



## **SCREENING CHAPTER 6 COMPANY LAW**

# **AGENDA ITEM : CAPITAL MAINTENANCE**

**Country Session : The Republic of Turkey  
20 July 2006**



- **Related Legislation:**

- **Turkish Commercial Code (TCC)** No. 6762 of 29.6.1956 as last amended by Law No. 5274 of 9.12.2004,
- **Capital Market Law (CML)** No. 2499 of 28.7.1981 as last amended by Law No. 4629 of 2001
- **Commercial Registry Regulation (CRR)** of 2.2.1957 as amended by Decision no 98/11548 of 1998,
- **Communiqués of the Ministry of Industry and Trade**  
**Scope:** Company limited by shares (public and private)  
(*Anonim Şirket – Aktiengesellschaft – Société Anonyme*)



- **Related Draft Legislation:**

- **Draft Turkish Commercial Code (Draft TCC)**

(The Draft TCC was submitted to the Presidency of the Turkish Grand National Assembly (TGNA) by the Council of Ministers on 9.11.2005. Currently negotiations have been completed at the sub-commission of the Justice Commission of the TGNA. The Draft will be negotiated in the plenary session of the TGNA after reviewed by the Justice Commission).

- **Draft Law on the Entry into Force and Implementation of the Turkish Commercial Code**

(Technical studies on Draft Law were completed. It will soon be sent to relevant institutions to have their opinions thereon).



## Formation : Minimum content of articles of association - 1 (Articles 2 and 3 of the 2<sup>nd</sup> Directive)

- The TCC provides for the minimum content of the company's articles of association including, *inter alia*:
  - The type, name, objects and duration of the company
  - The amount of subscribed or authorised capital
  - The procedure of appointing members of the bodies responsible for representing the company, administration and control of the company
  - Nominal value and type of shares



## Formation : Minimum content of articles of association - 2

- Amount of paid in capital
- Restrictions on share transfers
- Classes of shares and any special class rights
- Name, address and nationality of founders
- Any privileges granted to founders

(Arts. 279, 300, 401 and 416 of the TCC; Art. 12 CML;  
Arts. 60 and 61 of the CRR)



## Formation : Minimum content of articles of association - 3

- The Draft TCC maintains this system with the following addition to the minimum required content:
  - Assets acquired by the founders on behalf of the company and their value  
(Draft TCC, Arts. 339, 354)
- Furthermore, the Draft TCC requires the founders to sign a statement with the following information:
  - If the company has capital in kind or is acquiring assets or securities, that these are necessary for the company and that the amounts paid for them are appropriate;
  - Any undertakings, commitments or debts incurred by the company, in comparison with like transactions
  - Any privileges granted to founders  
(Draft TCC, Art. 349)



## Formation: Liabilities incurred before formation

Liabilities incurred before formation must be regulated by the Member States.

This has already been regulated by Art. 301 of the TCC:

- The company enjoys legal capacity upon registration in the Commercial Registry.
- Persons who act in the name of the company prior to its registration are personally and jointly and severally liable for these acts.
- If such liabilities were expressly incurred in the name of the company in formation and the company assumes such liabilities within a period of three months after its registration, the persons who so acted shall be discharged from such liabilities and such liabilities shall become the company's sole responsibility.

- **The Draft TCC maintains this system. (Art. 355)**



## Minimum capital requirements - 1

- **Law in force:**

Companies must have a minimum share capital which must be subscribed before a company may be incorporated:

- For private companies: YTL 50,000 (appr. Euro 25,000).
- For public companies with basic capital system: Same as above.



## Minimum capital requirements - 2

- For public companies with authorised capital system, the amount of initial capital or issued capital should be the minimum amount that is determined by the Capital Market Board (CMB). Currently this amount is approximately 3 million YTL (appr. Euro 1,5 million). The cap of authorised capital can be determined by the company and must be approved by the CMB.
- Shares may be issued above their nominal value (at a premium), but no shares may be issued below the nominal value.



## Minimum capital requirements - 3

- **Draft TCC:**

- Only prescribes minimum capital for private companies.
- Private companies (including single member companies) may choose between basic or authorised capital system. The shareholders may authorise the board for a maximum of five years to increase capital within the limits of authorised capital.
- In the basic capital system, the minimum capital must be YTL 50,000 (appr. Euro 25,000)
- In the authorised capital system, issued capital must be YTL 100,000 (appr. Euro 50,000)
- The Council of Ministers is entitled to increase the amount of minimum capital.  
(Arts. 332 and 460 Draft TCC)



## Type of capital - 1

- **Law in force:**

- Capital can be issued for cash or non-cash consideration. A quarter of the cash consideration must be paid within three months and the rest must be paid in three years (Communiqué of the Ministry of Industry and Trade No. 2003/3).
- There is no time limit for the transfer of non-cash consideration.
- Public companies are also subject to the same system, except that shares that are offered to the public may only be issued for cash consideration, which must be fully paid upon purchase (Art. 7 CML).
- In any case, capital may be formed only of assets capable of economic assessment and may not include an undertaking to perform work or supply services.
- Non-cash consideration must be valued by court appointed experts. (Art. 303 TCC)



## Type of capital - 2

- **Draft TCC**

- Capital can be issued for cash or non-cash consideration including intellectual property rights, domain names, websites and similar virtual media.
- A quarter of the cash consideration must be paid before the registration of the company in the commercial registry and the rest must be paid in 24 months. If shares are issued with a premium, the premium must be paid before registration. (Arts. 342, 344 Draft TCC)



## Type of capital - 3

- **Draft TCC (cont.)**

- If any shares are subscribed with the purpose of offering them to the public within two months, provided that the subscribers give a guarantee, the consideration for such shares may be paid with the proceeds of such public offering. The consideration for the shares that are not bought by the public must be paid within three days following the two month offer period. (Art. 346 Draft TCC)
- Subscriptions for non-cash consideration can only be accepted if movable assets are given in escrow and a note is made for immovable in the title registry. (Art. 128 Draft TCC)

## Type of capital - 4

### ● Draft TCC (cont.)

- Non-cash consideration must be transferred immediately and those assets requiring registration for transfer may be registered in the name of the company upon the request of the officer of the commercial registry. The company itself may also make such request (Art. 128 Draft TCC).
- Non-cash consideration may not include the following (Art. 342 Draft TCC):
  - ◆ undertaking to perform work or supply services
  - ◆ credits that are not mature
  - ◆ assets that have an encumbrance
- Non-cash consideration must be valued by court appointed experts (Art. 343 Draft TCC).



## Distributions to shareholders - 1

- **Law in force:**

- Dividends may be distributed from the net profit and distributable reserves. (Art. 470 TCC)
- Net profit is the amount remaining after the allocation of statutory reserves and other amounts to be reserved according to the articles of association. (Arts. 469, 470 TCC)
- Distribution from “net profit” also means that no profit may be distributed unless previous years’ losses are covered.
- Dividends that are received contrary to these rules must be returned to the company if the recipient knew or should have known about the unlawfulness of the distribution. (Art. 473 TCC)



## Distributions to shareholders - 2

(cont.)

- No interest may be paid on capital (Art. 470 TCC). Interim interest may be paid at a fixed rate for the period of foundation of the company until the start-up date of the full operation of the business (Art. 471 TCC)
- The capital may not be reimbursed to the shareholders (Art. 405 TCC)
  - **Draft TCC:**
- The same system continues in the Draft TCC



## Acquisition by a company of its own shares - 1

- **Law in force (Art. 329 TCC):**

- A company may not acquire its own shares or receive them as pledge. Such contracts are null and void, with the following exceptions:
  - ◆ Reduction of company's capital
  - ◆ Acquisition of shares for debts other than for capital subscription
  - ◆ Acquisition of shares during the acquisition of an enterprise
  - ◆ If the company's business includes acquisition or pledging of shares
  - ◆ If the shares are pledged by directors for their liabilities
  - ◆ If the acquisition is gratis



## Acquisition by a company of its own shares - 2

### ● Draft TCC: General Rules

- The Draft reflects the provisions of the Second Directive regarding the acquisition by a company of its own shares.
- Acquisition by a company of its own shares are in principle not allowed. However, a company may acquire its own shares under the permission of the general assembly and up to a maximum of 10 % of its capital.
- Authorisation shall be given exclusively by the general assembly which shall determine the terms and conditions of acquisition such as the maximum number of shares to be acquired, the minimum and maximum cap of buying price, the duration of the authorisation which may not exceed 18 months.



## Acquisition by a company of its own shares - 3

- **Draft TCC: General Rules (cont.)**
  - The acquisition may not have the effect of reducing the net assets of the company below the amount of subscribed capital plus those reserves which may not be distributed under the law or the articles of association.
  - The consideration for the shares to be acquired must be fully paid.
  - Loan, guarantee or similar financing agreements concluded between the company and third persons with the purpose of providing the acquisition of the company's shares are null and void. This provision does not apply to loans or guarantees given by banks or financial institutions within their field of business or for loans or guarantees given by the company to its personnel for the purpose of utilising share purchase options, provided that net assets do not fall below the required amount.



## Acquisition by a company of its own shares - 4

- **Draft TCC: General Rules (cont.)**
  - The company may not exercise any shareholders' rights based on its own shares.  
(Arts. 379, 380, 389 Draft TCC)
- **Draft TCC: Exceptions to the general rule**
  - The company may acquire its own shares, without the authorisation of the general assembly, if it is necessary to prevent a serious and imminent harm to the company. In such a case, the next general assembly must be informed by the board of the reasons for and the nature of the acquisition effected, of the number and nominal value of the shares acquired, of the proportion of the acquired shares to the subscribed capital and the consideration paid for these shares.



## Acquisition by a company of its own shares - 5

- **Draft TCC:** Exceptions to the general rule (cont.)
  - The company may acquire its shares in the following cases:
    - ◆ for the decrease of the capital,
    - ◆ due to universal succession,
    - ◆ by virtue of a legal obligation to acquire,
    - ◆ in order to collect a debt owed to the company, provided that the shares are fully paid up and the sale is enforced by a court order,
    - ◆ if the acquisition is free of charge and the shares are fully paid up,
    - ◆ if the company is an investment company
  - The Draft has special provisions regarding disposal of the company's own shares in conformity with the Second Directive.

## Subscription of a company's own shares

- **Law in force:**

- The TCC does not contain an explicit prohibition of subscription. However, it is generally accepted that a company may not subscribe for its own shares.

- **Draft TCC:**

- A company may not subscribe for its own shares.
- Such a subscription shall be null and void.
- Subscription by a subsidiary or by a third person on behalf of the company is considered as subscription by the company itself.
- If the said rule is violated by a fault of the founders or the directors, these persons shall be personally liable for such subscription.

(Art. 388 Draft TCC)



## Increase and reduction of capital - 1

- **Law in force:**

- For private companies and public companies with the basic capital system, capital may only be increased with a resolution of the general assembly.
- For public companies with authorised capital system, the cap of *authorised capital* may only be raised by a resolution of the general assembly. However, the general assembly may authorise the board of directors to increase the *issued capital* up to the cap of authorised capital (CML Art. 7)
- Capital increase may be effected through cash or non-cash consideration except for shares that are issued to the public, which may only be issued against a cash consideration. (CML Art. 7)



## Increase and reduction of capital - 2

(cont.)

- For both private and public companies, reduction of the capital is only possible with a resolution of the general assembly and respecting the amount of minimum capital.
- Shareholders have a pre-emption right to subscribe for new capital in proportion to the capital represented by their shares. Pre-emption rights may be limited by the general assembly.
- For both private and public companies, shares issued by a capital increase through the company's own means such as free reserves, revaluation funds, proceeds received through the sale of subsidiaries, are distributed free of charge to all shareholders in proportion to their shares.

(TCC Arts. 385, 389, 394, 396)



## Increase and reduction of capital - 3

- **Draft TCC:**

The system is maintained except for the following:

- Private companies may also adopt the system of authorised capital.
- Pre-emptive rights have an increased protection. In its resolution concerning the increase of the capital, the general assembly may suspend pre-emptive rights only for good cause, which may include an acquisition of business, public offering or participation of the employees in the company. A suspension of pre-emptive rights shall not cause an undue advantage or disadvantage to any person. The resolution regarding suspension may only be adopted by the affirmative votes of shares representing 60 % of the capital.  
(Art. 461 Draft TCC)
- The Draft contains special provisions pertaining to conditional increase of capital (Art. 463 et seq. Draft TCC)



**THANK YOU FOR YOUR ATTENTION**