Corporate governance and directors' duties in Turkey: overview

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A Q&A guide to corporate governance law in Turkey.

The Q&A gives a high level overview of board composition, the comply or explain approach, management rules and authority, directors' duties and liabilities, transactions with directors and conflicts, company meetings, internal controls, accounts and audit, institutional investors and reform proposals.

To compare answers across multiple jurisdictions, visit the *Corporate Governance Country Q&A tool*.

The Q&A is part of the global guide to corporate governance law. For a full list of jurisdictional Q&As visit *www.practicallaw.com/resources/global-guides/corpgov-guide*.

Corporate governance trends

1. What are the main recent corporate governance trends and reform proposals in your jurisdiction?

- There are not any recent fundamental legislative changes constituting any corporate governance trends or reform proposals in Turkey.
- However, a new system (called Central Registration System (MERSIS)) has been introduced and it has brought certain changes to the registration application procedures of corporate governance matters. The system aims to:
- Enable access to the present information regarding companies from a single resource.
- Share the related information with the other institutions when required.
- Expedite all processes such as applications and registrations before the relevant institutions.
- Unlike the previous system (where companies were only required to prepare all essential documents for registration in hard copy and submit them to relevant trade registry), this new system requires companies to make an application through the online system for registration of their corporate governance issues before submitting the hard copy documents to the trade registry by hand. Therefore, even if one of the aims was to expedite the registration process with MERSIS, MERSIS is now considered as an additional step in the registration process (as the documents still need to be submitted in hard copies).

- MERSIS was first used by certain trade registries in Turkey for testing purposes in 2010. 238 trade registries started using it from 1 January 2015 (as the old records were all transferred to the system) and the system has become popular since then. Istanbul Trade Registry was able to put this system to operation after the trade registries in Antalya, Ankara and Izmir. Even though the system was first used in the establishment processes of the companies, it is now necessary for all registration processes (including capital increase, appointment of managers and so on). The Istanbul Trade Registry has also started to use MERSIS for all registration processes as of May 2018.
- Other notable developments that companies should consider include:
- The Data Protection Law (which into force on 7 April 2016) and the Data Protection Authority's secondary legislation.
- The Presidential Decree No. 85 (dated 12 September 2018) and the Communiqué (Communiqué No: 2018-32/52) Relating to the Amendment of the Communiqué Concerning the Decision No. 32 on Protection of the Value of the Turkish Currency (Communiqué No: 2008-32/34) (published in Official Gazette No. 30597 and dated 16 November 2018), which prohibit the use of foreign currency in certain transactions.
- Communiqué Concerning the Resolution No. 32 on the Protection of the Value of Turkish Currency (published in Official Gazette No. 30525 and dated 04 September 2018) which requires companies to bring export revenue to Turkey.

Corporate entities

2. What are the main forms of corporate entity used in your jurisdiction?

The main forms of corporate entity used in Turkey are the:

- Limited liability company (LLC).
- Joint-stock company (JSC).

The LLC and JSC are the preferred company forms in Turkey for both foreign and local entrepreneurs. The minimum capital requirement for a JSC is TRY50,000 whereas the capital requirement for establishment of an LLC is TRY10,000. However, in JSCs, shareholders are not responsible personally for the company's public receivables, while in LLCs founders and shareholders are directly liable for those debts in proportion to their share capital contributions.

As the Commercial Code is structured around JSCs and many provisions applicable to JSCs also apply to LLCs, the answers below relate to JSCs. Where the relevant provisions are different in relation to LLCs, this is indicated.

Legal framework

3. Outline the main corporate governance legislation and authorities that enforce it. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? List any such groups with significant influence in this area.

The main corporate legislation includes the:

- Commercial Code.
- Capital Markets Law dated 6 December 2012 (6362), which entered into force on 30 December 2012.
- Capital Markets Communiqués, including the new Corporate Governance Communiqué dated 3 January 2014 (*see Question 4*).

The Ministry of Customs and Trade is the main authority for the enforcement of Commercial Code provisions on corporate entities. Disputes arising from Commercial Code are mainly resolved before the commercial courts.

The Capital Markets Law and Capital Markets Communiqués are enforced by the Capital Markets Board. The Capital Markets Board is the regulatory and supervisory authority in charge of the securities markets in Turkey. It can impose administrative sanctions on companies or individuals for non-compliance.

The Turkish Industry and Business Association (TUSIAD), which is an independent and voluntary non-governmental organisation, has an important role on the formation and development of the corporate governance principles. TUSIAD issued the first Corporate Governance Best Practice Code in Turkey in 2002.

4. Has your jurisdiction adopted a corporate governance code?

The Commercial Code regulates the main principles of corporate governance for both public and non-public companies. The Corporate Governance Communiqué regulates in detail corporate governance principles applicable only to public companies.

Under the Corporate Governance Communiqué, public companies with shares traded on the stock exchange are subject to its mandatory Corporate Governance Principles. The Communiqué has three categories of implementation, according to the average market value of the company and its shares. Category 1 companies must

comply with all mandatory corporate governance rules while there are some exemptions for companies that fall into Category 2 and Category 3.

See *Question 3*.

Corporate social responsibility and reporting

> 5. Is it common for companies to report on social, environmental and ethical issues? Highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

There are no legal requirements for companies in relation to corporate social responsibility. However, taking part in social, environmental and ethical projects attracts sympathy and trust. Therefore, it is common for well-known companies to take part in respectable social responsibility projects and to co-operate with non-governmental organisations. In practice, reputable companies (especially big or publicly held companies) disclose their social responsibility projects on their website and through the media.

Board composition and restrictions

> 6. What is the management/board structure of a company?

Structure
The board structure for both JSCs and LLCs is one-tier.

Management
The management body of a JSC is a board of directors containing at least one director. An LLC is managed by a board of managers consisting one or more managers.

Board members
Legal entities can be board members in both JSCs and LLCs. For a JSC, the board members do not have to be the shareholders. However, in an LLC, at least one of the shareholders must be appointed as a manager to the company.

Employees' representation
Employees do not have a right to be represented in the board.

Number of directors or members
The board must be composed of one or more individuals under the Commercial Code. The number must not be less than five for companies subject to the Corporate Governance Principles (*Corporate Governance Principles, 4.3.1*).

7. Are there any general restrictions or requirements on the identity of directors?

Age
Board members must have full capacity with power of discernment and must be older than 18 years.

Nationality
There are no nationality restrictions in the Commercial Code.

Gender
There are no gender restrictions in the Commercial Code. However, the Corporate Governance Principles require companies to set a target ratio for female board members, which should not be less than 25%, and to create a company policy for the accomplishment of that target (*Article 4.3.9, Corporate Governance Principles*).

8. Are non-executive, supervisory or independent directors recognised or required?

Recognition
Although there is no provision in the Commercial Code, both non-executive directors and independent directors are recognised and required by the Corporate Governance Principles.

Board composition
Under the Corporate Governance Principles, a majority of the board's members must consist of non-executive members. In addition, the number of independent board members cannot be fewer than one-third of the total number of board of directors' members, and the independent board members must be at least two (*Article 4.3.4, Corporate Governance Principles*).

Independence

The Corporate Governance Principles set out specific requirements for independent members (*Article 4.3.6, Corporate Governance Principles*). The independence requirements state that members must:

- Not work or be linked with any companies and corporations whose management is controlled by the member's company.
- Not be shareholders (of 5% or more of shares) or employees at an administrative level in companies that the company purchases or sells goods or services to or from.
- Have the requisite professional education and knowledge to carry out the assigned duties.
- Not be full-time employees in any public authority, except as faculty members.
- Reside in Turkey pursuant to the Income Tax Law.
- Be able to contribute to the operations of the company, and must be impartial and able to independently take decisions according to strong ethical standards.
- Have time for the corporation business.
- Not have been on a board of directors for more than six years within the last ten years.
- Not be an independent board member of more than three corporations which the company or controlling shareholders of the company hold the control of.
- Not be registered and announced as a legal entity representative board member.

9. Are the roles of individual board members restricted?

The roles of individual board members are not restricted. One person can be both the chairman and chief executive.

10. How are directors appointed and removed? Is shareholder approval required?

Appointment of directors
In the company establishment process, directors are appointed under the articles of association (*Article 359, Commercial Code*). Afterwards, the general assembly appoints the directors. Both the articles of association and relevant general assembly resolution must be registered with the relevant Trade Registry and announced in the *Trade Registry Gazette*.

Removal of directors
Directors can be dismissed at any time with a general assembly decision if either of the following occurs:

- The dismissal is included in the meeting agenda.
- There is a justified reason for the dismissal, even it is not included in the agenda (*Article 364, Commercial Code*).

11. Are there any restrictions on a director's term of appointment?

In JSCs, directors can be appointed for a maximum three-year period. The same director can be appointed again, unless otherwise specified in articles of association (*Article 362, Commercial Code*). However, in LLCs, managers' term of appointment is not subject to time restrictions.

12. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

Directors employed by the company
Under the Commercial Code, directors do not have to be employees of the company. Directors can be employees, shareholders or third parties.

Shareholders' inspection
Shareholders have a right to receive information and to investigate the company's annual reports and financial statements (*Article 437, Commercial Code*). Directors must make an annual activity report and financial report available in company's central and branch offices for shareholders' inspection at least 15 days before the annual general assembly meeting. Every shareholder has a right to receive a copy of the statement of income and balance sheet.

In addition, during the general assembly, shareholders can request information from directors concerning company operations, or from auditors concerning audit results.

13. Are directors allowed or required to own shares in the company?

Directors can own shares in the company, but there is no requirement in this regard.

In an LLC, at least one of the shareholders must be appointed as manager with full authority to represent the company (*see Question 6*).

Directors' remuneration

14. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

The articles of association or a general assembly decision can grant financial rights to directors, such as (*Article 394, Commercial Code*):

- Attendance fees.
- Wages.
- Bounties.
- Premiums.
- Percentages of annual profits.

Determination of directors' remuneration
The general assembly of shareholders determines directors' remuneration and this is one of the non-transferable duties of the general assembly.

Disclosure
The general assembly resolution deciding on the directors' remuneration must be registered with the Trade Registry and announced in the *Trade Registry Gazette*.

Shareholder approval
Shareholder approval is required, as the general assembly of shareholders determines directors' remuneration and this is one of the non-transferable duties of the general assembly.

General issues and trends
Directors' remuneration can vary depending on the sector in which the company is operating, the size and field of activity of the company.

Management rules and authority

15.How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

There is no specific provision on the length of the notice for board meetings. However, it is possible to regulate this in the articles of association.

Every board member can call the board for a meeting. Unless determined otherwise in the articles of association, the meeting quorum requires a majority of the members to be present and the votes of a majority of the members present are needed to pass a resolution.

In a JSC, if none of the board members requests a physical meeting, it is possible to take a decision by circulation among all board members (*Article 390, Commercial Code*). In this case, written approvals of at least majority of the members are needed.

16. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

Directors' powers
The board of directors is responsible for all company business and transactions required for realisation of the company's operations, save for the non-transferable powers granted to the general assembly by law or the articles of association.

Under the Commercial Code, the following issues are non-transferrable powers of the general assembly:

- Amending the articles of association.
- Releasing the auditors and the board of directors from liability or holding them liable for any wrongdoing.
- Appointing the members of the board of directors, determining their fees and term of duties, and releasing and replacing them.
- Appointing and releasing the auditor (except in certain legally-defined circumstances).
- Taking decisions regarding:

- financial statements;
- annual reports of the board of directors;
- savings from annual profits; or
- the determination of the dividend and gain margin, including injections of the reserve fund into capital or profit to be distributed, and deciding on the use of the reserve fund.

- Dissolving the company (except in certain legally-defined circumstances).
- Sale of a substantial part of the company.

Restrictions
Under the Commercial Code, in principle, signature authority must be exercised jointly by all the co-signatories, unless otherwise stated by the articles of association or the board of directors consists of only one member. However, 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, provided that at least one member of the board of directors remains entitled to represent the company.

In principle, a restriction on a director's power of representation has no effect as against third parties acting on that representation in good faith, unless (*Article 371, Commercial Code*):

- The power of representation is restricted to the affairs of the company headquarters or branch or is restricted to joint signatures of members of the board of directors.
- This restriction is duly registered and published.

In addition, in September 2014, an amendment was made to the Article 371 of the Commercial Code, relating to the representation authority of companies, by the Omnibus Law No. 6552. Under this amendment, the board of directors can 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 must be explicitly reflected in an internal directive issued in accordance with Article 367. That internal directive must 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 achieved through a signatory circular.

17. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

Although there is no requirement to do so, it is possible for board of directors to delegate responsibility for specific issues under the Commercial Code (*see Question 16*).

Directors' duties and liabilities

18. What is the scope of a director's general duties and liability to the company, shareholders and third parties?

The principal duties of directors are:

- 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 complies with the principles of good faith and the interests of the company and its shareholders.
- To keep confidential 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.
- Not to engage in transactions with the company unless authorised by the general assembly meeting, which can be for a maximum period of five years in relation to the repurchase of shares.

For a director to be personally liable, the following conditions must be met:

- The director must have breached his duties under the legislation or the articles of association.
- He must have acted with fault (including negligence).
- The company, shareholders or creditors must have suffered a loss/damage as a result of the breach,
- There must be a causal link between the loss/damage and the director's breaches.

(*Article 553, Commercial Code.*)

Directors who have assigned their duties (to the extent legally possible) arising from the law or the articles of association do not bear any liability for the acts and decisions of the assignee director (unless it is established that they failed to show reasonable care in the selection of the assignee officers).

In relation to directors' negligence, the required standard of care is that given by a prudent director, who acts cautiously and considering the interests of the company in good faith.

19. Briefly outline the regulatory framework for theft, fraud, and bribery that can apply to directors.

There is no umbrella legislation regulating white-collar crimes. However, the general regulations relating to white-collar crimes are mainly found in the Criminal Code.

Under the Turkish Constitution and the Criminal Code, criminal liability is personal and legal entities cannot be sentenced to criminal sanctions (unlike individuals). Therefore, directors who are involved in white-collar crimes such as theft, fraud and bribery can be held individually responsible under the relevant provisions of the Criminal Code.

20. Briefly outline the potential liability for directors under securities laws.

In securitisation processes, in case of a loss caused by false, fraudulent, fake and untrue documents, statements, commitments and warranties, the director who has prepared the relevant document or made the relevant declaration is liable (*Article 549, Commercial Code*).

The Capital Markets Board can take any kind of measures and request preliminary injunctions or provisional attachments against individuals who illegally issue or attempt to issue capital market tools as compensation for sold and for-sale securities (*Article 91, Capital Markets Law*). After the determination, the Capital Markets Board issues a written notice to the issuers within 30 days for mitigation of the consequences and refund of cash and other assets to right holders. If the consequences resulting from this illegal issuance are not totally eliminated within one year starting from the date of the written notice of the Board the Capital Markets Board can file a lawsuit for refund of cash and other assets to right holders or for the liquidation of the company.

21. What is the scope of a director's duties and liability under insolvency laws?

If a company becomes bankrupt due to the management failures of its directors, the shareholders or the creditors of the company can hold the directors or officers liable for their losses under the Code on Enforcement and Bankruptcy. The relevant criminal sanction is applied to the directors, liquidators or the auditors who committed the act defined in the crime.

A new Communiqué on the Procedures and Principles Regarding the Implementation of Article 376 of the Commercial Code was issued and entered into force on 15 September 2018. Under the Communiqué, the signs showing that the company may be insolvent can be found in the annual and interim financial statements, audit reports (if any), reports of the early detection committee and the findings of the directors. According to the

Communiqué, if there are signs that the company may be insolvent, the directors must prepare an interim balance sheet. If the balance sheet indicates that the company is insolvent, then the directors must apply to the court and ask the court to decide the company's bankruptcy if the following are present:

- The board of directors decides that the assets of the company are insufficient to cover the company's debts
- None of the measures under in Article 7 of the Communiqué have been taken (that is, deciding to continue trading with one third of the capital and making a capital decrease, or restoring the capital or increasing the capital).

Provisional Article 1 of the Communiqué prevents foreign exchange losses arising from the foreign currency liabilities that are not yet fulfilled from being considered in the calculations regarding the loss of capital or insolvency under Article 376 of the Commercial Code until 1 January 2023.

The directors in charge of management and representation can be punished with a maximum three months of imprisonment on the complaint of the creditors for not requesting the bankruptcy of the company when required to do so.

In addition, under the Code on Enforcement and Bankruptcy, directors who do not pay the company's debts partially or fully with the intention of damaging creditors' rights can be punished with imprisonment from between six months and two years, and a judicial penalty up to 5,000 days, upon the complaint of the creditors.

Negligent and fraudulent bankruptcy is defined under the Code on Enforcement and Bankruptcy, which refers to the Criminal Code regarding the sanctions applied. The following actions can constitute negligent bankruptcy:

- Not being able to show reasonable grounds for the losses.
- Incurring large losses during stock exchange transactions.
- Undertaking debts or issuing bonds in case of indebtedness.
- Not complying with the bankruptcy procedures.
- Not requesting the bankruptcy where it is compulsory.

Transactions aiming to damage the creditors' rights constitute fraudulent bankruptcy. These include:

- Entering into collusive transactions before or after the bankruptcy.
- Misrepresenting the value of the assets.
- Providing one of the creditors favourable conditions.
- Selling off the assets for an amount much less than its value.

The sanctions under the Criminal Code are imprisonment from two months to one year for negligent bankruptcy, and from three years to eight years for fraudulent bankruptcy.

22. Briefly outline the potential liability for directors under environment and health and safety laws.

Legal entities must ensure that they have taken the necessary environmental measures in respect of their commercial activities in accordance with the Environment Code (2872).

Requirements under the Environment Code include:

- Obtaining the necessary Environmental Impact Assessment Report before commencing activities that may lead to environmental problems (mostly construction projects).
- Obtaining the required licences and all other related permissions in relation to the commercial activity to be conducted.
- Notifying the relevant Ministry and administrative bodies as to any material change in the business that may result in any environment issues, and so on.

The Environment Code sets out administrative fines for non-compliance with these duties by companies. The companies will then have recourse to the relevant liable directors and officers for those losses in accordance with the general principles of liability (*see Question 18*).

Under the Law on the Occupational Health and Safety (6331), both real and legal persons, institutions and organisations without legal capacity who hire employees are considered to be employers. In addition, representatives of an employer who act on behalf of the employer and take part in the governance of the work and workplace, have the responsibilities and duties of employers, including in relation to:

- Protecting employees' safety and health by preventing occupational risks.
- Providing appropriate training.
- Making risk assessments.
- Hiring an occupational safety specialists or physicians.

In the case of non-fulfilment of these responsibilities, the responsible employer or employer representative can be subject to administrative fines ranging from TRY3,092 to TRY23,214 for each breach.

23. Briefly outline the potential liability for directors under anti-trust laws.

An administrative fine of up to 10% of an undertaking's annual gross revenues can be imposed for an infringement of competition law (*Article 16, Law on the Protection of Competition No. 4054*). In addition, an administrative fine of up to 5% of the penalty imposed on the undertaking can be imposed on managers/directors of the undertaking who are found to have a decisive influence in an infringement.

24. Briefly outline any other liability that directors can incur under other specific laws.

Legal representatives of a legal entity taxpayer can be held liable where they have failed in fulfilling their duties under the tax legislation (*Article 10, Tax Procedural Code*). The Council of State has set out that a person to be held personally liable for tax debts must have had an actual power of representation for tax issues and the capacity to pay the tax debts of the company, which would require having management authority in this respect.

Directors can also have employment-related liabilities under the Labour Code. Under the Labour Code, companies can be held liable for losses if there is a breach of any of the obligations or responsibilities imposed by the Labour Code and can be punished with administrative fines in case of violation of its general provisions. If a company is punished with administrative fines, it has a right to recourse to the relevant directors who have caused the loss under the general liability principles (*see Question 18*).

If an employee is injured or dies due to a work accident that occurred under the supervision of an employer's representative (directors or officers), the representative can also be criminally liable under the Criminal Code.

25. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

Directors can delegate their duties (*see Question 16 and Question 17*). Therefore, their liability can also be restricted in the same degree as the delegation. However, the delegation of duties does not absolve the director of liability if the director has failed to show reasonable care in the selection of the assignee office

ers. Also, a restriction does not eliminate liability towards third parties acting in good faith, unless both of the following apply:

- The power of representation is restricted to the affairs of the company headquarters or branch or is restricted to joint signatures of members of the board of directors.
- This restriction is duly registered and published.

A company can indemnify a director against liabilities. The general assembly can also decide to release directors from liability. The approval of the balance sheet results in the release of the members of board of directors, unless indicated otherwise in the general assembly decision. However, if the balance sheet is not properly provided or intentionally obscures the company's real conditions, the approval does not result in a release (*Article 424, Commercial Code*).

26. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

It is possible to obtain insurance against directors' personal liability arising from the performance of their duties. The company can pay the insurance premium.

In public companies, if the damage is insured at a price exceeding 25% of the company's capital and the company is secured, this must be announced in the Capital Markets Board bulletin. In addition, if the shares of the company are listed on a stock exchange, this must also be announced in the stock exchange bulletin (*Article 361, Commercial Code*).

27. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

The Commercial Code sets out a special liability for companies controlling other companies in its group:

- Shareholders and creditors of an affiliated company can initiate a compensation action against a dominant company and/or its directors where there is abuse of dominance by the controlling company that:
    - damages the affiliated company, for example, directing the affiliated company to engage in transactions that reduce or transfer its profits, assets or receivables, and so on; and
    - fails to compensate losses of the affiliated company or grant a right equivalent to the losses to the affiliated company within the same fiscal year.

- If a merger, demerger, acquisition or issuance of securities takes place in the affiliated company, with the use of dominance and without a justified reason, shareholders who voted against the relevant general assembly decision or who objected to the relevant resolution of the board of directors can:
    - initiate an action against the controlling company for indemnification of their losses; and
    - request the controlling company to purchase their shares.

Transactions with directors and conflicts

28. Are there general rules relating to conflicts of interest between a director and the company?

Article 369 of the Commercial Code sets out a duty of care and duty of loyalty for members of the board of directors. The Commercial Code requires the members of the board of directors to act as cautious directors while performing their duties and to protect the interests of the company in accordance with the principle of good faith.

The Commercial Code provides certain restrictions concerning the relations of the members of the board of directors with the company in light of the duty of care and duty of loyalty:

- A director is prohibited from participating in the relevant board of directors' meeting in cases of conflict of interest between the company and the director or his relatives by blood or marriage (*Article 393, Commercial Code*). This prohibition also applies in circumstances where the director must not participate in the discussions due to the principle of good faith.
- A director cannot conclude any transaction with the company on behalf of himself or a third party without the general assembly's approval (*Article 395, Commercial Code*). If he does so, the company can claim the transaction to be invalid. In addition, a director who is not a shareholder, and certain relatives of him, cannot incur any cash debt to the company.
- In parallel to the Commercial Code provisions, the Corporate Governance Principles also set out certain requirements in relation to related-party transactions, and require a board of directors' resolution and general assembly approval under certain circumstances.
- A director cannot conclude a transaction falling in the company's scope of activity on behalf of himself or a third party without the general assembly's approval or cannot become an unlimited partner to a company that has similar scope of activity (*Article 396, Commercial Code*).

29. Are there restrictions on particular transactions between a company and its directors?

There is a general prohibition on transactions between directors and the company (*see Question 28*). This restriction applies for all types of transactions.

30. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

There is no restriction in the Commercial Code on the purchase or sale by a director of the shares and other securities of the company he is a director of. However, Article 106 of the Capital Markets Law restricts the purchase or sale of such shares and other securities by a director. Directors can be sentenced to imprisonment from two to five years, or be punished with judicial fine, if they:

- Give, change or cancel purchase or sale orders for capital market instruments.
- Provide a benefit to themselves or someone else.
- Do so based on information that can affect the prices of the capital market instruments, or the decisions of investors, and that has not been declared to the public.

Disclosure of information

31. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

Companies that are subject to independent audit (*see Question 39*) must:

- Have a website.
- Dedicate a part of their website for information society services.
- Announce certain issues on their website.

(*Article 1524, Commercial Code.*)

If a company fails to do so, the resolutions will be void and the relevant directors are subject to judicial fines for delays of between 100 and 300 days at TRY20 to TRY100 per day.

Article 2.1 of the Corporate Governance Principles also requires certain issues to be disclosed on the website of the company.

In addition, certain documents such as annual reports and financial statements must also be disclosed in the Public Disclosure Platform, which is founded by the Communiqué of Public Disclosure Platform.

The Capital Markets Board also requires companies quoted on the stock exchange to disclose their financial reports, special conditions and other certain issues on the Istanbul Stock Exchange and Central Securities Depository.

Shareholder rights

Company meetings

32.Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

The general assembly of shareholders can hold ordinary or extraordinary meetings (*Article 409, Commercial Code*). The ordinary general assembly meetings must be held within three months following of the end of each fiscal year. Extraordinary general assembly meetings can be convened when required.

The person who calls the general assembly of the shareholders for a meeting decides on the agenda. Issues that are not included in the agenda cannot be discussed (*Article 413, Commercial Code*). The minimum agenda of the ordinary meeting must include:

- Appointment of company's bodies.
- Discussion and approval of financial reports.
- Annual report of the board of directors.
- Usage of profits.
- Determination of the amounts of dividend and profit shares.
- Releasing the directors.
- Other issues concerning operation of the company.

(*Article 409, Commercial Code*.)

33. What are the notice, quorum and voting requirements for holding meetings and passing resolutions?

Under the Commercial Code, shareholders must be invited to the meeting as set out under the articles of association, 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 general assembly meeting (*Article 414, Commercial Code*). The Corporate Governance Principles require the notice to be made on the company website and on the Public Disclosure Platform at least three weeks in advance of the meetings (*Article 1.3.1, Corporate Governance Principles*).

A notice must be sent by registered letter with return receipt to the shareholders who are recorded in the share ledger or who have proved their shareholding with share certificates or other documents in advance.

If all shareholders or their representatives are present in the meeting and nobody raises any objection, the general assembly meeting can be conducted without notice. If a meeting is convened without notice, an item can be added to agenda with the unanimous votes of the shareholders (*Article 416, Commercial Code*).

The meeting and voting quorum requirements are regulated under the Commercial Code. In principle, the general assembly meeting can be convened with at least one-quarter of the shareholders or their representatives, and a majority of the votes present is needed for a resolution (*Article 418, Commercial Code*). If this meeting quorum is not reached during the first meeting, no meeting quorum is provided for the second meeting.

However, there are aggravated quorum requirements for certain issues (*Article 421, Commercial Code*):

- Unless otherwise provided in the law or in the articles of association, the meeting quorum for amendments to the articles of association requires the shareholders representing at least half of the company's capital to be present. The amendment is approved only with the unanimous votes of the shareholders present at the meeting.
- If the meeting quorum cannot be reached during the first meeting, the second meeting's quorum is one-third of the shareholders.
- Resolutions to create obligations and secondary obligations for compensation of balance sheet losses, and to transfer of the company’s registered office abroad require unanimous shareholder approval.
- Amendments to the company's scope of activity, creation of privileged shares, and restriction of registered shares' transfer require both a meeting and resolution quorum of at least 75% of the shareholders.

34.Are specific voting majorities required by statute for certain corporate actions?

There are aggravated quorum requirements for certain resolutions (*see Question 33*).

35. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

Generally, the board of directors can call a meeting. If the board of directors cannot be gathered to call the general assembly for a meeting, a shareholder can also call the general assembly for a meeting with a court order (*Article 410, Commercial Code*). In addition to this general right for all shareholders, minority shareholders (shareholders holding at least 10% of the company's share capital for non-public companies, or at least 5% for public companies) can request the board of directors to call the general assembly for a meeting. If the general assembly is called for a meeting, minority shareholders have a right to request certain issues to be included in the meeting agenda.

If the board of directors refuses a minority shareholder's request for a meeting or an issue to be included in agenda, or does not provide a positive response to this request within seven days, minority shareholders can apply to the commercial court for enforcement of their request.

Minority shareholder action

36. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

Minority shareholders have a right to receive information and to investigate certain financial documents of the company (*Article 437, Commercial Code*) (*see Question 12*). If this right for information and investigation is exhausted, shareholders can request a special audit from the general assembly even it is not covered in the agenda of the general assembly meeting (*Article 438, Commercial Code*).

Internal controls, accounts and audit

37. Are there any formal requirements or guidelines relating to the internal control of business risks?

The board of directors of companies with shares traded on a stock exchange must set up a committee for early detection of risks related to the existence, development and continuance of company, and for applying required measures and remedies in this regard (*Article 378, Commercial Code*). In other companies, this committee is set up if it is deemed necessary by the auditor.

In addition, Article 4.5.12 of the Corporate Governance Principles also requires a committee to be formed for early detection of such risks.

38. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

The board of directors is responsible for the preparation of balance sheets and financial reports, and their submission to the general assembly for approval. Unless otherwise provided in the general assembly resolution, approval results in release of directors, managers and auditors from any associated liability (*Article 424, Commercial Code*) (*see Question 25*). However, if there are missing issues in the balance sheet, or the balance sheet deliberately includes issues which conceal the real situation of the company, the approval does not result in release.

39. Do a company's accounts have to be audited?

The conditions for determining the companies subject to independent audit are set out by the Decision of Council of Ministers (*Article 397, Commercial Code*). According to the Decision on the Determination of Companies Subject to Independent Audit No. 2018/11597 (as of 1 January 2018), the companies in List (I) in the annex for the decision are subject to independent auditing.

The companies whose capital market instruments are not traded on a stock exchange or other organised markets but are deemed publicly listed under the Capital Markets Board are subject to an independent audit if they have at least two of the following:

- A total assets value of at least TRY15 million.
- A net sales revenue of at least TRY20 million.
- At least 50 employees.
- The companies specified in List (II) are subject to independent audit if they have at least two of the following:
- A total assets value of at least TRY30 million.

- A net sales revenue of at least TRY40 million.
- At least 125 employees.

Companies that do not meet at least two of the criteria set out in List (I) and List (II) must retain independent auditors if they have at least two of following (either itself or together with its affiliates):

- A total assets value of at least TRY35 million.
- A net sales revenue of at least TRY70 million.
- At least 175 employees.

The audit must be made according to Turkey Auditing Standards, which are established by the Public Oversight Accounting and Auditing Standards Authority.

40. How are the company's auditors appointed? Is there a limit on the length of their appointment?

The company's auditor must be appointed by the general assembly. In a company group, the group auditor must be appointed by the general assembly of the controlling company.

The auditor must be appointed in every fiscal year and before the end of the fiscal year. After the appointment, the board of directors must register the relevant general assembly resolution with the Trade Registry and announce it on the *Trade Registry Gazette* and company's website immediately.

If there is a justified reason, especially in case of a doubt concerning auditor's impartiality, the court can assign another auditor at the request of board of directors or minority shareholders. For a minority shareholder to request the assignment of an auditor:

- The shareholder must have opposed the appointment of that auditor during the general assembly meeting.
- That opposition must have been recorded in the appointment resolution of general assembly.
- The shareholder must have become a shareholder of the company at least three months before the auditor's appointment.

If the auditor is not appointed within the first four months of the fiscal year the board of directors, directors and every shareholder can request the court to appoint an auditor. Also (according to a new provision that was added to Article 399 of the Commercial Code on 31 January 2018), if an auditor cannot be appointed until the fourth month of the activity period of a company for which the Savings Deposit Insurance Fund has been appointed as a guardian, the auditor will be appointed by the Minister to which the Savings Deposit Insurance Fund relates to. The Minister can delegate this authority to Fund Board.

An auditor can terminate the auditing contract only if there is a justified reason or a court action is filed for removal of the auditor (*Article 399, Commercial Code*).

41. Are there restrictions on who can be the company's auditors?

Company auditors must be either:

- Persons who are certified or independent public accountants that are licensed by Public Oversight Accounting and Auditing Standards Authority.
- Corporations whose shareholders are persons who are certified or independent public accountants that are licensed by Public Oversight Accounting and Auditing Standards Authority.

(*Article 400, Commercial Code*.)

A person cannot be appointed as an auditor if he/she:

- Is a shareholder, director or an employee of the company to be audited.
- Was a director or employee of the company to be audited three years before the appointment as an auditor.
- Is a representative or legal representative, or member of the board of directors of a company that is linked to the company subject to audit.
- Is a director or owner of a company that has a connection with the company to be audited.
- Is a shareholder holding more than 20% shares of that company.
- Is a spouse, or someone with lineal kinship with a director or manager of the company to be audited, including third degree relatives by blood or marriage.
- Is working in a company with a connection to the company to be audited, or in an enterprise that has more than 20% shares of the company, or that provides services to a real person who has more than 20% shares of the company to be audited.
- Is involved in or contributing to the keeping of commercial books and preparation of the financial statements of the company to be audited (other than providing audit services).
- Is a representative, legal representative, employee, director, shareholder or owner of a real or legal person who cannot be an auditor as above paragraph.
- Is working for a person who cannot be an auditor as above.
- Is a person who has received at least 30% of his income within the last five years by providing auditing and consultancy services to the company, or to companies which have more than 20% of the shares of the company to be audited.

In addition, an auditor who has been appointed as an auditor for seven years in a ten-year period, cannot be appointed again, until three years have passed (*Article 400, Commercial Code*).

42. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

The company's auditor or its affiliates cannot provide consultancy services to the company other than the tax consultancy and tax audit services (*Article 400/3, Commercial Code*).

43. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

If the auditors who audit the company's year-end and consolidated financial statements, reports and accounts act with fault while performing their legal duties, they are responsible to the shareholders and the company's creditors for damages caused by them (*Article 554, Commercial Code*).

There is no provision related to limitation or exclusion of liability.

44. What is the role of the company secretary (or equivalent) in corporate governance?

There are no provisions relating to company secretaries under Turkish law.

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Publications

- *International Insurance Law and Regulation, Thomson Reuters (West), Co-Author, 26 October 2018.*
- *Is Good, Fast, and Cheap Arbitration a Dream?, LexisNexis, Co-Author, 26 October 2018.*
- *Enforcement of Foreign Judgments 2019 in Turkey, GTDT, Co-Author, 17 October 2018.*
- *Interpretation of Big Data by InsurTechs, IBA - Insurance Committee Newsletter, Co-Author, 1 October 2018.*
- *Corporate Governance 2018 in Turkey, GTDT, Co-Author, 31 July 2018.*

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Publications

- *Amendments to Collection of Electronic Evidence Procedures, ILO - White Collar Crime Newsletter, Co-Author, 25 September 2018.*
- *An Overview of Turkish Data Protection Rules from Criminal Law Perspective, IAPP Privacy Tracker, Co-Author, 26 July 2018.*
- *IP in Business Transactions 2018 in Turkey, Practical Law, Co-Author, 24 May 2018.*
- *Business Crime and Investigations in Turkey, Practical Law, Co-Author, 23 May 2018.*

- *Criminal Liability of an Executive Under Turkish Law, SCCE - Compliance & Ethics Professional Volume 15, Issue 2, Co-Author, 5 February 2018.*

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Publications

- *Data Protection & Privacy 2019 in Turkey, GTDT, Co-Author, 2 October 2018.*
- *TMT Law and Practice 2018 in Turkey, Chambers and Partners, Co-Author, 26 March 2018.*
- *Competition Board Decision on Price Discrimination, Gün + Partners, Co-author, 27 January 2018.*
- *Investing in Turkey, The Oath-Features, Co-Author, 22 November 2017.*
- *Turkey Targets Foreign Investment, The Global Legal Post, Co-Author, 10 November 2017.*

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