

The Great Dilemma of the Companies: Share Buy-Back Decisions

While share buy-backs were used by other countries as a pay-out method for years, they were prohibited in Turkey until the end of 2009. Pursuant to Article 329 of the abrogated Turkish Commercial Code (the ‘TCC’) numbered 67621, it was unlawful for the joint stock companies to buy-back their own shares in exchange for any consideration in order to protect the capital and creditors’ interests, and also to prevent unequal treatment of shareholders. The share buy-back transaction was considered as null and void². Companies were paying out their shareholders only by the means of dividend payments until the end of 2009, when the Capital Markets Board (the ‘CMB’) has adopted the Principle Decision which allows share buy-backs³. However, the Principle Decision’s permission of share buy-backs initially only applied to investment trusts and intermediary institutions, accounting for only 16% of the publicly traded companies. Therefore, the share buy-back regime has evolved gradually in Turkey. The Principle Decision comprised many articles regarding limitations for share buy-back procedures. For instance, the share buy-back period was limited up to 18 months and shares to be purchased could not exceed 20% of the paid capital, and companies were required to disclose transactions in detail. Also, it was stipulated under the law that companies can repurchase their shares only if the company’s articles set out buy-back transaction as one of the company’s business areas.

When the TCC entered into force on July 1, 2012, the share buy-back has regime changed entirely and the new regime applied to all joint stock companies. Currently, the TCC allows companies to buy-back their shares subject to the following terms:

1. The acquisition cannot exceed 10% of the company’s share or issued capital.
2. The board of directors must be authorized for up to five years by the general assembly to be able to adopt a decision for a share buy-back. In this authorization, the number of the shares, the minimum and maximum value of the compensation must be specified.
3. After the deduction of the prices of the shares to be acquired, the company’s remaining net assets must be at least equal to the sum of paid-in capital and the reserves which cannot be distributed as set out in law and articles of association.
4. The company only can acquire those shares which are fully paid.
5. The company cannot acquire its own shares if the transaction results in the company becoming the sole shareholder.

Furthermore, there is a different regime applicable for publicly held companies in Turkey. The Communiqué⁴ on Buy-Back of Shares numbered II-22.14 (the ‘Communiqué?’) set outs principles and procedures regarding share buy-backs by the listed companies. Requirements set out under the Communiqué⁴ may fall into three categories: prior authorization process, transaction limitations, and disclosure requirements.

The share buy-back regime created under the Communiqué⁵ was very detailed and complicated. Hence, the companies were not thrilled to repurchase their shares in spite of its advantages. However, the coup attempt on July 15, 2016 has affected the financial markets dramatically. The Turkish lira plunged by over 5%⁵ and shares on the BIST-100 stock exchange slid by nearly 9% at one point⁶. As the regulatory authority, CMB decided to take measures in order 'to prevent the emergence of the desired benefits of the market and to support companies and investors'⁷. One of the first measures that have been taken by the CMB was changing of the requirements and limitations for share buy-back regime for listed companies. The CMB has revoked some limitations and requirements in order to mitigate and minimize the negative effects of the political turmoil and the state of emergency period affecting financial markets in Turkey.

Within a week, the CMB announced that the share buy-back regime will be changed for public companies. According to the announcement, public companies were divided into two categories: (a) public companies which do not have an approved buy-back program yet can buy-back their shares from the stock exchange without being subject to any limitations under the Communiqué provided that they disclose the transaction, and (b) public companies which have an approved share buy-back program may repurchase their own shares from the stock exchange without being subject to any limitations under the Communiqué provided that they disclose publicly such transaction and they duly inform the authorized bodies⁸.

The changes in the buy-back transaction regime for listed companies before and after the CMB intervention following the coup attempt are as follows:

Share buy-back regime of publicly held companies before July 21, 2016:

Prior Approval:

Approval must be given by the general assembly to the board of directors prior to share buy-back transaction and buy-back program must contain information according to Article 8 of the Communiqué⁹. The only exception of authorization is in the case of an imminent and serious loss possibility in the company. In such case companies whose shares are publicly traded may repurchase their own shares also by a decision of the board of directors without authorization of the general assembly, provided that they duly comply with the disclosure requirements¹⁰.

As per Article 7 of the Communiqué⁹, the duration of a buy-back program approved by the general assembly is maximum three years for listed companies whose shares are traded, and maximum one year for unlisted companies.

Share buy-back Transaction Limitations:

The nominal value of the shares subject to the share buy-back transaction cannot exceed 10% of the paid

or issued capital including previous buy-back transactions. The total number of the shares which can be acquired by the company and/or its subsidiaries in one day cannot exceed 25% of the average daily volume of shares 20 days prior to the acquisition day. Furthermore, the total value of shares subject to buy-back cannot exceed the total amount of sources which may be subject to profit distribution for listed companies.

Listed companies can only conduct share buy-back transaction on the exchange market on which they are traded, hence for these companies, off-market repurchases are not allowed in Turkey.

According to Article 15 of the Communiqué?, the companies whose share are traded on the exchange, additionally have following rules to comply with:

1. During the opening session and the last 15 minutes of the first session, and during the opening and closing sessions of the second session, an order cannot be given, and the transaction cannot be executed;
2. Price order given for the purchase cannot be higher than the existing price bid or the last trade price executed; and
3. If the acquisition transaction is executed through derivative instrument, the strike price of that derivative instruments cannot be higher than the existing independent price bid or the last independent trade price executed by the company.

Disclosure requirements:

In order to keep investors and market forces informed, the Communiqué? regulates public disclosure requirements for publicly listed companies. The public disclosure obligations are regulated differently for listed and unlisted companies. As per Article 12 of the Communiqué?, listed companies are subject to following public disclosure requirements:

1. The buy-back program prepared by the board of directors is required to be announced in a public filing no later than three weeks prior to the date of the general assembly meeting and must be published concurrently on the website of the company.
2. Decisions of authorized bodies are required to be announced. If and when the general assembly makes an alteration or revision in the program submitted for approval, the revised program is required to be announced by a public filing, in the first business day following the date of the general assembly meeting and is concurrently published on the corporation's internet website.
3. The company and/or its subsidiary is required to make a public filing on starting and ending date of scheduled period, and nominal value and ratio to the capital of the to-be-acquired shares, two business days prior to the commencement of the transactions pursuant to and under the program.
4. iFor every buy-back transaction (before start of session in the first business day following the date of transaction), the company and/or its subsidiary is required to make a public filing on the nominal value and ratio to capital, transaction price, nominal value of shares previously repurchased within the scope of the program, transaction date, and privileges, if any, associated

with these shares.

5. In case of the disposal of repurchased shares, the company is required to make a public filing on the nominal value of disposed shares, transaction price, its ratio to capital, ratio of remaining shares to capital, amount of actual earnings/losses, the transaction date, and privileges, if any, associated with these shares, before start of session in the first business day following the date of transaction.

The company and/or its subsidiary is required to make a public filing on maximum and average prices paid for repurchased shares, the cost of acquisition and sources used therein for, total number of buy-backed shares, and the ratio of these shares to capital within three business days following the end of the term declared by the company, and the termination, or completion of the scheduled program¹¹.

Share buy-back regime of publicly held companies after July 21, 2016:

Prior approval:

Publicly held companies which do not have an approved share buy-back program may repurchase their shares without any limitations by disclosing special circumstances, and publicly held companies which have an approved share buy-back program may repurchase their shares without any limitations by informing authorized bodies and disclosing special circumstances.

It is not clear whether the limitation regarding the maximum duration of the buy-back program set out under the Communiqué² continued to be in force. Considering the detailed nature of the announcement, it can be argued that since there is no specification regarding such a provision, Article 7 is still in force.

Share buy-back transaction limitations:

The second CMB announcement revoked the 10% limit on the value of shares, and the 25% limit on the average of the daily amount. The new regime includes that companies which exceeded the 10% limit may also buy back more shares until the next CMB announcement. Also, the profit distribution limitation for companies whose shares are traded on an exchange is not applicable to the new regime.

For listed companies, the repurchase transaction must still be executed on the same exchange where company's shares are traded.

Repurchased shares are subject to restriction for a period of thirty days from the date of purchase. 'First-in first-out method' is applicable in the calculation of the thirty days period. At the end of the thirty days period, repurchased shares must be disposed within three years. The shares can be held for an indefinite period of time if the company complies with the previous share buy-back regime under the Communiqué².

Article 10 of the Communiqué¹, did not allow transactions during the period from the date of decision of the general assembly pertaining to capital increase by the companies in the share capital system, or from the date of decision of the board of directors pertaining to capital increase by the companies in the registered capital system, to the date of completion of capital increase transactions. However, the new regime amended this system, and the limitation on publicly held companies in the capital increase process was lifted.

Disclosure requirements:

The only disclosure requirement prior to the buy-back is the decision of the board of directors that comprises the purpose of the buy-back, the maximum number of shares to be repurchased, and the maximum amount of funds that will be reserved for the transaction. The disclosures regarding the approval of the buy-back program by the general assembly, the alteration of the buy-back program and the purchase transaction by subsidiary companies are not required in the new regime.

In case of disposal of repurchased shares, the company is required to make a public filing on the nominal value of disposed shares, transaction price, its ratio to capital, ratio of remaining shares to capital, amount of actual earnings/losses, transaction date, and privileges, if any, associated with these shares, before the opening of the session in the first business day following the date of transaction.

In sum, nearly all protection mechanisms have been altered by the new regime of the CMB. As a consequence, the number of Turkish companies who repurchase their own shares increased rapidly. According to the CMB, after the announcement dated 21.07.2016, 35 companies made public announcements regarding share buy-back in only four days².

It has been two years since the new regime was adopted and the state of emergency period has come to an end in July 2018, but the CMB still has not made any changes about the new regime for buy-backs. Regardless of its flexible nature, the new regime does little to eliminate all the concerns in relation to capital maintenance, investor protection, and possible market manipulation. Therefore, the new regime should adopt at least the following mechanisms such as general assembly approval for the buy-backs and disclosure requirement after purchasing more than 10% of the capital.

1 Turkish Commercial Code numbered 6762 entered into force on 29.06.1956

2 Article 329 of the abrogated TCC numbered 6762

3 Principle Decision of CMB Dated 01.09.2009 and numbered 27/748. For listed companies whose shares are traded on the Borsa Istanbul (Istanbul Stock Exchange).

4 Communiqué on Buy-backed Shares numbered II-22.1 (No.28871 03.01.2014):

<http://www.cmb.gov.tr/Siteapps/Teblig/File/483>

5 Elena Holodny, Turkey's failed coup could whack its economy,
<<http://uk.businessinsider.com/turkey-coup-economic-and-investing-effects-2016-7?r=US&IR=T>>
(2016)

6 BBC, Turkish Shares Close Down 7% after the coup attempt,
<<https://www.bbc.co.uk/news/business-36823068>> (2016) and Ye Xie and Elena Popina, Lira Drops Most in 8 Years as Stock Futures Sink on Turkey Clash,

<<https://www.bloomberg.com/news/articles/2016-07-15/turkey-lira-etf-drop-as-prime-minister-says-military-revolting>> (2016)

7 Reuters, Turkish Financial Watchdog Cancels Stock Market Abuse Decision,
<<https://uk.reuters.com/article/turkey-bourse-directive/turkish-financial-watchdog-cancels-stock-market-abuse-decision-idUKL8N1UB0JK>> (2016)

8 Announcement of the Capital Markets Board dated 21.07.2016:
<<http://www.spk.gov.tr/Duyuru/Goster/20160721/0>>

9 The program must comprise information as follows: as follows: (i) purpose of share buy-back, (ii) duration of buy-back program, if applicable, (iii) maximum number of shares to be acquired, (iv) that the program will be terminated when maximum number of shares to be acquired is reached, (v) lower and upper price limits (proportionate or fixed) determined for bought back shares by indexing to a particular indicator, and if the transaction requires the correction of the price and how such transactions will be taken into consideration, (vi) disposal principles of shares set out under the program, if determined, (vii) the total amount and source of the fund, (viii) the number and proportion of the shares which are not disposed of yet to the capital and if any, results of the previous program, (ix) statements regarding probable effects of buy-back program on the corporation's financial status and on the results of its activities, (x) information on subsidiaries, which may acquire shares within the scope of the program, if applicable, (xi) information on the highest, lowest and weighted average share prices of the last year and the last three months, and (xii) benefits to be granted by related parties, if any, from this transaction

10 Article 9/4 of the Communique?

11 Additionally, according to Article 13, companies whose share are not traded on the exchange are required to make a public disclosure in case there is an applicant for a voluntary take-over bid within the frame of a buy-back program and at the end of the period of voluntary take-over bid regarding total nominal value of buy-backed share, and total amount paid for acquisition, and total number of shareholders responding to take-over bid are announced by a public disclosure. This latter announcement further includes the shareholder structure and management control after the voluntary take-over bid

12 Announcement of the Capital Markets Board dated 25.07.2016
<<http://www.spk.gov.tr/Duyuru/Goster/20160725/0>>