

Prohibitions Applied to Members of BoD in Joint Stock Companies

Introduction

Joint stock companies' ("JSC") assets, financial existence and sustainability are of utmost important for economic efficiency and growth of a country. There are several measures taken to ensure this in the Turkish Commercial Code ("TCC", Law No.6102) which came into force in 2012. One of the measures brought by the TCC is the prohibition for the members of Board of Directors ("BoD") on conducting transaction with company and to become indebted to it.

1

Prohibition on Conducting Transaction with Company

Former Turkish Commercial Code (Law No. 6762) used to regulate the subject matter by limiting the prohibition with any matter of transaction that company engages in. This limitation raised many discussions and therefore, the TCC has adopted a different approach.

According to Article 395/1 of the TCC, a board member cannot conduct any transaction with the company on behalf of himself/herself or any other person without the permission granted by the General Assembly ("GA"). In such a case, the nullity of the transaction can be asserted by the company however, not by the counterparty.

This minimizes the possibility of the misuse of the authority of a member of BoD. However, Articles of Association ("AoA") might allow the company for such transactions and depending on specific provision in

the AoA, all of the board members or specific members can benefit this exemption for a specific time period. If time period is not specified, it lasts until the election of the new board members.

A general permit granted by the GA does not mean that a board member can conduct any transactions with the company on any terms. Board Members should act in the best interest of the company otherwise they must compensate the possible losses.

Prohibition to Become Indebted to Company

Prohibition on becoming indebted to company is regulated under two distinct provisions: Prohibition for the members of the BoD who are shareholders and who are not shareholders.

Prohibition for the Members of the BoD who are Shareholders

Article 358 of the TCC which was amended in 2012 regulates the prohibition for the shareholders to become indebted to the company. Accordingly, shareholders of the company can become indebted to company under two conditions:

- First, a shareholder must fulfill its commitment of capital subscription towards company to become indebted to the company.
- Secondly, company's profit (including contingency reserves) should be on a sufficient level to cover the loss of the company for the previous year.

Legislator protects the financial status of the companies by introducing these two conditions and if these are not met, the company's financial stability might significantly be affected.

Contrary to the Article 395/2, which is examined below, the Article 358 does not regulate specific legal sanctions for the violation therefore, general provisions are applicable. Accordingly, if a shareholder becomes indebted to the company in a way that was not permitted within the context of the Article 358, the prohibited transaction will be regarded as null and void.

Prohibition for the Members of the BoD who are not Shareholders

Article 395/2 of the TCC regulates the prohibition rule for the members as well as certain relatives of the members of the BoD who are not shareholders.

Pursuant to this article, board members and their relatives specified in Article 393 of the TCC, who are not shareholders cannot become indebted in cash to the company. Furthermore, the company can neither provide surety, guarantee or security for these persons nor undertake liability or take over their debts. Otherwise, the creditors of the company can start execution proceedings directly against these people for the debt of the company in the amount for which the company is liable. As a result, a specific and maybe a heavier legal sanction is imposed for BoD members who are not shareholders.

Relatives specified under Article 393 of the TCC are board members' lineal consanguinity or their spouses or one of their blood and in-law relatives up to and including the third degree who are not shareholders. The aim of including certain relatives of the board members to this prohibition is protecting the assets of company.

3

Exceptions of the Rule

The TCC, also provides some exceptions to the rule on becoming indebted to the company. Article 395/3 states that; without prejudice to Article 202, companies that are within a group of companies can provide surety and guarantee for each other. Special provisions under Banking Law (Law No. 5411) are also reserved pursuant to Article 395/4 of the TCC which means any JSC subject to the Banking Law (such as Banks) are subject to the special provisions found in the Banking Law.

Penal Sanctions for Violating Prohibitions

Apart from the legal sanctions specified under the general provisions and Article 395/2, penal sanctions are also exercised in case of a violation. The aim of the prohibition to become indebted to company is to secure the economic existence of the company and to maintain its sustainability.

Therefore, to emphasize the importance of this matter as well as for deterrence, penal sanctions are imposed if the prohibition is violated. These sanctions are regulated under the Articles 562/5-b and 562/5-c of the TCC. Accordingly, a judicial fine not less than three hundred days is imposed for people for violating the prohibition under the Article 358 and 395/2 of the TCC.

GURULKAN ÇAKIR AVUKATLIK ORTAKLIĞI

Polat İş Merkezi, Offices 28-29
Mecidiyeköy 34387
Istanbul, TURKEY

T +90 212 215 30 00
M info@gurulkan.com
W www.gurulkan.com



Gurulkan Çakır Avukatlık Ortaklığı ("Gurulkan Çakır") is an attorney partnership registered at Istanbul Bar Association with a license number 105 and at the Union of Turkish Bar Associations with a license number 206.

This publication provides general information only and should not be relied upon in making any decision. It is not intended to provide legal or other advice. Gurulkan Çakır and its partners will not be liable for any loss or damage arising from reliance being placed on any of the information contained in this publication.

Before acting on any information, readers should consider the appropriateness of the information provided herein, having regard to their legal and financial status, objectives and needs. In particular, readers should seek independent professional advice prior to making any decision.

This publication may not be reproduced, in part or whole, by any process without prior written consent of Gurulkan Çakır.
