



Turkey: Independent Board Members

Authors: Gönenç Gürkaynak, Esq., Nazlı Nil Yukaruç and Işıl Ertekin Çokça, ELIG Gürkaynak Attorneys-at-Law

I. Introduction

Corporate governance principles are essential in order to protect benefits of minority shareholders and investors. Appointment of independent members is one of the most important elements that ensure proper implementation of the corporate governance principles. As a part of corporate governance principles regulated under the capital market legislation, independent board members must be appointed by the companies who are expected to objectively supervise the company and enlighten the public if necessary. It is important to have an independent member who will execute his/her duties without being influenced in order to create reliable cooperation.

In light of the foregoing, Corporate Governance Communique No. II-17.1. (“**Communique**”) stipulates mandatory provisions regarding appointment of the board of directors. For example; as per the Communique, the board of directors must consist of at least 5 (five) members, a majority of the members of the board of directors must have non-executive duties and there must be independent board members among the non-executive board members. In addition, the number of independent board members cannot be less than 1/3 (one-third) of the total number of board members in the public companies and in any case there cannot be less than 2 (two) independent members.

In this article, our aim is to briefly summarize requirements around appointing of the independent board members and their duties.

II. Requirements to be an Independent Board Member

The Communique also determines specific criteria for the ones who wish to be an independent member of the board of directors. According to 4.3.6 of Corporate Governance Principles that is Annex 1 of the Communique (“**CGP**”), independent board members must hold the following qualifications:

- (i) must not have an employment relationship at an administrative level to have significant duties and responsibilities within the last 5 (five) years, not own more than 5% of the capital or voting rights or privileged shares either jointly or solely or not to have a significant commercial relation between the corporation, companies on which the corporation hold control of management or have significant effect and shareholders who hold control of management of the corporation or have significant effect in the corporation and legal entities on which these shareholders hold control of management and himself/herself, his/her spouse and his/her relatives by blood or marriage up to second degree,
- (ii) must not be a shareholder (5% and more), an employee at an administrative level to have significant duties and responsibilities or member of board of directors within the last 5

(five) years in companies that the corporation purchases or sells goods or services at a significant level within the framework of the contracts executed, especially on audit, rating and consulting of the corporation, at the time period when the corporation purchases or sells services or goods,

- (iii) must have professional education, knowledge and experience to duly fulfill the assigned duties,
- (iv) must not be a full-time employee at public authorities and institutions after being elected (except being an academic member at university provided that is in compliance with the relevant legislation),
- (v) must reside in Turkey,
- (vi) must be capable to contribute positively to the operations of the company, to maintain his/her objectivity in conflicts of interests between the corporation and the shareholders, to have strong ethical standards, professional reputation and experience to freely take decisions by considering the rights of the shareholders,
- (vii) must have time for the company's business in order to follow up the activities and duly fulfill the allocated duties,
- (viii) must not have conducted membership of board of directors more than a term of 6 (six) years in the last 10 (ten) years,
- (ix) must not be registered and announced as a board member representing a legal entity and
- (x) must not be the independent member of the board of directors in more than 3 (three) of the companies as such; the corporation or the controlling shareholders of the corporation who hold the control of management corporations and in more than 5 (five) corporations in total which are admitted to the trading on the exchange.

III. Appointment of Independent Board Members

Generally, independent board members are appointed by the general assembly in similar with the other members of the board of directors. The general assembly considers the candidate proposal for independent membership. Candidate proposals are prepared by the board of directors or by the nomination committee if it is established.

After receiving proposal for nomination from the current members of the board of directors and/or the shareholders, the nomination committee takes them into consideration. Candidates submit a written declaration to the nomination committee stating that he/she is independent within the framework of relevant legislation, articles of association and the criteria set forth in the CGP.

The nomination committee evaluates the candidates who wish to be independent board members and consider whether they fulfill the independence criteria determined under CGP. After evaluation, the nomination committee reports the candidates to the board of directors, the board of directors reviews the report and prepare a list consisting of legible candidates for independent members within the framework of the report of nomination committee and submits the list to the Capital Market Board ("**Board**") at least 60 (sixty) days prior to the general assembly meeting. The Board reviews the list and determines the ones who are capable of being independent member in line with the independency criteria. Appointment of the candidates who are not found as independent by the Board are not discussed during the general assembly meeting.

Also, the company must disclose at Public Disclosure Platform the list of the candidate independent members and of the candidates who have not been accepted as candidate independent member, at the latest with the announcement of the general assembly meeting. General assembly resolution shall be announced together with the opposing votes and the grounds thereof, via the corporate website of the company.

IV. Responsibilities of Independent Board Members

Under Turkish laws, independent members do not have different duties from the executive and non-executive members of the board of directors. However, it is mandatory for independent members to be objective and transparent. According to the Turkish Commercial Code No. 6102, all members of the board of directors are jointly and severally liable to the company, the shareholders and the creditors of the company for damage occurring due to their fault and non-fulfilment of the duties stated in the laws or the articles of association.

V. Conclusion

Independent members are essential players while maintaining corporate governance in publicly-held companies. Independent members must fulfill specific criteria stated in this article. Such qualifications are proof that such member must perform his/her duties by respecting independency and transparency. While participating in board of directors and committees, the independent members take responsibility for management and audit of the companies.

Article contact: Gönenç Gürkaynak, Esq.

Email: gonenc.gurkaynak@elig.com

(First published by Mondaq on February 3, 2022)