THE Corporate Governance Review

Eleventh Edition

Editor
Willem J L Calkoen

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THE CORPORATE GOVERNANCE REVIEW

ELEVENTH EDITION

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this 11th edition, we can see that corporate governance is becoming a more vital and all-encompassing topic, especially this year with covid-19 as well as climate issues, political instability, technological change, environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, European Commission, US Securities and Exchange Commission (SEC), Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports and 17 social development goals, the media, supervising national banks, more and more shareholder activists, proxy advisory firms, the Business Roundtable and all stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working very diligently. Nevertheless, there have been failures in some sectors and trust must be regained.

How can directors do all their increasingly complex work and communicate with all the parties mentioned above? What should executive directors know? What should non-executive directors know? What systems should be set up for better enterprise risk management? How can chairs create a balance against imperial chief executive officers (CEOs)? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? Is diversity and inclusion actively being pursued? Is the remuneration policy fair? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal, inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards,

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while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, Business Roundtable, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust: one-on-ones. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top and work at complying with demands and trends for a better society?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances when CEOs have gradually amassed too much power, or companies have not developed new strategies and have incurred bad results – and sometimes even failure. More are failing since the global financial crisis than before, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, stewardship codes for shareholders and shareholder activists, and requirements for reporting on non-financial issues. The European Commission has developed regulation for these areas as well. We see governments wanting to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship. Business Roundtable, with about 180 signatories, has embraced stakeholder corporate governance.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in research and development. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management, with new risks entering, such as the increasingly digitalised world and cybercrime, is an essential part of directors' responsibilities, as is the tone from the top.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that this Review will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who have helped with this project. I hope this book will give you food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2021

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Chapter 23

TURKEY

Reşat Gökhan Basan, Buğse Kılıç and Güllü Gülver Bilgic[1]

I OVERVIEW OF GOVERNANCE REGIME

i Sources of law and practice

Turkish commercial companies are fundamentally governed by the Turkish Commercial Code (TCC), which entered into force on 1 July 2012. The current TCC, amending the former TCC No. 6762, sets forth new standards regarding establishment and governance of commercial companies, and new principles that comply with international corporate governance and auditing standards, such as international trade, finance, industry, and transparency of companies in terms of accounting and financial reporting.

Although the TCC governs every commercial enterprise duly incorporated in Turkey as a general law, there are also several examples of sector-specific legislation that govern the companies operating in specific industries, which are as follows:

a Capital Markets Law (CML) is one of the broadest specific pieces of legislation, covering all companies that have shares publicly traded at the Istanbul Stock Exchange (ISE);

b Capital Markets Board[2] Communiqué (the CMB Communiqué);

c the Corporate Governance Communiqué (CGC);

d corporate governance principles (CGPs), which implement mandatory and optional provisions. With some minor exceptions, the mandatory provisions are applicable to all publicly held companies that have shares traded on the ISE.

As the basis for corporate governance, the TCC lays out the various types and forms of legal entities that can be adopted. The two main legal forms used in Turkey are public and private joint stock companies (JSCs) and limited liability companies (LLCs). JSCs with more than 500 shareholders are deemed to have been offered to the public and are subject to the provisions of public JSCs. The TCC further sets out the fundamental principles of a corporation's structure, powers and duties of the various organs and its directors, the system of governance and management of a company, as well as the qualifications and necessities.

The CML and CMB communiqués set out the structure of the companies listed on the ISE, their auditing standards, special obligations and mandatory responsibilities, and other provisions for safeguarding the capital market.

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1 Reşat Gökhan Basan is managing partner, and Buğse Kılıç and Güllü Gülver Bilgic are associates, at Basan Attorney Partnership. The authors thank Elif Ece Şengül, trainee lawyer at Basan Attorney Partnership, for her contribution to this chapter.

2 The Capital Markets Board is the government organisation that regulates the capital markets in Turkey.

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ii Enforcement

As per Article 210 of the TCC, the Ministry of Trade is the regulatory body responsible for enforcing the TCC's provisions on companies incorporated in Turkey. Disputes arising from the TCC are mainly resolved before commercial courts, unless the parties adopted alternative national or international dispute resolutions.

CML and CMB communiqués and the CGPs are exclusively enforced by the CMB, which was established in 1981 and was Turkey's first independent supervisory authority. It oversees the securities markets, actively promotes the CGPs and monitors the securities market. The CMB has the authority to impose administrative sanctions on companies or individuals in the event of non-compliance. If the conditions set forth under the CML and the relevant legislation occur, the public prosecutor may prepare an indictment on the written request of the CMB.

Two associations whose reviews and decisions are also taken into consideration are the Turkish Industry and Business Association (TUSIAD) and the Capital Market Investors' Association (BORYAD). TUSIAD, established in 1971, performs an important role on the formation and development of the CGPs. It issued the first Corporate Governance Best Practice Code in Turkey in 2002.[3] BORYAD was established in 2001 mainly to safeguard the share and stakeholders' rights to support investment in the country.[4]

Although there have been no fundamental legislative changes on corporate governance in Turkey, the following developments have been noticed.

To meet the needs for a fast-developing environment, the Central Registration System (MERSIS) has been established as an online application system for all corporate governance issues that are subject to registration before the trade registry directorates. One of the aims of MERSIS is to expedite the registration process.

Another development that companies should consider is that natural persons and legal entities processing personal data must be registered and record data processing activities with the Data Controllers' Registry (VERBIS), an online information system (Article 16, Data Protection Law No. 6698). VERBIS registration is free of charge but mandatory for all data controllers with more than 50 employees or an annual balance sheet of more than 25 million Turkish lira. Failure to register with VERBIS can result in administrative fines of up to 1,966,862 lira or the restriction of the controller's data processing activities.

II CORPORATE LEADERSHIP

i Mandatory bodies

The field of corporate governance is modelled after the Swiss legal system, which is why Turkey has adopted a one-tier governance system. Although there is no provision that prohibits companies from adopting a two-tier system, in practice, most companies stay with a one-tier system. Both JSCs and LLCs are required to establish two bodies within the organisation: a general assembly of shareholders (GA) and a board, which is known as a board of directors (BOD) in JSCs and a board of managers (BOM) in LLCs. As a one-tier system is implemented, the board fulfils both executive and supervision functions.

3 For further information about the Turkish Industry and Business Association, see https://tusiad.org/en/.

4 For further information about the Capital Market Investors' Association, see http://www.boryad.org.tr/en/.

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ii Composition and powers

The GA consists of all shareholders, regardless of the percentage of shares they hold, and gathers usually once a year, or extraordinarily when deemed necessary. In the Turkish corporate governance regime, shareholders' interests are the main target protected by the legislators; therefore, the GA is granted certain inalienable powers and duties, including exclusive rights to:

a amend the articles of association (AOA);
b appoint and dismiss managers;
c appoint and dismiss auditors, including the group of companies' auditors and operational auditors;
d approve year-end financial statements and the annual report of the group of companies;
e approve year-end financial statements and the annual report;
f decide on the distribution of dividends;
g determine profit-sharing for board members;
h approve managers and determine their salaries;
i approve the transfer of basic capital shares;
j ask the court to dismiss a partner from the company;
k authorise a manager regarding the acquisition of the company's own shares, or to approve such an acquisition;
l dissolve the company; and
m adopt resolutions regarding issues on which the GA is authorised by law.

The GA's inalienable powers, provided they are set forth in the AOA, are to:

a approve activities of the managers and the conditions under which approval of the GA is required by the AOA;
b adopt resolutions on exercising the rights of being the first to be offered for subscription, first refusal, redemption and purchase;
c approve the establishment of pledge right on basic capital shares;
d issue internal directives regarding secondary performance liabilities;
e give the permission necessary for managers and partners to take part in activities incompatible with obligations to the company or non-compete obligations, in the event that the partners' approval is not adequate according to the AOA, in line with Paragraph 4 of Article 613; and
f dismiss a partner from the company for reasons set forth in the AOA.

As seen, strategic decisions are exclusively left up to the GA, and the TCC allows companies to extend these exclusive duties and responsibilities, provided that they are clearly stated in the company's AOA. One of the newest provisions of the TCC allows for other duties and responsibilities to be assigned to the BOD or BOM or other corporate bodies that can be formed by the GA. In such circumstances, the GA grants its auditing and supervising powers to an independent committee, technically forming a supervision board by its own decision. Through this amendment, the TCC aimed to leave the decision of adopting either a one-tier or two-tier structure to the company.

Beside the exclusive powers of the GA, the main executive body of companies is the BOD or BOM. In principal, management and representation powers are afforded to all members of the BOD or BOM, so that members are jointly responsible for any losses incurred. Members can consist of both natural and legal persons. However, if GAs wish to

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delegate their management and representation powers to one or some members of the BOD or BOM, or third parties, they must include a provision in the AOA and issue an internal directive. If delegated to third parties, one member of the BOD in a JSC and one shareholder in an LLC still must have the power of representation.

The BOD shall elect a chairman and at least one vice chairman from among its members to cover for the chairman when absent.

The TCC includes qualification requirements for board members and, overall, boards of the 10 largest listed and traded companies in the ISE have a diverse mixture of skills. The TCC and the CGPs require ISE-listed companies to establish committees. Pursuant to the CGPs, in public companies the following must be constituted as a rule:

a audit committee;
b corporate governance committee;
c nomination committee;
d early detection of risk committee; and
e wage committee.

The obligations to form these committees vary. However, only the audit committee, corporate governance committee and early detection of risk committee are mandatory. Audit committees must be entirely composed of independent directors, while the other committees may comprise non-executive, executive and non-board members.

Although the CGPs are not legally binding, companies must explain the extent and the reasons for non-compliance (comply or explain basis). The CGPs recommend that the roles of chief executive officer (CEO) and chair of the board be separate and codified in the AOA. If the roles are combined, the grounds for such a decision must be outlined by the company and be announced on a public disclosure platform with the justifications.

It is possible for a manager to have the title of both chairman and CEO. It is a common approach that the CEO of a company is also has a member of the BOD but in high-level companies, the roles must be separate to meet the requirements of the CGPs.

iii Directors

A JSC shall have a BOD consisting of one or more persons assigned by the AOA or elected by the GA. If a legal entity is chosen, a natural person has to be determined by the legal entity to act on its behalf and this decision must be registered and announced in the trade registry. Only this registered person can participate in and vote on behalf of the legal entity in board meetings. Members of the BOD are known as board members or directors.

As the main governing body in JSCs, the BOD has the right to exercise all powers not delegated to and reserved for other bodies of the company by law or by the AOA. To emphasise this role, amendments to the TCC provide the board with key strategic functions by assigning non-delegable duties to the board, including the exclusive right of appointing the top management of the company.

In accordance with international practices, shareholders have the exclusive authority to appoint and remove board members (except in the event of resignation and death). Shareholders may use this authority during the GA. However, if a vacancy arises in the BOD for any reason, the board has the authority to appoint a new member temporarily (co-opting) but this temporary appointment must be approved by the first meeting held by the GA. This

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authority is both a right and an obligation because if the company suffers some damage as a consequence of the lack of a director, the shareholders have the right to recourse from the BOD for any damages incurred.

For the removal or appointment of a board member, the required quorum in the GA is determined as shareholders or their duly authorised representatives being equal to at least 25 per cent of the capital and a simple majority of votes will be necessary, unless provided otherwise in any law or in the AOA. If a quorum is not met in the first meeting, no quorum will be sought in the second meeting.

The term of a member of the BOD shall be a maximum of three years. Unless otherwise specified in the AOA, board members may be candidates for re-election.

The TCC regulates that members of the BOD or third parties entrusted by the management have to act with the duty of care and loyalty of a cautious director. In the event of breach of their liabilities defined by law and the AOA through their own fault, board members shall be held responsible for the loss they cause against the company, shareholders and company creditors. This liability is extended to the highly controversial non-compete clause for BODs codified in Article 396 of the TCC, prohibiting BOD members from engaging in activities that fall within the scope of the company's business either on their own or on a third party's account. The High Court of Appeals has accepted that this clause also prohibits board members from becoming a board member, manager or an authorised executive in another company that engages in the same business as the initial company. The controversy results from the wide scope and the right of the company to choose whether to demand compensation from the breaching board member or to file a lawsuit for transferring the benefits or proceeds of the competing transaction or action performed by the breaching board member.

In contrast to the previous system, the level of diligence and responsibility expected from directors is based on their qualifications and level of ability and knowledge. Even though some are upholding the objective liability criterion in the doctrine, in practice, the commercial courts have tended to find specifically for the director in respect of the degree of responsibility. Therefore, directors bear the burden of proof to show that there was no negligent act.

As criminal liability is personal under the Turkish Constitution and Criminal Code, legal entities cannot be sentenced to criminal sanctions. The TCC sets forth several provisions for both legal and criminal liability for activities to be conducted during the management and representation of a company. Sanctions vary from fines to several years of imprisonment, including sanctions for the inaccuracy of documents and declarations, misrepresentation of share capital and awareness of incapability to satisfy capital undertakings or breach of obligations regulated under the TCC, laws or AOA.

The liability of directors in Turkish companies is not unlimited, however. Directors are not liable for illegal acts beyond their control and that could reasonably be forecast. Further, the obligation of supervision and the duty of care of directors shall not be used as the only ground for determining a directors' liability.

Another limitation can be found in Article 203 of the TCC for board members of group companies in which the parent company has absolute power over the subsidiary. Since board members are not free to decide whether or not to follow the instructions of the parent company, they will not be liable for actions taken as a result of the instructions of the parent company. As shareholders and creditors of the company may file a lawsuit against board members under the TCC, a release of the board members is one of the mandatory items

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to be decided in a GA meeting. If shareholders decide to release the board members, this resolution may not be revoked as a principle. An exception is made for shareholders who attended the GA meeting and did not vote for the release of the board members or rejected the release resolution. These shareholders may file a lawsuit against the board members within six months of the meeting. Without any affirmative votes of the minority shareholders, a resolution to release board members from their liability of incorporation and capital increases may be challenged by the minority shareholders for up to four years.

To prevent a conflict of interest, the law does not allow board members to participate in discussions about themselves or their related persons on matters that may lead to conflict between the company's and their interests, and that member is obliged to declare the conflict of interest. Board members are further prohibited from competing or making a transaction with the company, unless the general shareholders' meeting approves this.

For independent board members as required in public JSCs, the CGPs set out specific requirements and qualifications to prevent a conflict of interest.

Furthermore, a company must implement a policy to achieve the objectives required by the CGPs and must aim to have not less than 25 per cent female membership on the BOD.

As per Article 394 of the TCC, financial rights, including attendance fee, wage, bonus, premium and percentages of annual profit, can be granted to board members provided that the amounts are determined by the AOA or a GA resolution.

With regard to the CGPs, the profit share, share options or the schedules relating to a company's performance payments cannot be taken into consideration while determining the remuneration of independent board members. The remuneration of board members must only be sufficient to ensure their independence. Further, the remuneration paid, and other advantages granted to board members and members with administrative responsibility, shall be announced to the public in an annual activity report.

III DISCLOSURE

The AOA of a company and its amendments, structure, members of the BOD, their term of office and remuneration are determined in GA meetings, and the minutes of GA meetings are registered with the relevant trade registry and published in the *Turkish Trade Registry Gazette*, which is accessible online.

The TCC implemented new regulations on the auditing of equity capital companies, especially JSCs and LLCs. The audit of separate or consolidated financial statements of a company shall be based on its accounting records (e.g., its books, records and documents).

In respect of the requirements for annual reports by ISE-listed companies, Article 6 of the CMB Communiqué provides that the report should include information about whether or not the principles laid out in the CGPs are being properly applied or to explain why not. Disclosure for non-auditing services by external auditors (which is allowed in some cases) is limited.

Auditors and audit committee in ISE-listed JSCs

The new TCC has removed the old-fashioned internal and external audit systems for JSCs by introducing a fully external auditing system. To be subject to independent auditing, certain thresholds have to be exceeded:

a a company's assets shall be at least 35 million lira;

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b a company's net annual sales revenue shall be at least 70 million lira; and
c the number of employees is at least 175.[5]

Independent auditing is a requirement for companies that meet two of these thresholds for two consecutive years. Companies must comply with independent auditing requirements within the first 90 days of reaching the thresholds. The BOD may otherwise be subject to judicial fines or be held liable for their actions.

When preparing their financial statements, capital companies subject to independent auditing shall follow the Turkish Accounting Standards.[6]

For companies subject to independent auditing, the TCC grants the auditor the right to have access to financial statements and the annual activity reports as approved by the BOD for executing a comprehensive audit. In addition, supplementary documents and information may be requested from the BOD as deemed necessary.

Capital companies subject to independent audit are also required to establish a website within three months of the registration of the company with the trade registry and devote a section on the site to 'information society services' for making statutory announcements. The Regulation on Websites to be Established by Capital Companies, which entered into force on 1 July 2013, includes all relevant details for a website and its content. It also provides that companies may fulfil these on their own or enlist the help of a government-authorised central database service provider endorsed by the Ministry of Trade.[7]

Also listed in Article 6 of the Regulation are some documents and information that must be accessible to the public for at least six months or indefinitely on the company website. These include documents and information regarding merger, spinoff and capital matters, the representatives of the company, and the meeting duration of the GA.

The CMB amended the CGC on 2 October 2020. Public JSCs are now obliged to include in their annual activity report whether they are complying with the sustainability principles. Even though the requirement to comply with these principles is voluntary, public JSCs must provide an explanation if they have not complied.

IV CORPORATE RESPONSIBILITY

The TCC sets general rules on four main principles: transparency, equality, accountability and responsibility. Privately held companies that are not active in a regulated sector are usually monitored by their shareholders, BOD, management, creditors or customers. Those subject to independent audit may be required to immediately form an early risk detection committee on written request from an independent auditor if considered necessary.

According to the TCC, ISE-listed companies are obliged to establish an early risk detection committee, which reports to the BOD once every two months and warns the directors of any foreseen potential risks or threats, to allow directors to prepare any necessary precautions. As per the CGPs, listed companies are required to prepare annual corporate

5 Decision on the Determination of Companies Subject to Independent Audit No. 2018/11597 entered into force on 1 January 2018.
6 Published by the Public Oversight, Accounting and Auditing Standards Authority.
7 Regulation on Websites to be Established by Capital Companies is quite detailed and aims to maintain transparency for Turkish companies – for the full text, see https://www.resmigazete.gov.tr/eskiler/2013/05/20130531-15.html (in Turkish).

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governance compliance reports, annexed to the annual activity reports, and to disclose to what extent they comply with the principles. The CGPs deal with a large range of topics, including risk management. In respect of ISE-listed companies, the CMB is also authorised to issue administrative fines, seek judicial orders to invalidate non-compliant transactions in which the company failed to comply with mandatory principles, seek injunctive relief, withdraw activity permits and signatory authorities, replace board members, order that compliance be restored or even ban trading.

Besides various administrative monetary fines for breach of certain provisions of the TCC, board members and senior management could be held liable for damage to the company, its shareholders or creditors proportionate to the extent that their fault has been proven for breach of obligations, including their risk and compliance management obligations. They are held responsible on a pro rata basis with respect to the proportion of fault found attributable to them. If the members of governing bodies or senior management act in a way that falls within the scope of a specific crime, such as bribery, embezzlement, forgery, insider trading, market manipulation or forgery of company books, they may also face criminal liability, which can lead to imprisonment or judicial monetary fines.

Pursuant to the CGPs, it is mandatory for publicly held companies to look after their employees' rights and to undergo a strict audit. Accordingly, companies must develop models to support participation of employees in the company management in a way that the company activities are not disturbed, and this must be codified in the AOA and in internal regulations.

In general, the TCC is silent on the social responsibility of companies. Thus, there are no legal requirements for companies in relation to corporate social responsibility and, except for some specific provisions, there are no regulations obliging companies to take specific action for the wider society. However, the CMB has a different approach to the matter. As it is commonly believed that publicly held companies have a significant influence over the sector and society, the CGPs regulate these responsibilities in respect of companies involved in social, environmental and ethical projects.

V SHAREHOLDERS

i Shareholder rights and powers

The general structure of the TCC divides the rights of shareholders in Turkish companies into financial rights and personal rights.

Financial rights include the right to receive dividends that have been resolved in accordance with the AOA and law. If the JSC is liquidated, shareholders have a right to receive liquidation proceeds, provided that no other provision is included in the AOA.

Another right consists of the pre-emption rights of shareholders to acquire new shares following a capital increase. This right may be limited or excluded for important reasons by a qualified shareholders' resolution representing at least 60 per cent of the capital. A shareholder who seeks to acquire new shares following the capital increase must pay the value of the shares.

Other protective rights include the appointment of an independent auditor in a GA meeting and, if the GA does not accept a special audit request by a shareholder, the shareholder can request the appointment of a special auditor by a court. Each shareholder also has the right to ask the GA to file a lawsuit for damages against the BOD or auditors.

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In addition, the TCC regulates an escape fund to be paid to shareholders in the event of a merger or change in the type of company. If shareholders disagree with a merger or change in the type of company, they have the right to sell their shares to the company at a fair value.

Turkish law also provides minority shareholders (i.e., those holding at least 10 per cent of the share capital of non-public companies or 5 per cent of the capital of public companies) with additional rights. Minority shareholder rights include the right to request (1) the convening of an extraordinary GA meeting and the inclusion of additional items on the agenda, (2) that the GA appoint a special auditor to investigate and clarify certain issues, (3) that the board issue registered share certificates and (4) that the company be dissolved if there is a just cause.

Personal rights include protection and participation rights. The main aspect of shareholders' protection rights is the requirement of the equal treatment of shareholders. As a general rule, all shares in a Turkish stock company provide for equal rights, including equal voting rights. Therefore, one share means one vote and each shareholder has at least one vote. The AOA allows companies to limit the voting rights of shareholders holding more than one share. However, companies may also issue privileged shares to grant different voting powers to those shares in private companies. This privileged voting power is limited to a maximum of 15 votes per share. In some cases, this limit can be increased by a court decision for the sake of institutionalisation or because of a just cause. However, to ensure equal participation, the privileged voting power does not apply to a number of cases, including amendments to the AOA, blocking a capital increase or vetoing the filing of discharge or liability suits.

Participation rights include certain information and supervision rights of shareholders, including the disclosure of annual financial statements and the company's books to shareholders for their review.

Moreover, the Communiqué on Common Principles Regarding Significant Transactions and Retirement Rights determines the extent of significant transactions and shapes the limits of voting rights and shareholders' retirement rights in publicly held companies. According to this Communiqué, mergers, division transactions, changes in the type of company or dissolving the company, and certain other important transactions, require GA approval.

ii Shareholder duties and responsibilities

Shareholders of a JSC are subject to a loyalty duty requiring them not to directly cause harm to the company in the exercise of their shareholder right. Shareholders breaching this duty of loyalty may be liable for damage suffered by the company. Shareholders' liability is normally limited to their subscribed capital contribution. This rule is applicable for both JSCs and LLCs. Shareholders are not responsible for the acts or omissions of the company, unless the act or omission is caused by shareholders' own acts resulting in criminal liability.

The TCC regulates provisions regarding group companies and Article 202 of the TCC specifically stipulates that the dominant (controlling) company cannot exercise its dominance in a way that may give rise to a financial loss on the subsidiary, unless the loss is compensated within the same financial year or a right to claim compensation is granted to the subsidiary within the same financial year by providing details of when and how the loss will be compensated. The loss concept covers the cause of a potential risk to the company's financial assets or future profitability as well as depreciation of their value. Therefore, not only the actual losses sustained but also the potential risks that may arise fall within the

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definition of loss. Both the shareholders and the creditors of the subsidiaries may claim the indemnification of the loss of the subsidiary company from the dominant company by filing a lawsuit.

iii Shareholder activism

Shareholder activism is not a well-developed concept in Turkey and there is not any specific regulation providing rules in this respect. The TCC, which is greatly in line with the EU Shareholders' Directive,[8] provides monitoring rights to shareholders to influence companies' strategic decisions. Pursuant to the CGPs, shareholders also have a say on rights in respect of pay. Shareholders shall receive a written remuneration policy at the GA meeting in respect of both the BOD and managing director, which shall be discussed as an item on the agenda and the shareholders shall have the right to express their opinions.

Owing to historical and economical factors, even if (minority) shareholders can use their limited rights granted under the TCC, in practice these rights are seldom realised and the controlling shareholders in companies still tend to dominate.

Thanks to developments in information technology, transparency and access to information are widely available. Shareholders can conduct electronic GA meetings to follow up matters with management. With the continuing developments in information technology and of Turkey's global economic relations, new laws and regulations are expected to be adopted in this regard.

iv Takeover defences

Share transfer restrictions are prohibited under the TCC except when there are legal grounds. Nevertheless, some specific provisions in the TCC regarding the restriction of share transfers are regulated for JSCs and LLCs; for example, Article 492 requires JSCs to codify the specific reasons why share transfers may be rejected in their AOA. Shareholders will need to determine carefully the grounds for implementing share transfer rejections, whereby the most frequent grounds are the independence of the company and the area of business. Restrictions on share transfers may also continue as a contractual obligation pursuant to a shareholders' agreement.

JSCs are further protected under the TCC through the option of refusing the transfer of shares alongside a proposal to take over the shares at book value, or to transfer the shares themselves or on behalf of shareholders or a third party.

The TCC further prohibits a JSC, a third party, a JSC's subsidiary acting for the JSC, or a JSC's subsidiary promising shares in its parent company, from undertaking to sell treasury shares.

There is also no special provision forbidding hostile bids under Turkish law, but they are very rare in Turkey as public companies are difficult to approach on a hostile basis owing to publicly traded shares that are free-floating. Shares that are not publicly traded are usually owned by a limited number of shareholders, mostly consisting of family members. Therefore, the control over management is granted to the majority or controlling shareholder, significantly eliminating the chances of a hostile bidder acquiring control of a public JSC.

8 Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

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Recent trends also show that the past few years have been quite rewarding in terms of merger and acquisition transactions and the practice has gained an uplift. New legislation in this respect is expected from the Competition Authority and the CMB.

v Contact with shareholders

The annual GA of shareholders serves as the main portal for communication between a company and its shareholders. As companies are requested to treat all shareholders equally, any direct and personal communication with shareholders is a sensitive matter.

The introduction of online participation in GA meetings has created a communication platform that allows shareholders or their proxies to watch a live broadcast of a physical meeting through the Central Registration Agency (CRA). Not surprisingly, the use of this platform has become increasing popular during the covid-19 pandemic. The CRA requires all ISE-listed companies to become a member, whereas for other JSCs or LLCs, membership is voluntarily. With this system, the identification of shareholders is ensured (know your shareholder).

The foregoing system has enabled Turkey to introduce an electronic voting and communication platform between all parties, which has resulted in an increase in the total number of participants at general meetings, which is a step in the right direction towards shareholder democracy in Turkey.

VI OUTLOOK

Corperate governance in Turkey has changed dramatically during the past 10 years and will continue to evolve in significant ways in the coming years. The current covid-19 pandemic has broadly shown its effects on corporate governance in Turkey. Many temporary regulations were passed to adapt to the physical and financial burdens caused by the pandemic and mitigate the consequences. Companies were allowed to postpone their mandatory annual general meetings and were prohibited from distributing all their dividends (limited to 25 per cent) until 31 December 2020, withholding tax returns and VAT returns. Social security premiums and service documents were postponed for an extendable period for companies operating in certain industries, and the reporting dates for quarterly financial reports for public companies were delayed.

However, the pandemic has also had a significant influence on technological developments. Most recently, amendments were made to the TCC in which the electronic record-keeping and tracking of bearer share certificates in non-public JSCs through the CRA became obligatory. These types of companies are now required to keep and maintain their share ledgers and resolutions books electronically: the Ministry of Trade is the authorised entity to track any non-compliance with this requirement.

Title and transfers of bearer share certificates must also now be tracked through the CRA. Existing shareholders with bearer share certificates have to make an application to the company to initiate the notification of shareholders' title over the bearer shares and shareholding details to the CRA. Shareholders failing to apply cannot exercise their rights in respect of their bearer shares until the application is made. Any violation of timely notification may lead to an administrative fine of 20,000 lira. Further, share transfers must be notified to the CRA before the shareholders can exercise their shareholder rights in respect of those bearer shares. Holders of bearer share certificates failing to notify any transfer cannot exercise their rights arising from the transferred shares towards parties. The date on which the

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notification is made to the CRA will serve as reference for asserting the shareholding rights arising over bearer share certificates towards the company and third parties. Any violation of timely notification may lead to an administrative fine of 5,000 lira.

The electronic record-keeping requirement entered into force on 31 December 2020, and the remaining new requirements will follow on 1 April 2021.[9] Despite the pandemic, Turkey is constantly trying to adopt a well-functioning corporate governance system, which is seen as a precondition for attracting foreign investors. In light of the global trends, improvements in corporate governance and shareholder rights in particular are expected, with the aim of more liberal provisions for the establishment of corporations and gender quotas.

9 *Official Gazette* dated 31 December 2020, No. 31351 (5th Issue).

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Appendix 1

ABOUT THE AUTHORS

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Reşat Gökhan Basan is the founder and managing partner of Basan Attorney Partnership. He has degrees in both law and finance and an LLM degree in European law. He serves national and multinational clients in a variety of industries, including defence, aviation, energy, finance, construction and insurance, and has advised various national and multinational companies on numerous commercial matters – corporate disputes, agreements and the Turkish part of their M&A transactions. In his advisory role to companies, he was a member of corporate governance and corporate sustainability committees as an expert.

BUĞSE KILIÇ

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Buğse Kılıç received her law degree from Marmara University and has been an associate at Basan Attorney Partnership since 2016. She mainly concentrates on commercial and civil litigation in various fields, including Turkish personal data protection law, corporate law, trade law and labour law.

She has hands-on experience in shareholder disputes and litigation concerning shareholder oppression, corporate mismanagement and corporate control. Buğse not only assists clients in disputes subject to adjudication, but also oversees debt collection procedures following disputes.

GÜLLÜ GÜLVER BILGIC

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Güllü Gülver Bilgic has been an associate at Basan Attorney Partnership since 2019, where she mainly works in the areas of corporate, international trade and construction law. Previously, she worked at the Ministry of Justice in Turkey in the department of strategy development, focusing on foreign law implementations.

Most recently, she has been working as an in-house lawyer for one of Basan's clients, advising on clients' legal risks and liabilities and with responsibility for contract drafting, reviewing and negotiation.

Güllü received her law degree and her title of *magister juris* from the Ruprecht-Karls University Heidelberg (Germany). She is also a graduate of the University of Ankara and received her diploma of equivalence in 2019.

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