Journal of International Commercial Law and Technology **Vol. 3, Issue 2 (2008)**

Recent Developments of Corporate Governance in the Global Economy and the New Turkish Commercial Draft Law Reforms [*]

Cuneyt Yuksel
cuneyt.yuksel@boun.edu.tr

Abstract. Corporate governance in a globalized economy has become one of the most important topics for the business environment and the governments. The proper implementation of corporate governance regulations by the companies bring out advantages for companies and the countries. High quality status of corporate governance means low capital cost, increase in financial capabilities and liquidity, ability of overcoming crises more easily and prevention of the exclusion of soundly managed companies from the capital markets. For years, the OECD has been working to promote use of the corporate governance principles since they were first issued in 1999 and revised in 2004 to support good corporate governance policy and practice both within OECD countries and beyond. In accordance with the developments in the global market the Capital Markets Board of Turkey issued the corporate governance principles of Turkey for the listed companies in June 2003 and amended these principles in 2005. Most recently, the new Turkish Commercial Draft Law proposes important changes and reforms for corporate governance in Turkey.

Keywords. Corporate governance, corporate law, Turkish Commercial Draft Law, Turkish trade law, corporate governance in Turkey

1. Introduction

Recently, the corporate governance in a globalized economy has become one of the most important topics for the business environment and the governments. A series of corporate scandals caused billion dollars of loss and this made a destructive effect on the investors' trust (Macavoy and Millstein, 2004, pp. 1-3). Some of the biggest companies in the U.S.A. and Europe such as Enron, Worldcom, Arthur Andersen and Parmalat, became bankrupt rapidly (Widen, 2003, p. 961; Elson and Gyves, 2003, p. 855; Enriques and Volpin, 2007, p. 123). It is widely accepted that bad management practices have triggered these company scandals. Recent developments in global economy have proved that the companies shall have more responsibility against all beneficiaries including employees, directors, shareholders, stakeholders, customers, suppliers and the society as a whole. Today there is no doubt that the companies shall be more accountable and transparent. In U.S.A. and Europe the legislators enact rules that are based on the management system having ethical standards rather than just free market principles.

For example in the U.S.A., in response to these financial scandals and the demands raised by international investors to protect shareholders and the general public from fraudulent practices in the companies, a legislation called Sarbanes Oxley Act [1] has been enacted (Lander, 2004; Chandler and Strine, 2004; Ribstein, 2002). The basic aim of this Act is to protect the rights of the investors by increasing the reliability and accountability of the financial reports that are disclosed to the public by the companies. According to this Act, the enforcement to abide by these principles has been assured by the immediate threat of excluding such firms from stock exchange markets and there are serious sanctions for the directors and consultants of these companies in case of violation. Despite these, the legal regulations are not sufficient to prevent high profile scandals. It should be noted that no matter how harsh rules are set and enforced the bottom-line in the ultimate goal relies heavily on the inner dynamics of the corporations, namely good and proactive governance.

In order to prevent the above-mentioned problems and ensuring the accountability, transparency and good management of the companies, a system called "corporate governance" has been invented. The term "corporate governance" was first used in USA and afterwards has been a subject for various debates, academic works and international documents (Gilson, 1996; Longstreth, 1991; Gilson and Kraakman, 1991; Williamson, 1984).

For years, the OECD has been working to promote use of the corporate governance principles since they were first issued in 1999 and revised in 2004 to support good corporate governance policy and practice both within OECD countries and beyond. [2] In light of above-mentioned developments, the Capital Markets Board of Turkey (hereinafter "CMB") issued the corporate governance principles of Turkey [3] for the listed companies in June 2003 and amended these principles in 2005. The CMB principles set forth corporate governance principles under four

[*] This paper was first published in Kierkegaard, S.(2007) International Law and Trade: Bridging the East-West Divide. IAITL. pp.247-258

sections; shareholders, public disclosure and transparency, stakeholders and board of directors. For all corporations, the regulatory framework for corporate governance is in Turkish Commercial Code (hereinafter "TCC") and recent changes have been made to this regulation by Draft Turkish Commercial Code (hereinafter "The Draft Code"). This paper focuses on the developments of corporate governance in Turkey especially those made in the Draft Code.

2. Definition

Corporate governance has succeeded in attracting a good deal of public interest because of its apparent importance for the economic health of corporations and society in general. However, the concept of corporate governance is poorly defined because it potentially covers a large number of distinct economic phenomena. As a result different people have come up with different definitions that basically reflect their special interest in the field. It is hard to see that this "disorder" will be any different in the future so the best way to define the concept is perhaps to list a few of the different definitions rather than just mentioning one definition.

According to the OECD definition, corporate governance is the relationship between corporate managers, directors and the providers of equity, people and institutions who save and invest their capital to earn a return (OECD, 2004). It ensures that the board of directors is accountable for the pursuit of corporate objectives and that the corporation itself conforms to the law and regulations. A similar definition is made by Monks and Minow (1995) wherein corporate governance is the relationship among various participants [chief executive officer, management, shareholders, and employees] in determining the direction and performance of corporations. According to Sir Adrian Cadbury corporate governance is holding the balance between economic and social goals and between individual and communal goals (Cadbury, 2000). The aim is to align as nearly as possible the interests of individuals, corporations and society. The incentive to corporations is to achieve their corporate aims and to attract investment. The incentive for states is to strengthen their economics and discourage fraud and mismanagement. Margaret Blair(1995, p. 19)states that "Corporate governance is about "the whole set of legal, cultural, and institutional arrangements that determine what public corporations can do, who controls them, how that control is exercised, and how the risks and return from the activities they undertake are allocated."

Governance is ultimately concerned with the alignment of information, incentives and capacity to act (Monks and Minow, 1995). It involves the monitoring of the corporation's performance and the monitor's ability to observe and respond to that performance. Insufficient and/or unclear information may hamper the ability of the markets to function, increase volatility and the cost of capital, and result in poor allocation of resources (La Porta *et al.*, 2000). It is apparent that market forces for transparency would be weaker where ownership is concentrated. This partially explains the lack of strong disclosure tradition in Turkey. Weakness in standards of transparency and accountability allow corporate management (therefore major shareholders) to avoid disclosure and manipulate markets by misinformation. These weaknesses are conduit to asset transfers and asset stripping. Effective disclosure requires legally mandated disclosure requirements, good accounting standards, independent auditors, and enforcement. These standards are highly significant in ensuring that stakeholders have sufficient, timely, credible, comprehensible and cost-effective information to monitor the company's performance (Gilson, 1996).

Effective governance needs stem from the structure of these huge corporations, the fundamental conflict arising from the separation of ownership and control (Berle, 1958). Clearly, good corporate governance practices will emerge from effective application of full transparency, sound auditing and compliance mechanisms (Pound, 1993).

This shows the importance of the sound corporate management practices. Empirical studies indicate that international investors now better realize the significance of corporate governance practices on the financial performance of companies and while adopting investment decisions, international investors believe that this issue bears more importance for countries that are in need of reforms, and that they are more ready to pay higher premiums for companies having sound corporate governance practices (Lipton, 1987; Yuksel, 2004, p.38).

Several studies have been and are still being realized in the area of corporate governance. These studies emphasize the fact that no single corporate governance model is valid for every country (Roe, 2003; Roe, 1993). Accordingly, the model to be established should be compatible with the conditions peculiar to each country (Black and Kraakman, 1996). However, the concepts of equality, transparency, accountability and responsibility appear to be main concepts in all international corporate governance approaches that are widely accepted (Shleifer and Vishny, 1997). Equality means the equal treatment of share and stakeholders by the management in all activities of the company and thus aims to prevent all possible conflicts of interest. Transparency, on the other hand, aims to disclose company related financial and non-financial information to the public in a timely, accurate, complete, clear, construable manner and easy to reach at low cost, excluding the trade secrets and undisclosed information. Accountability means the obligation of the board to account to the company as a corporate body and to the shareholders. Finally, responsibility defines the conformity of all operations carried out on behalf of the company with the legislation, articles of association and in-house regulations together with the audit thereof.

3. Corporate Governance in Turkey

In Turkey corporate governance principles are regulated in TCC and CMB's corporate governance principles. Even if the regulatory framework became satisfactory after amendments in the Draft Code some challenges still remain (Hacimahmutoglu, 2000). Family-controlled groups of companies are a common feature of the Turkish business scene, often with a high degree of cross-ownership between companies. Controlling shareholders often play a leading role in the management and strategic direction of company groups, many of which include companies that are listed on the Istanbul Stock Exchange. Without effective safeguards, however, there is potential for abuse, for example in situations where controlling shareholders impose commercial conditions that go against the interests of the company as a whole and minority shareholders. Market discipline – defined as the power of financial markets to persuade companies to meet corporate governance standards or risk public criticism, lawsuits or a sell-off in their shares – is still relatively weak. In order to solve this problem:

- the laws on deals involving related parties shall be strengthened, for example by implementing proposed amendments to Turkish company law requiring more disclosure about deals between companies that belong to a group and requiring controlling companies to compensate controlled companies for losses resulting from the exercise of control.
- Publicly held companies shall be required to give more detailed and easier-to-understand disclosure about who owns them and controls them, proposes tougher penalties for breaking the law and encourages the authorities to focus more resources on enforcing these laws.

There is also in Turkey a need for supervisory, regulatory and enforcement authorities to have the power, integrity and resources to act professionally and objectively. Independent regulators like the CMB need stable funding, freedom to decide how they spend their budget and clear support from government. The continued strong leadership and independence of the CMB and other independent financial sector authorities are crucial for the long-term vitality of the corporate sector in Turkey and the economy as a whole.

The Turkish accounting system is not compatible with the International Accounting Standards (IAS). This discrepancy restricts investors' ability to make informed decisions about investment alternatives. A research jointly undertaken by seven major global accounting and auditing firms compares written national accounting standards of sixty-two countries and benchmarks them against IAS. It is apparent that Turkey is one of the four countries (Lithuania, Slovenia, Morocco and Turkey) where national standards have at least one major difference from IAS and it is the only country with deviation in more than one area. It is reported that in two key areas, the absence of Turkish rules leads to important differences from IAS: In addition adjusted reporting and mandatory financial consolidation for parent enterprises. This benchmark is based on the accounting standards issued by the CMB. There is no set of generally accepted accounting principles that applies equally to all companies operating in Turkey other than general rules that govern the aspects of accounting in the Tax Procedures Code and the Uniform Chart of Accounts which prescribe a code of accounts and a format for presentation of financial statements. Indeed, CMB has issued draft standards on accounting and consolidation in line with IAS requirements; however the changes required in the tax code are pending to be discussed in the parliament after several postponements (Ararat and Uğur, 2003, pp. 58-75).

In Turkey, compliance with requirements is assured by internal audits, external audits and regulatory audits. The internal audit framework is denned in the TCC, but the provisions are vague. External audits are required only for listed companies. External auditors have to be certified by CMB. The Independent Audit Association founded in 1988 does not have statutory position to self-regulate the profession. It is arguable that the audits are credible and objective. In case of failures, the ISE and the CMB can issue private and public warnings, impose penalties, suspend trading or may put the companies on a ''watch list'' (companies on watch list can trade for only 30 minutes per day). Regulatory audits are conducted by the CMB or by external auditors appointed by the CMB in case of complaints, suspects or when there is a need such as in the case of mergers and acquisitions. Although the existing regulations and the planned improvements present significant improvements, compliance is still a problem to be addressed.

In Turkey, the fundamental document governing the shareholders' rights is the company's articles of association – which should provide for the rights to participate in the general assembly, to vote and acquire information, to have the company audited, to .le a complain, and to take civil or legal action. There are no mandatory provisions in the TCC. In addition, the TCC provides for privileged shares and imposes practically no limit to the extent of privileges that may be granted – including multiple voting rights, pre-determined dividend rate, priority entitlement at the time of liquidation etc. Minority rights start from five percent for public companies and ten percent for non-public ones according to the TCC. Shareholders can vote by notarized proxy by appointing a representative through a power of attorney; however the procedure is complicated and costly.

Empirical evidence shows that based on a study of a cross sample of countries including Turkey, issues pertaining to stakeholders rights are generally covered by the relevant country's own legislation (law of obligations, law of execution and bankruptcy, law of labor, etc.). Moreover, it was generally observed that no separate division was devoted to stakeholders' rights within the principles of corporate governance. However in some other cases it was observed that stakeholders' rights were dealt with under a separate heading within the principles of corporate governance. For instance, examining the European Union reveals that, some regulations aim to increase the employee participation in the governance of companies and there is a gradual shift within companies to incorporate this issue within their principles of corporate governance. In Turkey, the stakeholder's rights are not protected properly by TCC; however, the Draft Code by complying with international standards enacts stakeholder rights too.

The CMB monitors implementation of the CMB principles. In 2005 it reviewed all listed companies' 2004 Corporate Governance Compliance Reports, published a survey about listed companies' implementation and held follow-up discussions with company representatives and advisers to discuss the results. A similar review is done in 2006. The CMB has issued financial reporting standards based on the IFRS that were in effect as of January 2003. For the financial years 2003 and 2004, the CMB permitted publicly held companies to satisfy the CMB's financial reporting obligations by complying either with the CMB's new IFRS-based standards (specified in Communique XI: No. 25) or the pre-existing CMB standards (specified in Communique XI: No. 1) since 2005, all listed companies except banks have been required to publish audited financial statements prepared either in accordance with the CMB's IFRS based standards or current IFRS. On the other hand CMB issued corporate governance standards in 2003 and revised them in 2005. The CMB principles represent a statement of governance practices which reflect international good practice standards. Briefly, CMB Principles state;

Shareholders:

- The scope of the shareholders' right to obtain accurate information is extended by a recommendation on inserting a special provision in the articles of association, which would allow this right to be exercised more effectively,
- Companies should have in-house regulations consisting of provisions that would enable important decisions to be adopted at the general shareholders' meeting only,
- The effectiveness of voting rights should be increased and Principles limiting voting privileges of shares should be included,
- Principles should be adopted in order to remove any impediment to the free circulation of shares,
- Sound record keeping practices and the update of these records has strongly been advised.

Public Disclosure and Transparency:

- Shareholders and investors of a company need to have regular access to reliable and accurate information about the management and legal and financial status of the company.
- The aim of the principle on public disclosure and transparency is to provide shareholders and investors accurate, complete, and comprehensible and easy-to-analyze information, which is also accessible at a low cost and in a timely manner.
- While disclosing information, the company is recommended to use most basic concepts and terminology and avoid using vague or indefinite expressions that would result in confusion.
- Disclosed information should be unbiased. Any information disclosed to benefit the information needs of a particular group of shareholders as opposed to others is unacceptable.
- Under no circumstances should a company refuse to disclose information, which is required to be publicly disclosed, even if such information may be detrimental to the company. However this information shall not contain trade secrets.

Stakeholders:

- The stakeholders benefit from sound management and protection of the capital of the company. Disclosure of the company's operations to the public in an honest, reliable and transparent manner therefore enables the stakeholders to be informed about the status of the company. Within this context, the strict adherence to the corporate governance principles is both vital and essential from the stakeholders' point of view.
- Taking into consideration the fact that effective communication and cooperation between the company and its stakeholders is advantageous for the company in the long term, the company should respect the

rights of its stakeholders that is protected by law and mutual arrangements and contracts and secure stakeholders' rights.

- To be able to minimize any possible conflicts of interest that may arise between the company and its stakeholders and within the stakeholders, well-balanced approaches should be adopted and these rights should be considered as independent.

Board of Directors:

- The board of directors should fairly represent the company within the framework of the relevant legislation, the articles of association and the in-house regulations and policies.
- In adopting and applying the decisions, the board of directors should aim to raise the company's market value to the maximum extent possible.
- While managing the company, the board of directors should ensure that the shareholders acquire long-term and stable income.
- In conducting its business, the board should pay special attention to maintaining the balance between the interests of the shareholders and the company's growth prospects.
- The board of directors should perform its functions in a rational manner and act in accordance with the rules of good faith through maintaining the balance between interests of the company and the shareholders and stakeholders.
- The board of directors should be composed in a manner to enable utmost efficiency thereof and to perform its decision-making, management and representation duties independently, free of any conflicts of interest and influence. Level of skills, experience and degree of independence of the board members will serve as a useful tool in determining the performance level and success of the board of directors and therefore directly affects the success of the company.
- The independent board members are assumed to be objective in decision-making and have the natural advantage to praise the interests of the company, shareholders and stakeholders equally.

4. Complying with Corporate Governance Principles

Compliance programs are on the priority list of leading corporations of the world. In this regard, those Turkish firms that are internationalizing can benefit largely from the application of this widely accepted risk management method. Two major factors are taken into consideration when developing such a compliance program: based on norms (written rules and law), and based on ethics (virtues) (Berenbeim, 2005). Norms approach is about the firms abiding by the common law. Ethics based approach, also referred to as the behaviorist approach, is about the firms' everyday actions and practices complying with the values and virtues (Worthington, 2005, p.1). In this latter approach, firm has the initiative to choose and implement among various practices not based on norms but largely on free will. An effective compliance program should entail these six factors: a) setting compliance standards by the employees, b) delegation of responsibility to top management, c) providing effective communication among all employees, d) making rational moves to reach compliance such as controlling, auditing, and employee reports, e) standardizing the application of the program items, and f) to retaliate and to prevent wrongdoings.

Designing the work according to the law in affect, setting priorities, determining responsibilities, printing handbooks and procedures, training employees, and updating programs are the main determinants of success of these compliance programs. Compliance programs will benefit firms in many ways. By detecting unlawful practices firms can help reduce responsibility for managers and other employees. Firms can resolve prior conflicts using these compliance programs. Firms can also gain from such programs by designing the underpinnings of their organizational culture and educating their employees about the risk bearing law related issues.

An effective corporate governance system is mandatory for the betterment of the markets and economic development. In the Turkish setting, even though political stability and the macro economic indicators show improvement, a fully trustworthy investment environment has not been achieved, yet. Capital markets still can be characterized to provide low liquidity, short term, limited and high cost capital. In those economies where management scandals and poor governance practices prevail, managers steal from shareholder, majority shareholders steal from minority shareholders and the public. When we look at the big picture, in such examples the resources are wasted. In the global economy, it should be noted that, those firms with good and effective corporate governance will undeniably be much more valuable than those that lack such practices. Higher standards of corporate governance combined with the accountability of those who manage the vast resources will enable trust among investors all around the world and in Turkey.

According to Schneider (2006) , there are eight steps in developing a culture of compliance. First, establishing a vision for reasonable compliance system design is required. Having a clear and shared understanding of the reasons of such a program, its consequences and benefits is the essence of having such a

vision in the first place. Second, organizing the effort by evaluating prior efforts and identifying key stakeholders is necessary. The third step is to determine the compliance requirements. For this purpose applicable laws and regulations and relevant business practices should be considered. Fourth, these laws and regulations must be mapped to the relevant business activities and to the functional areas that are responsible. Fifth, prioritizing compliance requirements using a risk-based approach is advised. Sixth, drafting, reviewing and approving policies and procedures give us an initial program to work with. Seventh, a company should launch and implement this compliance program by means of first training employees and then communicating this effort to investors. Lastly, an annual review comprised of self-assessment, testing, escalation, and reporting is suggested. In this comprehensive model, companies are encouraged to perform a risk-based assessment of the current state of affairs on an ongoing basis. Schneider suggests that becoming compliant is more than putting policies and procedure in place (Schneider, 2006). Truly developing a "culture of compliance" requires leaders who clearly articulate the importance of compliance to the organization and who follow through with in-depth training for everyone. Employees at all levels must understand their responsibilities and how they support the organization's compliance efforts. Training should be an ongoing effort, not just a crash course.

5. The Draft Code

The proper implementation of these regulations by the companies will bring out advantages for companies and the countries. High quality status of corporate governance means low capital cost, increase in financial capabilities and liquidity, ability of overcoming crises more easily and prevention of the exclusion of soundly managed companies from the capital markets. On the other hand, with respect to the country, sound corporate governance means improvement of a country's image, prevention of outflow of domestic funds, increase in foreign capital investments, increase in the competitive power of the economy and capital markets, overcoming crises with less damage, more efficient allocation of resources attainment and maintenance of a higher level of prosperity.

The Turkish Commercial Code was adopted in 1956 and remained in effect for fifty years. When it came to effect, it was inspired by the best codes of its age and since then, most of the provisions remained same despite international commercial improvements in fifty years. The need to regulate trade law as per, recent developments in the local and global business environment, technological and legal developments and the requirements of Turkey's integration to the European Union, was the occasion of the efforts to modernize the TCC. European Union Commission's recommendation to start negotiations with Turkey introduced the obligation of not only harmonizing Turkish commercial regulations to EU *acquis communautaire* but also following the EU's action plans with respect to the commercial law. In accordance with these, the Draft Code shall regulate dynamic provisions to reconcile with the economic and technological developments and the commercial laws of the European Union member states.

On the other hand, extension of internet usage in every area has affected commercial law positively. Beginning with entrance into contract by electronic signatures, exchanging business documents and calling the directors, personnel, shareholders to meeting by e-mails or voting by e-mails addressed the need to change regulations in accordance with these developments. Since the beginning of 2000s, e-trade is used widely in Germany, France, Scandinavian countries and most of the other states. The Draft Code shall reflect these developments.

In light of these facts, the new Draft Code shall govern social responsibility of the companies and take corporate ethical standards into consideration.

The relevant Commission of the Ministry of Justice presented the Draft Code for public opinion in late February 2005. The Commission has paid particular focus to electronic transactions, consumer protection, minority shareholders' rights and corporate governance.

The global and national developments as the reason for modernizing the Turkish Commercial Code:

- The global economic developments,
- Harmonizing Turkish commercial regulations to EU Legislation (*acquis communautaire*),
- Technological developments and the extension of e-trade,
- Growing global competition,
- Establishment of the World Trade Organization,
- Aim to play a significant role in international markets,
- Insufficiency of the Turkish Commercial Code as to the new legal needs.
- In accordance with the above mentioned developments;
- The Draft Code has been regulated in a way which helps the judges solving the new legal needs.
- The requirements of Turkey's integration to the European Union have been met,
- Corporate governance principles have been regulated in the Draft Code,

- Besides shareholders rights, the stakeholders rights have been protected in the Draft Code,
- The capital protection, public disclosure, transparency and accountability principles have been regulated in the Draft Code,
- The organs of joint stock companies have been regulated in a global view,
- The independent auditing companies have been given more efficient and active role in the Draft Code,
- Turkish Commercial Code, which is the main legislation for the Turkish companies to compete with international companies in the global market, has been modernized.

According to a Report prepared by OECD Corporate Governance in Turkey (2004): A Pilot Study evaluates Turkish corporate governance standards and practices in light of recommendations in the OECD Principles of Corporate Governance. Turkey has a strong regulatory framework for corporate governance, according to the report. Disclosure to the market by listed companies is improving, and international standards for accounting and auditing are being introduced. The report urges the Turkish government to adopt as soon as possible proposed amendments to Turkish company law, including a proposal to centralize the process for setting accounting standards under the Turkish Accounting Standards Board. The report also examines the Draft Code about corporate governance standards.

5.1. Trade Registry and Commercial Records

Important changes are proposed in the Draft Code regarding the trade registry and the function of registrations. The authorized bodies to keep track of company records are defined exhaustively as the chambers of commerce and chambers of industry. Furthermore, the Turkish Union of Chambers and Stock Exchanges is required to establish and maintain an online data room, where any and all issues required to be registered will be stored and regularly updated.

Under the Draft Code, a plaintiff may no longer rely on the commercial books and records of a commercial enterprise as evidence to prove a claim. The Draft Code, however, stipulates that merchants must keep commercial books and must record their commercial actions and assets in their books in line with the Turkish Accounting Standards, in a manner clear enough for third parties to understand. The books may be kept in written, visual or electronic form.

5.2. Unfair Competition

The Draft Code introduces some major changes to provisions regarding unfair competition. It aims to ensure an honest and uncorrupted competition environment to the benefit of all market players. Misleading, insulting, libelling statements, sales techniques imperative to competition, actions that may lead a person to cancel or violate a contract, unauthorized exploitation of another person’s work products are considered as actions and practices that violate the good faith principle. The Draft Code, among others, sets out a non-exhaustive list of actions that constitute unfair competition. These include misleading customers about the fair price of a product, limiting consumers’ freedom of choice by employing aggressive sales techniques, and dishonesty in instalment sales.

5.3. Company Groups

The Draft Code introduces the concept of “company groups”. Accordingly, a multi-company group is formed when a corporation, directly or indirectly, controls the majority of voting rights, or is in a position to vote for the appointment of enough members to establish a majority in the governing body, or exercises the majority of the voting rights due to contractual relations on its own or with other shareholders, or keeps another corporation under control by virtue of a contract or in any other manner. Furthermore, the Draft Code stipulates that if a real person or a legal entity or enterprise (that is not a corporation), regardless of whether its residence is in Turkey or abroad, is at the head of a multi-company group, the multi-company group principles will still be applied and the person or entity in the controlling position will be considered as a merchant. It is mentioned that the purpose of defining and regulating multi-company groups is to achieve transparency, accountability, and a balance of interests in transactions between the parent (controlling) and the affiliate (controlled) companies.

There are various duties and liabilities imposed on the members of the Board of the parent company, such as the requirement to prepare a report concerning all legal transactions with affiliates, any precautions taken or not taken, as well as the losses of the affiliate in detail within the first three months of each operational year. Furthermore, members of the Board of the parent company may request a detailed report relating to all transactions with affiliate companies, and may also request such reports to be included in the annual reports of the parent company. Additionally, according to the Draft Code, shareholders of the parent company are entitled to request reports on the financial status of affiliate companies at the general assembly meetings of the parent

company. The Draft Code provides that parent companies cannot use their controlling positions to direct the affiliate to act in certain ways to the detriment of the affiliate.

5.4. Shareholders

Shareholders play a very crucial and significant role within the structure of corporations since each shareholder owns a particular portion of a company's property in real economic terms. As a result, each shareholder is entitled to both pecuniary and managing rights. When corporate governance regulations (codes, reports, guides etc.) of various countries are examined, it becomes evident that the shareholders' rights are included under the right to obtain accurate information, the right to participate actively in the general shareholder meeting, and the right for equal treatment among shareholders. In fact, regulations of various countries only include issues such as the Board of Directors' structure, accountability and responsibility without mentioning the shareholders at all. With respect to the previously applied corporate governance regulations of Turkey, it is generally accepted that shareholders are unable to exercise their rights effectively, and to communicate and interact effectively with management and that there exist various imperfections in the regulations pertaining to shareholders rights. Above-mentioned circumstances lead to deviations between Turkey's legislation and the OECD Corporate Governance Principles. Therefore, in order to ensure proper harmonization between these regulations, it has been proposed that provisions are adopted in the articles of association and in the internal regulations of a company in order to improve and protect shareholders rights.

Another major change proposed by the Draft Code concerns the number of shareholders. Under the current TCC, a minimum of five shareholders is required to incorporate a joint stock corporation and a minimum of two partners for a limited liability partnership. The Draft Code reduces this number to one shareholder both for joint stock corporations and limited liability partnerships. The Commission noted that the rationale behind this change was to avoid the presence of nominee shareholders with as little as 0.001% stakes in companies solely for the purpose of complying with the minimum shareholder requirement imposed by the TCC.

5.5. Privileged Shares

The Draft Code provides that under equal circumstances, all shareholders of a joint stock corporation must be treated equally. The Draft Code recognizes privileged shares, and a privilege is described as "a prevailing position with regard to rights such as dividends, liquidation shares, rights of first refusal and voting or other shareholder rights not foreseen in the Draft Code". Thus, "voting privileges" are recognized, whereby shares with equal nominal value are ascribed with different voting powers. However, the Draft Code limits the number of votes per privileged share to 15, unless required by the circumstances of institutionalization or a justified cause is proven. Nonetheless, the relevant commercial court must inspect the institutionalization project or the justified cause and decide in favor of one of the two exceptions being adopted.

5.6. Statutory Auditors

Another significant change is the abolition of the requirement to have statutory auditors among the statutory bodies of joint stock corporations. According to the system prescribed by the Draft Code, auditing of joint stock corporations of all sizes shall be conducted by independent auditing companies, or alternatively, in small-scale joint stock corporations, by a minimum of two independent sworn-in auditors or public accountants to ensure compliance with laws, Turkish Accounting Standards, and the articles of association.

5.7. Web Site

The Draft Code requires every company to have a Web site. Joint stock companies are allowed to hold online general assembly meetings. All administrative transactions of joint stock companies may be conducted online, which will create such options as online attendance for general assembly meetings, online submission of motions, online negotiations and online voting. People will have easy access to previously unavailable company information.

On their Web sites, companies may publish corporate information, documents, reports, statements and invitations. If they publish false information on their Web sites, they will face legal and criminal liability. Online meetings are allowed for boards of directors, executive boards of capital stock companies, board of directors or general assemblies for sole proprietorships, limited liability companies and shareholding companies. Decisions made in online meetings will be deemed valid, and it will be possible to record the decisions with secure electronic signatures or physical signatures appended afterwards. Online attendance will facilitate easy access by ordinary shareholders to general assembly meetings, creating more transparent management. The Ministry of Industry and Commerce will draft regulations for the implementation of these principles.

International standards will be introduced for company inspection. The auditors system will be replaced with an "independent supervision" system for large capital stock companies. As per the Draft Code, large companies will be inspected by independent and impartial supervision companies while small companies may be supervised by at least two chartered accountants or a certified public accountant and a financial advisor. The Draft Code prohibits independent supervision companies from providing consulting to the companies they are inspecting. Independent inspection companies are responsible for reporting correctly to shareholders and the public. Otherwise, they will face criminal, indemnification and confidentiality liabilities.

In joint stock companies, shareholders are not allowed to become indebted to their own companies except for debt arising from capital subscriptions. In the legal basis section of the article, it reads this provision intends to prevent the bad and faulty practice, which is widespread in the business world. The goal is to prevent shareholders from using the company's money in various transactions, from making their personal expenditures using this channel and from drawing money from the company. Shareholders cannot be denied their rights related to their shares through general assembly decisions, other arrangements or administrative acts. Participants will be held liable for damages and losses arising from unlawful, incorrect, misleading or obscured statements in the documents or deeds concerning the establishment of a company, capital increase or decrease and issuing securities.

Consent by the CMB is required for raising funds for the purposes of, or with the promise of, establishing a joint stock company or increasing capital. Those raising funds in breach of these provisions and members of the boards of directors of companies who are aware of such acts shall be held responsible in proportion to the amount of funds raised and an action will be brought against them in six months following precautionary measures or attachments imposed.

There will be follow-up inspections to ensure that the funds raised after obtaining the CMB's consent are properly spent. This is intended to put an end to deception, particularly against Turks living abroad.

Single-partner limited liability companies. The number of partners in a limited liability companies will not exceed 50. Establishment and operation of single-partner limited liability companies are allowed. In case the number of partners decreases to one, this will be registered and published in seven days. Otherwise, managers will be held responsible for resultant damages. Single-partner limited liability company will be a subcategory of limited liability companies, not a new category of companies.

Partners will not be responsible for company debts but only for their capital subscriptions, additional payment and secondary performance liabilities. A limited liability company may be established for all economic areas of activity not specifically prohibited under laws.

The Draft Code lists the requirements that articles of association must contain pertaining to establishment of a limited liability company. Thus, founders may include any provision in the company's articles of association, provided that it does not violate mandatory provisions.

Partners shall be responsible for protecting confidential information of the company, and this responsibility cannot be eliminated through provisions of the articles of association or general assembly decisions. Partners will not act in a manner detrimental to company interests. They will not be allowed to conduct transactions that bring private gains or be harmful to the goals of the company.

6. Conclusion

The current analyses about the globalization of the corporate activities show that the national legislations have little importance in determining the management systems of the corporations (Thomsen, 2003; Gregory, 2000; Cohen and Boyd, 2000). This observation does not take into consideration the fact that national legislations have an important role in company management and activities (Black and Kraakman, 1996). Therefore, national companies' laws, capital markets laws and labor laws shall be analyzed thoroughly in respect of corporate governance systems. The globalization of corporate governance shall be the reason for amending legal regulations in accordance with the recent developments and shall not curtail the role of national governments in economy (Cioffi, 2000, p. 572).

The legislators shall consider the domestic circumstances while regulating corporate governance principles. There is consensus between all international bodies working on this subject that there can not be a uniform international corporate governance regulation and implementation and the domestic circumstances and priorities shall be taken into account.

Indeed, while improving the management of the companies based on corporate governance principles, the companies shall be informed about the importance of the subject and shall endeavor to implement these regulations. In accordance with this fact, the Draft Code will have a significant role in improving the governance of all joint stock companies by obligating them to act in conformity with these rules.

The need of effective corporate governance is for the separation of ownership and control in big or publicly held companies (Coffee, 2001). The transparency and adequate auditing standards shall be accompanied by compliance mechanisms in order to prevent misuse of control on the ownership (Yüksel, 2004, p. 38).

Increase in foreign capital investments has a significant effect on Turkish companies to comply with the international corporate governance principles. However, the importance of corporate governance shall be realized by local companies which are improving to become international and even global companies. It is inevitable that the companies shall analyze the improvements in the global market and take steps to comply with the developing standards of the market.

Even if the national commercial law regulations are in conformity with OECD corporate governance principles, targeted efficiency cannot be obtained because of the ineffectiveness of the compliance practices. It is stated in the survey that this ineffectiveness is especially, widespread among global companies, shareholder rights are not protected and the public is not informed properly. Generally, the features of the Turkish business scene are as follows (i) there are very few listed companies, (ii) the majority shares are held by an individual or a family, (iii) shareholding generally has a very complex structure, and (iv) the relationship between big companies and their own banks cause some problems.

In the global economy, firms and customers are becomingly demanding two things; internationally standardized trust, and application of appropriate procedures. In this respect, we see the Turkish law and its practice becoming more transparent and compatible with the international standards. Turkey's efforts to become a full member of the European Union and in this regard the praised compliance practices including the Customs' Union depict this fact. Moreover, international foreign investment inflow to Turkey is increasing steadily. This highlights the foreign investors' increasing interest in those firms that are more compatible with the international standards (Wielan 2005).

Today's global financial market place sets the scene for outstanding and swift developments. In the light of such developments and latest novelties, the competitive power of the markets is more important than ever. The global trends need to be clearly identified to ensure efficient functioning of capital markets for the purpose of the country's development. Although national borders maintain their physical existence, they are becoming less significant in today's world that is becoming a smaller place to live in. Recent trends in globalization and improvements in information technology have enabled funds to move from one market to another in just a few seconds. On the other hand, as governments across the world and international finance institutions have realized the need for closer cooperation, international standard setting is becoming a must in many areas. Companies and even governments no longer feel restricted to limit their financial capacities with their own domestic markets, but rather seek to utilize their opportunities in the international financial arena. International competition is becoming a lot more essential in order to best utilize the flow of capital movements across the world. As new funds and new innovations enter the world financial markets, investor preferences are getting enhanced with each day. In parallel with these developments, regulation of the problems and standard issues being faced in today's financial markets is becoming more complex. Due to the increase in competitive conditions within financial markets, countries are being required to harmonize their legislation with the international level and realize a set of regulations in order to attain and sustain development. Within this context, the new Turkish Draft Code is becoming highly significant especially for companies that want to become international ones in terms of providing global liquidity and expanding the fund provision capabilities of international financial markets.

REFERENCES

1) Ararat, M. and Mehmet Uğur. (2003). Corporate Governance in Turkey: An Overview and Some Policy Recommendations," Corporate Governance, Vol. 3, No. 1, pp. 58-75.
2) Berenbeim, R. (2005). Giving Ethics Operational Meaning In Corporate Governance, Executive Speeches, Vol.19, Iss. 5.
3) Berle, A. (Dec. 1958). "Control in Corporate Law," Columbia Law Review 58, pp. 1212–25.
4) Bernard S. Black, B. S. and Reinier Kraakman. (1996). A Self-Enforcing Model of Corporate Law. 109 Harvard Law Review 1911.
5) Blair, M. (1995). Ownership and Control: Rethinking Corporate Governance For The Twenty-First Century, The Brookings Institution.
6) Cadbury, Sir Adrian. Speech made in Global Corporate Governance Forum, World Bank, (2000), from http://www.gcgf.org/.
7) Chandler, W. B. and Leo E. Strine. (2003). The New Federalism of the American Corporate Governance System. 152 University of Pennsylvania Law Review 953.
8) Cioffi, J. W. (2000). Governing Globalization? The State, Law, and Structural Change in Corporate Governance, Journal of Law and Society, vol. 27, no. 4, pp. 572-600.
9) Coffee, J. C. (2001). The Rise of Dispersed Ownership: The Roles of Law and the State in the Seperation of Ownership and Control. Yale Law Journal, 1, 74.
10) Cohen, S. S. and Gavin Boyd. (Eds.). (2000). Corporate Governance And Globalization: Long Range Planning Issues, Northampton, MA., Edward Elgar Publishing Inc.

11) Elson, C. M. and Christopher J. Gyves (2003). The Enron Failure and Corporate Governance Reform, 38 WAKE FOREST L. REV. 855.
12) Enriques, L. and Paolo Volpin. (Winter 2007). Corporate Governance Reforms in Continental Europe. Journal of Economic Perspectives. Volume 21, Number 1, pp. 117–140
13) Gilson, R. J. (Spring 2006). "Corporate Governance and Economic Efficiency: When Do Institutions Matter?," 74 Wash. U. L. Q. 327.
14) Gilson, R. J. and Reinier Kraakman. (1991). Reinventing the Outside Director: An Agenda for Institutional Investors. 43 Stanford. L. Rev. 863.
15) Gregory, H.J. (2000). The Globalization of Corporate Governance. Global Counsel. Vol. 7. 52.
16) Hacimahmutoglu, S. (2000). The System of Corporate Governance: A Turkish Perspective. International and Comporative Corporate Law Journal, 1.
17) La Porta, R. F. Lopez-de-Silanes, A. Shleifer, R. Wishny. (1997). Legal Determinants of External Finance. Journal of Finance, 52, pp. 1131-1150.
18) Lander, G. P. (2004). What is Sarbanes-Oxley?, New York, Mc Graw Hill.
19) Lipton, M. (1987). Corporate Governance in the Age of Finance Corporatism. 136 U. Pa. L. Rev. 1.
20) Longstreth, B. (Spring 1991). Reflections on the State of Corporate Governance. 57 Brooklyn L. Rev. 113.
21) Macavoy, P. W. and Ira M. Millstein. (2004). The Recurrent Crisis In Corporate Governance. New York, Palgrave Macmillan.
22) Monks, R. A. G. and Nell Minow. (2004). Corporate Governance. MA, Blackwell Publishing.
23) OECD, Principles of Corporate Governance, Paris, (2004) from http://www.oecd.org/dataoecd/32/18/31557724.pdf .
24) Pound, J. (1993). The Rise of the Political Model of Corporate Governance and Corporate Control", 68 N.Y.U. L. Rev. 1003.
25) Ribstein, L. E. (2002). Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002," 28 J. CORP. L. 1.
26) Roe, M. J. (2003). Political Determinants of Corpoarte Governance, Oford, Oxford Univ. Press.
27) Roe, M. J. (1993). Some Differences in Corporate Structure in Germany, Japan, and the United States. 102 Yale L. J. 1927.
28) Schneider, J. (2006). Falling into Line. Strategic Finance. Vol.87, Iss.11.
29) Shleifer, A. and Robert W. Vishny. (June 1997). A Survey of Corporate Governance. Journal of Finance 52(2), pp.737-783.
30) Thomsen, S. (2003). The Convergence of Corporate Governance Systems to European and Anglo-American Standarts. European Business Organization Law Review, 4, pp. 31-50.
31) Widen, W. H., (May 2003). Enron at the Margin. 58 The Business Lawyer 961.
32) Wielan, J. (2005). Corporate Governance, Values Management, and Standards: A European Perspective. Business and Society, Vol.44, Iss.1.
33) Williamson, O. (1984). Corporate Governance. 93 Yale L. J. 1197.
34) Worthington, J. (2005). Rebuilding Ethics and Compliance. Regulatory Register. New York.
35) Yuksel, C. (June 2004). Corporate Governance in the Global Economy: Compliance Programs and Risk Management of Multinational Companies. Guncel Hukuk. No.6 (In Turkish).

NOTES

[1] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 from http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/gwbush/sarbanesoxley072302.pdf
[2] OECD Corporate Governance Principles from www.oecd.org
[3] CMB Corporate Governance Principles from http://www.cmb.gov.tr/regulations/files/corporate_governance.pdf