

## **Communiqué on the Procedures and Principles for Implementation of Article 376 of the Turkish Commercial Code Numbered 6102**

Communiqué on the Procedures and Principles for Implementation of Article 376 of the Turkish Commercial Code Numbered 6102 (“**Communiqué**”) is published in the Official Gazette and entered into force on September 15, 2018. The Communiqué outlines the procedures and principles for the implementation of article 376 of Turkish Commercial Code numbered 6102 (“**Law**”) which regulates capital loss and financial distress; and applies to joint-stock companies, limited liability companies and limited partnerships whose their capital is divided into shares. With the Communiqué, it is aimed to bring a guideline for the companies which have financial difficulties due to capital loss and financial distress by emphasizing the required steps should be taken by such companies. In case of capital loss and financial distress, the Communiqué comprehensively addresses certain steps should be taken by the companies facing with financial difficulties in parallel with the relevant law and introduced three different categories of companies: (i) the companies whose at least half of their share capital and legal reserves is not covered; (ii) the companies whose at least two-third of their share capital and legal reserves is not covered ; and (iii) all of their share capital and legal reserves is not covered. The Communiqué envisaged different measures for each situation:

- 1. If at least half of their share capital and legal reserves is not covered**, the managing body shall call the general assembly to the meeting by adding to the agenda that their share of capital and legal reserves are unrequited. It shall disclose the final annual balance sheet and the financial situation in such a way that each partner may understand (optionally may also submit a report on the subject) and shall present remedial measures and alternatives in order to improve the financial position of the company. At this point, the Communiqué provides an exception to the principle of adherence to the agenda by stating that this matter will be discussed in the general assembly even if the general assembly has not been invited to the meeting with such agenda, unlike the Law. Free of the numerous clauses principle, some precautions which might be recommended to be taken by the managing body such as completion or increase of the capital, closing or

reduction of some production units, sale of the affiliates and change of the marketing system are envisaged in Communiqué. The general assembly has right to accept to implement the remedial measures have been offered, or to change such remedies or to implement different remedies.

**2. If at least two-thirds of their share capital and legal reserves are unrequited due to loss of the company, the managing body has the obligation to call the general assembly for a meeting** and the following decisions may be taken by the general assembly:

- a) To continue with the remained one-third of share capital and resolve to capital decrease,
- b) Completion of capital,
- c) Increase of capital.

To continue with the remained one-third of share capital and resolve to capital decrease. shall be made in accordance with article 473-475 of the Law. In such case, short-term reduction might be made without applying protective measures for creditors. In case of completion of capital, the balance sheet deficits are covered by the unanimous decision of all or some of the shareholders. It is not necessary to cover the deficits in the reserves. Upon the resolution to complete the capital, the shareholders are obliged to pay the unrequited amount, and they do not have right to reclaim such amount or such amount shall not be considered as an advance payment for capital increase might be carried out in the future. These funds are considered within the capital completion fund in company's own funds. In case of a resolution about the increase of capital at the requested amount as well as a simultaneous capital decrease amounting to losses, an amount corresponding to at least one-fourth of the increased capital must be paid. In this case, there is both increase and decrease of share capital. In the systematic of the Communiqué, the increase rate does not have to be as much as the reduction rate. If the resolution is made only to increase the capital without capital decrease at the amount of the loss; the increased amount must reduce the loss rate below the 1/2 limit in the Communiqué. This regulation in the Communiqué also dismisses the discussion in the implementation of law and judicial decisions -even if it is open to discuss in terms of the hierarchy of norms- and allow the companies in capital loss to increase their capital directly. In the latter case, by the obligation to pay an amount corresponding to at least half of the capital before registration, only a commitment or the payment of a quarter of the increased amount was not considered sufficient.

If the general assembly does not take one of the three measures mentioned above, the company shall automatically terminate. In such case, the liquidation process for the company begins according to the liquidation provisions of the relevant law.

**3. In case of financial distress**, - if one of the above measures is not taken – it is foreseen for the managing body to apply directly to the court for the bankruptcy of the company. The detection of the financial distress which means that the total amount of the share capital and legal reserves become totally uncovered and loss of share capital mentioned above must be made voluntary or obligatorily at the companies which implements the rules of Turkish Accounting Standards according to TAS financials. In other companies, it provides in the light of the financial statements prepared based on article 88 of the Law.

the relevant Communiqué envisaged that companies with capital loss or financial distress might be merged with a company able to unrestrainedly use its' equity that can afford the capital loss. For the transferee company , existence of the equity which can afford the capital loss or financial distress can be considered as a precondition for the merger.

Lastly and most importantly, the Communiqué introduces a provisional article in order to prevent companies from being damaged due to foreign exchange differences in terms of foreign currency denominated loans. Until January 1, 2023, it is possible to exclude foreign exchange losses arising out of forthcoming foreign exchange debts from calculations to be made within the scope of article 376 of the Law to determine the capital loss or financial distress.

Respectfully submitted.

*This information note is prepared only from a general Turkish Law perspective and not as a comprehensive "legal opinion". Hence, information given in this note may differ due to special circumstances for each case and Gokce Attorney Partnership does not assume any liability in this regard. We do not purport to be qualified or opine and express any opinion as to the laws of any other jurisdiction other than the Republic of Turkey and we do not provide any opinion with regards to the taxation law of the Republic of Turkey*