**10 May 2013**

This note focuses on the action points for compliance with the new Turkish Commercial Code ("**TCC**"), introduces the recent regulations and communiqués which have been promulgated in accordance with the new Turkish Commercial Code and provides brief information on each of them.

## A. COMPLIANCE WITH THE NEW TCC

The TCC has entered into force on 1 July 2012 and it provides significant changes for the Turkish commercial business environment. We set out below the most significant amendments with which the companies are required to comply and, unless it is indicated otherwise, such changes are applicable on the companies as of 1 July 2012.

### 1. Amendment of the Due Payment Dates in Commercial Contracts

As a general rule, the due date for payments prescribed in a commercial contract may not exceed 60 (sixty) days starting from: (i) the receipt of the relevant invoice; (ii) the receipt of the relevant good or service; or (iii) the completion of the review and acceptance procedure relating to the said good or service. A longer period may be prescribed, provided that it is explicitly agreed between the parties and no unjust benefit is created to the detriment of the creditor. The due date may however, under no circumstances, exceed 60 (sixty) days if: (i) the creditor is a small-medium size business; or (ii) if the debtor is a large scale enterprise.

Consequently, the due payment dates of the contracts entered into by the companies falling within the scope of the above determinations should be revised in order to comply with this new rule.

### 2. Shareholders' and Board Members' Borrowing From the Company

Shareholders may borrow from the company, on the condition that they have fully paid their due debts related to their capital subscription obligations. Any borrowing that took place after 1 July 2012 is to be in compliance with this rule. As to the board members that are not the shareholders of a company and the non-shareholder close relatives of board members cannot be indebted to the company in cash. The TCC further stipulates that the company cannot issue surety, guaranty nor create security interest for the said persons.

In case of non-compliance with this rule, creditors of the company are entitled to claim such receivables directly from the said persons on behalf of the company.

### 3. Resignation of Board Members appointed by Legal Entity Shareholders

Under the TCC, the board members that are appointed as the nominee of a legal entity shareholder are required to resign from their duty as board member by 1 October 2012 at the latest. Either natural persons or legal entities can be appointed as board members in their stead. In case a legal entity is appointed, a natural person representative must be appointed to represent it in the relevant board meetings.

**4. Entry into Force of Auditing Requirements and Appointment of Independent Auditor**

The Council of Ministers' Decree on Determination of the Companies subject to Independent Audit has been published in the Official Gazette dated 23 January 2013 being effective as of 1 January 2013.

The Decree stipulates that the companies, standing alone or together with their subsidiaries, satisfying at least two of the below three criteria are subject to independent audit. In case the companies exceed the said criteria in two consecutive fiscal years, they are subject to independent audit as of the following fiscal year. The criteria are as follows:

- The total of the actives of the company is equal to or above TL 150,000,000 (approximately USD 85,000,000)

- Annual net sales revenue of the company is equal to or above TL 200,000,000 (approximately USD 115,000,000)

- Number of the employees of the company is equal to or above five hundred.

Notwithstanding the foregoing, certain companies specified in the Decree are subject to independent audit, regardless of the above mentioned criteria. These include, *inter alia*, (i) the companies subject to regulation and supervision of the Capital Markets Board; (ii) the companies subject to regulation and supervision of the Banking Regulation and Supervision Agency; and (iii) the media service providers owning national terrestrial, satellite and cable television.

The Decree includes another (exhaustive) list of companies (such as companies publishing daily newspapers, companies subject to the supervision of the Information and Communications Technologies Authority, etc.) which are subject to independent audit. The companies included in this particular list are subject to different levels of thresholds regarding each criterion of actives, annual net sales revenue and number of employees.

Companies which are subject to independent audit requirement pursuant to the Decree are required to appoint an independent auditor by 31 March 2013 at the latest. The independent audit in accordance with the Turkish Audit Standards will be made starting from 1 January 2013.

**5. Entry into force of Turkish Accounting Standards ("TAS")**

Companies which are subject to independent audit requirement will be obliged to prepare their financial statements and annual activity reports and submit these to the general assembly in accordance with the TAS which is effective as of 1 January 2013. The financial statements that are in compliance with the TAS will be submitted within the first three months of the relevant fiscal year.

Those companies which are not subject to independent audit requirement will continue to prepare their financial statements in accordance with the current effective rules.

**6. Amendments to the Articles of Association**

The TCC provides an important number of changes regarding the articles of association of commercial companies. As an example, a joint stock company must include certain provisions in its articles of association and may deviate from the mandatory rules of the TCC if, and only if, it is explicitly allowed under the TCC. The necessary changes to the articles of association for the purpose of complying with the TCC should be made by 1 July 2013 at the latest. In case of failure to do such changes within the specified period, the relevant provisions of the TCC will apply instead of the provisions of the articles of association.

For instance, in case it is stipulated in the articles of association of a company that the quorums under the previous TCC will apply, such companies should make the necessary amendments to comply with the new TCC. In case they do not make such amendments by 1 July 2013, meeting and decision quorums of the new TCC will begin to apply automatically.

**7. Unenforceability of Transfer Restrictions re Registered Shares**

Under the previous regime, it was allowed under the articles of association of the company to empower the board of directors with a limitless authority as to the approval on the transfer of the shares. However, the general spirit of the TCC aims to set up a legal environment where the shares of a joint stock company are freely transferred without any limits, if possible. Given this approach, under the TCC, the joint stock companies which want to grant their board of directors with a power to limit the transfer of shares of the company are required to identify just reasons in their articles of associations in advance. Therefore, the companies which have provisions in their articles of associations to that effect are required to amend their articles of association by 1 July 2013 in accordance with the provisions of the TCC. Otherwise, such share transfer restrictions will become void upon expiry of the specified period.

**8. Requirement to open a Website**

Companies which are subject to independent audit requirements are obliged to create a website by 1 July 2013. Such companies should publish certain pieces of information (such as trade registry number, trade name, head office address that is used in its commercial letters and commercial books as well as the names of the board members, subscribed and paid in capital) on their website. Such company must also allocate a certain part of its website for publication of the mandatory announcements.

**9. Including Mandatory Contents in the Commercial Documents**

The companies must include information as to their registry number, trade name, address of their head office, and website (if applicable) in their commercial letters and commercial books by 1 January 2014.

## B. SECONDARY LEGISLATION UNDER THE NEW TCC

This section aims to provide you with certain generic information as to the secondary legislation enacted within the framework of the TCC.

**1. Content of the Annual Activity Report of the Companies**

The Regulation on Determination of the Minimum Content of the Annual Activity Report of the Companies has been published in the Official Gazette dated 28 August 2012.

The Regulation obliges the management bodies of joint stock companies and limited liability companies to include the following pieces of information in their annual activity report: (i) general information, (ii) financial rights provided to the members of the management body and senior executives, (iii) research and development work of the company, (iv) company's activities and significant developments relating to the activities, (v) financial situation, (vi) risks and the evaluation of the management body, and (vii) other subjects. The Regulation further details each item and determines the specific content of the same. Additional information that the management body deems necessary can also be included in the annual activity report, provided that it is not in breach of the provisions of the Regulation.

## 2. General Assemblies of Joint Stock Companies and other Assemblies of Commercial Companies in Electronic Form

The Regulation on Electronic General Assemblies of Joint Stock Companies, the Communiqué on Electronic General Assembly System ("**EGAS**") of Joint Stock Companies and the Communiqué on Assemblies of Commercial Companies in Electronic Form other than the General Assemblies of Joint Stock Companies have been published in the Official Gazettes dated 28 August 2012, 29 August 2012 and 29 August 2012, respectively.

The Regulation and the Communiqués set out the principles and procedures regarding participation, making suggestions and voting in electronic general assemblies of joint stock companies and other assemblies of commercial companies and the implementation of electronic assembly systems. The companies that choose to implement the said electronic participation and voting systems will make required amendments in their articles of association. The wording of the provision to be added to the articles of association of such companies is specified in the said Regulation and Communiqués. Companies having such provision in their articles of association have to ensure electronic participation and voting opportunity to the right holders and their representatives in each relevant assembly. In case of meetings of the board of directors, the meeting may take place completely in electronic form as long as any of the members do not declare that they will participate in the meeting physically.

It should be noted that as indicated in the new TCC, with the entry into force of the Regulation, it will become mandatory for the publicly held joint stock companies to implement EGAS, thus to make the required amendment to their articles of association in their first general assembly meeting following the entry into force of the Regulation. The participation, deputation, making suggestions and voting in electronic general assemblies of such companies will be made via EGAS provided by the Central Registry Agency.

The companies may provide electronic assembly systems on their own or with the support of specific firms which are expert in this field. In either case, the systems must be certified to be in compliance with the Regulation and the Communiqués and such compliance must be registered and published with the Trade Registry.

## 3. Cumulative Voting in General Assemblies of Non-Public Joint Stock Companies

The Communiqué on Principles of Cumulative Voting in General Assemblies of Non-Public Joint Stock Companies has been published in the Official Gazette dated 29 August 2012.

Communiqué sets forth the principles and procedures of cumulative voting which enables minority shareholders to appoint members to the board of directors of the company. Cumulative vote is calculated by multiplying the number of votes that the shareholders or their representatives who attend the general assembly meeting are authorized to cast by the number of board of directors members to be appointed.

The articles of association of the companies to enable cumulative voting are required to include relevant provisions in order to implement cumulative voting system. Moreover, (i) there cannot be any provision granting certain groups the right to be represented in the board or the right to make nominations for appointment and (ii) the number of the members must be set out in the articles of association as a specific number not to be less than three.

## 4. Registered Capital System for Non-Public Companies

The Communiqué on Principles regarding the Registered Capital System for Non-Public Companies has been published in the Official Gazette dated 19 October 2012.

The Communiqué sets forth the procedures and principles for the companies to adopt the registered capital system, to increase the capital in line with the requirements of such system, and to leave the

system or to be expelled from the system. It facilitates the capital increase, under certain circumstances, by enabling companies to increase their capital with a resolution of the board of directors instead of a general assembly resolution.

In order for non-public companies to adopt the registered capital system, the issued capital should be fully paid up. It is stipulated in the Communiqué that the minimum capital is TL 100,000 (approximately USD 56,000) in order to enter into registered capital system upon the approval of Ministry of Customs and Trade. Even though it is not clearly stipulated under the Communiqué, the affirmative opinion of the Capital Markets Board is also sought for the adoption of the registered capital system. The cap of registered capital is limited to five times the initial minimum capital of TL 100,000. For future increases of the said cap, it must be noted that the ceiling of the registered capital can never be more than five times the then-issued capital amount.

The companies should include the relevant provisions in their articles of associations such as the time period during which the board of directors may exercise its right to increase the company's capital until the registered capital cap (not to exceed five years) and the methodology under which the board's resolutions to this effect will be announced. In the event the board of directors will be authorized to grant privileges or to restrict pre-emptive rights of the current shareholders, these issues should also be set out in specific provisions in the articles of association of such company.

**5. Minimum Capital Amounts for Joint Stock And Limited Liability Companies and Determination of Joint Stock Companies subject to Approval**

The Communiqué Regarding Joint Stock and Limited Liability Companies Increasing their Capital to the New Minimum Amounts and Determination of Joint Stock Companies which will be Subject to Approval Prior to Incorporation and Amendment of Articles of Association has been published in the Official Gazette dated 15 November 2012.

The Communiqué sets forth 14 February 2014 as the final date for the joint stock and limited liability companies to bring their capital up to the minimum capital requirement amounts if their capital amounts are below TL 50,000 and TL 10,000 respectively. It is stated that the companies that do not meet the minimum capital requirement within the specified period will be deemed to dissolve at the end of this period. We believe this is not relevant to the joint stock companies, as the minimum capital amount have not changed under the TCC. This is, however, important for the limited liability companies, as, under previous regime, the minimum share capital requirement for a limited liability company was TL 5,000 and now they are required to increase their capital by TL 5,000.

The Communiqué sets forth an exhaustive list of companies that are subject to approval of the Ministry of Customs and Trade prior to incorporation and while amending their articles of association. The list includes banks, financial leasing companies, insurance companies, holding companies incorporated as joint stock companies, companies involved in bonded warehousing, independent auditing companies, etc. The approval of the Ministry will be obtained before the application for registration at the trade registry in the case of incorporation and before the general assembly date in the case of articles of association amendment.

**6. General Assemblies of Joint Stock Companies, Internal Directive and Participation of Ministry Representative**

The Regulation Regarding the Procedures and Principles of General Assembly Meetings of Joint Stock Companies and the Ministry of Customs and Regarding the Trade Representatives to be Present at these Meetings has been published in the Official Gazette dated 28 November 2012.

The Regulation sets out the procedures and principles of general assembly meetings of joint stock companies, identifies the assemblies where the participation of a ministry representative is mandatory and imposes on all joint stock companies the obligation to adopt an internal directive.

The Regulation obliges the participation of a ministry representative in (i) all general assembly meetings of the companies whose incorporations and articles of association amendments are subject to approval of ministry (mentioned under section B.5 above); (ii) general assembly meetings of other companies whose agendas include capital increase or decrease, adaptation of registered capital system and leaving such system, registered capital cap increase or changes in field of business, merger, demerger or change of type; (iii) general assembly meetings of companies which implement the electronic participation system; and (iv) all general assembly meetings held abroad.

The Regulation sets out the meeting and decision quorums applicable in general assemblies in great detail. While it is allowed to increase such quorums by way of provisions in the company's articles of association, it is prohibited to decrease the stated quorums. Please do not hesitate to contact us should you require further information on the applicable quorums.

The Regulation also goes into detail regarding the procedures applicable whenever a general assembly is needed to be convened, e.g. the invitation of shareholders, mandatory agenda items of ordinary general assemblies, wording of the required power of attorney for appointment of proxies, postponement of a general assembly, the details that must be included in the meeting minutes and the attendance list, etc.

In addition, it is now required that all joint stock companies adopt an internal directive regarding the principles and procedures applicable for convening general assemblies. A draft internal directive is attached to the Regulation which includes the minimum requirements as to the content of such directive. The internal directive to be prepared by the board of directors is required to be submitted to the approval at the ordinary general assembly meeting to be held in 2013 at the latest.

## 7. Commercial Books

The Communiqué on Commercial Books has been published in the Official Gazette dated 19 December 2012.This Communiqué aims to determine the procedures and principles regarding how the books will be kept by real person or legal entity merchants in physical or electronic form. Registration and renewal of approval times and opening and closing approvals are described.

The novelties this Communiqué brings are real person merchants' obligation to keep commercial books and companies' obligation to keep a general assembly resolution book to which general assembly meeting minutes will be attached.

All commercial books as well as the documents underlying the records entered into such books must be kept for ten years.

## 8. Capital Movements Under the TCC

Under the TCC, the share capital increase mechanism is slightly changed. According to this new system, during the share capital increases, the shareholders are now requested to deposit at least 25% of their contribution undertaking to the bank account of the relevant company before the share capital increase decision is registered with the trade registry[1]. Such amount may only be used by the company, once a letter is submitted to the bank evidencing that the share capital increase decision is registered with the trade registry. Further, such shareholders are required to pay the remaining amount to the company within two years from the date of the registration of the share capital increase decision.

Within the above framework, on 29 March 2013, the Central Bank of the Republic of Turkey has amended its Circular on Capital Movements (the "**Circular**") and excluded the term "capital advance" from the Circular which was frequently used by the foreign companies in order to fund their Turkish subsidiaries.

[1] Under the previous regime, the shareholders were required to pay 25% of their contribution undertaking within three months as of the registration date and the remaining amount within three years starting from the registration date.

As per the Circular, the payments made by foreign parents to their Turkish subsidiaries are now required to be classified either as (i) a "capital payment"; or (ii) a "capital increase payment". Consequently, the relevant Turkish subsidiary will not be free to use the relevant fund, up until it passes and registers a general assembly resolution where it increases its share capital. The Turkish subsidiary will only be entitled to freely use such funds, once it submits a letter from the trade registry to the relevant bank evidencing that it has increased its capital by such amount.

Needless to say that such foreign partners are still entitled to make available such amounts under an intercompany loan agreement to their subsidiaries. However, the intercompany loans are subject to strict rules such as: (i) stamp tax duty requirement over principal amount; (ii) mandatory submission of original loan agreement to the relevant bank; and (ii) (under certain circumstances) the Resource Utilization Support Fund requirement over the principal amount.

## C. A NEW CONCEPT: GROUP OF COMPANIES

### 1. General Overview

The TCC has regulated for the first time the concept of group of companies ("**Group of Companies**"). In addition to the TCC, a secondary piece of legislation, namely the Trade Registry Regulation (the "**Regulation**") has recently come into force regulating such concept in greater detail.

According to the TCC, these Groups of Companies are subject to some additional obligations such as issuing dependency reports, registering the share transfers, etc. However, in order to determine if this obligation is applicable in a particular situation, it is necessary to define first the concept of dominance and then to determine the consequences arising from being in a dominant position.

The concept of dominance is essential as to determine whether there is a Group of Companies relation between a parent company and its subsidiaries. The TCC provides different criteria regarding the determination of the Group of Companies relation. Accordingly, if a commercial enterprise;

i. holds directly or indirectly the majority of the voting rights of another commercial enterprise;

ii. has the authority to appoint a number of members which would form the majority of the board of directors in conformity with the articles of association;

iii. in addition to its voting rights, holds the majority of the voting rights by itself, with other shareholders or with other partners on the basis of a contract; or

iv. holds the company under its dominance based on a contact or by any other means;

then the first company will be considered as the "dominant company" and the second one will be deemed as the "dependent company" and such entities form a "Group of Companies" within the framework of the TCC. If at least one of such companies' headquarters is located in Turkey, the provisions relating to the Group of Companies will apply to them. That being said, there are still uncertainties as to the determination of "Group of Companies" relation among a parent company and its subsidiaries especially due to the fact that there are no court precedents on the issue yet.

Article 105 of the Regulation further provides that a Group of Companies, as defined in Article 195 of the TCC, is constituted if there are at least two companies directly or indirectly affiliated to the parent company. As you may see, this provision sets forth a new condition for the determination of the Group of Companies, which is the holding of at least two other companies as subsidiaries of the parent company.

## 2. Implications of Group of Companies Relation

a. Registration of Share Transfers Exceeding Certain Thresholds

According to the TCC and the Regulation, if a commercial entity, within the framework of a Group of Companies relation, directly or indirectly holds 5, 10, 20, 25, 33, 50, 67, 100 per cent of another company's shares, or its shares fall below such percentages, the said entity should inform its subsidiary of such occurrence and notify the relevant authorities within ten days of the completion of the relevant transaction (such as relevant tax offices, general directorate of foreign capital (if applicable), etc.). Such share transfer must also be registered with the relevant trade registry within the same period. The acquisition or disposition of the shares in the above-mentioned ratios must also be declared under a separate heading in the annual and audit reports and announced in the company's web site, to the extent applicable.

The TCC clearly states that, in case the notification and registration requirement is not duly fulfilled, all the rights (including voting rights) attached to the relevant shares will be suspended until such registration is duly made.

b. Issuance of Dependency Report

Within the framework of the Group of Companies relation, the board of directors of the dependent company is required to prepare a report regarding its relationships with its parent company and other dependent companies within the first three months of its fiscal year. Such report should indicate the consequences of these relationships in terms of loss and benefits. Failure to prepare such report is subject to an administrative monetary fine.

c. Compensation to be made by the Parent Company to its Subsidiary

In case a parent company causes its dependent company to suffer certain loss or losses by way of forcing it to undertake liabilities, decrease or transfer its profits, preventing it from taking necessary measures; it must either (i) compensate such losses within the same activity year or (ii) grant the dependent company an equivalent right with the same value until the end of that activity year, provided that it clarifies how and when it will make the compensation.

Failure to do so may result in each shareholder of the dependent company being entitled to request the compensation of the company from the parent company or its board of directors' members who caused the mentioned loss.

In case a dependent company has loss or losses specified above at the date of entry into force of the new TCC, such loss or losses should be compensated by the parent company or such dependent company should be granted with the equivalent rights by 1 July 2014 at the latest. Otherwise, the right holders may sue the parent company immediately following the expiry of the specified period.

*Güner Law Office was established in 1996 and has since grown into one of the major corporate, M&A, banking, litigation, energy, TMT and capital markets practices in Turkey.*

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