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Delegating and Distributing a Board of Directors' Management Duties and Representation Authority Under the Turkish Commercial Code

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The delegation and distribution of management duties and representation authorities are important to the efficient functioning of a board of directors. When a board delegates duties and authorities this mitigates risk for the board because the delegation also carries with it the assumption of liability for performance.

The right to manage a company and the authority to represent it are granted to the board of directors by Section 365 of the Turkish Commercial Code Nr. 6102 (the "**TCC**").

The TCC introduces a distinction between the *right to manage a company and the authority to represent* it. The TCC's predecessor, the former Turkish Commercial Code numbered 6762 ("**fTCC**"), only referred to the right and duty to represent the company.

A Board May Delegate All Duties and Authorities Unless Prohibited by Law

Unless it is prohibited by law the board of directors may transfer any of its management and representation powers. The duties and authorities which are exceptions to this general rule are listed in Section 375 of the TCC. These include matters relating to governance and supervision of employees, among others.

Delegation of the Power to Manage the Company

Section 367(1) of the TCC says that a board of directors may partially or completely delegate its management powers to one or more board members, or even to a third person, provided that the company's articles of association contain a provision that allows this delegation. If a company's articles of association contain such a provision, the first step for a board to delegate its management powers is to prepare an internal directive (iç yönerge).

The internal directive should regulate management of the company by describing the duties, the persons who are responsible for those duties and the persons to whom the others are obliged to submit reports. When drafting this directive the board should consider any legal restrictions on the company as well as regulations in its articles of association.

The internal directive should address the company's management as a whole. This should also include detailed information regarding the structure, operation and functions of departments such as manufacturing, marketing and accounting.

It is highly recommended that the internal directive should not merely include organizational structures that outline staff reporting lines. Rather, the directive should also include the decision-making, appointment and assignment mechanisms within the various departments. A detailed internal directive bears great significance when determining the person(s) and/or director(s) that will be held liable in certain cases.

The board of directors must inform shareholders in writing about the internal directive. Upon request, the Board must also inform interested creditors about the internal directive, provided the creditor has convincingly shown they are worth protecting.

The internal directive should only address the delegation of management powers. In other words, there is no need to create and issue a similar internal directive regarding delegation of the authority to represent the company.

Once the board of directors has prepared an internal directive, it may then issue a resolution for delegation.

Delegation of Authority to Represent the Company

Section 370(1) of the TCC outlines the principle that the board of directors represents the company through joint signatures. The TCC states that the authority to represent the company may be transferred to one (or more) executive director(s), or to a third person, to act as manager. The TCC goes on to state that at least one of the board members must be granted the authority to represent the company.1

It is significant to note that the TCC no longer includes the ultra vires principle. Therefore, if the company's representatives execute transactions that fall outside the scope of the company's field of activity those transactions shall be deemed to be valid unless the other party to that transaction is proved to be aware of the situation or should have known in the circumstances. Announcing the company's articles of association in the trade registry gazette will not suffice to eliminate the good faith of third persons in these circumstances.

In order to delegate the representation authority, the board of directors must register this with the Trade Registry Office and announce one notarized copy of the board resolution in the Turkish Trade Registry Gazette. The announcement must indicate who the company's representative(s) is and the manner in which they shall use their representation authority.

Liability in Cases of Delegated Management Powers

In principle, if the management authority is not delegated as outlined in section b above, then the authority is deemed to belong to all members of the board of directors. If the board of directors delegates management duties and authorities then the person who is assigned to that duty or authority will be liable for its performance and consequences rather than the individual board members.

The fTCC contained the concept of "joint and several liability" for board members, auditors and other persons. However, the TCC has adopted the concept of "differentiated liability", as accepted in Swiss law.2 In accordance with this change, when a case for liability under the relevant articles comes before a court, the court should distinguish the damage caused to the company as either "damage caused by joint action" or "damage caused by individual action". Classifying the damage in this way will lead to the emergence of different liability groups. Delegation of duties and authorities will mean that different people are liable for different tasks and duties.

Section 553(2) of the TCC explicitly states that where powers or authorities are delegated on a legal basis to other persons, the delegator shall not be held liable for the delegatee's actions and decisions unless it is proven that the delegator did not exercise reasonable diligence when choosing the delegatee.

The Board May Distribute Some Management Duties to a Committee Without Formal Delegation

The TCC says the board of directors may form committees for following up certain procedures, preparing reports, executing resolutions or for the purpose of internal audits.3 The board of directors may create such a committee via a resolution.

If the board of directors forms such committees, the Board is deemed to have distributed its duties, but not delegated them. Therefore, the board of directors shall still be liable for all the acts, decisions and transactions conducted by the relevant committees.

The TCC specifically refers to two committees:

i. Audit Committee

The board of directors may set up an audit committee for financial planning.4 This is one of the board's non-transferrable authorities. The committee shall conduct the internal audit of financial acts and transactions, the financial resources of the company, utilization of skills and effective use of resources.

The audit committee may be made up of non-executive members of board of directors or independent specialists.

ii. Early Detection of Risk Committee

The aim of this committee is to detect potential dangers and risks at an early stage and to ensure that the company takes all necessary measures to avoid losses.

Publicly traded companies must establish a committee for the early detection of risk.5 For private companies, this committee should be established if the company's auditor considers the establishment of the committee to be necessary and notifies the board of directors in writing about such necessity.

As with the audit committee, this committee may be composed either of non-executive board members or independent specialists.

[1] Second paragraph of Section 370(2) of the TCC
[2] Section 557 of the TCC
[3] Section 366(2) of the TCC
[4] Section 375(1)(c) of the TCC
[5] 378 of the TCC

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