

Liabilities of the Board of Directors in a Joint Stock Company in the Consideration of the Current Turkish Commercial Code

by

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A. Introduction

Although there have been preparations to regulate the commercial life in Turkey, a new draft commercial code is pending in the commission to be finalized and proposed. The current Turkish Commercial Code (“TCC”) is still in effect and applicable for the liabilities of the Board of Directors in a joint stock company in Turkey. According to Article 317 of TCC, “Joint Stock Company shall be managed and represented by the Board of Director (“board”).

B. Duties and Liabilities of the Board of Directors under Turkish Commercial Code

Before evaluating the liability of the members of the board, it would be better to designate their duties. The duties are as follows; management, representation, keeping the books of the company accurately, duties regarding the general meeting, execution of the decisions of the general meeting, arranging company accounts and annual reports, duties in case of a decrease in assets, duties in case of a decrease or increase in the capital, duties in case of the termination or receivership of the company, duty of the registry and announcement, duties arising out of bonds, duties of care and loyalty.

TCC Article 336 sets forth the liability of the board members in a joint-stock company. In general, the board members are liable to the joint stock company, shareholders and the creditors for their actions. This is not a personal liability but a joint liability. The members are liable for their negligence of failing to fulfill their duties determined by law, the articles of incorporation and the contract between the company and the members if there is any.

In case there is a factitious agreement between a shareholder and a board member, which indicates that the share price has been paid totally or in partial, then the shareholder and the board member are jointly and severally liable for this deceptive action.

In a joint stock company, the general assembly takes the decision of distributing dividends, and afterwards the board of directors shall make the payment of dividend distribution. In case

the distributed and paid dividends are not accurate, the board members are liable for these payments.

According to Article 325 of the TCC, the board of directors is under the duty to keep all the required books of the company. Such books shall be duly kept accurately and completely by the board of directors. All mistakes with regard to the company books shall be under the responsibility of the board of directors. In the event of non-compliance with such duty, the board members shall be individually liable.

The board of directors is under duty to execute the decisions taken by the general assembly. However, if the decision taken by the general meeting is contrary to the legislation, articles of incorporation and/or good faith, in this case the decision of the general assembly shall not be executed. Otherwise liability of the board members may arise out of the execution of such decisions because they are under duty of care and observation duty.

The board members are obliged to observe the management, representation and business of the company. The board members shall protect the interest of the company and shall provide that the company business is conducted in compliance with the legislature and the articles of incorporation of the company. If the board members do not report the same to the auditors of the company, they shall be liable for any breach of such duty. In the event of non-compliance with such duty, the board members shall be individually liable. Furthermore, in the event of failure of showing utmost diligence while conducting the business of the company, the board members shall be individually liable against the shareholders and creditors of the company.

The relationship between the company and the board members is accepted as a “service agreement” under law and such agreement imposes a loyalty obligation on the board members. So, the board members are under duty to consider the interest of the company and they shall prefer the interest of the company over his/her own interest.

The board members are restricted from performing any transactions that may mislead third parties regarding the current situation of the company. If a board member causes harm to a third party by giving misleading information about the company or its transactions, then such member shall be individually liable for any damage that may arise under such misleading information.

As per the TCC, board members are also restricted from attending meetings of the board of directors and/or resolving on matters regarding the interest of the relevant member or his/her relatives, to a degree of his/her ascendants and descendants. In the event of a breach of such restriction, such member shall be liable for the damages arising out of such resolution and shall compensate the damage incurred by the company and/or other shareholders.

Beside these liabilities, another issue is the liability for the public debts of the company. As the board of directors is the legal representative of the joint stock company, the board is liable for such public debts. On the other hand, if a board member proves that he/she has fulfilled his/her duty and s/he is not faulty or negligent in the occurrence of that public debt then he/she is not responsible for such liability.

C. CONCLUSION

As per TCC, the members of the board of directors are liable in many cases so any board member shall be aware of these liabilities that may arise out of the boards' duties. On the other hand, in daily commercial life, there are some difficulties in the application of the relevant TCC articles on the board members, which necessitates the new draft commercial code to be passed and introduced for better and more applicable practices on boards.