

Amending a Company's Articles of Association under Turkish Law

Introduction

The Articles of Association (“AoA”) is regarded as the constitutional basis of a company, representing a covenant between founders who share common purpose and interests. In order to establish a company, an AoA must be agreed upon and signed by all founding shareholders (or by their proxies) before the trade registry office. The AoA is not only a valid contract between the founders but also a binding contract for future shareholders once they acquire ownership in the company.

AoA is a multilateral agreement which regulates the operation of a company, its internal and external affairs, as well as the rights and obligations of the shareholders. Amendments to the AoA are of major significance since they often create direct and considerable effects on the shareholders, on persons holding executive positions as well as on the legal entity itself.

An AoA may be amended for a variety of reasons; for example, the creation of a new class of shares, to initiate public offerings, or to reflect a change in the law or market practice. If a shelf company is acquired, it is quite likely that its AoA will need to be altered to address a company's specific needs.

Amendments to the AoA can be made by way of inserting new provisions into the contract, annulling a provision partially or wholly, or amending statements. Amendments of error of facts or revising the spelling errors are not regarded as amendments to the AoA.

This article explains the key points and the procedural steps for alterations to be made to AoAs in Joint Stock Companies (“JSC”) and in Limited Liability Companies (“LLC”), which are the two most common corporate vehicles in Turkey.

I. Joint Stock Companies

According to the Turkish Commercial Law (“TCC”), the General Assembly (“GA”) has a right to amend any articles of the AoA within the limits of the law. However, vested rights and unalienable rights are reserved but there is no definition or list provided in the law with regards to such rights.

Procedural Steps

Preparation of the Amendment Draft

It is the Board of Directors’ (“BoD”) duty to prepare the amendment proposals by taking into consideration the needs and requirements of the company. For this purpose, the GA may give instructions to the BoD in advance.

2

Permission from the Ministry of Trade

In principle, the permission of an authority is not required for the establishment of a JSC. Exceptionally, incorporation of certain JSCs necessitates the permission of the Ministry of Trade (“Ministry”) due to their fields of activity which are subject to significant regulatory and supervisory requirements, such as energy, banking, financial leasing, exchange operating, independent auditing etc.

Pursuant to TCC, such exceptional operational areas are determined and declared by the Ministry. The amendments to the AoA of such companies are also subject to the permission of the Ministry. The Ministry shall only examine the compliance of the projected amendments with the mandatory provisions of the law.

Invitation to the GA Meeting

BoD invites shareholders to participate in the GA meeting where the proposed amendments will be voted on. The invitation is made

in accordance with the procedure prescribed in the AoA. The invitation including the proposed amendments is also announced in the Trade Registry Gazette and on the company website¹ at least two weeks before the meeting.

Resolution and Quorums

Amending the AoA is one of the unassignable powers of the GA. Therefore, it can only be amended by a resolution of the GA.

As was mentioned above, permission of the Ministry may be necessary in some cases. Following the permission of the Ministry, the GA, where necessary, can further amend the approved draft. However, this amended draft adopted by the GA must also be approved by the Ministry.

Amendments to the AoA are made by way of a GA resolution. Therefore, shareholders and members of the BoD are entitled to file an annulment action.

3

Unless otherwise specified by law or by the AoA, the resolutions regarding the amendments shall be taken in the GA meetings where at least half of the company's capital is represented and with the majority of votes present at the meeting. If the said quorum is not established in the first meeting, second meeting may be held within one month. The meeting quorum for the second meeting is the representation of at least one third of the company's capital at the meeting.

Following resolutions regarding the amendments shall be adopted by unanimous decision of the shareholders or their representatives holding the entire capital;

- Resolutions providing obligations or secondary obligations for the settlement of balance sheet loss,
- Resolutions concerning the moving of the company headquarters abroad.

Following resolutions may only be adopted by votes of shareholders holding at least seventy five percent of the capital;

¹ Only for companies which are required to open and maintain a website.

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- Modification of the entire purpose and scope of the company,
- Issuance of preference shares and limitation of transfer of nominative shares.

If the above quorums cannot be established in the first meeting, the same quorums are applicable for the following meetings.

Resolution of Preference Shareholders

Some of the resolutions on amendment of the AoA may infringe preference shareholders' privileges. Such resolutions cannot be implemented unless it is approved by a decision made at a meeting held by the preference shareholders.

Registration and Announcement

The resolutions of GA which amends the AoA shall be registered by the BoD to the trade registry where headquarters and branch offices of the company are located. Furthermore, issues that are subject to announcement under TCC must be announced. The registered and announced resolutions shall be published on the website of the company. Amendments become effective for third parties only after registration.

4

II. Limited Liability Companies

As was the case for JSCs, AoA of an LLC is amended by a resolution of the GA. According to the TCC, the GA may amend all articles of the AoA provided that they comply with TCC.

Procedural Steps

Preparation of the Amendment Draft

Amendment procedure begins with the preparation of the draft by the director of the LLC. Once the draft is prepared, director makes a call for a GA meeting.

Resolution and Quorums

AoA of an LLC is amended through the resolution of its shareholders. Unless otherwise provided in the AoA, the AoA can be amended by the resolution of the GA meetings where two-thirds of basic capital is represented.

That being said, the following matters can be adopted with at least two-thirds of represented votes together with the absolute majority of the total of basic capital shares with voting right:

- To change company's scope of activity.
- To restrict, prohibit or facilitate the transfer of basic capital shares.
- To increase basic capital.
- To restrict or cancel pre-emptive rights.
- To change location of the headquarters.

Registration and Announcement

Any amendment made to the AoA of an LLC shall be registered to the trade registry and announced pursuant to the TCC.

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