Turkey: Acquisition of Own Shares by Joint Stock Companies

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I. Introduction

Turkish company law allows joint stock companies to acquire its own shares subject to conditions stipulated under Articles 379 – 389 of the Turkish Commercial Code No. 6102 ("**TCC**"), which are mainly based on the 77/91/EEC Second Council Directive dated December 13, 1976 and German Joint Stock Corporation Act (AktG). This article will cover joint stock companies' acquisition of own shares under the TCC.

II. The Rule

Pursuant to Article 379 of the TCC, a joint stock company may acquire its own shares or accept them as pledge, with consideration, so long as they do not exceed 1/10 (10%) of the principal or issued capital of the company. Moreover, the subscription amounts for such shares in question must be fully paid. Another condition is that the net asset of the company must meet at least the total amount of the principal or issued capital and reserved funds which are not allowed to be distributed as per the law and articles of association, when the acquired shares' amounts are deducted. In addition to the company itself, a third party may acquire shares in the name of the company, or its subsidiaries can also acquire shares subject to same provision.

The acquisition of own shares is carried out by the board of directors pursuant to an authority granted by the general assembly. During the acquisition process, the board of directors is prohibited from acting in a discriminatory manner between the shareholders in accordance with the non-discrimination principle. The general assembly may authorize the board of directors for the acquisition for a maximum of 5 (five) year period by ordinary resolution as per Article 418 of the TCC and this authorization may be revoked by the general assembly.

Although the board of directors is the corporate body to carry out the acquisition, the general assembly determines the quantity and the total nominal value of the shares while setting the lower and upper limits for the amount to be paid.

Rights arising from the shares acquired by the joint stock company are frozen during the period that the shares are held by the company. Besides, such shares are not counted when calculating the quorum for the general assembly.

If the company will become a "*sole shareholder joint stock company*" as a result of the acquisition, the acquisition cannot take place as per Article 338/3 of the TCC "*Company shall not acquire its shares or have them acquired to become a sole shareholder company."*

III. Imminent and Serious Loss

Pursuant to Article 381 of the TCC, a joint stock company may acquire its shares without obtaining authority from the general assembly when the acquisition is necessary in order to prevent an imminent and serious loss. "*Imminent*" means both direct and losses with effects, possibly happening within 6 (six) to 12 (twelve) months. "*Loss*" means any kind of situation, potentially negatively impacting the company, shareholders, an investment of importance or market share. Imminent and serious loss does not mean that the loss will immediately happen, but means that its indications are noticeable and there is a possibility that such loss will occur soon, *i.e.* it is foreseeable. In that case, the board of directors shall objectively evaluate the situation and they must conclude that the acquisition of shares is mandatory in order to prevent the loss. The board of directors is further obliged to inform the general assembly in writing in the subsequent general assembly meeting regarding the reason and purpose of the acquisition, the number of shares acquired, the total nominal value of the shares and what is the ratio of the shares over the share capital of the company.

There are different opinions regarding whether Article 381 of the TCC provides complete exemption from the conditions set forth under Article 379. However, the article expressly states only an exemption from the general assembly authorization provided in Article 379, and not from the rest of the conditions such as the 10% limit and net assets after deduction being minimum the total amount of the principal or issued capital and reserved funds.

IV. Exceptions

Article 382 and 383 of the TCC set the exception to the general rule under Article 379 of the TCC. As per Article 382 of the TCC, a joint stock company may acquire its shares without being subject to conditions under Article 379 of the TCC if either (i) they are acquiring shares

as a result of share capital decrease as per Articles 473 – 475 of the TCC, (ii) it is a result of complete succession (*e.g.* merger, demerger, transfer of business), (iii) it is a result of a statutory purchase obligation, (iv) it is to collect company's receivables by way of compulsory enforcement, provided that the subscription amounts for the shares in question are fully paid, or (v) the company is a securities company. Furthermore, as per Article 383 of the TCC, a company may acquire its shares without paying any consideration, provided that the subscription amounts for the shares in question are fully paid. A subsidiary might also acquire shares of the parent company as stipulated under Article 383/2 provided that the subscription amounts for the shares in question are fully paid. The board of directors may resolve to the acquisition if one of the conditions is met.

Pursuant to Article 520/1 of the TCC, company must reserve funds amounting covering the acquisition price of the shares acquired. Surely, Article 520/1 is not applicable to gratuitous acquisitions without consideration. In case that the company does not set aside the funds at the time of the acquisition, the acquisition will still be valid, but board of directors may be held liable for their breach.

V. Fraud Against Law

If a joint stock company lends a third party or pays them advance, or provides guarantee to a third party so that they can borrow in order to acquire the company's shares, the transaction will be null and void, and will be considered as fraud against law, as per Article 380/1 of the TCC. This provision is not applicable to credit and finance institutions' transactions within their scope of businesses, or to the company's or its subsidiaries' employees. However, such transaction will be invalid if the company decreases its reserve funds that a company must set aside. The transaction will also be invalid when a broker is acquiring the shares in the name of the company, if the transaction would breach Article 379 of the TCC if it were carried out by the board of directors instead of the broker.

VI. Disposal of the Acquired Shares

Under Article 384 of the TCC, shares acquired as a result of complete succession and to collect company's receivables by way of compulsory enforcement, the shares must be disposed of, as soon as the transfer is possible without having the company to incur any losses,

and in any case within 3 (three) years, if such shares owned by the company and/or its subsidiary are more than 10% of the principal or issued share capital of the company. In other words, the company's obligation is to dispose of the shares exceeding 10% of the principal or issued share capital.

Although no conditions are expressly stipulated regarding disposing of the shares acquired pursuant to the TCC, those shares should also be disposed of when financially convenient, considering the legislative intent. Moreover, the shares also bear rights such as management and voting rights, therefore, keeping the shares for a long period of time might in fact damage the company.

As per Article 385 of the TCC, shares acquired or accepted as pledge in breach of law must be disposed of within 6 (six) months of their acquisition or pledge must be discharged by the board of directors within the same period. Failure of board of directors to duly dispose the shares or duly discharge pledge would cause grounds for an action against them. If the shares in question could not be disposed, the shares must be extinguished by decreasing share capital.

VII. Conclusion

As a rule, a joint stock company can acquire its shares up to 10% of its share capital by maintaining enough net assets. While carrying out duties as directors, the board of directors may come to a conclusion that acquisition of own shares is required in order to avoid a foreseeable damage as per Article 382 of the TCC, or that one of the conditions under Article 383 of the TCC is met, or, simply, they might obtain the authority from the general assembly for the acquisition as they deem that it will be beneficial for the company pursuant to Article 379 of the TCC. TCC allows the acquisition subject to conditions mentioned in this article, but the board of directors must be careful during pre-acquisition, the transaction and post-acquisition, given that in case of breach of laws, they will be held liable.

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(First published by Mondaq on August 25, 2021)