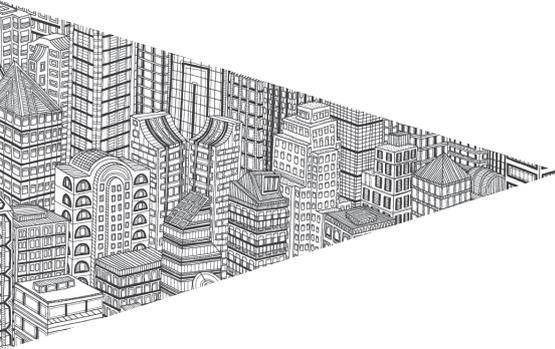


# International Tax Alert



## Turkey welcomes new commercial code

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The new Turkish Commercial Code No. 6102 (new Commercial Code) has been accepted by the Grand National Assembly and published in the Official Gazette on 14 February 2011.

The Commission in charge of replacing the former half-century-old commercial code consisted of judges, scholars, practitioners and representatives of non-governmental organizations and public institutions. A total of 631 meetings were held during its working period of more than five years. The Drafts were shared with the public and opinions from all relevant institutions and organizations were taken and discussed.

The new Commercial Code integrates Turkish commercial regulations with EU legislation and puts into effect generally accepted financial reporting and auditing principles, paves the way for democracy among shareholders, introduces new concepts such as transaction auditor and facilitates the use of information technology tools. Granting a transition period to the market with a majority of its provisions, the new Commercial Code will enter into force on 1 July 2012.

The necessities which led to the development of a new Commercial Code can be summarized as follows

- ▶ The former code's insufficiency with regard to the transparency, auditing, institutionalization, and accountability of companies
- ▶ Harmonization of the commercial code with new Turkish corporate income code, Turkish civil code and Turkish penal code
- ▶ The need to ease bureaucratic procedures, ending disputes over intellectual copyrights, fighting the gray economy, providing an easier monitoring for stakeholders and drawing more foreign direct investments to the country

- ▶ Necessity to reflect the changes which are observed in the IT industry and company structures during the last fifty years (participation in general meetings through the internet, publication of company information on the internet, corporation sole, professional boards of directors, group companies, consolidated and uniform accounting, external audits, etc.)
- ▶ Necessity of speaking an international language while conducting business

The new Commercial Code consists of six main sections: namely commercial enterprise, commercial companies, negotiable instruments, maritime commerce, transportation operations and insurance law.

### Commercial enterprise

#### Commercial books and trade registry

- ▶ Trade registries are to be kept by the Chambers of Trade and Industry, establishing a data bank to present the registrations on line.
- ▶ The use of commercial books as evidence continues but their utilization as certain proof is removed.
- ▶ Opening and closing certification of the books by the notary is required. Closing certification should be completed until the end of the 6th month of the following period.
- ▶ The Board of Turkish Accounting Standards is granted vast authority regarding the commercial books to be kept and Turkish Accounting

Standards compliant with International Financial Reporting Standards will be taken as the basis in keeping the commercial books.

- ▶ Turkish Accounting Standards, and in this respect the International Financial Reporting Standards are mandatory in keeping the books, the most important purpose of this amendment prescribed for keeping commercial entries and books is to ensure that an expert third party can comprehend, based on the books, the financial situation of the enterprise in a reasonable period of time.

#### Corporate governance

- ▶ The Code obliges all types of companies to keep external auditors and be audited by professional and independent auditors complying with international auditing and Turkish financial reporting standards.
- ▶ More effective provisions are introduced for the prevention of unfair competition and for protection of consumers.
- ▶ Publishing a corporate governance report has become mandatory for publicly held companies.

### Commercial companies

#### Capital structure and minimum capital requirements

- ▶ Although the minimum capital required for a joint stock company remains the same, TRY 50,000 (approximately €25,000), the Code expanded the capital in-kind including IP rights, domain names, tradenames, brands. Moreover,

with the new Code, joint stock companies are able to have a single shareholder eliminating the need for foreign companies to enter mandatory partnerships.

- ▶ For limited companies, the minimum capital requirement has been increased from TRY 5,000 to TRY 10,000. Upon establishment, the capital must be fully paid up in one instalment and in cash. Limited companies are also able to be established with a single shareholder.
- ▶ With the new Code, the partners of a limited company can have more than one share and the transfer of shares has been simplified. The transfer may be made easier by the articles of association. If the partners aim to have a closely held company, the transfer of shares may be made harder or prohibited.
- ▶ The obligation of being a shareholder to be a member of the Board of Directors in joint stock companies is abolished.

#### Shareholder rights

- ▶ Shareholder rights (the rights to sue, to gather information, to inspect) have been enhanced, minority rights have been enriched and privileged shares have been restricted.
- ▶ The position of shareholders is strengthened (shareholder rights are expanded, new rights of action are recognized, the use of rights is rendered easier and more effective, importance is given to transparency, privilege of vote is limited, the restriction on the

transferability of registered shares is released from arbitrariness, notification obligations are foreseen, an obligation to give reports to boards of directors regarding certain matters is adopted, etc.).

- ▶ The company may acquire its own shares up to a maximum of 10% of capital provided that an authorization from the General Assembly is obtained. The company may not acquire or have acquired its own share if it becomes a single shareholder.
- ▶ Besides the concept of shareholder, the concept of stakeholder is equivalently taken into account by the Code. The rights of the stakeholders, such as creditors, bond holders, etc., have been safeguarded.

### **General assembly and board of directors**

- ▶ The liability of the board of directors has been regulated in detail. According to the new Code, members of the board of directors are jointly liable for each and every transaction of the company unless a responsible person is assigned for a specific duty with a written resolution of the board of directors. In this respect, the assigned person or persons or, if there is no assignment of duty, the members of the board of directors will be liable if they are in fault during the fulfilling of their duties.
- ▶ The new Code enables the arrangement of online general assembly meetings, where the

shareholders may participate and vote online. In listed companies; the arrangement of online general assembly meetings would become obligatory upon promulgation of related by-laws.

- ▶ The board of directors can now even be composed of only one director who is not required to be a shareholder of the company. The Code also enables legal entities to become board members. The Code enables the board of directors' meetings to be held on-line, and this will provide the directors the opportunity to attend to the meeting without having to travel to the place where the meeting will take place.
- ▶ At least one member (authorized to represent the company) should be resident in Turkey and be a Turkish citizen.

### **New auditing principles**

- ▶ Unlike the current system according to which the statutory company auditor will be assigned among any Turkish citizen individuals as one of the mandatory organs of the joint stock and limited companies, with the new system introduced by the Code, although the auditor is no more a statutory organ of joint stock and limited companies, the auditor will have to be assigned among independent audit companies or Sworn-in Fiscal Consultants/ Independent Accountant and Fiscal Consultants. The actual audit will be performed, a report will be issued at the end and

liabilities will be assigned to these independent auditors. Independence of the auditor will become important.

### **Transaction auditor**

- ▶ The Code introduces the concept of transaction auditor who audits certain transactions of the company, such as a capital increase or decrease, merger, incorporation, division and issuance of securities. "Transaction auditor" is separate from "auditor" or "financial auditor" who audits the financial statements and the annual report of the company as well as the consolidated financial statements
- ▶ Transaction auditors can be:
  - Independent audit companies
  - Sworn Fiscal Advisors and certified public accountants for small and medium scale companies

### **Group companies**

- ▶ The concepts of controlling (parent) company and dependent (subsidiary) company have been defined and the legal status of these firms and their relationships have been specified.
- ▶ The subsidiary should prepare a report in the first three months of the following year detailing the inter-company relations annually. These reports will not be disclosed to the public but only their result section will be included in the annual report. The report includes information about:
  - Relations with the controlling company and subsidiaries

- All legal procedures
- Other measures taken or avoided for the benefit of the controlling company or its subsidiary in the previous operating year
- Actions and counter actions in legal processes, reasons behind the measures and their advantages and disadvantages (loss) for the company,
- If the loss is equalized, how this was realized within the operating year

### **Turkish financial reporting standards**

- ▶ Compliance with the Turkish Financial Reporting Standards, which are identical to the International Financial Reporting Standards (IFRS) became mandatory.
- ▶ The Code accepts the Turkish Accounting Standards Board (TASB) as a sole and exclusive authority to set Turkish Accounting Standards (TAS), and provides TASB with the appropriate exclusive powers.
- ▶ The provisions related to bookkeeping obligations, inventory, opening balance sheets, financial statements, balance sheet principles, prohibition of capitalization, provisions, prepaid expenses and deferred income, valuation, custody and disclosure are completely new.

### **Website requirement**

- ▶ Obligation to create websites has been introduced for companies.

- ▶ Obligatory content titles:
  - Assessment reports, founders' declaration, public offering commitments, text of decisions on the deferment of bankruptcy, BoD and GA decisions on the company's acquisition of its own shares
  - Documents on merger, spin-off, conversion
  - Documents pertaining to amendments to the articles of association
  - Documents, reports and BoD explanations on all kinds of calls
  - Information that must be disclosed as per the transparency principle and for the sake of information society
  - Financial statements, interim statements, balance sheets drawn up for specific purposes, BoD annual reports, money paid to directors, travelling expenses, indemnities
  - Reports prepared by auditors, special auditors and transaction auditors
  - Information demanded by related authorities (e.g., Capital Market Board)
- ▶ Failure to provide the obligatory content constitutes grounds for cancellation of the related decision and the Board of Directors and managers at fault would be liable.
- ▶ The website must be open to everyone's access.

- ▶ A content put on the website remains there for at least 6 months. (This period is 5 years for financial statements).

### **Penalties**

- ▶ Unlike the current Turkish Commercial Code, the Code prescribes severe sanctions.
- ▶ Board of directors' members, managers and auditors of companies who fail to fulfil certain liabilities prescribed under the Code can be penalized with imprisonment in addition to judicial fines.

### **Negotiable instruments**

- ▶ Correction of simple mistakes in translation and amendment of some minor inconsistencies have been enabled.
- ▶ The prohibition against payment of checks, which was frequently abused, is removed in the new Code.
- ▶ Electronic signature is not applicable for negotiable instruments.

### **Transportation operations**

- ▶ Provisions regarding transportation operations used to be regulated under negotiable instruments in the former commercial code. A separate section has been created in the new Commercial Code.
- ▶ The regulations regarding transportation operations have been rearranged according to the Convention Merchandise Report (CMR) regulations.

## Maritime commerce

Maritime commerce law is another area which the Code fundamentally modifies. The institutions and provisions contain innovations, some new institutions and provisions were added, and out-of-date provisions were removed. While the former regime was in line with the Hague Rules, the Code creates a mixed system based on Hague-Visby and Hamburg Rules.

Highlights may be summarized as follows:

- ▶ Time charters are now included within the Code. However the new Code has been criticized for treating time charters as a separate type of contract, i.e., they have not been placed with other types of contracts of affreightment.

- ▶ Provisions regarding overseas sales, which had been inspired by the Incoterms of the 1940s and which do not meet current needs, were also removed.
- ▶ According to the Code, the carrier will be liable for loss or damage to the cargo as well as losses arising out of delay. This seems to be the main essence of the Hamburg Rules and significant evidence of deviation from Hague-Visby Rules.
- ▶ Deficiencies in the system in the current regulations were corrected, and the new provisions were attached to a scientific system.

## Insurance law

- ▶ Insurance agreement provisions are expanded in a manner that covers all sorts of insurance, and the terms are redefined.

- ▶ Life insurance is realigned in accordance with new products developed in the area and with the needs in practice.
- ▶ Informing and enlightening insurance holders before the execution of and during the agreement has become mandatory for insurers and their agencies.
- ▶ Certain kinds of insurance, such as fire, agriculture, or burglary insurance are not separately regulated by taking into account the dynamic and developing structure of insurance law, and general clauses suitable for each sort of insurance are adopted.
- ▶ Liability insurance, which did not exist in the former code, is quite common in practice, and which is of great importance for today's insurance business, is regulated.

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EYG no. CM2311

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