

# GEDİK & ERAKSOY

September 2018

## *The Communiqué on Implementation of Article 376 of the Turkish Commercial Code*

*The Communiqué on the Procedures and Principles Regarding the Implementation of article 376 of the Turkish Commercial Code No. 6102 (the Communiqué) was published in the Official Gazette dated 15 September 2018 and entered into force as of its publication date. The Communiqué, which is applicable to joint stock companies (anonim şirket), limited companies (limited şirket) and partnerships divided into shares (sermayesi paylara bölünmüş komandit şirket), is expected to be a roadmap for financially distressed companies.*

Article 376 of the TCC sets out the general framework that must be implemented by the board of directors of a company facing insolvency or technical bankruptcy issues. The Communiqué aims to clarify and complement the remedial actions that could be taken within this framework. The Communiqué also sets out a temporary principle in relation to the treatment of foreign exchange losses in the calculation of the loss of capital or insolvency.

### 1. Remedial actions

The general framework and obligations under article 376 of the TCC relates to the three different insolvency tests as follows. Article 376 of the TCC as well as the Communiqué sets out the actions that must be taken if a company fails these tests.

#### (a) The 1/2 test

If the latest annual balance sheet of a company reveals that the company has suffered losses equal to 50% of the sum of its share capital and its statutory legal reserves, then the board of directors must call a general assembly of shareholders' meeting immediately and propose remedial measures.

While the TCC was silent on the remedial measures that could be proposed by the board of directors, the Communiqué sets out a non-exhaustive list of actions that the board may propose. These actions include increasing the share capital or remedying the capital deficit, shutting down or downsizing production units, disposal of subsidiaries or changing the marketing strategy.

The general assembly of shareholders is not bound by the remedial measures proposed by the board of directors and may decide on implementing other measures to mitigate the effects of or to resolve the financial distress.

#### (b) The 2/3 test (ie "technical bankruptcy" or "teknik iflas")

According to article 376 of the TCC, if the latest annual balance sheet of a company reveals that the company has incurred losses corresponding to 2/3 of the sum of its share capital and its statutory legal reserves, then the board of directors must promptly call a general assembly of shareholders' meeting, during which the general assembly must decide to take one of the following actions: (i)

decrease the share capital by 2/3 and resume operations with the remaining 1/3 of the share capital; or (ii) remedy the capital deficit.

In this regard, the Communiqué brings in further clarifications and describes how the above-mentioned actions should be taken. The Communiqué also includes an additional action, ie increase of the share capital, to the list of actions which must be considered by the general assembly of shareholders.

The Communiqué reiterates the consequences of the general assembly of shareholders' inability to decide on any of the above-mentioned actions. Accordingly, the general assembly of shareholders' failure would result in the dissolution (*sona erme*) of the company and the company must be liquidated in accordance with the liquidation procedure set out under the TCC.

(c) Balance sheet insolvency ("*borca batıklık*")

According to article 376 of the TCC, if there are concerns that the assets of the company might be insufficient to meet its liabilities, the board of directors is obliged to furnish interim balance sheets based on both the "liquidation value" (*muhtemel satış fiyatı*) and the "going concern value" (*işletmenin devamlılığı esası*) of the company's assets. If these interim balance sheets reveal that the liabilities of the company exceed its assets, the board of directors must notify the competent court of the financial status of the corporate debtor and request the court to declare the corporate debtor bankrupt. The same article also set out certain exemptions from filing for bankruptcy.

The Communiqué provides for further guidance as to how the balance sheet insolvency might be detected. Accordingly, the annual or interim financial tables, audit reports (if relevant), reports of the early risk detection committee or the board of directors' own assessments may signal a balance sheet insolvency.

The Communiqué also provides that before filing for bankruptcy, the board of directors may propose the remedial actions applied in the loss of 2/3 of the share capital and statutory legal reserves as explained in Section 1(b) above.

2. Treatment of FX losses

According to temporary article 1 of the Communiqué, foreign exchange losses arising from the outstanding foreign currency denominated obligations *may* be disregarded until 1 January 2023 while making calculations in order to detect loss of share capital (ie for the "1/2 or 2/3" tests) or balance sheet insolvency.

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