

BULLETIN

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Prohibition of Members of the Board of Directors of Joint Stock Companies from Transactions with the Company and from Borrowing from the Company

In a joint-stock company, the board of directors is the body responsible for conducting the business and affairs of the company and for maintaining relations between the company and its shareholders. In this context, the board of directors is authorized to carry out transactions on behalf of the company. In order to prevent the members of the board of directors from using this authority for their own benefit and to protect the assets of the company, the Turkish Commercial Code (TCC) prohibits the members of the board of directors from entering into transactions with the company and from borrowing money from the company.

Legal basis of the prohibition

One of the most important duties imposed on the members of the board of directors of joint-stock companies is the duty of loyalty. The Board of Directors must carry out its transactions with due care and loyalty within the framework of the company's interests.

Prohibition of transactions with the company

Article 395/2 of the TCC prohibits the members of the Board of Directors from entering into transactions with the company on their own behalf or as representatives of third parties. It is irrelevant whether these transactions are within the scope of the company's business or not.

Since this prohibition is a relatively mandatory provision, it may be otherwise agreed. Accordingly, the Articles of Association of the company may provide that the members of the Board of Directors may enter into transactions with the company on their own behalf or as representatives of another person. It should be noted, however, that such a provision creates a freedom for all members of the Board of Directors.

Should the transaction in breach of the prohibition be cancelled?

If the members of the Board of Directors carry out a transaction in breach of the prohibition in this way, the transaction is null and void, i.e. the validity of the transaction depends on the approval of the transaction by the General Assembly. The General Assembly may validate the transaction by approving the transaction before it is executed or by giving its consent after the transaction has been executed. No cancellation is required to invalidate the transaction.

Can the director who authorized the transaction claim that the transaction is invalid?

No. The only party that can claim the invalidity of a transaction is the company. The director who is the counterparty to the transaction and who is transacting with the company, or the third party who is transacting on behalf of the director, cannot claim that the transaction is void.

Legal liability

If a member of the Board of Directors carries out a transaction in violation of this prohibition, he shall be liable for the damage caused to the Company if he is at fault pursuant to Article 553 of the TCC. Such damage may also be determined as the inability of the company to carry out another more profitable transaction as a result of the execution of this transaction within the framework of the duty of loyalty of the members of the Board of Directors.

Criminal liability

Article 562/5 of the TCC also imposes criminal liability on the director who violates this prohibition. The person who carries out a transaction in violation of this prohibition shall be sentenced to a judicial fine of not less than 300 days.

Prohibition on Board members borrowing from the company:

Pursuant to Article 395/2 of the TCC, in order to protect the assets of the company, it is prohibited for the members of the Board of Directors who are not shareholders of the joint stock company, or their descendants, or their spouses, or their blood relatives and in-laws up to and including the third degree, to borrow money from the company. As can be seen from the wording of the article, the prohibition on borrowing relates only to the borrowing of cash.

Within the scope of this prohibition, the aforementioned persons may not borrow money from the company, nor may they enter into any contract of suretyship, guarantee or security with the company. If the company borrows money, the creditors can pursue the person who carried out the transaction directly instead of the company.

Does the prohibition on borrowing from the company apply only to non-shareholder members of the board of directors?

The article in question applies only to directors who are not shareholders. According to Article 358 of the TCC, the directors who are shareholders may not borrow money from the company "unless they fulfil their obligations arising from the capital commitment and the company's profit together with the free reserves is sufficient to cover the losses of previous years".

Conclusion

The ability of the members of the board of directors, which is the executive body of a joint-stock company, to enter into transactions with the company is subject to the decision of the general assembly. In this context, the vote to be taken at the general assembly will be of an important nature regarding the validity of the transactions made by the members of the board of directors in the company of which the shareholder is a shareholder. In addition, the members of the Board of Directors should pay attention not to violate this prohibition when carrying out transactions with the company. Naturally, the risk can be avoided by obtaining the opinion of an expert lawyer when determining whether the transactions fall within the scope of the legal prohibition.