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# LATEST AMENDMENTS IN THE TURKISH CAPITAL MARKETS BOARD LEGISLATION

The capital markets legislation in Turkey has seen important changes in the second half of this year. While some of those changes have been initiated by the Turkish Parliament as part of the lawmaking process, the Turkish Capital Markets Board (the "**CMB**"), the regulatory authority of the capital markets in Turkey, has been the source of other amendments and changes. This article summarizes the new landscape and discusses the impact of the referred new amendments.

## Acquisition and Pledge of Company Shares by the Company Itself

The new Turkish Commercial Code has been approved in February 2011 and most of its provisions will become effective as of 1 July 2012. This new Code will allow the joint stock companies to acquire and pledge their own shares up to 10% of their paid-in or issued share capital. It will also be possible for a third party to acquire or pledge the shares on his own name but for the account of the relevant company. For the acquisition of such shares (which are sometimes referred to as treasury shares in other jurisdictions), the board of directors of the company should be authorized by the general assembly of shareholders, which is the main governing body in a Turkish joint stock company. The board's authorization shall be limited to a period of five years, after which it will need to be renewed by the general assembly. The new code entitles the CMB to issue regulations for the implementation of transparency principles and pricing issues for the listed companies.

The CMB issued a resolution on 10.08.2011 which establishes the principles applicable to acquisitions of their own shares by the companies listed in the Istanbul Stock Exchange. Accordingly;

- Acquisitions can be made pursuant to a decision of the board of directors within purview of the authorization granted by the general assembly, for a maximum period of 18 months and only at the Istanbul Stock Exchange.
- Nominal value of the shares to be acquired (with the addition of the value of the shares which have been previously acquired), shall not exceed 10% of the paid-in or issued share capital of the company.
- Following the deduction of the amounts of the shares to be acquired, the equity of the company shall at least be equal to the aggregate amount of paid-in/issued share capital plus the legal reserves which cannot be distributed pursuant to law and the articles of association of the company.
- Company shall be free to determine how long it will keep the acquired shares on the condition that such period does not exceed three years. Shares which are not divested within three years shall be cancelled via a capital decrease.
- The board of directors of the company shall prepare an acquisition schedule which covers (i) the purpose of the acquisition, (ii) amount and source of the funds reserved for the acquisition, (iii) maximum number of shares to be acquired, (iv) upper and lower limits for the acquisition price, (v) authorized persons for the transaction, (vi) authorization period to be requested from the general assembly and (vii) the date of the general assembly meeting for the approval of the schedule. The schedule should also be announced on the web site of the company at least 15 days prior to the general assembly meeting.



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- A material event disclosure shall be made within the following business day of each transaction made in the framework of the acquisition schedule. A separate material event disclosure shall be made within five business days following the end of the acquisition schedule and in case of the divestment of the acquired shares, a material event disclosure shall be made within the following business day of each transaction.
- In the presence of reasonable grounds, the board of directors is entitled to proceed to the acquisition of the company shares without being authorized by the general assembly. In such cases, acquisition transaction should be announced to public with a material event disclosure at least two business days prior to the commencement of acquisition transaction.

In addition to the fact that the CMB adopted the above mentioned resolution prior to the entry into force of the new commercial code, the most intriguing provision of the said resolution is the one which allows the board of directors of a listed company to decide on the acquisition of the company shares without being authorized to do so by the general assembly of the company, in the presence of reasonable grounds. By entitling the board of directors to transact without the approval of the general assembly, it can be argued that the CMB has unilaterally broadened the implementation of the relevant provision of the new Turkish Commercial Code. While this situation creates doubts in respect to the applicability of the referred resolution of the CMB, a listed company has already completed acquisition of its shares up to 10% of its share capital pursuant to a simple board resolution within September 2011.

**Corporate Governance Principles**

The Communiqué Regarding Determination and Implementation of Corporate Governance Principles, has been issued by the CMB and entered into force on 11 October 2011 (the "**Communiqué**"). According to the Communiqué, except for the banks, the publicly held joint stock companies which are listed in the Istanbul Stock Exchange (the "**ISE**") and are on the ISE-30 Index, must comply with some of the corporate governance principles as attached to the Communiqué. Furthermore, annual activity reports of the listed companies should cover the following issues: (i) explanations as to whether such principles are applied, (ii) explanations, with reasoning, in case of non-implementation of the said principles, (iii) explanations with respect to any conflict of interests resulting from the failure to fully comply with the principles and (iv) whether there is any contemplated plan to amend the management practices of the company in the future, in accordance with the principles.

The corporate governance principles which are mandatorily applied to companies listed on the ISE-30 Index, are described below:

Announcement of the General Assembly Meeting: In addition to the procedures already set forth in the Turkish Commercial Code, announcement of the general assembly meeting shall be made via all kinds of communication tools, including electronic communication, at least 3 weeks prior to the general assembly meeting date. The announcement should also be posted on the website of the company and should include the following issues in addition to notices and explanations which are required under the relevant law:

- Total number of shares and voting rights, number of shares representing each of the privileged groups of share and their voting rights if there is any privileged share, as of the announcement date,



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- Any changes on the management and activity organization of the company, material subsidiaries and affiliates of the company, which have been realized within the preceding accounting period or are contemplated for the future accounting periods, along with underlying reasons of such changes and activity reports, annual financial tables and pro forma financial tables related to the last three accounting periods of all the entities which are parties to the changes about the organisation structure,
- If the agenda of the general assembly meeting includes dismissal, replacement or election of members of the board of directors, underlying reasons of the dismissal and replacement, and the names and curriculum vitae's of the nominees. The shareholders which nominates the said nominees shall inform the company, to be immediately disclosed to public, with respect to the following issues, within 1 week as of the announcement date of the general assembly meeting: (i) names and curriculum vitae's of the nominees, (ii) duties assumed by such nominees within the last 10 years and the reasons of their leave, (iii) nature and level of the relationship of such nominees with the company, related parties of the company and entities that the company is doing business with, (iv) whether such nominees can be qualified as independent, and (v) information in respect to similar issues which may affect the company's activities in case of their appointment as board members.

Non-Assignable Authorities of the General Assembly The articles of association shall provide that the below mentioned issues shall be resolved by the shareholders at a general assembly meeting where the parties to the relevant transactions and related parties of those persons shall be precluded from voting. Until the amendment of the articles of association in accordance with the foregoing, board resolutions in respect to the said issues shall not be applicable without the approval of the general assembly:

- spin-off and share swaps resulting in a change on the company's capital structure, management structure and assets,
- sale/purchase and rent/rent out of tangible/intangible assets having a significant amount,
- donation and contributions having a significant amount,
- providing guarantees in favour of third parties, such as surety or mortgage.

Voting Rights In the event that a reciprocal shareholding in each entity also results in a control relationship, companies which holds the shares of each other shall abstain from voting at the general assembly of the companies which they participate, except for absolutely necessary situations such as constitution of a quorum, and shall publicly disclose their abstinence from voting, to public.

Transaction between the Board Members and the Company In the event that the general assembly approves that the board members can transact and compete with the company, the relevant board members shall inform the general assembly in respect to the transactions made with the company and the activities which are in competition with the company.

Salaries of the Board Members Principles governing the salaries of the board members and managers shall be in writing and shareholders shall be allowed to give their opinions regarding this issue. The "salary policy" to be prepared accordingly shall be posted on the web site of the company and be presented to the shareholders at the ordinary general assembly meeting, as a separate item on the agenda.



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Composition of the Board of Directors At least one third of the board of directors shall be composed of independent members and in the event that a fraction occurs in calculation, such number shall be rolled up to the following highest number. A board member should comply with the following criteria in order to be qualified as an "independent member".

- There should not be any direct or indirect benefit relationship with respect to employment, shareholding or commercial, within the last five years between the member, his/her spouse and kin related of the member by blood or marriage up to third degree and the company or between one of the related parties of the company or legal entities which the shareholders that hold directly or indirectly at least 5% of the capital of the company are related within the meaning of management or shareholding,
- He/she should not be appointed as the representative of a share group,
- He/she should not have been employed in companies which conduct, partly or wholly, activity and organization of the company, especially the companies which conduct the audit and counselling services for the company. He/she should also have not been employed in such companies as a manager during the last five years,
- He/she should not have been employed in the entities which act as independent auditor of the company or be present in the independent audit process, during the last five years,
- He/she should not have been employed in the entities which provide services and products at a significant level to the company and he/she should not have been employed in such entities as a manager during the last five years,
- None of the spouse or kin related of the member by blood or marriage up to third degree should be a manager in the company or a shareholder who holds more than 5% of the capital or who has management control of the company regardless of the percentage of share he/she holds,
- He/she should not earn any income from the company other than the board member remuneration and attendance fee; if he/she is a shareholder due to his/her title as a board member, his/her share ratio should not be more than 1% and such shares should not be privileged shares.

In the presence of justified reasons, for the protection of investor's rights and with the approval of the CMB, individuals who do not comply with one or several of above mentioned criteria can be temporarily appointed by the general assembly as independent board members for a maximum period of one year.

Independent board member should submit to the board of directors, a written declaration stating that he/she is independent in accordance with the articles of association, legislation and above mentioned criteria at the time of his/her nomination. The board of directors should assess whether the nominee fulfils the requirements to be an independent member and present a report in this respect to the general assembly. The general assembly resolution with respect to the appointment of an independent board member should be declared on the web site of the company together with the justifications of the resolutions, dissenting votes and the assessment report of the board of directors. In the event that the nominees who have received dissenting votes of the shareholders representing 5% of the share capital are appointed as independent board members, independency of such members should be assessed and resolved by the CMB.



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**Mandatory Tender Offer**

The mandatory tender offer is regulated by the Communiqué Serial No: IV and No: 44 of the CMB. As per the said communiqué, the mandatory tender offer is triggered in the event of direct or indirect acquisition of management control of the company. Acquisition of 50% or more of the capital or voting rights of the company directly or indirectly, individually or together with the persons acting jointly shall be deemed as the acquisition of the management control. Furthermore, regardless of the amount of shares acquired, the acquisition of privileged shares which grant their holders the right to nominate the absolute majority of the board of directors at the general assembly of shareholders, is also considered as an acquisition of the management control.

The Council of State (*Danistay*) has ruled on 18 July 2011 in favour of a stay of execution of the provision set forth in the first paragraph of article 5 of the communiqué which states that "Furthermore, regardless of the amount of shares acquired, acquisition of privileged shares which grant their holders the right to nominate the absolute majority of the board of directors at the general assembly of shareholders, is also considered as an acquisition of the management control". Following this stay of execution, the CMB has issued a resolution stating that with respect to the issue as to whether or not the management control has been obtained, the CMB shall take into consideration the acquisition of shares (privileged or unprivileged) which grant their holders the right to nominate the absolute majority of the board of directors. Pursuant to the said resolution, such principle shall apply until the final decision of the Council of the State in the relevant matter or until a new regulation is issued by the CMB. Therefore, under the new regime, it is important to note that the acquisition of the means to nominate the majority of the board of directors, irrespective of the class or privilege of the underlying shares, may trigger the requirement for a mandatory tender.



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