

## Liabilities of Members of the Board of Directors in a Joint Stock Company

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### Introduction

1 Under Turkish law, the Board of Directors (“BoD”) is one of the two mandatory bodies of a joint stock company (“JSC”) along with the General Assembly. The BoD is responsible for management and representation of the company; and its formation, duties and liabilities are regulated mainly under Turkish Commercial Code (“TCC”) No.6102 which was promulgated in the Official Gazette on 14 February 2011 and came into force on 1<sup>st</sup> July of 2012.

### Formation of the BoD

Under TCC, a JSC shall have a BoD which exercises the authority to manage and represent the company. Members of the BoD shall be appointed in the articles of association (“AoA”) at the time when the company is established and shall subsequently be elected, dismissed or re-elected by a General Assembly resolution during the company’s lifespan.

Members of the BoD shall be appointed for a maximum period of 3 years. The BoD comprises of at least one person. There is no upper limit for number of members, imposed under TCC. However, minimum and maximum number of board members may be

specified under the AoA and may be amended with a General Assembly resolution.

There is no nationality criterion for being a member of the BoD. Thus, both foreign nationals and Turkish citizens may be appointed as a member. In accordance with TCC, those who are not shareholders of the company may also be appointed as a member. In addition, a legal entity may be assigned or elected as a member of the board. In this situation, such legal entity appoints a real person to attend the meetings of the BoD on its behalf.

Shareholders may determine requirements/qualifications for the appointment of a board member in the AoA and may alter these requirements/qualifications with a resolution of General Assembly.

### **Duties and Powers of the BoD**

As mentioned above, the BoD's primary duty is to manage and represent the company. It is also responsible to fulfill its duties specified under the laws as well as the AoA. As determined under TCC, the BoD has the authority to take decisions, regarding all business matters and transactions, necessary to achieve company objectives, excluding those which are solely left to the authority of General Assembly in respect of the laws or the AoA.

While performing its duties, i.e. managing and representing the company in general, the BoD is under a duty of care and loyalty. Board members and those who are assigned for management are obliged to perform their duties with due care of a cautious manager and to pursue company interests in good faith.

### **Delegation of Duties and Powers**

Management duty of the BoD may be delegated to specific members of the BoD or to any third parties in case the AoA provides for an arrangement regarding such delegation. In case management powers is not delegated to any specific member/s or a third party, these duties shall be carried out by all board members.

Board members shall have exclusive authority over the below mentioned duties and powers which cannot be delegated to any

specific members of the BoD or any third parties (a.k.a. non-delegable duties and powers):

- Top level governance of the company,
- Determination of the organizational structure of management,
- Setting up the necessary system for financial planning, to the extent that accounting, financial audit and management of the company requires,
- Assignment and dismissal of managers and other authorized signatories,
- Supervision of the activities of persons in managerial positions as to whether their activities are in accordance with the laws, the AoA, internal directives and written instructions of the BoD,
- Keeping commercial books, preparing annual activity report and corporate governance statement and submitting them to the General Assembly, organizing General Assembly meetings and executing General Assembly resolutions,
- Notifying the court in case the company is deep in debt.

### Liability of the Board Members

#### I. Civil Liability

The liability of founders, board members, directors and liquidators are defined in detail under TCC. The liability of the members of the BoD is a fault-based liability, meaning the BoD members shall be held liable in case they breach their duties defined under the laws and the AoA due to their fault. They are liable to (i) the company, (ii) its shareholders and (iii) its creditors. As it is a fault-based liability, it is certain that none of the Board members shall be held responsible for the loss or damages which occur beyond their control.

The burden of proof with respect to faulty actions lies with the claimant. It means claimant has to prove that there is a loss and this loss arises from the breach of liabilities of a board member due to his fault. In case the claimant party proves the existence of loss, together with the board member's fault and causal link between

the loss and fault, such board member shall be excluded from responsibility only by proving that he fulfilled the duty of care.

Members of the BoD may not be held responsible in case they delegate their duties and powers arising from the law and the AoA. However, they may only be held responsible if it is proved that they did not choose their delegates with due care. It should also be noted that members shall in no way transfer their non-delegable duties and powers stated above.

TCC accepts that in case more than one member is responsible for any loss, each member may be found liable pro rata to the degree of his or her fault. It means, members who act with due care shall not be held responsible for the loss while those may be found liable as they act without due care, or due to his or her fault.

TCC also regulates the following liabilities of board members under separate articles:

- Preparation of inaccurate, false documents and declarations regarding incorporation of company, increase or decrease of company capital, merger, division, changing of company type and issuance of securities,
- False declaration of share capital and awareness of incapability for payment of capital,
- Corruption in valuation of capital in kind,
- Collecting money from the public.

## II. Criminal Liability

TCC has provisions regarding criminal liability of the board members and in this respect following actions shall be subject to punishment:

- Non-shareholder board members and their non-shareholder relatives (relatives including his/her lineal consanguinity, his/her spouse or up to third degree (including this degree) of consanguinity or of affinity) cannot become indebted in cash to the company. In addition, company cannot provide pledge, guaranty and security to them; undertake any liability for them and take over their debts. In case a member

breaches these provisions, this member shall be punished with a judicial fine which may not be less than 300 days.

- Keeping commercial books is one of the responsibilities of the BoD. In case these books (i)do not exist, (ii) do not contain any records or, (iii) are not kept in accordance with related provisions of TCC, the member who is in charge shall be punished with a judicial fine which may not be less than 300 days.
- In case a member breaches his/her duty of confidentiality, this member shall be punished with imprisonment from 1 year to 3 years and with judicial fine up to 5.000 days.
- Members who issue inaccurate/false documents stated under TCC and those intentionally keeping commercial books with wrong records shall be punished with imprisonment from 1 year to 3 years. (Documents mentioned in relevant article as follows; documents and declarations regarding incorporation of company, increase or decrease of company capital, merger, division, changing of company type and issuance of securities)
- Responsibility for false declaration of share capital and awareness of incapability for capital payment undertaking is defined in detail under TCC. Those acting in contradiction with relevant provision shall be punished with a judicial fine or imprisonment from 3 months to 2 years.
- In case, there is a corruption regarding valuation of capital in kind or valuation of entity, those in charge shall be punished with a judicial fine which may not be less than 90 days.
- Collecting money from the public for increasing capital or giving such a promise shall be punished with imprisonment from 6 months to 2 years.
- Companies subject to audit in respect of TCC are required to have a website. Board members are responsible to create the website as stipulated under article 1524 of TCC. Otherwise, board members shall be punished with a judicial fine between 100 days to 300 days. Those failing to properly post the content stated in the same article shall be punished with a judicial fine up to 100 days.

In case one of the offences determined under TCC is repeated before the decision of administrative fine, relevant real or legal person shall be sentenced to 1 administrative fine and penalty shall be imposed as doubled in accordance with the related provision. However, in case the person in question makes any profit or causes any loss due to this offence, he shall be subjected to administrative fine which may not be less than 3 times of the amount of such profit or loss.

### III. Tax Liability

In respect of Tax Procedural Code No.213 ("TPC"), in case the tax payer or tax responsible is a legal entity, tax duties of this legal entity shall be fulfilled by its legal representatives. In case taxes cannot be collected from the company's assets, the legal representatives shall be held personally liable with their own assets. Legal representatives of the company shall be jointly and severally liable in such a situation.

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### IV. Liability for Public Debts

Another provision regarding liability of legal representatives is regulated under Procedures for The Collection of Public Receivables Code No.6183 ("PRC") for public debts. According to the relevant provision, legal representatives shall be held liable for public debts in the event public debts cannot be received from the company and are not likely to be received.

As both TPC and PRC refer to the term "representative", members or managers who do not have representation power shall not be held liable. In other words, those having signatory authorities shall be deemed liable for public debts of the company.

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