single member. Mentioned condition which was not included in O-TCC is aimed at ensuring professional management and will lead to significant changes in practise which will need to be taken heed of.

### 3. Payment of Capital

Minimum amount of capital required for joint stock companies, which was TL50.000 under O-TCC, has been changed under N-TCC. Pursuant to article 332 of N-TCC, the capital, which represents the capital fully subscribed in the articles of association of the company, cannot be less than TL50.000; on the other hand, in case of non-public joint stock companies which have adopted a registered capital system

indicating the authority limit granted to the board of directors with respect to any capital increase, the initial capital shall be at least TL100.000 (for your reference, 1 TL is approximately EUR 2.4 and USD 1.8).

Another change introduced by N-TCC is that recognition of moveable and immovable assets as in rem capital has been made subject to some conditions which provide that there should not be any limited rights *in rem*, attachments or precautionary judgments over the moveable and immovable assets and that annotation must be placed with the relevant registry.

Furthermore, N-TCC provides for a requirement of the part of the share price subscribed in cash being paid before registration of the joint stock company and the remaining of such share price being paid within a certain period of time. Accordingly, application for registration being made without any payment has been abandoned.

According to this new arrangement, under principal capital systems, at least 25% of nominal value of subscribed shares is required to be paid prior to registration with the remaining being paid within 24 months from the registration of the joint stock company. It is possible to provide in the Articles of Association a percentage higher than 25% for the amount to be paid prior to registration of capital.

On the other hand, under registered capital systems<sup>2</sup>, it is a requirement that, in public joint stock companies, the initial capital and the issued capital are paid. However, there is no such requirement for non-public joint stock companies.

Another significant change is that, N-TCC does not prohibit shares in consideration of *in rem* capital being transferred for a period of two years which was included as a prohibition under O-TCC.

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<sup>2</sup> In the registered capital system, companies apply to and register with the Turkish Capital Markets Board a maximum capital amount. Accordingly, companies may increase their capital up to the registered amount by a board resolution without the need for a general assembly.

#### 4. Prohibition on Becoming Indebted to the Company

This very important restriction introduced by N-TCC is set out in Article 358. According to the relevant article, shareholders cannot become indebted to the company, except for liabilities arising due to contributions made to the capital. This provision has already started receiving criticism even before N-TCC has come into force. Any liability which arises due to a procedure that has been carried out pursuant to the scope of business of the company and operations of a shareholder, and which is subject to the same or similar conditions with other similar liabilities, is an exception to the above provision. The purpose of this exception is to enable shareholders who have business dealings with the company to purchase goods from the company in instalments or on consignment or by similar methods as all the other customers of the company. Accordingly, by the same exception, it has been clearly provided that the same terms and conditions apply to the shareholders of the company as the other customers of the company.

Similarly, according to article 395 of N-TCC, board members; their relatives; private companies in which board members or their relatives are shareholders and capital stock companies in which board members or their relatives hold at least 20% of the shares, shall not become indebted to the company in cash or in rem. Otherwise, company creditors can commence proceedings directly against the mentioned persons for any amounts the mentioned persons owe to the company, with respect to company debts which the company is liable for. For debts previously owed to the company, there is an entitlement to repay by 1 July 2015. It is very important to take heed of the mentioned deadline.

It will be possible to impose a judicial fine of three hundred days at minimum as provided for under Article 562 of N-TCC against those acting in breach of the above provisions. The mentioned judicial fine is another provision which has been receiving criticism prior to N-TCC coming into force.

#### 5. General Assembly

By Article 1527 of N-TCC, it has been made possible to hold and participate in online general assemblies which will provide great convenience for companies. According to Article 1524 of N-TCC, it is necessary to issue general assembly decisions on the company website.

By the provisions of N-TCC, the function of the general assembly and the allocation of duty and power between the general assembly and the board of directors have been further clarified and persons obliged to participate in general assemblies and those who *may* participate have been clearly specified. Accordingly, while managing directors and at least one board member are obliged to attend general assemblies, other board members may also participate if they so wish. As explained in more detail in 6 below, the auditor, who has different powers and qualifications under N-TCC compared to O-TCC and also the process auditor, which is a concept introduced by N-TCC, may attend general assemblies regarding matters concerning itself.

N-TCC provides for a new requirement according to which board of directors of companies are required to issue an internal regulation in relation to principles and procedures of operation of the general assembly and the commissaire requirement. This requirement should also be carefully followed by the board of directors of companies.

#### 6. Auditing of the Company

Even though under O-TCC, statutory auditor(s) was a corporate body equipped with special powers, N-TCC does not include a statutory auditor(s) as a company organ and introduces three types of auditors instead.

(i) Auditor: carries out the independent inspection of a company. They are persons inspecting the consolidated annual financial statements and are sworn financial advisors or independent accountant financial advisors.

(ii) Process auditor: person inspecting the incorporation, capital increase, decrease, merger, demerger, change of type, issuance of securities of joint stock companies or actions having a similar public interest, concerning the capital markets.

(iii) Private auditor: person carrying out a special inspection on certain matters requiring clarification with respect to the interests of a joint stock company and shareholders specialised in the particular area.

With N-TCC, auditing is entrusted to organisation or persons which do not have the capacity of a joint stock company organ.

### **7. Obligation to maintain a website**

According to Article 1524 of N-TCC, capital stock companies are obliged to open a website and publish information set out in Article 1524. Some of the information required to be published on a website is as follows:

- Announcements legally required to be made by the company;
- Information, documents and explanations necessary for shareholders to protect their rights, exercise their rights in an informed manner;
- Documents relating to amendments to the articles of association including increase in capital;
- Documents relating to all types of calls, including calls to general assemblies, declarations of the board of directors, reports;
- Financial statements, interim statements legally required to be declared;
- Annual reports of the board of directors, audit reports.

Same article further provides that if the mentioned contents are not published on the company's website, this will cause annulment of any such non-published decisions and will raise all consequences of non-compliance with the law (i.e. absolute nullity and voidance) and will

also cause negligent directors and board member to become liable. The article provides that, if the website provided for in the relevant article is not created, or part of an existing website is not allocated for public information purposes, the liable board members shall be penalised by imprisonment of up to six months or judicial fine of between hundred days up to three hundred days. Furthermore, board members, who do not publish the mentioned contents on the website shall also be penalised by imprisonment of up to three months and judicial fine of up to hundred days.

This provision which will have significant consequences upon coming into force and being applied in practice is already controversial under the doctrine and many companies have already begun criticising the new requirement even before the entry into force of N-TCC.

### **8. Online boards**

According to Article 1527 of N-TCC, meetings of board of directors may be entirely held online or some board members may attend meetings in person and others online.

Four conditions have been provided for in order for meetings of boards of directors to be held online as described above:

- The company maintaining a website specifically for this purpose;
- The shareholder making a request to use the system in this manner;
- The suitability of electronic instruments allowing such participation being proven by way of a technical report and such report being registered and published; and
- The identity of voters being concealed.

### **9. Voluntary insurance**

Article 361 of N-TCC provides for voluntary insurance as security for the damages which may be caused by board members to the company. According to the mentioned Article, in the event that the insurance amount against damages

which may be caused to the company as a result of negligence of board members whilst performing duties exceeds 25% of the company capital, this will be announced in the bulletin of the Capital

Markets Board in public companies and in the bulletin of the stock exchange if the shares of the company are being traded on the stock exchange.

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\* The views expressed in this memo are those of the authors and aimed only at providing brief information on the New Turkish Commercial Code (N-TCC). This memo does not constitute a legal document and does not constitute any legal opinion or legal advice. Please do not hesitate to contact our offices should you require more detailed information on any of the issues mentioned in this memo.