



Financial Assistance Prohibition under Turkish Law

Being the fastest emerging market of Europe and the OECD, Turkey is still an attractive market for international investors. Among other forms of deal structures, investors are often interested in leveraged buyout transactions (“LBO”). An LBO can be explained as the acquisition of a company’s shares or assets, in which the purchase price is financed by collateralization of the shares, assets and cash flow of the target company. When the former Commercial Code No. 6762¹ was in force, there were no legal restrictions against LBOs. Investors were freely enjoying this structure for their share purchase transactions. However, in 2012, the new Turkish Commercial Code² (the “TCC”) introduced the financial assistance prohibition. Article 380 of the TCC prohibits transactions concerning the grant of advance, loans or security by the target company for the purpose of acquiring the target company’s shares by a third party.

Article 380 provides two carve-outs to the general rule: (i) transactions performed by banks and financial institutions as part of their ordinary business, and (ii) transactions facilitating share acquisitions by the target company’s employees or the subsidiary’s employees. Nevertheless, these carve-outs will be considered null and void if such transactions have a negative effect of reducing the target company’s statutory reserves.

The financial assistance prohibition is heavily inspired by the Second Council Directive 77/91/EEC (dated 13 December 1976) (the “Directive”). In 2006, the European Commission amended the Directive, loosening the tight financial assistance prohibition on public companies. The financial assistance in Turkey was subject to various discussions and criticism among scholars and legal practitioners, even before the TCC came into force. However, the TCC adopts the structure and system of the first version of the Directive and goes one level further from the majority of EU countries: it imposes the financial assistance prohibition on all companies – public and private – without any distinction.

The official commentary of the TCC explains the mechanics of Article 380 in further detail. It emphasizes that Article 380 of the TCC does not create a *de minimis* rule, but in fact considers the existence of any form of financial assistance for the acquisition of shares invalid and null. It also does not make any difference whether the financial assistance is given before or after the acquisition of shares.

Lack of established market practice and solid court of appeals precedent regarding the financial assistance prohibition has led to an ambiguous zone for LBOs. Legal practitioners, banks, investors and other players in the M&A practice work their way hard to find a reliable mechanism to create a gateway to overcome the financial assistance prohibition.

¹ Published in the Official Gazette dated 9 July 1956 and numbered 9353.

² Published in the Official Gazette dated 14 February 2011 and numbered 27846.

KOLCUOĐLU DEMİRKAN KOĐAKLI

This newly introduced provision has not been tested before the courts yet. The Turkish courts' view of Article 380 and its scope is yet to be clarified.

Mahmut Barlas (mbarlas@kolcuoglu.av.tr) & Rıza Yücel (ryucel@kolcuoglu.av.tr)

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