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The Corporate Governance of the Turkish Joint Stock Companies and Harmonisation with European Union Acquis

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LIST OF ABBREVIATIONS

Art.	Article
CEO	Chief Executive Officer
CMB	Capital Market Board of Turkey
CML	Capital Market Law
DM	Deutsche Mark
Draft TCC	Draft of the Turkish Commercial Code
ECFR	European Company and Financial Law Review
EU	European Union
EC	European Community
EEA	European Economic Area
EEC	European Economic Community
et seq.	et sequentia
GCGF	Global Corporate Governance Forum
edn.	edition
IAS	International Accounting Standards
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
IFC	International Finance Corporation
IFRS	International Financial Reporting Standards

ISE	Istanbul Stock Exchange
No.	Number
New TCC	New Turkish Commercial Code (Law no: 6102)
OECD	Organization of Economic Cooperation and Development
pg.	page
pp.	pages
TAIEX	Technical Assistance Information Exchange Office
TASB	Turkish Accounting Standards Board
TAS	Turkish Accounting Standards
TCC	Turkish Commercial Code (Law No: 6762)
US GAAP	United States Generally Accepted Accounting Principles
USSR	Union of Soviet Socialist Republics

A. Introduction

I. Corporate Governance As A Term

There is no single definition of corporate governance. Each country tries to interpret it uniquely according to its legislation and customs. Nevertheless, narrowly defined, "corporate governance is a set of relationships, rights and segregation of responsibilities between a company's management, its board of directors, shareholders, and other stakeholders."[1] Wider definition states that corporate governance is a combination of laws, codes and discretionary practices of private sector, which allows influx of external capital funding to the company and permits operations to be performed efficiently. Thus besides shareholders, by respecting interests of stakeholders and the society overall, it ensures long term growth of economic value of the shares.[2]

Basically equality, transparency, accountability and responsibility are core concepts of the system consisting of Anglo-American law following the derivation formula:-

> *"How do suppliers of finance make sure that the managers do not invest it in bad projects?" The answer in short: by "Corporate Governance".*[3]

Worldwide for the past fifteen years, especially in publicly traded stocks in joint stock companies, mainly shareholders, in the interests of all concerned of the company to maintain the ideal level of system, oriented itself to impose new work regulations. These regulations are intended to increase the capabilities of the organs to take the right decision at the right time, for it gives companies a new weight common structure to cause recommendations. Foundations of the aforementioned rules, transparency, and the account can be given good management and effective internal and external

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1 Paslı Ali, *Anonim Ortaklık Kurumsal Yönetimi* (Corporate Governance), 2. edn. İstanbul 2005, pg. 12.

2 Paslı, pp. 30-39.

3 Pulaşlı Hasan, *Anonim Şirket Yönetiminde Yeni Model* (Corporate Governance), Ankara 2003, pg. 135.

control, calling into question corporate governance principles (New TCC, General Justification, No. 88).

II. Evolution History of Corporate Governance

Being a very new area of research the framework of corporate governance is under constant scrutiny. Interest can be observed both from private sectors and from the state. On an international level, renowned institutions like IFC and OECD are showing great enthusiasm. Therefore, these two organizations established the Global Corporate Governance Forum (GCGF) to cooperate and communicate the importance of corporate governance under this unique umbrella.[4]

Developed countries understood the important role of corporate governance and started reconsidering their own commercial laws. Sarbanes-Oxley Act is a good example for the development in the United States to prevent similar future frauds like Enron or WorldCom cases, or Basel III to prevent another financial crisis. The same developments are observable in continental Europe, countries such as Germany put in practice new corporate governance principles, Japan has reviewed its own regulations.[5] Many states all over the world have a tendency to adopt a new regulation which would lead corporate governance to a higher, more socially and shareholder value conscious level.

Conflict of interest arises because executives cannot show the same effort to manage company's resources as they would have done with their own wealth. Development of free markets, industrial boom, and technological advancement lead to bigger corporations with larger pool of shareholders. This showed desperate need for professional management.

One of the main developments is the publication of corporate governance principles of OECD and World Bank cooperatively. Academic researches in

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[4] CMB Principles, introduction, pg. 3.

[5] CMB Principles, introduction, pg. 3.

this field have been started since the 1990s. It can be closely related to historical developments at that time. One of the main ones are privatization processes in sovereign states following dissolution of USSR, Merger and Acquisitions, Asian financial crisis and corruption cases in multinational companies.

In the international arena, "corporate governance" on the basis of shares of joint stock companies traded on the stock market is envisaged. However, the other joint-stock companies and all businesses that even the management and control of each institution and non-profit organization[6], have finally recommended that the State will also have gained a scope and prevalence.[7] Law and business policies directly affect the teachings of this dynamic in the UK Cadbury Report and the act passed in 1992. Initially, there was only an effort to keep investors to trade on the stock market when the economic stagnation of the 1990s left a mark buckling the stock market crises. Then the operation of joint-stock company, the management, control, and other interested shareholders establishing protective systems has evolved into a comprehensive configuration (New TCC General Justification, No. 88). After the Cadbury Report, relating to the compensation of top managers` losses, the Greenbury Report and in the UK in 1998, the Hampel Report were published.

The corporate governance was introduced into the German academic debate in the 1990s. The German 1998 “Law on the Improvement of the Supervision and Transparency of Companies” (Gesetz zur Verbesserung von Kontrolle und Transparenz im Unternehmensbereich-KonTraG) was put into force. With this law, the duties of management board, supervisory board and accounting auditors were precisely determined and boards` responsibilities were stiffened even more.

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[6] For the detailed information about corporate governance of non-profit organizations see: Hopt, Klaus J. / von Hippel, Thomas, Comparative Corporate Governance of Non-Profit Organizations, Cambridge University Press 2010.

[7] For instance Germany adopted a Public Corporate Governance Code on 1 July 2009 to provide transparency and to apply corporate governance principles in the state-owned non-listed companies.

London Stock Exchange, in the year 1998/1999 "Cadbury Report" and the previously published three British reports also highlighted the gathering of the "combined code" report. Thus this code for all the companies listed in London Stock Exchange for the binding of the "Listing Requirements" was put into effect.

Corporate Governance developments in the capital market find themselves in a dynamic system constantly evolving and changing. Companies with good management are more transparent and create a legal ground for the developing countries, according to the conditions, making necessary changes to legislation. Continuously improved corporate governance and the evolution of this are still showing to be incomplete.

III. Importance of the Corporate Governance

On exclusively company level corporate governance thrives to improve companies' financial performance, bringing more capital and placing the company to an attractive position in financial markets which is very crucial for increasing liquidity. On the contrary, this regulation enhances dignity of the country on the global stage, which not only utilizes domestic capital profitably, freezing its outflow, but also attracts foreign capital funds. As a result, there would be a boost in the economic prosperity, respecting efficiency of resources and its effect on environment, also accompanied by higher competitiveness on the international arena.[8]

According to portfolio management theory diversification of investment is necessary to decrease systemic risk. Increasing number of shareholders gives a similar effect. However, in big corporations free rider problems are encountered from time to time due to a large number of small shareholders. Managers prefer highly profitable yet risky projects since the lost might not be shared but their bonuses most of the time depends on profit. In addition, information asymmetry causes adverse selection and moral hazard. Management can take decisions on its own advantage disregarding interests of

[8] CMB Principles, introduction, pg. 2.

owners in case of information asymmetry. Corporate governance tries to prevent these instances.

There is no doubt that developed countries in the world-wide corporate governance principles protecting small shareholders. However, in recent years, it has been observed that some large companies in corporate governance damage minority shareholders and that they are brought even to the brink of bankruptcy.

Especially one company directed by the dominant group of shareholders, taking into consideration their own interests, company resources although the minority shareholders were directed to them as lawful or unlawful. Parmalat in Italy, the world-famous company is steeped in 2003, Switzerland's Swissair and some of the largest companies in Australia[9] were on the verge of bankruptcy according to the criteria applied showing us poor corporate governance principles. This problem is especially seen in a "pyramidic group", legally independent companies with a chain by the same entrepreneurial companies, managed in line with the property relations.[10]

Occurring in 2008, and after the ongoing global economic crisis, this deeply affected many countries.[11] Corporate governance after the economic crisis was the subject of discussion in academic circles again. The basis of these discussions is formed in the corporate governance of joint stock companies, between the economies of EU member countries and to minimize fluctuations in the effort to create a uniform company law.[12] Adoption of corporate governance is very important for standardization of company law in the EU.

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9 Ansay Tuğrul, *Anonim Şirketler Hukuku Nereye Gidiyor?*, Ankara 2005, pg. 2.

10 Andrea Melis, *Kurumsal Yönetim Başarısızlıkları: Parmalat Ne Ölçüde Özellikle Bir İtalyan Olayıdır?*, Prof. Dr. Hüseyin ÜLGEN'e Armağan, (Translated by Değirmenci, Cenker), İstanbul 2007, pg. 268-269.

11 Some EU countries such as Greece, Ireland, Spain and Portugal also have been deeply influenced by the crisis.

12 For the detailed information see: Kort, M., *Standardization of Company Law in Germany, other EU Member States and Turkey by Corporate Governance Rules*, (2008) 5 European Company and Financial Law Review, 379-421.

Turkey's EU process has come a long way in the company law and corporate governance will be an effective tool to align with acquis communautaire in this way.

B. Basic Principles of Corporate Governance

Different perspective on corporate governance is determined by unique characteristics of each country, aspiration of all countries to reflect their local peculiarities in corporation governance, existence of dissimilar business cultures, customs, traditions, legislative regulations and patterns of competition. Therefore, there is no universal model of corporate governance.[13] Nevertheless, it is sought to delineate the basic principles of "equality", "transparency", "accountability" and "responsibility", which have to be compatible with other corporate governance approaches. It is also known that corporate governance is continuously improving with time.[14]

I. Equality

This notion seeks adequate and sufficient protection through legislature or under contract terms of acknowledged rights of all shareholders including minority and foreign investor interests, as well as prevention of probable conflict of interests.[15] This has to be performed within the framework of integrity rules.[16]

The Management of the company has to act within the equal distance to every stakeholder while performing their duty. At the same time any publication aimed for external readers have to be comprehendible by everyone.[17]

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[13] DVFA Method, pg. 11, from Paslı pg. 70

[14] CMB Principles, pg. 2; Millstein Report, pg. 8-9; Shelton Joanna R., *"Introduction", Corporate Governance in Asia - A Comparative Perspective,* OECD publications, 2001, pg. 13.

[15] Paslı, ibid, pg. 72-73

[16] CMB Principles, introduction, pg. 3.

[17] Tuzcu Arcan, *Halka Açık Şirketlerde Kurumsal Yönetim Anlayışı,* pg. 25, Ankara 2004.

Equality, in a broader sense, equal treatment principle is not only the shareholders, but also a wider environment, frankly employees, creditors, customers, the company's interest in those interests, or even intended for the public. Equality and fairness can be summarized that transparency on the basis of good management and supervision, in the form of interests should be regarded as the ideal point (New TCC, General Justification No: 89).

II. Transparency

The rights of shareholders have to be protected so that capital markets can operate within safety and lucidity. For making an investment to the company, shareholders expect to be informed and protected from deceit. Transparency provides this ambient. Having an alternative name as public disclosure, this doctrine defined as protecting interests of shareholders and creditors and assisting to use their rights deliberately and effectively. It also prevents future shareholders, bondholders and other interested parties of capital markets from being deceived as well as brings advantages to the company, while it realizes its operations according to market rules. Finally, it comprises all notions related to internal and external governance.[18]

If scandals and other negative impacts of wrong management are considered, from the perspective of efficient markets and penetration of decent management, increasing transparency would be for the benefit of public.[19]

Putting transparency principle fully into practice is extremely difficult. Management of the company, controlling shareholders or other interested parties would not want to share with the public company's economic conditions and its way of operations. Therefore, application of transparency should be guaranteed through legislative regulations, penalties and thorough inspection. Thus groups, which possess control, would benefit as well. In the total transparent environment of trust, the company would become very

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[18] Yıldırım Veliye Yanlı, *Sermaye Piyasası Hukuku Çerçevesinde Halka Açık Anonim Şirketler ve Kamunun Aydınlatılması*, pg. 96. İstanbul 2005

[19] Tuzcu, ibid pg. 18.

attractive for the investors.[20] In addition, it does not oblige a company to disclose trade secrets or confidential information, having set a framework for them as well, transparency seeks easy to access publications of financial and not finance related information in time and complete, without leaving much anxiety to interested parties and breaking competition or intellectual property rules.[21]

Establishing transparency needs public declaration of share percentages of the management, board of directors and shareholders who might influence company's decisions.[22] Thus transparency would be increased and hostile takeovers might be prevented.

An environment of trust created by transparency would increase enthusiasm of minority shareholders. They would participate to general shareholders' meeting, so that a more conscience-mechanism of governance would be established.

A transparent company is a "glass pocket" - a concept beyond the understanding of vision and a new understanding. This phenomenon is now identified with the information society. Transparency aims fully to inform and illuminate shareholders and all actors have a role in the capital market. According to transparency principle, reports, plans, projects and all the relationships in terms of shareholders, stakeholders, the parties concerned, capital markets actors should be disclosure. The new tools of transparency in the joint stock companies are the internet, electronic transfers and enforcement of opening up of the web sites. Each capital company should have a website which works as a mechanism of transparency (New TCC, General Justification No. 89).

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[20] Paslı, ibid pg. 75.

[21] CMB Principles, introduction, pg. 3.

[22] Tekinalp Ünal, *Halka Açık Anonim Ortaklıklarda Yönetime Katılma Sorunları*, İstanbul 1980, pg. 98.

III. Accountability

According to CMB accountability defines as "the obligation of the board of directors to account to the company as a corporate body and to the shareholders."[23] This principle refers to transparency and accuracy of executives, a legitimate reason on a fair basis and the professional nature of the decisions (New TCC, General Justification No. 89).

Views of management who possesses control and interests of company's owners do not always coincide. This situation brought about a requirement for an accountability principle. On the basis of this concept, the roles and responsibilities of the management are explicitly regulated and are being strictly administered under objective conditions.[24]

Accountability sets a requirement that people and parties involved in decision making process are responsible and accountable for their decisions as well as actions. At the same time the principle conveys accuracy of decisions and acknowledgement of responsibilities[25].

There is a need for a separate inspection unit to put into practice principles of corporate governance. The establishment of a separate supervisory board within the company for checking the executive body is essential.

If the principle is reversed, in other words, if the board of directors controls the auditors, there will then be no meaning of corporate governance. Some research about this issue has shown that if the management system is formed by a controlling shareholder there is no internal control mechanism. Due to the lack of this control, there are some examples of companies having billions of Euros capital[26] collapsing in Italy.[27]

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[23] CMB Principles, introduction, pg. 3.

[24] Paslı, ibid pg. 76.

[25] Tuzcu, ibid pg. 24.

[26] For example,in December 2003 the Parmalat Group, a world leader in the field of dairy products enterprise which was managed within the framework of corporate governance principles, declared bankruptcy because of deficit on the balance sheet.

[27] Andrea, ibid pg. 282.

IV. Responsibility

According to CMB, responsibility means

> *"The conformity of all operations carried out on behalf of the company with the legislation, articles of association and in-house regulations together with the audit thereof."* [28]

Responsibility means complete adherence to the obligations arising from the legislation of the company, the articles of association and in-company rules and regulations and the fulfilment of the audit of the company (New TCC, General Justification No. 89).

The Company's activities are carried out by the board of directors. Therefore, the company's decisions and recommendations are, in the first degree, the responsibility of this committee. In this regard, for the good management of the company, liability of board of directors should be determined accurately.[29] In short, directors of company should fulfil requests of all concerned such as workers, creditors, customers, producers, shareholders and the state. [30]

C. Corporate Governance in Turkey and Harmonisation with EU Acquis

In Turkish Law the principle of "Numerus Clausus" prevails concerning "Trading Companies". Companies are divided into two parts; incorporated and unincorporated. Incorporated companies are joint stock companies (Anonim Şirket), limited liability companies (Limited Şirket), limited partnership by shares (Sermayesi Paylara Bölünmüş Komandit Şirket), Unlimited Companies (General Partnerships - Kollektif Şirket) and commandites

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[28] CMB Principles, introduction, pg. 3.

[29] Aktan Coşkun Can, *Kurumsal Şirket Yönetimi*, pg. 9-10. http://www.sobiadacademy.net/sobem/ e-yonetim/ kurumsal-yonetim/aktan-kurumsal. pdf accessed 20.04.2011.

[30] Paslı, ibid pg. 78.

(Komandit Şirket). Unincorporated companies[31] are either joint-ventures, business associations or consortiums.

Limited liability companies and joint stock companies are the most common company types in Turkey. Joint stock companies[32] are also separated into two parts as publicly held joint stock companies[33] and closely held joint stock companies.

The concept of publicly held joint-stock companies is widely used in Turkey. This concept was widely used in other countries until recently. Like "Public Company", "Publikumsgesellschaft", etc. However, the laws of foreign countries and the location of these concepts in academic circles, "listed companies" have dropped the concept.[34] Therefore, term of listed companies is especially used in the New TCC.

According to Turkish law and EU Acquis, corporate governance principles are especially obligatory for publicly held joint stock companies and listed companies[35]. For this reason, I will examine corporate governance princi-

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[31] Unincorporated companies are regulated in the Code of Obligations which is totally revised and adopted on 11 January 2011 by Parliament.

[32] Stock capital of the join stock company is split into equal shares and the liability of the shareholders is limited to the capital subscribed and paid by the shareholder.

[33] According to CML Article 3 (g) publicly held joint stock companies mean joint stock companies whose shares have been offered to the public or which are considered to have been offered to the public. CML Art. 11 indicates that *"the shares of joint stock companies having more than 250 shareholders shall be considered to have been offered to the public and such companies shall be subject to the provisions applicable to publicly held joint stock companies."* Doctrine rightly criticized this provision that number of shareholders is not important to be considered publicly held joint stock company which are not traded in the stock market.

[34] Nobel Peter, Transnationales und Europäisches Aktienrecht, Kapital 5, pg. 505 et Seq. Tekinalp Ünal, *Türk Ticaret Kanunu Tasarısının Sermaye Piyasasına ve Sermaye Piyasası Kanuna İlişkin Hükümleri, Avrupa Birliği Perspektifinden Türk Ticaret KanunuTasarısının Sermaye Piyasasına Etkileri* (Impacts of the Draft Turkish Commercial Code (Draft of TCC) on Capital Markets from an EU Perspective), Ankara 2010, pg. 25.

[35] Unlike in TCC, in accordance with further developments in the world and Europe, New TCC used the term "listed company" instead of the term "publicly held joint stock company" mostly and was paid special attention (New TCC, General Justification No.117).

ples of publicly held joint stock companies and listed companies in this study.[36]

I. Legal Framework of the Capital Markets in Turkey

The Turkish Commercial Code (TCC) as a main source of Turkish Company Law has been in force since 1957[37] and it was only sporadically updated until today. The establishment and operation of companies are regulated generally by TCC. Therefore, if there is no provision in CML about publicly held joint stock companies, TCC provisions are applied.

TCC was wholly revised and a draft was presented to the Parliament in 2005 by Commission of the Turkish Ministry of Justice. The aim of the draft TCC is on the one hand to order commercial relations in accordance with economic developments and to converge TCC with EU Acquis, on the other hand to provide shareholder democracy and the use of information technology tools.[38] This draft TCC was adopted on 13 January 2011 by the Turkish Grand National Assembly. The New Turkish Commercial Code (New TCC Law No. 6102)[39] and Implementation Code of New TCC (Law No. 6103) are going to be in force on 01 July 2012.

The second main source of Turkish Company Law is the Capital Market Law (CML) which was adopted in 1981.[40] The aim of this law is "to regulate and control the secure, transparent and stable functioning of the capital market and to protect the rights and benefits of investors."[41] CML empow-

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[36] There are also some provisions about corporate governance for closely held joint stock companies and limited liability companies in New TCC.

[37] TCC was written by Prof. Dr. Ernst Hirsch and came into force in 1957. There are five books in TCC (Law No. 6762), and one of them is about companies. The company law is particularly concerning joint stock companies and limited liability companies, are mainly based on Swiss Company Law. This code will remain in force until 01 July 2012.

[38] Draft Turkish Commercial Code, a blue print for the future, pg. 2. http://www.turkey-now.org/db/Docs/taxguide2009_pwc.pdf, accessed on 28.01.2011.

[39] New TCC published in the Official Gazette number 27846 on February 14, 2011.

[40] Capital Market Law No. 2499 published in the Official Gazette number 17416 on July 30, 1981.

[41] CML, Art. 1. CML is available online at : http://www.cmb.gov.tr/_displayfile.aspx?

ered Capital Market Board of Turkey (CMB)[42] to regulate and supervise in charge of the securities markets in Turkey. CMB issues communiqués "to make innovative regulations, and perform supervision with the aim of ensuring fairness, efficiency and transparency in Turkish capital markets, and improving their international competitiveness."[43] These communiqués are the richest source of legislation in the field of securities law[44] and more detailed regulations which are bound all listed companies.

The New TCC indicates that CMB is the single authority which is empowered to issue corporate governance principles and to lay down rules on disclosure and rating with regard to compliance (Art. 1529). The authority of CMB is established by the introduction of regulatory procedures and the implementation of decisions according to the merits of individual cases. The regulations and communiqués come into force by being published in the Official Gazette.

The main task of the CMB is "to ensure transparency, openness and security for shareholders and creditors, in line with the corresponding directives of the EU."[45] According to CML, the board is authorised *"to take all kinds o f required measures for issues, to file lawsuits for board decision, to demand the reporting of auditing results from the companies, to make the public announcement of undisclosed information and remedies, to take such measures needed to ensure the prevention of real persons or legal entities in the case of any wrongdoing, to suspend the activities of capital market institutions, to decide on the gradual liquidation of capital market institutions, and to fine the institutions in case of a breach of regulations"* (CML Art. 46).

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action=displayfile&pageid=64&fn=64.pdf&submenuheader=null accessed 22.01.2011.

42 This board can be compared with Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) which supervises credit institutions, insurance companies, securities trading and financial services institutions in Germany.

43 For the duties and authorities of CMB see CML Art. 22.

44 Nilsson Okutan Gül, *The Draft Turkish Commercial Code and Corporate Governance*, Festschrift für KLAUS J. HOPT zum 70. Geburtstag am 24. August 2010, Volume 2, pg. 3178.

45 Turkish National Programme for the adoption of the Aquis, pg. 157 http://ec.europa.eu/enlargement/pdf/turkey/npaa_full_en.pdf accessed on 10.04.2011.

II. Enforcement of the Capital Markets Board Principles

The adoption of CML is an important step for the active process and the improvement of the capital market in Turkey. But because of the capital market being a market which develops fastly, both CML and TCC remain insufficient and this space is trying to be filled with CMB communiqués. Even though there are deviations from TCC, it is a fact that CMB's regulations fill the legal gap in the capital market.[46] But this situation causes CMB to have authority with non-specific limits and the developing capital market being left without legal guarantees. CMB is an executive organ, so this organ's decisions and arrangements also have an executive essence. For this reason there is an academic debate about this state because some academics have propounded that the decisions of CMB is semi-judicial.[47] Although CMB's regulations and decisions have been enforced it is possible to prosecute against these regulations. But CMB has also the advisory decisions such as corporate governance principles.

The CMB Principles are essentially "comply-or-explain" principles and related to publicly held joint stock companies which have not to implement them. However, joint stock companies listed on the Istanbul Stock Exchange have to prepare a corporate governance report showing the degree of their compliance with these principles and explaining reasons for any diversions.[48] Companies which do not comply with the corporate governance principles are finding it difficult to explain and elucidate why they are not complying. This is affecting public prestige, its values and performance in a negative way. Thus these principles are bringing forth a psychological enforcement effect on the companies.[49]

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[46] Pulaşlı, ibid pg. 136.

[47] Akgül Aydın, *Sermaye Piyasasi Kurulu Kararlarının Hukuki Nitelği ve Yargısal Denetimi*, İstanbul 2008. pg.83. For the discussions about this topic see; Gürsel Kutlu, "*Sermaye Piyasası Kurulu`nun Denetimi*", Danıştay 137. Yıl Sempozyumu, Danıştay Yayını, No:72, Ankara 2005, pp. 39-99.

[48] Nilsson, *Draft*, pg. 3179.

[49] Pulaşlı, ibid pg. 136.

Istanbul Stock Exchange (ISE) Corporate Governance Index (XKURY)[50] was set up to measure the price and return performances of companies traded in ISE Markets with a corporate governance rating of minimum 7 over 10 rates[51] and to improve implementation of principles in Turkey. Implementation of principles and disclosure to the public will diminish conflicts in the company. The rating institutions will also determine the implementation status of the principles.[52]

CMB communiqués have a binding force for publicly joint stock companies. In addition, CMB is authorized *"to open lawsuits for the determination or annulment of the transactions in violation of the law that lead to the decrease or loss of capital with the transactions and situations which appear to be contrary to law, the provisions of the articles of incorporation or the purpose of operation and legislation of the corporations and capital market institutions which are subject to this Law; to request from the related parties that precautionary measures are taken and that the envisioned procedures are made for the removal of the violations provided that the provisions of the TCC are reserved and when necessary to convey these conditions to the related authorities"* (CML Art. 46/c).

Due to the binding of CMB communiqués, some rules are within these regulations relating to corporate governance principles and must also be obligatory. For example, Serial X No:26 "Communiqué Amending the Communiqué Regarding Independent Auditing in Capital Markets", Serial VIII No. 54 communiqué regarding "The Public Disclosure of Material Events", Seri VIII No. 40 communiqué regarding "Principles Concerning Rating in the Capital Markets and Rating Institutions", Serial XIII No. 51 communiqué regarding "The Principles of Rating in the Capital Markets and Rating Agencies" etc…

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50 Corporate Governance Index has calculated since 31.08.2007.

51 http://www.ise.org/Indexes/StockIndexesHome/CorporateGovernanceIndex.aspx accessed on 10.03.2011.

52 CMB Principles, introduction, pg. 4.

Some principles of the CMB restate provisions of CML or TCC to strengthen them and to provide more democratic governance of the company or improve protection of the shareholders.[53]

The system of corporate governance is defined as "soft rules" and criticized by some academics.[54] However, the rapid development of capital markets has revealed the necessity of the corporate governance to secure mandatory provisions. New TCC, unlike in CMB, did not list corporate governance principles, processed with its relevant mandatory provisions in whole code.[55] Because, unless otherwise expressly provided, each item in the New TCC is mandatory. It means that with the new TCC, comply or explain principles have turned into mandatory guidelines.

III. Relation Between New TCC and EU Acquis

Turkish Law is based on the legal system of Continental Europe. Therefore no major differences exist between Turkish law and the acquis communautaire of the EU in the field of company law.[56] On the other hand, regulations creating a common law and harmonisation directives of EU, compose a "European company law". The topics organized by regulations and directives, result from current problems of the company law and indicate targets of the reform (New TCC, General Justification No. 34).

Such development has revealed the necessity of the harmonisation of TCC with acquis communautaire. However Turkey has the necessity of harmonisation according to the directives also that will be published in the future,

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53 Nilsson, *Draft*, pg. 3179.

54 Zöllner / Noack used expression of "Diese importierte u durchaus modische Züge tragenden Begriff" for corporate governance. See: Zöllner / Noack, Baumbach/Hueck, GmbHG 18. Edn., Munich 2006, Vor § 35 note 1, pg. 582. But then use of the expression was dropped. This also indicates that criticism related to corporate governance is decreasing. See: Zöllner / Noack, Baumbach/Hueck, GmbHG 19. Edn., Munich 2010, Vor § 35 note 1, pg. 636.

55 Tekinalp Ünal, *Zorunlu Hedefler Bağlamında Türk Ticaret Kanunu Tasarısı'nda Anonim Şirkete İlişkin Kurumsal ve Dogmatik Düzen*, Hukuk Perspektifleri Dergisi, No. 4, 2005. pg. 635.

56 National program Turkey, pg. 157.

evaluation of the proposals in the commission report of High Level Experts established by European Commission, monitoring the action plan in the commercial law field of EU and the need to make the necessary changes inside legal regulations (New TCC, General Justification No. 3). Because of these reasons, a new draft was drawn up protecting characteristic features of the existing TCC, provided that appropriate to EU Acquis.[57]

The draft could not become law for a long time. Current state always was the subject of criticism in the Progress Reports. For example, according to "Turkey 2010 Progress Report", it is mentioned that there has been no progress about adoption of the long-pending TCC and implementation of the TCC, because of that electronic disclosure and access to company information is not possible. [58]

Finally the draft was accepted in the Turkish Grand National Assembly. The reform accomplished by New TCC that will take effect in 2012 and was carried out not only for harmonisation purpose with EU Company Law. Besides modern developments, theories, criticism about the doctrines, case law accumulation and listed companies had also influence on this reform.

While the New TCC was being prepared, the Final Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law[59] was also taken into consideration. This Report states fixing its place of Company Law in part of EU in the coming decade and indicating the prescribed stages, stating firm offers relating to short, medium and long-term, many systems and judgements as new entrant to the New TCC constituted a direct source of inspiration: ensuring transparency in the most efficient way, application of the corporate governance principles to the general shareholders' meeting, to the board of directors and the audit, each

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[57] Barış Akgül,, *Türk Ticaret Kanunu Tasarısı`nın Halka Açık Anonim Şirketlere Etkisi, Avrupa Birliği Perspektifinden Türk Ticaret Kanunu Tasarısının Sermaye Piyasasına Etkileri* (Impacts of the Draft Turkish Commercial Code on Capital Markets from an EU Perspective), Ankara 2010, pg. 332.

[58] 2010 Progress Report, pg. 51.

[59] Available online at http://ec.europa.eu/internal_market/ company/docs/modern/ report_ en.pdf accessed 14.04.2011.

capital company to be responsible for opening a website, making general boards included by audio and video transfer, online participation and voting to the boards depending arrangement by regulation, holding the board meetings electronically, having an effective position for voting with institutional investors, regulation of the holding companies, information of the shareholders, like effective and close control with a good, informed, transparent, fair, accountable and responsible management. (General Justification No: 94)

IV. Turkish Corporate Governance Principles

It is known that the most important reason of financial crises[60] is bad management practices.[61] For this reason CMB gives great importance to the corporate governance of companies and issues regulations about it. These regulations keep dynamic Turkish capital market law, contrary to the static and statutory nature of general company law.[62] To compete within the global financial markets, the CMB issued corporate governance principles in June 2003 and amended them in February 2005. On the other hand, the New TCC prepared the ground to embody these principles in law.

1. Shareholders

a. In Turkish Law

aa. In General

Shareholders reserve the right to a set of rights. For example dividend rights, right to information, the right to participate in the general shareholders' meeting, minority rights or voting rights etc. It is impossible to vote regarding every decision about the company. Therefore the presence of the

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[60] In Turkey there were three big financial crises in 1994, 1998 and 2000-2001, which have deeply affected economic activities in Turkish capital markets.

[61] CMB Principles, introduction, pg. 1-2.

[62] Nilsson Okutan Gül, *Corporate Governance in Turkey*, (2007) 8 European Business Organization Law Review, pg. 198.

board of directors is essential for faster conduct of company business.[63] However, this right of the board of directors, using the utmost care, should reflect the interests of the shareholders. To ensure this, an understanding of the corporate governance standards of management should be adopted.

bb. Facilitating the Exercise of Shareholders' Rights

According to CMB principles Corporate Governance Committee should be set up to facilitate the exercise of shareholders` rights. Thus on the one hand the exercising of rights will be improved, on the other hand the communication between shareholders and board of directors will be provided (CMB principles, Part I/1.1.1). The establishment of this committee is obligatory for listed companies (CMB Communiqués Art. 2, Serial: IV, No. 51).[64]

Shareholders' rights, especially the important structural changes and decision-making activities have to be augmented. To increase effectiveness, together with the New TCC, the position of the shareholder has been strengthened. New TCC not only gave shareholders rights relating to assets, management, examination and supervision in the existing TCC, but also enriched this list with new rights in every aspect. The Corporate representative system,[65] and the obligation of representative to receive instruction before the general meeting (New TCC 428 to 429) are some provisions to facilitate the exercise of rights (New TCC, General Justification No. 90 /d).

These provisions bring at the same time a new system for the representation at the general shareholders` meeting. These provisions are inspired by the Switzerland Code of Obligation Art. 689/c et seq. However, many points in the New TCC system were segregated from the systems in Switzerland and Germany and brought a little more complex arrangement.[66] This system is

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[63] Paslı, ibid pg. 89.

[64] The communiqué is published in the Official Gazette number 27876 on 16.03.2011.

[65] This system is like Proxy system in USA.

[66] Aytaç Zühtü, *Sermaye Piyasası Hukuku Bağlamında Türk Ticaret Kanunu Tasarısı ve Pay Sahipliği Hakları*, Impacts of the Draft Turkish Commercial Code on Capital Markets from an EU Perspective, Ankara 2010. pg. 113.

an initial matter that should not be compared to advanced regulations such as "Depotstimmrecht" in German law or other systems in other European countries. Depotstimmrecht system is not possible to be brought about in Turkish law in all its details because Turkey does not have to adhere to this institution (Justification of the New TCC, Art. 428).

cc. Right to Information

Right to information of shareholders is a vested, indispensable, independent and individual right (TCC Art. 362-363; New TCC Art. 200[67] and 437). In the existing TCC, there is no provision to obtain information and examine the documents with technical meaning outside the general shareholders` meeting. New TCC granted a comprehensive right to information and examination in accordance with equality, transparency, accountability and responsibility (Justification of the New TCC, Art. 437).

Obligation to inform the shareholders in accordance with corporate governance principles has brought about some hesitation regarding interoperability of the system practically, because the last word to inform the shareholders is said by directors of the company. However, the limits to obtain information are also determined by the directors. On the other hand, institutional investors or major shareholders can procure the information easily. Nevertheless, there is no possibility such as getting or comprehending the information for minor shareholders.[68] For this reason, lawmakers gave special importance to the right of information and protected this by way of numerous articles. It is reiterated that right to information of shareholders is an indispensable right which can not be violated, restricted or

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[67] New TCC Art. 200 **"** Each shareholder of the controlling company may request at the general shareholders' meeting that careful, satisfactory information be provided in accordance with true and fair accounting principles regarding dependent companies' position regarding its finance and assets and the accounting results, the relations of the controlling company y with dependent companies, of dependent companies with each other, of controlling and dependent companies with their shareholders, managing directors and their relatives, the transactions they have conducted and results thereof." For this article and hereafter articles see: Draft Turkish Commercial Code, a blue print for the future, http://www.turkey-now.org/db/Docs/taxguide2009_pwc.pdf, accessed 28.01.2011.

[68] Ansay, ibid pg. 37.

made difficult to exercise (New TCC, Art. 447, 391/1/c). The solitary exception of this provision is trade secrets and company benefits (New TCC, Art. 437/3).

dd. The Right to Participate in the General Shareholders' Meeting

According to the principle of active participation in the general shareholders` meeting, shareholders should participate in general meetings and declare their will about the company's future. Implementation of this principle is very hard, as well as important.

The General shareholders' meeting in New TCC is described as a board in which shareholders can express their will and use the majority rights (Justification of New TCC, Art. 407). However, New TCC is prepared in accordance with active participation in general meetings[69]. To answer questions of shareholders about management and supervision of company, chief executive officers (CEOs), at least one member of the board of directors and the independent auditor appointed for the examination of a certain transaction shall participate in the general shareholders' meeting (New TCC, Art. 407/II).[70] It can be understood that this article is oriented to enable an efficient coordination among several units of the corporation and to serve for a better information service to shareholders.[71]

According to the existing TCC, the general shareholders` meeting is the nature of the upper body due to the decision making body. This understanding has changed in the New TCC. Not hierarchical relationship between boards, functional separation is emphasised.[72] Justifiable rights have been protected in the conflict of interests between majority and minority shareholders. In terms of the consciousness of shareholders, it is intended that

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[69] Tekinalp Ünal, TTK Tasarısında Anonim Şirket, pg. 18.

[70] This new article is inspired by German Aktiengesetzt § 118 (Justification of New TCC, Art. 407).

[71] Karakteristik Çizgileriyle Türk Ticaret Kanunu Tasarısı, pg. 6, http://www.deloitte.com/assets/DcomTukey/Local%20Assets/Documents/turkeytr_audit_TTKtasarisi_261207.pdf, accessed 28.01.2011.

[72] Tekinalp, TTK Tasarısında Anonim Şirket, pg. 19.

they know the aim of voting for which decisions to be voted for. Hence they will receive this information before voting. The aim of this is not only for the participation of the shareholders but this makes voting sensible.[73]

There are detailed provisions about process of the general shareholders` meeting in CMB principles. It is mentioned as follows;

> *"The general shareholders' meeting should be conducted in a manner to ensure the highest level of participation (CMB principles, Part I/3.3). Agenda items should be expressed in an unbiased and detailed manner with, clear and concise method in the general shareholders' meeting. Shareholders should be provided with equal opportunities to express their opinions, and raise any questions and a sound discussion environment should be created (CMB principles, Part I/3.4)."*

The convocation should also be clear. Otherwise there is no legal convocation.[74] This convocation may also be issued by mail. On the other hand, New TCC also ensures to arrange online general shareholders` meeting. In this way, shareholders may participate in general meeting and vote online (Art. 1527).

ee. Voting Rights

According to CMB Principles "*The right to vote is an indispensable right, which cannot be abolished in any way by the articles of association and its essence can not be interfered with in any way (CMB principles, Part I/4.1). The effectiveness of voting rights should be increased and Principles limiting voting privileges of shares should be included."*[75] Improvement of voting rights is very important for corporate governance. Fort this reason there are several principles about this topic.

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[73] Karakteristik Çizgileriyle Türk Ticaret Kanunu Tasarısı, pg. 12, http://www.deloitte.com/assets/Dcom-Turkey/Local%20Assets/Documents/turkey-tr_audit_TTKtasarisi_261207.pdf, accessed 28.01.2011.

[74] Moroğlu Erdoğan, *Anonim Ortaklıkta Genel Kurulun Toplantıya Daveti Merasimine Aykırılığın Genel Kurul Kararına Etkisi ve Yargıtay Kararları*, Makaleler I, 2. Edn, pg. 167.

[75] CMB Principles, shareholders, pg. 8.

> *"A shareholder can vote either personally or by appointing a third person as his/her representative, regardless of whether this third person is a shareholder or not (CMB Principles, Part I/4.6.1, TCC Art. 360/2)".*

New TCC improved this article and highlighted that this representative right can not be abolished in any way by the articles of association (New TCC Art. 425/1).

There is a possibility to vote outside of shareholders` will within the representative voting method. Voting by correspondence on the one hand eliminates this risk, on the other hand makes voting easier for shareholders.[76] By this way, shareholders` own will is directly reflected in the general meeting by this system.

New TCC that aims to solve the free-rider problem by means of the proxy system has not given place the system of voting by correspondence. New TCC has stated that shareholders exercise their rights related to company labours just only on the general board, but in this respect statutory exceptions are in hidden (New TCC Art. 407/I). It is a statutory rule that it can be voted on the general board but the issue of online voting has been coordinated as an exception (New TCC Art.1527). It is not possible for voting by correspondence in accordance with the statutory rule. Used in this way votes are invalid (Justification of New TCC Art. 434/I). New TCC has not given place the system of voting by correspondence in order to aim the development systems that provide the accession of the shareholders and their delegates to the general meeting (New TCC, General Justification No. 70).

In my opinion, the voting by correspondence right should be granted to shareholders both to solve free-rider problem and to harmonize with EU Acquis. Indeed, it is also considered for European Companies in the EU.

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[76] Poroy Reha / Tekinalp Ünal / Çamoğlu Ersin, *Ortaklıklar ve Kooperatif Hukuku*, 9. edn. İstanbul 2003, pg. 402; Çeker Mustafa, *Oy Hakkı ve Kulanılması*, Ankara 2000, pg. 178-179.

ff. Minority Rights

The minority rights for joint stock companies set forth in TCC, that "can be exercised by shareholders representing ten percent of the equity capital of the company may be, in the case of publicly held joint stock companies, exercised by shareholders representing at least one twentieth of the basic or issued capital of the company" (CML Art. 11, New TCC Art. 399, 411, 420, 439, 531, 559).

According to CMB Principles great importance should be given to the minority rights. The cumulative voting procedure should be adopted that minority shareholders may send their representatives to the board of directors (CMB principles, Part I/5). According to New TCC Art. 360[77], minorities may be granted the right to be represented on the board of directors.

Shareholders and minority rights in Europe have developed in several ways. First for the existing known shareholders, the gaps have been filled as regards to minority of rights, content, scope of effectiveness in terms of efficiency. Examples of this subject, the rights of active and passive receiving information, audit and supervision right of minority can be shown. Secondly, the new trial rights should be emphasized. In many other European countries existing litigation rights are, on the one hand, being retrieved in light of current cases and new trial rights added. Among others: (1) the determination of nullity of the resolutions of the general shareholders` meeting (2) right to exit from the company in case of merger, division, conversion

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[77] "Provided that it is set forth in the articles of association, certain share groups, shareholders composing a certain group according to their qualities and properties, and minorities may be granted the right to be represented on the board of directors. For this purpose, the articles of association may stipulate that board members shall be elected from among the shareholders composing a certain group, certain share groups and minorities or that the right to nominate a candidate for the board of directors may also be granted to them in the articles of association. It is mandatory that the candidate, who is nominated by the general shareholders' meeting as a board member or who is a member of the group and the minority to whom the right to nominate is granted, shall be elected unless there is any reasonable grounds. The number of board members empowered to represent in this way may not exceed half the number of the members of the board of directors in publicly held joint stock companies. The regulations regarding independent board members are reserved (New TCC Art. 360/1) According to this article, the shares entitled to be represented on the board of directors shall be considered as privileged shares (New TCC Art. 360/2)."

(3) termination of company in case of good causes (New TCC, General Justification No. 76) .

Improvements have been made in three ways regarding minority rights: Firstly the exceptions are mentioned about the loyalty of agenda that prevents the effective use of the minority rights (New TCC, Art. 364[78], 438, 440 and 463). Secondly the special auditor in the centre of the minority rights system is strengthened because his report could cause liability of the board of directors, and delay balance sheet negotiations. If the mechanism of a special auditor does not work, the expected benefit can not be derived from the minority rights. The system of the existing TCC is not working effectively and correctly. New TCC remedied failures and provided the auditor selected by the court, written the provisions again (New TCC Art. 438, 440). Similarly, mandatory provisions are laid down about duration of convocation (New TCC Art. 412). Lastly, the new minority rights such as shareholders rights are added to the list. These rights are inter alia as follows;

- The right to request the company's dissolution is permitted (New TCC Art. 531).

- In case of violation of the impartiality and if they are good causes, the minority has the right to sue for the dismissal of auditor and the appointment of a new one (New TCC, General Justification No. 133).

In New TCC great importance is given to the protection of the minority against the majority and balanced provisions are included for the majority against the minority (Art 208).[79]

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[78] **New TCC Article 364 – "(1)** Even if the board members have been assigned through the articles of association, in case of reasonable grounds, despite the existence or **non-existence of a relevant item on the agenda,** they may, at all times, be dismissed from office by the resolution of the general assembly. The legal entity who is a board member may, at any time, replace the person registered in his/her name."

[79] **New TCC Article 208 – "(1)** If the controlling company, directly or indirectly, holds at least ninety percent of shares and voting rights in a capital stock company and if the minority prevents the company from running its business, does not act in good faith, creates obvious trouble or behaves in a reckless manner, the controlling company may pur-

gg. Dividend Rights

In a joint-stock company the most important financial rights of a shareholder are the dividend rights. An issue of great importance is also corporate governance found in the CMB principles according to:

> *"The company should have a clearly defined and consistent dividend policy. This policy should be announced to the shareholders at the general shareholders' meeting and also included in the company's annual report, prospectus and circulars (CMB Principles, Part I/6.2).*
>
> *In case the board of directors proposes not to distribute any dividends at the general shareholders' meeting, the basis for such proposal and information on the method of use of the profit should be announced to the shareholders and published in the annual report, prospectus and circulars (CMB principles, Part I/6.3)."*

Dividend rights in the existing TCC[80] and CML are arranged comprehensively and TCC has accepted the dividend right as a weak vested rights.[81] Together with CML, this understanding has been changed in accordance with the capital market as appropriate. According to CML Art. 15:

> *"The articles of association of publicly held joint stock corporations shall set forth a rate for the first dividend. This rate shall not be below the rate determined by the Board and announced in its communiqués. The Board may abolish or postpone the requirement for distribution of dividends for types of issuers and amounts of distributable profits."*

With this article the company's dividend distribution has been made compulsory. However, by New TCC, the amendments have made the capital market regulations more appropriate. For the advanced payment of the dividend for all joint-stock companies, this will bring about a foreseeable application pursuant to the EU Acquis (Art. 509/3).

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chase the shares of the minority at stock exchange value, if any, or at the value determined in accordance with the method set forth in paragraph two of article 202."

[80] TCC Art: 455, 456, 457, 458, 466, 467, 469 and 470.

[81] Aytaç, ibid pg. 91.

hh. Equal Treatment of Shareholders

There is no provision that directly regulates the principle of equal treatment of shareholders in the existing TCC. The Turkish Civil Code Art. 2 regarding doctrine and judicial decisions has defended the necessity of application regarding the rule of good faith on the basis of equal treatment of shareholders. This lack of universally attributed "equal treatment of shareholders" has been expressly stipulated and resolved by the clear principle of provision.

According to the New TCC shareholders, including minority shareholders and foreign shareholders, shall be subject to equal treatment under equal terms (New TCC Art. 357/1, CMB principles, Part I/8.1). It can be regarded that this policy dedicated to only shareholders is not in accordance with corporate governance principles. However, there is not any provision about prevention of equal treatment to other interested parties than shareholders in the New TCC. In addition it has not been clarified whether the principle of equal treatment should be applied equal parties or different parties in corporate governance (New TCC, General Justification No.121).

There is an indirect article about equal treatment of shareholders in CML. According to CML Art. 12 the power to restrict the rights of shareholders obtaining new shares shall not be used in a way causing inequalities among the shareholders. Thanks to the New TCC principle of equal treatment of shareholders, this has now been assured and undertaken with legal provisions. It is obvious that Art. 357 will affect the capital market positively. This article also must be applied for dividend rights and bonus shares.[82]

b. Harmonisation with EU Acquis

New TCC laid down provisions (Art. 415-451) to facilitate the shareholders participating in the general meeting in accordance with EU Acquis.[83] Many EU countries are forming the legal basis necessary for the use of online votes. The High Level Experts Report in EU member states is recommend-

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[82] Aytaç, ibid pg. 84.

[83] Aytaç, ibid pg. 111.

ing legislation on how to implement the right to online voting. The new development and corporate governance principles also suits the General Assembly, namely the online general shareholders' meeting, and is to be done and the online vote (Art. 1527) is to be recognized and adopted into one of the New TCC modern systems.

The minority rights in EU countries are showing a development parallel to shareholder rights and their list is also enriched. The new minority rights are added to the list, the appointment of the end-of-year accounts auditor and special auditor, the selection of board members. (New TCC, General Justification No.77).

One of the important directives on shareholder rights is "The Exercise of Certain Rights of Shareholders in Listed Companies (2007/36/EC).[84] This Directive has organized the use of voting rights in the general shareholders` meetings of the listed companies in EU member countries. More details as regards the regulations of the minimum harmonization Directive regarding member states can be made.

In the Directive, "the subject of equal treatment of shareholders, information prior to the general meeting, right to put items on the agenda of the general meeting and to table draft resolutions, requirements for participation and voting in the general meeting, participation in the general meeting by electronic means, proxy voting, voting by correspondence" are stated.

This is reflected in the arrangements stipulated that Member States transposed from the date of 03.08.2009. By New TCC, Turkey has also adhered to this Directive to a large extent.

CMB, in compliance with this directive, has published some communiqués. For example; proxy voting for the first time Turkish law has entered serial: IV No: 8 Communiqué[85] on "Principles Regarding Proxy Voting at Share-

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[84] Available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= OJ:L: 2007: 184:0017:0024:EN: PDF accessed on 28.03.2011.

[85] The communiqué is published in the Official Gazette number 22852 on 19.12.1996.

holders' Meetings of Publicly Held Joint Stock Companies, Proxy Solicitation and Tender Offer." The directive mentioned that *"Good corporate governance requires a smooth and effective process of proxy voting."*[86] and emphasized the importance of proxy voting for corporate governance by means of this.

In this respect, the CMB communiqués and EU Acquis is said to be appropriate. In compliance with the re-alignment of the Directive, equal treatment of shareholders (Art. 357), minority rights (Art. 411 – 412), the right to participate in the general shareholder's meeting (Art. 415), online general shareholders' meeting (Art. 1527) has been re-arranged and alignment achieved in New TCC.

In addition, equal treatment of shareholders (New TCC, Art. 357), with the provision of Art. 42 of the second council directive 77/91/EEC, compliance has been provided.

According to the directive (2007/36/EC) "member states shall ensure that the company issues the convocation of the general shareholders' meeting not later than on the 21st day before the day of the meeting (Art. 5/1)." The company also shall make available to its shareholders, on its website at least the following information the 21st day before the meeting (Art. 5/4). On the contrary in New TCC and the existing TCC, it is stipulated that it is necessary to issue convocation to shareholders at least two weeks prior to the general shareholders` meeting taking place (New TCC Art. 414).

In this respect, the New TCC can be said to be incompatible with the Directive. This point should be amended at a later date by the CML and brought into line with the EU Acquis.

Voting by correspondence right of the shareholders is given by the Directive. According to this:-

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[86] Directive 2007/36/EC, 10.

> *"Voting by correspondence Member States shall permit companies to offer their shareholders the possibility to vote by correspondence in advance of the general shareholders' meeting. Voting by correspondence may be made subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and only to the extent that they are proportionate to achieving that objective (Art.5/12)."*

The relevant article of the Directive concerns itself with listed companies. However, there is no provision in the existing TCC and New TCC for voting by correspondence. To adapt to the EU Acquis, legislation needs to be done.

A stronger corporate governance increases the confidence of domestic or foreign investors and shareholders and therefore will result in the development of capital markets.

The main target of the New TCC is to strengthen the shareholder's position. Because without shareholders there is neither a company management nor stakeholders. Along with the right to access, companies are shaped by the provisions of holding companies, giving information, receiving information, and the New TCC shows the importance of the provisions of the shareholders regarding the controlling company's purchasing requests, demanding counter-balance losses, new types of liability lawsuits (New TCC, Art. 198, 199, 200, 202, 206, 207) and active shareholders` rights (New TCC, Art. 141, 192, 193, 194, 357, 339,447, 428, 429, 437, 438, 466, 479, 537 etc.) together with minority rights (New TCC, Art. 364, 389, 438 – 440, 463, 486, 531 etc).[87]

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[87] Tekinalp, Kurumsal Yönetim, pg. 636. The other EU Regulation as a reference in New TCC is "Statute for a European company (SE)" Council Regulation (EC) No 2157/2001 of 8 October 2001. Available online at: http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001R2157&model=guichett accessed on 17.04.2011.

2. Disclosure and Transparency

a. In Turkish Law

aa. Obligation to Disclose

Starting from the 2004 financial year in Turkey, the CMB has decreed that each company must submit a corporate governance report, according to the basic format as stated by the CMB, annually.[88]

The most effective tool of our time as regards public disclosure is the web-site. CMB, taking into account its principles, has allowed for this. Accordingly:-

> *"The company's website should be actively used as a means of public disclosure (CMB principles, Part II/1.11). The company's website should emphasize the announcement of the planned general shareholders' meeting, agenda items and informative documents thereof, other information, documents and reports on the agenda items and information on methods of participation in the general shareholders' meeting (CMB principles, Part II/1.11.6)".*

In the 21st century, the New TCC took into consideration this technological development and for each capital company a website has brought on an obligation. Enterprises are required to submit information via the website regarding all kinds of voting, its transparency and public disclosure is required in terms of informing society as being useful and in the context of all its services. In addition, the financial statements, the annual report of the board of the directors, the board of directors' annual statement in adherence to the corporate governance principles and the auditors' reports must be published on the website. The board of directors is liable and bears the results of non-compliance with this obligation. Financial statements must be kept open together with any kind of reports must be kept open for access on the site for a period of three years (New TCC, Art. 1524/1).

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[88] Nilsson, Corporate Governance in Turkey, pg. 203.

bb. Financial Reporting

For a country to be part of the international markets, it has to be based on full transparency according to international accounting standards and financial statements need to be issued.

Financial reports for companies operating with the global economy are extracted only to national standards and are incompatible with the realities of the economy. Because some examples[89] that showed the differences in accounting standards also affect the results of financial reports.

National Auditing Standards has replaced the International Accounting Standards, and in IAS's place, International Accounting Standards Board (IASB) and International Accounting Standards Committee (IASC) has been prepared and the International Financial Reporting Standards (IFRS) procured. Lawmakers adjust to the laws referred to. Now, national, regional, economic and regulations of political associations have remained insufficient. The most striking example is the EU. This is the reason the "Implementation of the IAS Regulation on the application of international accounting standards (1606/2002/EC)"[90] has been adopted (New TCC, General Justification No.75).

The aim of this regulation to adopt and use IAS in EU (Art. 1). Publicly traded companies established in EU shall prepare their consolidated accounts in conformity with the IAS adopted (Art. 4). This regulation directly requires (without transposition into national law) the use of IFRS in the consolidated financial statements of companies. However each member state

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89 In 1993, Daimler-Benz wanted to list on New-York Stock Exchange and publicly announced half-yearly earnings that had been calculated under US GAAP. Daimler-Benz announced loss of DM 1839 million for the full year 1993. Profit of DM 615 million had been calculated under German Accounting Standards in the first financial reports of the year 1993. The stark difference was about DM 2.5 billion between the numbers (see: Ray, Ball, Corporate Governance and Financial Reporting at Daimler-Benz (Daimler-Chrysler) AG: From a "Stakeholder" toward a "Shareholder Value" Model, pg. 126-127,http://faculty.chicagobooth.edu/ray.ball/research/Papers/2004%20Daimler%20-%20Shareholder%20Value%20and%20Stakeholder%20Governance%20Models.pdf accessed on 09.04.2011.

90 Available online at: http://eur- lex.europa.eu/LexUriServ/ LexUriServ.do? uri= OJ:L: 2002:243:0001:0004:en:PDF accessed on 12.04.2011.

has also an option in respect of annual accounts and of non-publicly traded companies. The application of the IAS Regulation through national law may be extended or the use of IFRS may be required (Art. 5). In addition, the consolidated balance sheets of listed companies are subject not only to IFRS but also to special provisions and therefore, other judicial accounting standards, particularly US GAAP, if carried out, will come within the scope of IFRS.

Financial reporting is a condition *sine qua non* of corporate governance. Therefore, CMB places different importance on communiques produced by the CMB. Serial: XI No: 25[91] Communique has been compiled with the accounting standards according to IFRS. Serial: XI No: 29[92] Communiqué to be held by companies with financial reports and their preparation of financial statements for submission of the relevant policy, determined by its principles and procedure. According to this communiqué, the IAS/IFRS standards adopted by EU will apply and be prepared according to these reports. Room has also been allowed for the financial reporting in CMB Principles[93].

Separate importance has been given to the financial reporting in the New TCC. Accordingly, Turkish auditing standards shall be in accordance with IAS and IFRS. On the other hand, it has to be emphasized that the only authorized institution is TASB (Art. 88).

cc. Audit

Audit is one of the most important pillars of corporate governance, but the existing TCC does not meet contemporary requirements of the paper therein contained. This deficiency is supplied by CML and CMB communiqués. To

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91 The communiqué is published in the Official Gazette number 25290 on 15.11.2003.

92 The communiqué is published in the Official Gazette number 26842 on 09.04.2008.

93 Some of these principles;

"The company's periodical financial statements and their footnotes should be prepared in order to reflect actual financial situation of the company and disclosed to public (CMB principles, Part II//3.1).

The annual report should be prepared in a manner to ensure public access to all kinds of information regarding the company's activities (CMB principles, Part II/3.2)."

ensure this, it is indicated that an independent audit should be reproduced within the framework of the audit procedures for publicly held joint stock companies by independent auditing firms (CML Art. 16). However, CMB has authority about examination publicly held joint stock companies (CML Art. 22/1). The subject of the audit has, at large, been put in the CMB Principles. Accordingly:-

> *"The audit firm and auditors employed by such audit firm must be independent. Independence principle indicates that the independent audit activities should be conducted without being influenced by any relationship, benefit or other factors that may impede the auditor's professional discretion and impartiality (CMB principles, Part II/4.1). Audit firms should be subject to regular rotation (CMB principles, Part II/4.2). Audit and consultancy services should be clearly separated (CMB principles, Part II/4.3)."*

The New TCC has introduced a completely new system of inspection. With reference to the New TCC, audit committee is not a board of the company. In addition that, the company shall only be audited by an independent auditing firm[94]. According to the New TCC, "small and medium sized joint stock companies may be audited by one or more sworn financial adviser or independent accountant financial adviser (Art. 400/1). The audit of the company's financial reporting and the annual reports of their boards of directors shall include the examination of it in compliance with TAS, law and the provisions of the articles of association (Art. 398/1)."[95]

The basic element of the audit and auditor is independence. It means that the first approach of independence is that the company is controlled by an independent auditor in neutral terms. For this reason, the presence of a business relationship between the auditor and the company monitoring the company cannot be accepted. The auditor or the auditing company must not be monitored over several years. A long-lasting relationship between the controller

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[94] Shareholders of the independent auditing firm must only be sworn financial adviser or independent accountant financial adviser.

[95] "The auditor may not provide consultancy or other services other than tax consultancy and tax auditing for the company he/she audits and he/she may not provide such services through one of its subsidiaries (Art. 400/3)."

and the company eliminates independence and impartiality. Due to the development in the world, especially after the Enron incident, audit firms can not give consultancy to customers outside auditing such as law, restructuring, valuation, consultation, etc. Perhaps an exception in tax can be created. Echoes of the Sarbanes-Oxley Act, dated 30/07/2002, whereby the primary goal is the independence of the auditor, audit and advisory service, is to be separated from each other exactly. European Commission, dated 16/05/2002 and No. 2002/590/EC regarding the "End of Year Account Auditors Independence" in the EU:- a set of fundamental principles has been recommended to explain the rules regarding this issue. According to the corporate governance principles, the required establishment of an audit committee, one of whose important duties include independence, impartiality and not providing customer service to another of independent auditors, needs to be kept under surveillance. (New TCC, General Justification No.73). New TCC, taking into account developments in the world and in the EU, has accepted an appropriate control system in corporate governance.

dd. Risk Management

New TCC, in accordance with the corporate governance principles, the establishment of an early risk recognition and management committee has been felt as an obligation for listed companies (Art. 378)[96]. This committee is actually different from the "audit committee" or "internal audit committee". Whilst these committees are intended for all joint stock companies, an early risk recognition and management committee is only intended for listed

[96] **Article 378** –" (1) For companies whose shares are listed on the stock exchange, the board of directors shall be liable to set up an expert committee, to run and to develop the system for the purpose of early detection of the causes putting the existence of the company, its development and continuity of the business unit in danger, of applying the necessary measures and remedies in this regard and of managing the risk. In other companies, this committee, if deemed necessary and the board of directors is notified in writing, by the auditor, shall immediately be constituted and shall submit its first report at the end of the month following its constitution.

(2) In the report to submitted to the board of directors bimonthly, the committee shall evaluate the situation and indicate the dangers if any, and point out remedies. The report shall also be sent to the auditor."

companies.[97] On the other hand, skipping this committee's examination, in the future there will be an assessment.[98] However, both committees will be combined into the same committee (New TCC, General Justification No.127) .

A third person or members of the board of directors may be formed of the early risk recognition and management committee. In case of presence of directors in this committee, the separation executive/non-executive directors may occur as in the USA system.[99] This committee can be compared with risk management system for the early detection of company threats which is required by KonTraG in German Law.

In terms of the fact of Turkey, in addition to the internal audit committee, early risk recognition and management committee has special importance. Because many companies in Turkey are at risk due to frequent fluctuations in interest rates, foreign currency speculation and due to other similar reasons. Many stable and industrialized countries do not come across such risks doing business. However, Turkish companies can easily experience a downturn or even the danger of bankruptcy. Despite this committee is not in corporate governance principles, for reasons described above, the New TCC has seen this to be necessary (General Justification No. 127).

b. Harmonisation with EU Acquis

The first importance order of the issues of EU to stand on are the audit and the auditors. Especially with the control of the auditor, matter that not to serve a separate service to customers of the auditors, was given importance. New TCC, changing the audit system completely, has brought a system compatible with "Statutory Auditors Independence in the EU: A set of Fundamental Principles, commission recommendation (2002/590/EC)".

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97 Helvacı Mehmet, *The Turkish Trade Draft Law on the Board`s Anonymous Innovations Partnership, the European Union Perspective of Capital Market Effects of the Turkish Commercial Code Draft,* (Impacts of the Draft Turkish Commercial Code (DTCC) on Capital Markets from an EU Perspective), Ankara 2010, pg. 218.

98 Tekinalp, Tasarı, pg. 31; Helvacı, ibid pg. 218.

It has been adopted by EU countries for a long time, making controls of processes such as Financial statements and the merger, division, conversion, increasing and reducing capital, according to IAS by independent audit firms. The Eighth Directive of EEC about auditors has been effective since 1984. For twenty years Europe has still brought auditing to perfection (New TCC, General Justification No. 73).

Turkey, prepared to become a full member of the EU, has to be part of the international markets and Turkish companies have to act efficiently, reliably and have the power to compete in these markets. For this, the financial statements of Turkish companies in the framework of corporate governance must be organized according to IFRS and be audited in accordance with IAS. (New TCC, General Justification No. 5). New TCC, on the one hand, aligned standards of financial reporting and auditing system with the IAS, on the other hand, removing the principle of transparency to the foreground, removed to the background the Trade Secret concept (General Justification No. 97).

It was indicated as limited the compliance with "Fourth Council Directive on the Annual Accounts of Certain Types of Companies (78/660 EEC)" and "Seventh Council Directive on Consolidated Accounts of Companies with Limited Liability (83/349/EEC)" of the Turkish Legislation in Screening Report Turkey[100]. However, it was emphasized that the degree of compliance of listed companies and financial institutions were better conditions. Emphasizing the necessity of audit according to international standards by expert, independent and impartial auditors (General Justification No:90/f), was worked to provide harmonisation to a large extent in New TCC. However, it is clear that the laws should be amended.

CMB has largely aligned Turkish accounting system with EU standards by publishing communiqués. Turkish Accounting Standards Board (TASB) in

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[99] Helvacı, ibid pg. 218.

[100] Available online at: http://ec.europa.eu/enlargement/pdf/turkey/ screening_reports/ screening_report_06_tr_internet_en.pdf accessed on 14.04.2011.

addition published Turkish accounting Standards (TAS) and has an aligned accounting system with IAS/IFRS.[101]. According to Turkish National Programme for the Adoption of Acquis[102],TASB is responsible for alignments to EU Acquis related to accounting. TASB has made the necessary arrangements related to the subject and published them.[103] Some projects also were applied between Turkey and EU countries for the development of the Capital Market standards. For example, twinning project with Germany were conducted between 2006-2007. The most important goal of this project is to align Turkish company law with EU Acquis. The Project is aimed at the harmonisation of Turkish Legislation especially with the accounting directives and training personnel of CMB.

A similar project was done with Netherlands Authority for Financial Markets. In this Project also aimed at the control of 'listed Stock companies' in accordance with international accounting standards. Thus, it had been given priority to provide increased confidence of investors. In addition, with Technical Assistance Information Exchange Office (TAIEX) working under the Directorate General for Enlargement, joint meetings were held.[104]

In order to ensure compliance with the EU Acquis in the New TCC received other EU references are; "Disclosure and the validity of obligations entered into by, and the nullity of, companies with limited liability (68/151/EEC)"; "The role, the position and the liability of the statutory auditor within the European Union, Green Paper 1996, OJ C 321/1"[105]; "Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, Brussels, 21.5.2003 COM 2003 (284)"[106]; "Ac-

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[101] Akgül, ibid pg. 341.

[102] Available online at: http://ec.europa.eu/enlargement/pdf/turkey/npaa_full_en.pdf accessed on 15.04.2011.

[103] For the detailed information see : http://www.tmsk.org.tr/

[104] Ekşit, ibid pg. 465.

[105] Available online at: http://europa.eu/documents/ comm/ green_ papers/pdf/ com96_ 338 _en.pdf accessed on 10.03.2011.

[106] Available online at: http://www.ecgi.org/commission/ documents/com2003_ 0284en01. pdf accessed on 15.03.2011.

counting Harmonisation : A New Strategy Vis-À-Vis International Harmonisation, COM 95 (508)"[107], "Financial Services: Implementing the Framework for Financial Markets: Action Plan of 11 May 1995, COM 1999 (230)"; "The Application of International Accounting Standards, Regulation (EC) No 1606/2002"[108]; "The Recognition, Measurement and Disclosure of Environmental Issues in the Annual Accounts and Annual Reports of Companies, Commission Recommendation, 30 May 2001"[109]; "Statutory Auditors' Independence in the EU: a set of fundamental principles, Recommendation 2002/590/EC"[110]; "Statutory Audit in the European Union, the way forward, Commission Communication (98/C143/03) "[111]; "EU Financial Reporting Strategy: the way forward, COM 2000 (359)"[112]; "Report Of The High Level Group Of Company Law Experts On Issues Related To Takeover Bids, 2002"[113]; "Strengtheining statutory audit in the EU, Brussels 21.05.2003 (IP/03/715)"[114] (General Justification, No. 221, 222, 224, 225).

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[107] Available online at: http://ec.europa.eu/internal_market/accounting/docs/com-95-508/com- 95-508_en.pdf accessed on 20.03.2011.

[108] Available online at: http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do? uri= CONSLEG:2002R1606:20080410:EN:PDF accessed on 13.03.2011.

[109] Available online at: http://www.iasplus.com/resource/0105euroenv.pdf accessed on 27.04.2011.

[110] Available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= OJ:L:2002:191:0022:0057:EN:PDF accessed on 27.04.2011.

[111] Available online at: http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri= OJ:C:1998:143:0012:0018:EN:PDF accessed on 21.02.2011.

[112] Available online at: http://www.iasplus.com/resource/cec.pdf accessed on 15.03.2011.

[113] Available online at: http://ec.europa.eu/internal_market/company/ docs/takeoverbids/2002-01-hlg-report_en.pdf accessed on 11.03.2011.

[114] Available online at: http://europa.eu/rapid/ pressReleasesAction.do? reference=IP/03/716&format=HTML&aged=&language=null&guiLanguage=en accessed on 23.03.2011.

3. Board of Directors

a. In Turkish Law

aa. Basic Functions of the Board

For the best practice of corporate governance, the most important body of the company is the board of directors. It is the basic management and representation body of the company and elected in the general shareholders' meeting.

The board of directors should maintain the balance between interests of the company and the shareholders and stakeholders.[115] It should closely supervise the company's operations in accordance with the relevant legislation, articles of association and in-house regulations (CMB principles, Part IV/1.4).

New TCC organized new provisions on both structural and functional aspects of the board of directors considering the corporate governance rules, in doing so took into consideration professional management and full transparency carefully. In addition, especially in foreign capital companies, the meetings have the opportunity to be held electronically in order to facilitate the meetings of the board of directors. The Board of Directors has the obligation of diligence, related to the objective, equal and applicable rules. (New TCC, General Justification No. 124).

To disclose corporate governance report and submission thereof to the general shareholders' meeting are the non-delegable duties of the Board of the directors (New TCC, Art. 377/f). This report and the rules related to the disclosure and proceedings are determined by the CMB (New TCC, Art. 1529).

New TCC has made a significant difference between investors and management. Indicating clearly the non-delegable duties of the board of direc-

[115] CMB Principles, board of directors, pg. 37.

tors (Art. 375)[116], the intervention of investors, namely the general shareholders` meeting was blocked. New TCC assumes the board of directors not only as representative of the shareholders and but also obliged it to protect the interests of the stakeholders.[117] In addition, it separated the "board of directors" and "management" concepts from each other (Art. 367) [118].

bb. Election and Qualification of Directors

It is emphasized that members of the board of directors need to divide of two parts in New TCC. Accordingly, the first group, the executive directors, have the authority for executive power, in the second group, not possessing these powers, non-executive members have to audit and control the first holding members. For the two class members` powers, rights and access to

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[116] **Article 375 –** " **(1)** The board of directors' non-delegable and indispensable duties and powers are as follows:

a) Top level management of the company and giving instructions in this regard.

b) Determination of the company's management organization.

c) Establishment of the necessary system for financial planning to the extent required for the management of the company, and for accounting and finance audit.

d) Appointment and dismissal of managers and persons performing the same function and authorized signatories.

e) High level supervision of whether or not the persons in charge of management, act in accordance particularly with law, articles of association, internal regulations and written instructions of the board of directors.

f) Keeping share book, resolution book of the board and book of general shareholders' meeting and discussion, the preparation of the annual report and corporate governance disclosure and submission thereof to the general shareholders' meeting, the organization of general shareholders' meetings and enforcement of general shareholders' meeting resolutions.

g) Notifying the court regarding the company's state of excess of liabilities over assets."

[117] Tekinalp Ünal, *Türk Ticaret Kanunu Tasarısının Kurumsal Yönetim Felsefesine Yaklaşımı*, Uğur Alacakaptan'a Armağan, Volume 2, İstanbul 2008, pg. 639.

[118] **Article 367 –** " **(1)** In accordance with an internal regulation to be drawn up by the board based on a provision to be inserted into the articles of association, the board of directors may be authorized partially or fully to delegate management to one or more board members or to a third party. This regulation shall organize the management of the company; it shall define the duties required for management, indicate their positions, and particularly specify who is subordinated to whom and who is obliged to provide information. The board of directors shall, upon request, inform in writing the shareholders and the creditors who convincingly bring up their interests which are worthwhile to protect of this regulation.

(2) In case the management is not delegated, the company shall be managed by all board members."

company information and making-decision positions for company-binding are different, legal, criminal and financial responsibilities have to be different (General Justification, Art. 90/a).

New TCC, provided that it is set forth in the articles of association, anticipating the transfer of management in part or in whole, in a sense, corresponded to the USA board system, the system already existing in TCC, has become developed. The new system is suitable for the executive power implementation of the separation of the executive/non executive directive. This arrangement also allows the system in which Vorstand/Aufsichtsrat and "Président Directeur Genéral" of French are the company's president.

According to CMB Principles, directors should have a high level of knowledge and skills and a qualified, specific experience and background. General rules in this respect should be set forth in the articles of association of the company (Part IV/3.1.1). According to New TCC, at least one quarter of the members of the board of directors must have higher education (Art. 359/3). In the justification of this Article, the board of directors has upgraded the level quantitativement and therefore laying the groundwork for the selection of professional management, it has emphasized having an achieved harmony with corporate governance principles.

According to New TCC, "the board of directors consists of one or more persons assigned by the articles of association or elected by the general shareholders` meeting (Art. 359/1)". However not only a real person but also a legal entity can be elected as a member of the board of directors (New TCC, Art. 359/2). To be adjudicated bankrupt or under interdiction of membership shall prevent being elected (New TCC, Art. 359/3). In order to provide shareholder democracy, cumulative voting right should be given to the shareholders in the election of the board of directors (Part IV/3.4). In addition that representation right of minority and certain share groups may be granted on the board of directors (New TCC, Art. 360/1). For the profes-

sional management, delegation of management should be possible in accordance with an internal regulation (New TCC, Art. 367).[119]

New TCC has adopted the professional board of directors principle, and removed the necessity of choosing the director among the shareholders[120]. This policy is perfectly compatible with corporate governance concept.[121]

cc. Liability of the Board of Directors

In order to prevent company losses, the board of directors should be under duty of care and duty of loyalty against the company and its shareholders (New TCC, Art. 369/1). According to CMB Principles

> *"Members of the board of directors will be jointly liable should they intentionally or unintentionally fail to properly perform their duties assigned to them by legislation, the articles of association and the general shareholders' meeting (CMB principles, Part IV/2.5)."*

But, if the directors hand over their authority to other persons, they are not responsible for these persons' actions and decisions. They are only obliged to comply with diligence obligation in these persons' selection (New TCC, Art. 553/2).

The joint and several liability of directors has turned to differentiated solidarity liability in New TCC. In the existing TCC each director is individually responsible for the entire obligation (TCC, Art. 336 et seq.). In New TCC the liability of directors is separate and distinct from another's liability (New TCC, Art. 557). So the separation of "executive" and "non-executive" in the EU has been adopted in Turkish Law and has exactly adopted the Swiss Code of Obligations Art. 759, New TCC has made an important

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[119] "In accordance with an internal regulation to be drawn up by the board based on a provision to be inserted into the articles of association, the board of directors may be authorized partially or fully to delegate management to one or more board members or to a third party (Art. 367/1). In case the management is not delegated, the company shall be managed by all board members (Art. 367/2)."

[120] For the detailed see: Kurt, Gülüzar / Demir, Göneç, *"Türk Ticaret Kanunu Tasarısında Profesyonelleştirme ve Vekalet Teorisi"* Hukuki Perspektifler Dergisi 2006-Mayıs, pg. 60-66.

[121] Tekinalp, Kurumsal Yönetim, pg. 639.

change in the board liability. The existing TCC holds directors jointly and severally liable for the overall damage, and not interested in recourse (TCC Art. 336-341). Although there is no causal relation, setting spreading all responsibility to each member of the board of directors has been disapproved to equity. For this reason, the New TCC, has accepted the differentiated solidarity liability by Art. 557 (New TCC, General Justification No. 142). On the other hand in accordance with corporate governance, New TCC laid down "insurance of liability" for the board of directors.[122]

dd. Remuneration

The board of directors is the main responsible body for achieving the company's goals. For that reason, self-performance of the board of directors should be evaluated in accordance with the transparency principle[123] in order to provide a reasonable remuneration to be paid to executives.

Just as in the case of the Act on Disclosure of Management Board Remuneration (Gesetz über die Offenlegung der Vorstandsvergütungen, VorstOG), according to Turkish Law, "honorarium, salary, bonus, premium and a portion of the annual profit to the members of the board of directors shall be mentioned in the articles of association in Turkish Law" (TCC Art. 279/5, New TCC, Art. 339/f, 394). If these benefits are not set forth in the articles of association, they shall be mentioned in the general shareholders` meeting (TCC, Art. 369/3). These benefits of the members shall be under the control (New TCC, General Justification No. 90/e). If the company goes insolvent, unreasonable high amount of bonus or other benefits have been received in a period of three years before the insolvency by directors shall be paid to the creditors of the company (New TCC, Art. 513/1).

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[122] "If the damage that may be incurred by the company due the faults of board members committed while performing their duties, is insured with a price exceeding twenty five percent of the company capital and if thus the company is secured; in case of publicly held companies; this matter shall be announced in the bulletin of the Capital Market Board, if the shares are listed in the stock exchange market and also announced in the bulletin of stock exchange and such matter shall be taken into account in the assessment of compliance with the principles of corporate governance (New TCC, Art. 361/1)."

[123] CMB Principles, board of directors, pg 38.

b. Harmonisation with EU Acquis

The most affected unit of the corporate governance principles is the board of directors. For adding a new one everyday to the proposals about structure of the unit, duties of members, their positions and responsibilities, the reform process is permanent. It has enabled the two-tier system of management board and supervisory board (Vorstand/Aufsichtsrat)[124] of Germany and PDG "Président Directeur Genéral" of French, besides the one-tier board system accepted by New TCC. CMB to launch the application of "Independent Board Members" and establishment of the committees[125] in this context. It is not possible to remain indifferent as regards the necessity of improving the structural aspects and reaching more perfect operation order for none of the member of EU including Turkey (General Justification No. 72).

New TCC, has brought the possibility "single member company" in accordance with the EU Acquis (Art. 359/1).[126] This provision is a natural reflection of the " single member company" system introduced by the New TCC.

In Principles of the CMB, there are several articles about the structure of the board of directors in accordance with "the recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC)"[127]. These are;

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[124] There has been the two-tier board structure in Germany since 1870. The management board (Vorstand) is only comprised of management, and a supervisory board (Aufsichtrat) is compromised of both shareholder and employee representatives in accordance with the Industrial Constitution Act (Betriebsverfassungsgesetz) and the Co-Determination Act (Mitbestimmungsgesetz). Lattreuter Philipp, *Towards a Combined Model of Corporate Governance – with application to the European Monetary Union*, Dissertation, Barmberg 2005, pg. 65.

[125] According to CMB principles ; "In accordance with the conditions and necessities of the company, an adequate number of committees should be formed so as to enable the board to execute its tasks in an efficient manner (Part IV/5.1)."

[126] **Article 359 – (1) "**The joint stock company shall have a board of directors which consists of one or more persons assigned by the articles of association or elected by the general shareholders' meeting. At least one member who is authorized for representation must have his/her domicile in Turkey and must be a Turkish citizen."

[127] Available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do? uri=OJ:L:2005:052:0051:0063:EN:PDF accessed on 25.04.2011.

> *"The board of directors comprises of both executive and non-executive members (Part IV/3.2). It should be maintained that the board chairman and chief executive officer are not the same person and that majority of the board of directors should consist of non-executive members (Part IV/3.2.1). Non-executive members of the board of directors should regularly conduct internal meetings (Part IV/3.2.2). The board should be composed to comprise independent members who have the ability to execute their duties without being influenced under any circumstances (Part IV/3.3). Independent board members should comprise at least one third of the board of directors and in any case two members of the board should be independent (Part IV/3.3.1). In accordance with the conditions and necessities of the company, an adequate number of committees should be formed so as to enable the board to execute its tasks in an efficient manner (Part IV/5.1). An audit committee in charge of supervision of the financial and operational activities of the committee should be established (Part IV/5.6)."*

CMB determines in detail the differences between EU Acquis and Turkish Legislation, then considering also the market conditions, harmonizes with Corporate Governance Recommendations of EU. During this alignment, report results and applications in member countries related to implementation of the Recommendations published in July 2007 by EU Commission, must be taken into consideration because it has been observed that corporate governance applications have developed in member countries together with Recommendations adopted by EU Commission.[128]

The New TCC in accord with the EU Acquis mentioned that early risk recognition and management committee, audit committee and nominations committee shall be set up and these committees shall be bound up with non-executive directors (General Justification No. 90/b).

About Remuneration, Recommendations, named "The role of non-executive or supervisory directors of listed companies and on the committees of the supervisory board (2005/162/EC)" and "Fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC)"[129] are

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[128] Ekşit, ibid pg. 458,460.

[129] Available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= OJ:L:2004:385:0055:0059:EN:PDF accessed on 21.04.2011.

available. For these arrangements are advisory, different arrangements and applications are available for the member countries. However, it has been predicted that member countries applications must be monitored in detail by EU Commission because of the importance of the subject in corporate governance. Indeed, EU Commission published the recommendations and reports which were examined the applications in the member countries.[130]

Germany legislated the Act on Disclosure of Management Board Remuneration (VorstOG) to harmonise with EU Acquis regarding remuneration. After the financial market crises, the Act on the Adequacy of Management Board Compensation (Gesetz zur Angemessenheit der Vorstandsvergütung, VorstAG) was enacted on 31 July 2009. By this Act, remuneration of the management board members was strengthened and disclosed in accordance with transparency principle.[131]

Some provisions are available in New TCC and the existing TCC being compatible with recommendation of EU related to financial benefits that were provided to the company directors. According to this, benefits to be provided from the company profit to the members of the board of directors shall be mentioned in the articles of association (TCC Art. 279/5, New TCC Art. 339/f.). If the benefits are not set forth in the articles of association, they shall be mentioned in the general shareholders` meeting (TCC, Art. 369/3). [132]

EU has stated being mainly compatible with recommendations of EU in the Screening Report Turkey, Corporate Governance Principles of CMB about the board of directors and independent directors, financial benefits that were provided to directors.[133] This harmonisation has still been consolidated with the New TCC. However, while preparing the law, implementations in member countries has not been considered. To be reflected the theoretical

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[130] Ekşit, pg. 456.

[131] Werder/Talaulicar, pg. 48.

[132] Ekşit, pg. 458.

[133] Screening report Turkey Chapter 6- Company Law http://ec.europa.eu/ enlargement/pdf/

changes to the implementation, arrangements in member countries must be considered and the implementation oriented regulations must be removed.

CMB Principles includes the appropriate arrangements for recommendations of EU about board of directors. Listed companies on Istanbul Stock Exchange give place reports in web sites and annual reports since 2004 whether they comply with the corporate governance principles. To comply with these principles is optional, but the publication of reports on compliance with the corporate governance principles is an obligation.

In Corporate Governance Principles Compliance Report arranged by CMB, in accordance with "the recommendation on fostering an appropriate regime for the remuneration of directors of listed companies"[134] , in this respect transparency has been established, predicting the provision of

> *"All sort of rights, compensations and wages granted to the members of the board and the criteria that are used to determine them, whether a remuneration is implemented when determining remuneration of the board of directors according their performance and the performance of the company. In this section, additionally, whether the company lends money to any member of the board and the managers; whether it provides credit to them; whether it prolongs the terms of existing loans and credits; whether it improves the borrowing conditions; whether it extends credit under the name of personal credit means through a third person or it provides warranties, such as guarantee and if one or more than one of these cases take place, then its grounds and the conflicts of interest that result from this incident will be disclosed."*[135]

However, there are some differences between Corporate Governance Principles at the New TCC and recommendations of EU, like: not to provide much detail in the clarification about financial rights provided to the managers as an example to basic differences, not being an obligation for setting up remuneration committee responsible for the identification of the financial rights provided to the directors and nomination committee responsible for

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turkey/screening_reports/screening_report_06_tr_internet_en.pdf accessed 15.04.2011.

[134] Ekşit, ibid pg. 458-459.

[135] Corporate Governance Principles Compliance Report, http://www.spk.gov.tr/ display-file.aspx?action=displayfile&pageid=56&fn=56.pdf accessed on 16.04.2011.

the member selection of the directors. Some judicial functions that must be exercised by these committees, have been exercised by Corporate Governance Committee[136] stated in CMB Corporate Governance Principles.[137] On the other hand, nomination committee and remuneration committee are suggested for listed companies. For this reason when it is required, CMB can regulate these committees. However in New TCC, there is no obstacle to any provision of setting up these committees. Thus, while being evaluated the liability of directors, the presence of these committees has an importance for proof of faultless of the directors. [138]

4. Stakeholders

Stakeholders of the joint stock company are defined narrowly in TCC that they are only creditors or employees of the company (Art. 466/3, 468). On the other hand, CMB defines wider stakeholder as follows:

> *"A stakeholder of a company is defined as any person, entity or party, who have an interest in the operations and reaching the targets of the company. These parties may be persons/groups who have a binding contractual agreement with the company; or it may be persons/groups who have no binding contractual agreement with the company. Stakeholders of the company can comprise shareholders as well as employees, creditors, customers, suppliers, trade unions, various non-governmental organizations, governmental organizations and potential investors."*[139]

Many studies have been conducted on the factors affecting capital market investment, and it is concluded that a significant impact has been achieved by legal reforms.[140] Holding an important place in the New TCC and being one of the main goals of corporate governance is the investors' negligence

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[136] "A corporate governance committee should be established in order to monitor the company's compliance with the corporate governance Principles and perform improvement studies and offer any possible suggestions to the board (CMB principles, Part IV/5.7)."

[137] Ekşit, ibid pp. 459-460.

[138] Helvacı, ibid pg. 219.

[139] CMB principles, stakeholder, pg. 35

[140] Ekşit ibid pg. 467.

in listed companies and, in the narrower sense, to strengthen the shareholder's position.[141]

New TCC has a special importance in the concept of stakeholders. And it has provided shareholders herewith creditors, employees, customers, suppliers and distributors the beneficial opportunity from the transparency principle. It has been provided that these persons can easily access to fair information.

Creditors have the right to sue the company's directors or auditors in case of any violation against the law or the articles of association (New TCC, Art. 553-554). Additionally, in order to protect creditors and employees, impact of the merger or division on the employees and creditors of companies participating in the merger or division shall be explained in a report (New TCC, Art. 147, 169).

One of the key issues of corporate governance is representation of employees which is laid down in Art. 14 of the directive 2004/25/EC on takeover bids. New TCC gave a special importance in the right to information of employees by transparency but unfortunately there is no provision about representation of employees.

While New TCC was being arranged, the Council Directive 2001/86/EC of 8 October 2001 has been taken into consideration in "Supplementing the Statue for a European company with regard to the involvement of employees" [142] and in this regard aligned with the EU Acquis.

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[141] Tekinalp, Kurumsal Yönetim, pg. 636.

[142] Available online at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do? uri=OJ:L:2001:294:0022:0032:EN:PDF accessed on 27.04.2011.

CONCLUSION

For the first time in Turkish Law CMB Principles and corporate governance have been turned into a codex. However, these principles which have been prescribed for publicly held joint stock companies, are the nature of comply and explain. Along with New TCC, corporate governance has gone out of a system applied just only for publicly held joint stock companies, turned into a structure in nature of binding for all joint stock companies.

By New TCC, corporate governance principles do not only comply and explain principles, but have turned into statutory provisions because New TCC, on the one hand, has directly laid down principles and general provisions in relation to corporate governance principles and, on the other hand, has made regulation in some provisions in accordance with the principles.

The provisions in the first group may be listed as; authority of the CMB to lay down rules on disclosure and rating with regard to compliance with corporate governance principles (Art. 1529); corporate governance disclosure and submission thereof to the general shareholders' meeting by board of directors (Art. 375/f); early risk recognition and management committee (Art. 378); in this context warning duties of auditors (Art. 398/2-4); delegation of management in accordance an internal regulation (Art. 367); executive directors (Art. 370); audit in compliance with international auditing standards (Art. 397 et seq.).

In the second group, some of the concrete provisions are inter alia as follows;

(1) In the field of founding and basic principles: Founder benefits (Art. 348), founders declaration (Art. 349), operational auditor report (Art. 351), equal treatment principle (Art. 357), prohibition of shareholders becoming indebted to the company (Art. 358).

(2) In the field of board of directors: the removal of the obligation to have a share of the board of directors (Art. 359); representation of minority on the board of directors (Art. 360); insurance of the damage that may be incurred

by the company due the faults of board members committed while performing their duties (Art. 361); remedial measures about capital loss, excess of liabilities over assets (Art. 376 - 377).

(3) In the field of audit : Independence, neutrality, international standards on audit, prohibition of other services to clients for auditor and consultancy, annual report of the board of directors to be within the scope of audit, risk identification and audit of if the internal control order conforms with the standards.

(4) In the field of general shareholders` meeting: the determination of the non-delegable duties of the general shareholders` meeting (Art. 408); internal regulation of general meeting (Art. 419); company agent, independent agent, institutional agent (Art. 428 vd.); restriction of privileged vote (Art. 479).

(5) Differentiated solidarity liability (Art. 557).

(6) Transparency: web sites (Art. 1502) (New TCC, General Justification No. 136).

Corporate governance has attracted attention worldwide, become prevalent, each related international organization and country have had codex of conduct in this respect. However, the last word on the principles has not been mentioned yet. It has not clarified that these principles are code of conduct or the principles that shape the future. However, we can say that corporate governance principles are an effective vehicle providing standardization of company law of EU member countries because certain forms of conduct are recommended with these principles firstly to the companies. After being provided a certain ground, harmonization of municipal law systems with statutory provisions, is ensured. Some principles are being implemented first in practice and then taken under the legal guarantee. Thus, both companies align with standard judicial system and resistance of groups who try to hold present circumstances against changes, decrease.

Turkey towards EU, continues the work of keeping pace with "European Company Law" that has come into existence. However, the existing TCC has a line too far from this harmonisation. Not being able to be changed for many years, gaps in TCC have been filled with CMB communiqués and capital markets have tried to be brought into line. However, CMB as being an administrative institution and also communiqués as being administrative arrangement, bears another debate. Even though constructive arrangements related to capital market have occurred, it is inconsequent relating to law that communiqués make arrangements like law.

Finally, with the adoption of the New TCC this gap is filled in with the law. New TCC has aligned with related regulations of EEC/EC about corporate governance, by provisions mentioned above. However harmonisation is not in question on some topics like voting by correspondence, period of convocation as mentioned above. Nonetheless unfortunately, during the preparation of New TCC, the arrangements of EU in 2006 and post-2006 can not be examined carefully.[143] Development reports related to corporate governance in member countries must be examined and related arrangements made to provide updating because both amendments - theoretical and method of implementation- are critically important. This lack can be supplied by regulations related to the application of New TCC and amendments to be made later in CML.

[143] The reason of this that the draft was held for a long time in The Grand National Assembly of Turkey after arranging it and that it has been accepted without making the latest updates.