
Turkey

Financial Assistance

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INTRODUCTION

This guide sets out an overview regarding the financial assistance regulations in Turkey, that is currently regulated with the newly adopted Turkish Commercial Code (the “TCC”) numbered 6102 and dated July 1, 2012 in connection with joint stock and limited liability companies, as well as publicly held companies (which are mainly stipulated with the Capital Market Law). Additional regulations regarding bank entities are also included in this guide.

GENERAL OVERVIEW

■ Which are the origins of financial assistance in Turkish law?

The previous Turkish Commercial Code (No: 6762) set in Article 329 a prohibition in the acceptance of pledges by the companies on its own shares, while forbidding share buybacks except under some conditions. However, due to court precedents and requirements for commercial transactions, the newly adopted TCC (No: 6102) relaxes this prohibition pursuant to Article 379 and the following ones. Thus, joint stock companies may buy back their own shares with a maximum limit of 10 %. Article 380 has also been envisaged to prevent the breach of Article 379 by prohibiting advances in funding, granting credits or accepting own shares as securities by companies to third parties to purchase its own shares, as this is considered an indirect share buyback.

Additionally, financial assistance transactions of publicly held companies have its origins in the Capital Market Law numbered 6362 and dated December 30th, 2012 in relation with the decisions of the Capital Market Board. Furthermore, banks play an important role as regards their ordinary activities, such as granting loans and opening credits and, because of that, they are included in the financial assistance area and exist provisions that regulate their activities within the referred framework in Turkish Banking Law.

■ What should be understood as financial assistance under Turkish law?

In general terms, financial assistance can be defined under Turkish law as providing a loan or security by companies, banks or other institutions, for the purpose of (i) acquiring their own shares by third parties or shareholders; (ii) undertaking share buybacks; or (iii) giving guarantees or securities.

■ Is it accepted under Turkish law the financial assistance?

As mentioned above, contrary to the prior regulation, financial assistance has been mainly stipulated under Article 379 and the following articles of the TCC prohibiting companies to provide loans or securities for the purpose of acquiring its own shares by third parties. On the other hand, it allows share buy-backs under some conditions.

In addition, it is accepted by the Turkish Banking Law for banks and financial institutions to provide loans or securities under the condition to make such transactions as part of their ordinary activity and, for transactions that facilitate share acquisitions by the employees of the company or the employees of its subsidiary.

- **Is there any exception under Turkish law as regards the general prohibition of providing financial assistance to third parties?**

There are two exceptions as regards the general prohibition of providing financial assistance to third parties:

1. Transactions undertaken by banks and other credit and financial institutions which fall within the scope of such institutions' ordinary activity.
2. Transactions whereby shares are purchased by or for the employees of a company or its subsidiary.

PUBLICLY HELD COMPANIES

With regard to the Decision numbered 28/780 and dated 9th of September 2009, of Capital Market Board which currently regulates the transactions of pledges, mortgages and guarantees of publicly held companies, such companies are entitled to provide pledges, mortgages or guarantees either in the name and on behalf of their own legal entities, or for the benefit of companies which have been fully consolidated with their financial statements, or for the benefit of third parties in order to conduct ordinary commercial activities.

Subsequently, Capital Market Board adopted a Communiqué Serial IV. No. 56 on 30th of December 2011 about the Determination and Implementation of the Corporate Governance Principles. According to Article 4.4.7 of this Communiqué, it is stipulated that the joint stock companies can grant a security, pledge or mortgage in favor of third parties, subject to a condition consisting on a board resolution to be adopted with the affirmative votes of the majority of the independent directors of the company. Additionally, it is not required a meeting quorum in order to constitute the board that is going to adopt such decision. If the decision is not approved by the independent directors, such condition shall be publicly disclosed and the transaction will be subject to the approval of the general assembly.

JOINT STOCK AND LIMITED LIABILITY COMPANIES

- **General rule**

As per Article 379 of the TCC, joint stock companies and limited liability companies are entitled to undertake share buy-backs not exceeding 10% of their share capital under certain conditions, such as a general assembly approval for granting authority to the board for a period of maximum 5 years. Within this scope, the general assembly determines the ratio to be acquired, the price and the purpose of the acquisition, provided that the determination will be limited to a ten per cent (10 %).

In the case of existence of an imminent and serious danger for the company, the latter can acquire its own shares regardless of the need of the authorization stated above.

Also, the Amendment Law 6335 dated 26th of June 2012 stipulates by amending Article 358 of the TCC, the prohibition for shareholders to take loans from joint stock companies and limited liability companies unless they have fulfilled completely their liability of capital contribution and the profit of the company is sufficient to set aside the statutory reserves and preceding losses.

As per Article 395 (3) of the TCC, companies which are included within the same group are entitled to provide securities to each other as long as such transaction does not cause a loss to the affiliate.

- **Exceptions to the applicability of the general rule**

There are four exceptions to the applicability of the general rule:

1. The general rule and the prohibition regarding the threshold above of financial assistance shall not apply to transactions carried out by banks and financial institutions as their usual business.
2. Advances, loans and securities provided to the company's employees or parent company's or subsidiary's employees in order to acquire the shares of the company.

These transactions shall be valid as long as the requirements related to preservation of legal reserves are complied with.

3. According to Article 50 of the Banking Law numbered 5411 and dated 1st of November, 2005; banks are not allowed to provide loans to their directors, people who are authorized to ask for credits and their relatives, corporations in which they hold more than 25% of the share capital, and to the institutions and foundations which have been established by the bank members.
4. In addition, as per Article 56 of the Banking Law, banks are not allowed to (i) acquire shares in the corporations or institutions which hold shares directly or indirectly of that bank, and (ii) accept their shares as pledge or provide them funds in advanced for such pledge.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE

- **General**

If the company grants loans, advances or guarantees to a third party for the purpose of acquiring its own shares or acts in breach of the prohibition of share buy-back with exceeding the threshold of 10% of the company; such financial assistance transactions shall be null and void, and the shares which were subject to acquisition or pledge shall be disposed within six (6) months or the pledge shall be removed.

- **Liability of the administration body**

The liability of the administration body for acting contrary to the above mentioned provisions is limited to the share amount.

- **Fines**

As regards Article 562 of the TCC those who acted contrary to Article 358 and grant shareholders in joint stock companies and limited liability companies loans within the framework where the capital contribution liability has not been subscribed, shall be penalized with a judicial fine consisting in no less than 300 days. Moreover, Article 395 (2) prohibits directors who do not hold any shares and their relatives, to have loans from the

company or to be granted with any kind of guarantee by the company; and stipulates a judicial fine consisting in a minimum of three hundred (300) days.