

Criminal Liability of the Board of Directors Members

The board of directors [“Board”] stands out as a body that undertakes the management and representation duties of a joint stock corporation and is endowed with the power that can affect the interests of the corporation as well as its related parties. Such broad authority brings with it the same degree of responsibility. Although such responsibility mostly results in legal liability, the legislator did not remain silent on the fact that the activities of the Board are directly related to the market economy, and thus, imposed criminal sanctions in connection with the actions of the members. In this respect, the use of management and representation powers by the Board members or their personal actions may lead to criminal liability.

Criminal liability of the Board members often arises during the exercise of their management and representation duties, however, such liability may also incur as a result of their personal actions. Although the provisions regarding the criminal liability are regulated in detail under Turkish law, they are quite dispersed. Penal sanctions for the Board members are regulated in more than one legislation, the Turkish Commercial Code No. 6102 [“TCC”] being the primary one.

I. Criminal Liability Under the Turkish Commercial Code

Criminal liability provisions regulated in the TCC are not specific to the Board members but are binding on all merchants. However, considering the authorities and responsibilities of the Board in the corporation's management, the members are often the perpetrators of the relevant crime. Sanctions regulated in the TCC are mostly punitive or administrative fines, yet, in some cases it is also possible for the Board members to face imprisonment.

A. Cases of Imprisonment

The legislator did not consider fines sufficient for certain crimes regulated in the TCC and imposes imprisonment sentence instead. For example, if the documents and statements related to the incorporation, capital increase or decrease, merger, spin-off, change of company type, as regulated in Article 549 of the TCC, are false, the Board members may face imprisonment from 1 [one] to 3 [three] years. Another wrongful act for which prison sentence is imposed happen when the share capital is shown as committed or paid even if it has not been fully committed and paid in. In such case, those responsible would be punished with imprisonment from 3 [three] months to 1 [one] year.

Moreover, without prejudice to the provisions of the Capital Market Law No. 6362, in case of collecting money from public to establish a company or increase the share capital, the perpetrators would be sentenced to imprisonment from 6 [six] months to 2 [two] years.

Another important case for which prison sentence is regulated relates to unfair competition. In addition to legal liability for indemnification, imprisonment of up to 2 [two] years or a corresponding judicial fine is stated for those who deliberately commit acts constituting unfair competition.

B. Cases For Which Punitive Fine is Imposed

Directors of a corporation must comply with the principles of public disclosure and transparency while performing their managerial and representative duties. Criminal liability of the directors may come to the fore due to their behaviors contrary to these obligations. For example, the Board members who do not fulfill their obligation to prepare corporate report relating to controlling or affiliated companies would face the risk of judicial fines of not less than 200 [two hundred] days. Again, those who commit the crime of preventing the audit of the corporation in violation of the principle of transparency would be punished with a judicial fine of not less than 300 [three hundred] days.

In addition, judicial fine is imposed on those who failed the obligation to establish a company website or duly upload the necessary content on the site.

One of the principal duties of the directors is related to the protection of the company's share capital. This duty contains the prohibition to become indebted to the company. Some penal sanctions are stipulated in the TCC to prevent this situation. For example, if the corporation lends to the shareholders in case the profits, together with the reserves, are not enough to cover the previous years' losses, the responsible Board members would be punished with a judicial fine of not less than 300 [three hundred]

days. Further, in case of lending to non-shareholder members of the Board or their relatives who are not shareholders, a judicial fine of not less than 300 [three hundred] days would be imposed.

C. Cases For Which Administrative Fine is Imposed

The TCC stipulates cases where administrative fines are regulated in addition to imprisonment and judicial fines. For example, an administrative fine of 10.242-Turkish Liras is imposed on persons who do not fulfill their bookkeeping-related obligations.

Furthermore, it is now a legal obligation to have registered bearer share certificates issued by closed companies before the Central Securities Depository [“CSD”]. Accordingly, in closed companies, both the shareholders and the company's Board are obliged to notify the CSD about the bearer share certificates issued by the corporation. [For more information on this matter, you can review our article “**The Awaited Rules on Registration of Bearer Shares Entered into Force**” on our website.] Administrative fine of 5.000-Turkish Liras may be imposed if the Board members do not comply with such notification obligation.

II. Criminal Liability in Other Laws

A. Offenses Regulated Under Turkish Penal Code

The Turkish Penal Code No. 5237 [“TPC”] sets forth various white-collar crimes which may also be committed by a Board member. The most common one the offense of abuse of trust regulated in Article 155 of the TPC. Accordingly, if a Board member harms the company by abusing the powers given to him/her in order to obtain personal benefit, s/he would commit the qualified form of abuse of trust in accordance with Article 155/2 of the TPC and may be sentenced to up to 7 [seven] years imprisonment.

B. Criminal Liability Arising from Workplace Safety-Related Duties and Duty of Care

It is possible for the Board members to be subject to accusations due to their negligent behavior. Those who do not take the relevant precautions stipulated in the laws regarding the field of activity of the corporation may find themselves in the position of perpetrator as a result of such negligence. Since the company executives are deemed as the employer, they have some responsibilities arising from this qualification. Accordingly, in case safety measures to prevent work accidents have been neglected, criminal liability of the executives may come to the fore. For example, in a fatal work accident, it is possible for executives to be held liable for reckless murder –and even in some cases, murder with probable intent.

Responsibility of the executives may not only be towards the employees, but also to the third parties and even the customers of the corporation. For instance, an executive of a corporation operating in the food industry would be held responsible for reckless murder or injury if any of the customers dies or gets injured by poisoning due to failure of taking the safety precautions set out in the relevant regulations pertaining to corporation's field of activity.

C. Offences Regulated in the Execution and Bankruptcy Law

Criminal liability of the Board members may also incur pursuant to Article 345 of the Execution and Bankruptcy Law No. 2004 [“EBL”]. Accordingly, if the offences regulated in the EBL occur during the management of a legal entity, the Board members would be held responsible. For example, those who act in violation of verdicts about doing or not doing something would be punished with a detention of up to 3 [three] months. If this act is committed by a legal entity, the sanction would be directed to the Board members.

Another example of the offences regulated in the EBL is the obligation to declare bankruptcy. Accordingly, responsible Board members who fail to declare bankruptcy when the company's assets are not sufficient to pay its debts will be sentenced to imprisonment from 10 [ten] days to 3 [three] months upon the complaint of one of the corporation's creditors.

D. Offences and Administrative Sanctions Regulated in the Capital Market Law

Some penal sanctions regulated in the Capital Markets Law No. 6362 [“CML”] may lead to the liability of the Board members of the corporations subject to capital markets legislation. Article 103 of the CML greatly expands the area of responsibility, and it is stipulated that those who violate the provisions of the CML, or the decisions taken by the Capital Markets Board would be punished with an administrative fine from 51.236-Turkish Liras to 640.442-Turkish Liras.

The CML does not only regulate administrative sanctions but also offences. For example, the offence of insider trading regulated in Article 106 will happen if any interest is obtained by using information that has been learnt during performance of the duties and could affect the value of a market instrument or investor's decisions. Those who commit this crime would be sentenced to imprisonment from 3 [three] to 5 [five] years or judicial fine.

III. Criminal Liability of Legal Entities

Under Turkish law, legal entities cannot be subject to criminal sanctions. Only security measures, which are cancellation of the operation license and confiscation can be applied to legal entities. However, Article 43/A of the Misdemeanor Law No. 5326 allows to hold legal entities liable by referring to some offences regulated in the TPC and other laws. Accordingly, in case those crimes are committed to the benefit of a legal entity, an administrative fine from 10.000- Turkish Liras to 50.000.000- Turkish Liras would then be imposed on the corporation provided that the fine corresponds not less than twice of the profit obtained through the criminal act. Crimes of bribery, fraud and bid rigging are examples of the crimes mentioned in the respective provision. These crimes can be committed by the Board members themselves, or by non-directors who are involved in the company operations.

IV. Assessment

Considering the nature of their duties and authorities, the Board members are endowed with broad powers, which naturally bring same level of responsibility. Besides their legal liability, it is possible for the members to face criminal sanctions including imprisonment. An explicit distribution of duties and responsibilities among the Board members pursuant to the relevant regulations would limit their liability to their assigned duties and prevent them from facing criminal sanctions in possible adverse situations.

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