



## **Turkey: Shareholders' Borrowing from the Joint Stock Company and Vice Versa**

**Authors:** Gönenç Gürkaynak, Esq., Nazlı Nil Yukaruç and Nisa Aybüke Erođlu, ELIG Gürkaynak Attorneys-at-Law

### **I. Introduction**

According to Turkish Commercial Code (“TCC”), some companies are defined as equity companies. Joint stock companies are one of these equity companies and are within the scope of "Principle of Maintenance of Share Capital" under TCC. The principle of maintenance of share capital requires full payment of the share capital value committed by the shareholders to the company and accordingly protecting the creditors of the company. In this context, considering that the shareholders already owe the capital payment to the joint stock company, this article will focus on how the shareholders may borrow money from the company and how the company may borrow money from the shareholder.

### **II. Indebtedness of Shareholders to the Company**

Pursuant to Article 358 of the TCC, shareholders are prohibited from borrowing from the company. As a matter of fact, the relevant article is as follows: “*Shareholders cannot owe to the company unless they fulfill their outstanding obligations arising from capital commitments and the company's profit, together with the contingency reserves, is not at a level to cover previous years' losses*”. In other words, according to the relevant article, two elements must be present in order for the shareholders to be able to borrow money from the company: (i) shareholders must have paid all of their debts arising from the capital commitment to the company and (ii) along with contingency reserves, the company's profit should be at a level to cover the previous year's losses. Therefore, in fact, company shareholders are not prohibited from borrowing from the company, but certain conditions must be met for the indebtedness of the shareholders.

The TCC also regulates the sanction of non-compliance with restrictions, and according to Article 562/5 of the TCC, those who lend money to the shareholders in violation of the borrowing prohibition shall be punished with a judicial fine of not less than 300 (three hundred) days. Considering the joint stock company's corporate structure, the people who may lend to the company shareholder are the members of the board of directors. Therefore, the said sanction has been regulated for the board members.

### **III. Indebtedness of Company to the Shareholders**

As briefly explained above, although the TCC regulates some limitations on the indebtedness of shareholders to the company, it does not include any restrictions or regulations regarding the indebtedness of company to the shareholders. Therefore, it is possible for the company to borrow money from the shareholder.

According to Article 127 of the TCC, unless there is a contrary provision in the law; money, receivables, valuable papers etc. shall be accepted as capital for the joint stock companies. Therefore, the receivables of the shareholders from the company may also be added to the company as capital. Regarding this issue, the Ministry of Commerce, General Directorate of Internal Trade has also issued a circular dated July 15, 2013 and numbered 67300147.431.04/559478/4979 – 5665 (“**Circular**”). As per the Circular, in the case the shareholder has a receivable from the company, and this receivable will be subject to the capital increase, in the assessment of the receivable, according to Article 343 of the TCC it may be submitted to the expert’s report that was appointed by the basic commercial court where the company is located, it is also evaluated that the submitting of a certified public accountant’s report or an independent accountant and financial advisor report or inspection report of the inspector of a company that is subject to inspection regarding these assessments may be submitted.

On the other hand, although it is possible to meet the needs of the companies with the borrowings obtained from the shareholders, the said borrowing will also have to be realized within certain limits. As a matter of fact, the concept of thin capitalization is explained in Article 12 of the Corporate Tax Law and in the event that the company borrows from its shareholders, it is stated that thin capitalization will come to the fore once certain conditions are met. Pursuant to the foregoing article, if the ratio of the borrowings directly or indirectly from the shareholders or from the persons related to the shareholders exceeds three times the shareholders’ equity of the borrower company at any time within the relevant accounting year, the excess portion of the borrowing will be considered as disguised capital. Further details of the thin capitalization related issues should be examined with the local tax advisors.

### **IV. Conclusion**

In joint stock companies, it is possible for the shareholders of the company to borrow from the company and the company to borrow from the shareholders. However, as mentioned above, the shareholders of the company will have to fulfill their share capital commitments first, as they owe to the company. In terms of borrowings of the company, the important issue is whether the amount of receivable constitutes a disguised capital in terms of tax law.

Article Contact: Gönenç Gürkaynak, Esq.

E-mail: [gonenc.gurkaynak@elig.com](mailto:gonenc.gurkaynak@elig.com)

*(First published by Mondaq on August 25, 2022)*