

## Turkey: Restriction Or Solution? Amendments With Regards To The Representation Authority Under The Turkish Commercial Code

*1 Jul 2012*

An Omnibus Bill that entered into force September 11 has made several amendments to various laws and regulations under the Turkish Commercial Code. Under the new regulation numbered 6552, amendments in regards to representation authority in joint stock companies and limited liability companies under Articles 131 and 132 of the new regulation were made to the Turkish Commercial Code numbered 6102 ("**TCC**"), which came into force on July 1, 2012.

### Representation Authority Under the TCC

Pursuant to the TCC, as a rule, the board of directors is the authorized body to manage and represent a joint stock company. The TCC regulates issues such as how to use the management and representation authority, the registration processes and the delegation and transfer of such authorities. Unlike the former Turkish Commercial Code numbered 6762 ("**fTCC**"), the TCC makes a clear distinction between the management of a company and the representation of it and regulates such authorities under separate articles.

In general, as per Article 39 of the TCC, each merchant should use its trade name and put its signature under its trade name for the transactions carried out in relation to its business. For the legal entities, the signatory authorities registered in line with Article 40/2 of the TCC have the representation power by signing the documents on behalf of the legal entity.

The board of directors has the authority, in principle, to represent the joint stock company. According to Article 370 of the TCC, unless otherwise determined under the articles of association of the joint stock company, the board of directors uses the representation authority 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 acting as manager.

However, unlike in the transfer of the management duties, the representative authority cannot be fully transferred to third persons who are not members of the board of directors. At least one member of the board of directors should continue to hold representation authority. According to Article 373, to appoint the signatory authorities, the related board of directors' decision should be notarized, registered with the trade registry and announced.

When it comes to the limitation of the representation authority, as per the Article 371 of the TCC, which regulates the scope and the limits of the authority to represent and bind the company, the signatory authorities are empowered to carry out all kind of operations and legal transactions that are within scope of company's field of activity.

The TCC further stipulates that transactions that do not fall within the scope of the field of activity of the joint stock company will also bind the company. Accordingly, unless it is proven that third parties transacting with the joint stock company knew or were in a position to know that the transaction fell outside of the field of activities of the company, such activities will bind the company.

On top of that, it is not sufficient to announce the articles of association of the company in the trade registry gazette to suppress the good faith of third parties. Therefore, it is understood that the ultra vires rule accepted by the fTCC is abandoned. In other words, the TCC adopts an unlimited representation authority. These excessive restrictions, which are not among the exceptions identified by the TCC, will be valid only in regards to persons who are aware of the restriction imposed on the representative authority of a signatory.

Two exceptions to the general rule of unlimited representative authority, which were both included in the fTCC legislation as well, are stipulated under the TCC. Accordingly, pursuant to Article 371/3 of the TCC, the representation authority of signatories may only be limited either by limiting the power to the transactions regarding the headquarters or branch offices of a joint stock company or by requiring joint signatures of multiple signatories instead of a single signatory.

In line with this rule, any other restriction is not binding on bona fide third persons engaging in transactions with the company, even if such limitations are registered with the trade registry and announced.

## Amendments regarding the Representation Authority

Before the new amendments, it was already possible to appoint signatory authorities through board of directors' decision. With the new amendments introduced, a new provision is inserted as paragraph 7 to Article 371 of the TCC. Accordingly, the board of directors now can appoint members of board of directors who do not have authority to represent and bind or the persons that are bound by an employment contract as a trade agent or other merchant assistants with limited power not through a board of directors' decision but through an internal directive.

The duties and authorities of the trade agent and other merchant assistants to be appointed as the signatory authorities in accordance with the new paragraph 7 of Article 371 shall be explicitly determined in the internal directive.

The İstanbul Trade Registry recently announced that only the signature groups and the scope of their signature authorities will be included in the internal directive. The names and identity numbers of such persons will be stated by referring to the internal directive in the related board of directors' decision or in case the authority to appoint such persons belongs to the general assembly in the general assembly resolution.

The registration and announcement of the internal directive are accepted as compulsory. The trade agent and other merchant assistants who have been authorized pursuant to this provision shall be registered and announced before the Trade Registry. The board of directors shall be severally liable for any damages arising from the acts of such persons that are given to the company and third parties.

Upon the assessment of the above-mentioned amendment, the purpose appears to be to eliminate the difficulties experienced by the companies due to the restrictive angle of Article 371/3 of the TCC and to realize the delegation of management duty and transfer of representation authority under one document.

Within this scope, the two exceptions for the limitation of the representation authority are already stated. Additionally, it is also mentioned that any other restriction is not binding on bona fide third persons engaging in transactions with the company, even if such limitations are registered with the trade registry and announced. The registration and announcement of such excessive restrictions only have effect on the recourse relation between the company and the signatory authority. However, in practice, the companies issue and register signatory circulars for the announcement of the scope of the power of its signatory authorities with the Trade Registry and they tend to put monetary limitations, which is not one of the limitations identified by the TCC.

Although the new amendment is aimed at preventing the difficulties caused by the registration of the board of directors' decision regarding signatory circulars that contain representation restrictions other than the exceptions identified by the TCC, it also creates confusion with regard to the implementation of such amendment. Some trade

registries such as Istanbul Trade Registry took a more progressive and solution-oriented approach by allowing the monetary limitation while giving guidance about the implementation of the new amendment in the announcement on its website. Whereas other Trade Registries adopts a different view that any limitations other than two exceptions stated in the TCC especially the monetary limitations are prohibited under the new amendments made to the representation authority. Therefore, the Trade Registries' inconsistent approach increases the uncertainty regarding the implementation of the new amendment.

There is also uncertainty with regard to the issuance of an internal directive. As per Article 367 of the TCC, the 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.

The delegation of the management authority is made through an internal directive prepared by the board of directors. The internal directive stipulated under Article 367 should contain the description of duties, the persons who are responsible for which duty, the organizational structure as well as the decision-making authorities and technical, legal and commercial principals regarding the management of the company.

With the new amendment made to the Article 371, in order to appoint to the trade agent or other merchant assistants (signatory authorities) with limited power, the issuance of an internal directive is also required similar to the delegation of management authority as explained above. However, it is not clear that whether the appointment of the signatory authorities with limited power will be made under the same internal directive for the delegation of management authorities under Article 367.

If the aim of the lawmaker is to provide convenience to third parties realizing transactions with the company then it can be assumed that the delegation of the management authority and the transfer of representation authority will be regulated under the same internal directive. Another issue is that the internal directive anticipated under Article 367 of the TCC is not subject to registration and announcement. However, with the new amendment, the joint stock companies will be obliged to register the internal directive with the Trade Registry and make an announcement. Accordingly, in case if it is accepted that the delegation of management power and the transfer of the representation authority is made under the same directive then the companies are now obliged to register and announce the related internal directive.

Paragraph 7 of Article 371 of the TCC will be applied to limited liability companies by analogy. As per Article 132 of the new regulation, the managers of the limited liability companies are now able to appoint persons who are bound by employment contract as trade agent or other merchant assistants with limited power through the same procedure applied to the joint stock companies.

## The Regulation's Effectiveness Remains to be Seen

With the new regulation, the board of directors of the joint stock companies as well as the managers of the limited liability companies are now obliged to issue an internal directive in case they intend to appoint members of a board of directors who do not have authority to represent and bind or persons that are bound by employment contract as trade agent or other merchant assistants with limited power. Such internal directive shall be registered with the Trade Registry and announced. The same procedures shall also be applied in limited companies that intend to appoint the persons who are bound by employment contract as trade agent or other merchant assistants with limited power. However, the amendment itself has created inconsistent implementations that are open to dispute as well as the inconsistencies between the approaches of the Trade Registries. Therefore, the effectiveness of the amendment regarding the representation authority will be approved by its de facto application in the next days.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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