

Turkey

Financial Assistance

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INTRODUCTION

This guide sets out an overview of share repurchase and financial assistance regulations in the Republic of Turkey, in accordance with the Turkish Commercial Code 6102 (TCC), and other relevant legislation.

GENERAL OVERVIEW

What are the origins of financial assistance in Turkish law?

As per the previous Turkish Commercial Code, abrogated by the TCC as of 1 July 2012, companies were prohibited from acquiring their own shares or accepting the same as pledges, save for certain exceptions. Any agreements that would result in such outcomes were deemed null.

Article 379 of the TCC relaxes the prohibition by allowing companies to directly or indirectly repurchase their own shares, or accept them as pledges, provided that such amount does not exceed 10 per cent of the registered or issued share capital of the company.

According to Article 380 of the TCC, entitled 'Fraud against the Law', legal transactions involving the provision of advances, loans or security between the company and a third party for the purpose of acquiring shares of such company shall be deemed null. Article 380 aims to prevent evasion of Article 379; accordingly, financing a third party and supporting a third party through loans, securities or other financial instruments, to allow the third party to purchase the company's shares, is considered an indirect buy-back of the company shares and therefore shall be deemed null.

The basis for Article 380 of the TCC can be found in the Second Council Directive of the European Economic Community numbered 77/91, dated 13 December 1976.

What should be understood as financial assistance under Turkish law?

While the TCC does not define or explicitly refer to the concept of 'financial assistance', financial assistance as per the TCC can be understood as the provision of advances, loans, security or similar financial aids by a company to a third party in order to effect the repurchase of such company's shares.

Is it accepted under Turkish law to provide financial assistance?

According to Article 380 of the TCC, any legal transaction constituting financial assistance shall be deemed null and void. Therefore, save for certain exceptions, financial assistance is prohibited under Turkish law.

Are there any exceptions under Turkish law as regards the general prohibition of providing financial assistance to third parties?

TCC regulates certain exceptions to the general prohibition of providing financial assistance to third parties to buy back company shares. Subject to the realisation of certain conditions regarding legal reserve funds, the general rule of Article 380 shall not be applicable with regards to:

- transactions within the scope of activity of credit and finance institutions; and
- legal transactions providing advance, loan or security to employees of the company or its affiliates to enable them to acquire company shares.

PUBLICLY HELD COMPANIES

The Communiqué on Re-Purchased Shares II-22.1 (the Communiqué), issued by the Capital Makers Board (CMB) on 3 January 2014, regulates procedures and principles regarding the repurchase, or acceptance as pledge, of shares by publicly held companies.

General

The Communiqué defines 'repurchase' as purchase of shares by a company or its subsidiaries. For publicly held companies to carry out a repurchase transaction, the shareholders of the company must grant authorisation to the board of directors. Such authorisation shall be granted by approval by the shareholders of the repurchase program prepared and submitted by the board of directors. The maximum term of the approved repurchase program shall be three years for listed companies and one year for non-listed companies.

If necessary to avoid an imminent and crucial loss, listed companies may repurchase its shares without authorisation by the shareholders of the company, provided that public disclosure obligations are met. This shall not be applicable with respect to repurchases by the subsidiary of the shares of the parent company.

The Communiqué sets a repurchase threshold. The nominal value of the shares subject to repurchase shall not exceed 10 per cent of the paid-up or issued share capital of the company, including any previous purchases. The total consideration of the repurchased shares shall not exceed the total amount of sources that can be subjected to profit distribution, as per CMB regulations.

Exceptions

As per Article 16 of the Communiqué, a company may repurchase its shares without being subject to limitation regarding authorisation and threshold in the following cases:

- due to a capital decrease;
- if the shares are transferred as a result of total subrogation;
- if the shares are transferred because of a statutory purchase obligation;
- a *gratis* transfer;
- as result of a decision of the CMB or a court for the protection of minority rights;
- for the purposes of collection of a company debt through enforcement or court decision; or
- utilisation of exit or removal rights as per CMB regulations.

Consequences

The repurchased shares shall not be taken into consideration in the calculation of shareholders' meeting quorums. Re-purchased shares and *gratis* shares obtained as a result may be held indefinitely, provided that the terms of the Communiqué are met. Shares repurchased in violation of the Communiqué shall be disposed of within one year at the latest; any shares that could not be sold during this period shall be redeemed by way of capital decrease.

With regards to listed companies and its subsidiaries, repurchase transactions carried out in line with the provisions of the Communiqué shall benefit from the exemption under Capital Markets Law 6362 with respect to insider trading or market manipulation, provided that:

- such repurchase is carried out as per a repurchase programme;
- such repurchase is carried out for the purpose of fulfilling obligations arising out of capital decrease, issuance of capital markets instruments or share plans for employees; or

- no sale has been made during the term of the repurchase programme.
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PRIVATE COMPANIES

General rule

This is a general explanation regarding repurchase of shares and financial assistance with respect to private companies, as provided under the applicable provisions of the TCC. Exceptions and consequences of repurchase of shares and financial assistance are discussed below under the relevant sections.

Joint stock companies

As per Article 379 of the TCC, joint stock companies can, directly or indirectly, repurchase or accept as pledge their own shares, provided that:

- such amount of shares does not exceed 10 per cent of the total share capital; and
- the share capital represented by such shares has been fully paid.

The limitations under Article 379 would apply to shares purchased or accepted as pledge by a third party on a company's account, as well as to the purchase of shares of a parent company by its subsidiary.

To effect such a repurchase or acceptance as pledge, the shareholders of the joint stock company must grant authorisation to the board of directors, which shall be valid for a maximum period of five years. The authorisation shall include the number of shares and the total nominal value of the shares subject to repurchase, as well as the maximum and minimum amount of consideration to be paid.

As per Article 380 of the TCC, joint stock companies cannot provide financial assistance (ie, advances, loan, securities or similar financial aids) to third parties for the purposes of repurchase of its own shares. Exceptions to and consequences of violation of the financial assistance prohibition shall be detailed below.

Article 381 states that, if necessary to avoid an imminent and crucial loss, a company may repurchase its shares without authorisation by the shareholders of the company. In this case, the board of directors shall inform the shareholders at the following meeting regarding the repurchase along with its reasons and purpose, details of the shares and payment.

Moreover, as per Article 383, a company may repurchase its shares without paying a consideration, provided that the share capital represented by such shares has been fully paid.

Limited liability companies

As per Article 612 of the TCC, a limited liability company can repurchase its own shares provided that:

- it has equity that can be freely utilised in the required amount; and
- the total nominal value of the shares subject to repurchase does not exceed 10 per cent of the total share capital.

When re-purchasing of shares due to exiting or removal from a company, this ratio shall be 20 per cent. The company shall set aside reserve funds in the amount of consideration paid for the repurchased shares.

Provisions and limitations regarding repurchase of shares shall be applicable when purchasing shares of a parent company by a subsidiary, the majority of the shares of which are held by such parent company.

Repurchased shares exceeding 10 per cent of the share capital shall be disposed or redeemed by capital decrease within two years. Voting rights and similar rights arising out of the buy-back shares held by the company shall not be utilised as long as they are held by the company.

Exceptions to the applicability of the general rule

Pursuant to Article 380 of TCC, the general prohibition of providing financial assistance through advances, loan, securities or similar financial aids shall not be applicable with regards to

- transactions within the scope of activity of credit and finance institutions; and
- legal transactions of providing advances, loans or security to employees of the company or its affiliates for them to acquire company shares.

In other words, transactions within the scope of these exceptions shall be deemed valid. However, any such transaction shall be deemed invalid in case it decreases the reserve funds of the company, or violates provisions regarding the use of reserve funds as per the TCC and does not allow the company to reserve the funds required in case of a buy-back transaction.

As per Article 382, a company may repurchase its shares without being subject to limitations under Article 379 in the following cases:

- a capital decrease;
- if the shares are transferred as a result of total subrogation;
- if the shares are transferred because of a statutory purchase obligation;
- for the purposes of collection of a company debt through enforcement, provided that the share capital represented by such shares has been fully paid; or
- if the company in question is a securities company.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE

General

According to Article 380 of the TCC, any legal transactions that provide advances, loans or security to third parties as financial assistance for the purpose of acquiring such company shares shall be deemed null and void.

With regards to shares that have been repurchased as a result of total subrogation or for the purposes of collection as per Article 382, or without consideration as per Article 383, such repurchased shares shall be transferred as soon as they can be transferred without causing a loss to the company and, in any case, within three years as of their repurchase.

Shares repurchased or pledged in violation of Article 379 or through financial assistance as per Article 380 shall be disposed of or released within six months at the latest.

If shares cannot be appropriately disposed of as per the above mentioned methods, they shall be immediately abolished by way of capital decrease.

Shares repurchased by the company or by its subsidiary shall not be taken into consideration in the calculation of the shareholders' meeting quorum of the company. In other words, such shares shall not grant shareholding rights to the holder.