

Prohibition on Self-dealing and Lending to Board Members

Introduction

Article 395 of the Turkish Commercial Code (“TCC” Law No. 6102) is primarily important for its content regarding the prohibition of self-dealing and becoming indebted to the company. The prohibition to become indebted to the company is regulated for the first time in TCC and the grounds of its existence is based on the idea of protecting the company’s assets. On the other hand, the provision regulating the prohibition of self-dealing is relatively same with the previous TCC (Law No. 6762). The phrase “commercial transaction concerning the company’s business” is removed in the new TCC which allows a wider interpretation of the prohibition.

Prohibition on Self-Dealing

Pursuant to Article 395, board members of a Joint Stock Company may not conduct any transaction with the company in their name or any other person’s name without obtaining permission from the General Assembly (“GA”). The GA can grant authorization to the board members to carry out transactions concerning company business with the corporation itself.

The main purpose of Article 395 is to prevent the ill-use of the positions and authorities of the board members. It is clear from the wording of the provision that the prohibition can be lifted with a permission granted by the GA. This permission can be general or can be on a specific subject. According to Turkish scholars, such permission might be granted in the Articles of Association (“AoA”).

However, a board member cannot enjoy this permission freely as she/he must prioritize the company's interests parallel to the Article 369/1 of TCC.

Article 395 sets forth a sanction for the violation of the prohibition. If a board member conducts a transaction with the company without obtaining permission from the GA, the company may claim that the conducted transaction is null and void.

The GA decides whether the transaction in question binds the corporation or not. Even if the transaction is decided not to be binding for the corporation, the damage may not be compensated. In that case, the Board Member will be liable for the damage as per Article 553/1. The idea behind this rule is to protect the company in circumstances where there is a conflict of interest between the company and the board member.

Prohibition on Lending to Board Members

a) Non-Shareholder Board Members

2

Paragraph 2 of Article 395 regulates the scope of the prohibition to become indebted to the company. Pursuant to the provision, board members and their relatives specified in Article 393 cannot become indebted in cash to the company. The company cannot provide surety, guarantee or security for these persons and, furthermore, is not allowed to undertake liability, and take over their debts.

Specified relatives are; Board Members' lineal consanguinity or their spouse or one of their blood and in-law relatives up to and including third degree. Yet again, the prohibition for relatives might come to the fore when the board member is also a legal entity. In principle, provision does not apply if the board member is a legal entity. In that case when a board member is a legal entity, execution field of the Article will be limited with the legal entity only. However, taking into consideration the purpose of the provision, a real person who is not a shareholder and acting on behalf of the legal entity as a Board Member must be included within the scope of the provision.

If the provision is violated, the creditors of the company can start execution proceedings directly against these people for the debt of

the company up to the amount for which the company is rendered liable.

b) Shareholder Board Members

Under certain conditions shareholders can take loan from the company. Article 358 shall apply when a board member is also a shareholder and for his/her relatives specified in Article 393.

Pursuant to the provision; shareholders may not become indebted to the company unless they execute their debts arising from their capital subscription and unless the company's profit along with the reserved funds are on a sufficient level to counterbalance the previous year's loss.

Article 358 grants a freedom on becoming indebted when compared to Article 395. This freedom, however, does not mean that the board member can enjoy it without any limitation. The loan must bear the same conditions as a loan that is given to a third party in terms of amount, interest rate, maturity etc. Otherwise, the board member is under obligation to compensate the loss in accordance with Article 553 and the following provisions.

3

Liability for breach of Article 358 is regulated under Article 562/5-(b). Accordingly, anyone lending money to a board member, in other words, concluding an agreement between the company and the board member, is charged with a punitive fine with no less than three hundred days. As can be understood from the provision, the sanction does not apply to the debtor board member but to the lender.

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.
