TURKISH COMMERCIAL CODE - 2013

ERTA BAĞIMSIZ DENETİM VE YMM LTD.ŞTİ./ PRAXITY
NEW TURKISH COMMERCIAL CODE
What are the main changes introduced regarding the establishment of joint stock companies?

The new Turkish Commercial Code (the “New TCC”), which will be effective from 1 July 2012, has abolished the mechanism of gradual formation, which exists in the current legislation, but is never applied. In addition, the New TCC allows the establishment of the joint stock Companies (“A.Ş.”) or the limited liability companies (“L.Ş.”) with a single shareholder or partner, respectively. As a requirement for protection of the company and its capital, the obligation for the declaration of founder has been introduced to ensure transparency. If capital contribution is made in-kind, or if capital in-kind or an enterprise is taken over, the founder’s declaration must include documents including justified and precisely stated explanations regarding the appropriateness of the values of the shares to be given to the founders in return for capital, and the benefits of this kind of capital or takeover to the company. In addition, benefits granted to the founders, if any, are to be explained in the declaration together with the underlying justification. Another change introduced by the New TCC, regarding the establishment of the A.Ş., is concerned with the supervision mechanism. Within this context, one of the conditions introduced during the incorporation of A.Ş. is concerned with the receipt of a report from the special auditor appointed for the audit of the incorporation. Regarding the establishment of a public offering company, the New TCC has introduced a system that is simple, straightforward, easily applicable and original. The real person or the legal entity that provides a commitment to offer its shares to the public, only has to provide the commitment, and will not be obligated to invest one-quarter of the value of shares. These shares can be offered to the public at the value of the said commitment, or at a premium, and the portion of the cash derived from the public corresponding to the nominal value of the shares is paid to the company, with the outstanding difference belonging to the party who has made the commitment. Shares left unpurchased shall belong to the party who made the commitment. The party who has made the commitment is obliged to pay one-quarter of this total immediately. The public offering procedure is applied in conformity with the regulations of the Capital Markets Board (“CMB”).
One of the significant changes, introduced by the New TCC, concerns with the single shareholder A.Ş. and single member partner L.Ş. As is known, acceding to the current code, joint stock companies are established with minimum five shareholders, and limited liability companies are established with minimum two member partners. The single shareholder or single member partner is allowed to exercise all the authorizations granted to the General Assembly, and can take all types of decisions. In addition, the Board of Directors of companies is allowed to be formed with the presence of just one person. Single shareholder company were reflected to the Turkish legislation as a requirement of the 12th European Union (“EU”) directive concerning the founding of companies. The reason why the EU insists on the introduction of single shareholder company relates to the protection of small and medium size enterprises (“SMEs”). In this way, SMEs with single shareholder shall be discharged from unlimited responsibility. Turkish SMEs established with single shareholder also need such protection. In addition, the single shareholder company regulation means that institutions and corporations such as foundations and associations, which do not need to operate their goods and assets together with other shareholders, are also allowed to establish single shareholder A.Ş. and L.Ş. In this way an important change, particularly from the standpoint of foreign capital, has been introduced. This is because foreign investors want to invest in a country through a company exclusively belonging to themselves. Urging a foreign investor to accept a partner generally causes legal complications. In addition, if an existing A.Ş. or L.Ş. wishes to introduce a sub-industry in addition to its main field of activity, with the new regulation it will be able to do so. Besides, if companies founded with the participation of more than one shareholder, are subsequently restructured as a single shareholder company, the said type of company becomes able to continue its existence without becoming subject to the risk of dissolution. Single Shareholder Company is a widespread application, particularly in European countries. Foreign investors are also granted the opportunity to initiate foreign direct investments in Turkey, through the establishment of a single shareholder company with a single shareholder or single member partner. The New TCC also allows the contribution of domain rights, including intellectual property rights, and of demand receivables, to capital. In order for an asset to be contributed to the capital, there should be no measures, pledges or similar encumbrances imposed on them. The registration of the capital in kind on behalf of the company is made directly to the title deed registry directorates, and the concerned asset is not accepted as capital in kind unless it is entrusted to a reliable person.
What kind of regulations introduced related to the group of companies?

In the New TCC, the concept of group of companies, in other words, the relations between the parent company (companies) and its subsidiaries that are subject to the same principles and policies, and are gathered under the roof of the same management, have been regulated in Turkish legislation for the first time. On one hand, the new regulation protects the shareholders and creditors that remain outside of the group, and on the other, the executives of the subsidiaries, ensures transparency and balance between the benefits of the concerned parties.
Division of powers between BOD and general assembly?

Confusion of authorities between the general assembly and board of directors threatens the efficient performance of the governance mechanisms. In order to prevent such confusion, TCC advances to enumerate certain powers of the general assembly and of the board of directors and to determine the mutual position of both decision mechanisms.

According to these regulations,

• Absolute and inalienable powers of the board of directors have been enumerated in Article 375 TCC.

• Similarly, absolute and inalienable powers of the general assembly have been enumerated in Article 408 TCC and in some other articles.

• For decisions which are not within the absolute area of each organ, the statute may appoint the competent organ. In the absence of such a regulation, the board of directors is competent to resolve the matter.

Representation of the management in the general assembly CEO’s,

at least one member of the board of directors and the independent auditor appointed for the inspection of a certain transaction such as mergers shall participate in the general assembly (Art.407 / 2 TCC). This regulation is oriented to enable an efficient coordination among several units of the corporation and to serve for a better information service to shareholders.

By-Laws, The board of directors shall arrange by-laws referring the mechanisms and the conduction of general assembly and register these by-laws with the commercial registry (Art. 419/2 TCC). The preparation of by-laws as a complementing source in addition to the statute of the corporation will serve to the establishment of a transparent and efficient corporate organization.
What are the auditing requirements introduced for joint stock companies? Who can be authorised as auditor and conduct independent audit?

The New TCC envisages a system for the auditing of the firms that is completely new. Through the new regulation, the audit currently included among the mandatory organs of the companies, and exercised through an auditor who does not necessarily have expertise in the subject matter, is replaced by the independent audit mechanism which should be conducted by independent audit firms or by sworn financial advisers (Yeminli Mali Müşavir or YMM) or independent accounting financial advisers (Serbest Muhasebeci Mali Müşavir or SMMM). The scope of audit includes the audit of financial statements and/or consolidated financial statements and the annual report. The audit is required to be performed in accordance with Turkish Auditing Standards which are identical with International Auditing Standards (“ISA”). Another change introduced by the New TCC is the transaction auditor and hence audit of the transactions. These transaction auditors are auditors who will examine various transactions conducted by the company, such as incorporation, capital increase and reduction, merger, spin-off, conversion of type of the company or the issuance of marketable securities.

The New TCC also allows the application of special audits at the request of any shareholder. A special auditor will be appointed by the court if the General Assembly accepts the request for special audit request by a shareholder. Under the New TCC, audits are to be performed by independent auditors. Independent audit firms are allowed to audit the financial statements of all companies regardless of the size of the company. For SMEs, the audit of the financial statements can also be performed by at least one YMM or SMMM. The auditor that was assigned by the independent audit firm to audit a company must be replaced by another auditor for at least two years, if the auditor submitted audit reports for that company for seven consecutive years.

The financial statements have to be prepared in conformity with Turkish Accounting standards (“TAS”) published by the Turkish Accounting Standards Board (“TMSK”), which are inline with International Financial Reporting Standards (“IFRS”). Within this framework, a further obligation has also been introduced regarding the preparation of consolidated financial statements. The TAS should be put into practice as of 1 January 2013; within this framework initially the opening balance sheet for the year 2013 should be prepared in compliance with TAS.
ERTA Bağımsız Denetim ve YMM Ltd.Şti. is a professional auditing and consultancy company serving the leading firms in Turkey by giving independent auditing, financial advisory, full certification, corporate finance, designing and providing internal auditing, management consultancy, tax dispute services.

We are pleased to announce that our firm is now part of Praxity-Global Alliance Ltd. – the Number 1 international alliance of dynamic international, national and regional accounting firms which has been launched to meet those challenges. The alliance has been designed to offer a global reach for companies who operate across the world.

The Alliance has operations with coverage in more than 96 countries and combined 2012 turnover of approximately USD 3.9 billion. Organised as a not-for-profit organisation under Belgian law (AISBL), Praxity has its administrative centre in London.

With its operational base in London, the Praxity alliance will offer top rate services to existing global businesses that need top class auditing and accounting expertise, as well as to fast growing businesses that need international support in addition to local services in their home market.

References: Pwc- Zeynep Uras – TCC Roadmap

CONTACT DETAILS:

ASIM ANIL DİZDAR – DIRECTOR

Address: Halaskargazi Cad. AK Apt.No135/1
Osmanbey/ Istanbul
Tel : +90 212 231 32 09
Fax : +90 212 231 34 71
e-mail : anil.dizdar@ertadenetim.com
Web : www.ertadenetim.com