



SCREENING CHAPTER 6 COMPANY LAW

AGENDA ITEM : DOMESTIC MERGERS OF PUBLIC LIMITED LIABILITY COMPANIES

**Country Session : The Republic of Turkey
20 July 2006**



Overview of the Turkish Legislation on Mergers

- **Turkish Commercial Code (TCC) No. 6762** of 29.6.1956 as last amended by Law No. 5274 of 9.12.2004
- **Commercial Registry Regulation (CRR)** of 2.2.1957 as amended by Decision No. 98/11548 of 1998, TCC, (Arts. 78-81 CRR)
- *Scope:*
 - ◆ General provisions for all commercial companies (Arts. 146-151 TCC)
 - ◆ Special provisions for companies limited by shares (Arts. 451-452 TCC)



General Principles of Mergers

- Mergers are allowed only between commercial companies of the “*same kind*”
- For this purpose, general and limited partnership on the one hand and the companies limited by shares and partnership limited by shares on the other hand are considered to be the same kind.
- Principle of *successio universalis*
- Types of Merger:
 - Merger by acquisition
 - Merger by formation of a new company
(Arts. 147, 151 TCC)



Special rules on companies limited by shares - 1

- **Scope:** All companies limited by shares, both public and private
- **Procedure:**
 - “Merger Balance Sheet”: Both companies shall prepare annual balance sheets according to a jointly determined model (Art. 149 TCC)
 - ◆ Date of merger is the date of the balance sheet
 - ◆ The merger must be completed within three months after the drawing of the balance sheets



Special rules on companies limited by shares – 2

(cont.)

- Share exchange ratio to be determined by an independent expert appointed by the court
 - ◆ No rules on the method of valuation and determination of the share exchange ratio
- Draft Terms of Merger (Arts. 451, 452 TCC)
 - ◆ No rules on the draft terms of merger
 - ◆ According to established practice, the draft terms include the rights and obligations of the merging companies, the share exchange ratio, the increase of capital of the acquiring company
- Approval of the general assembly of shareholders
- Registration and announcement of the merger decision in the commercial registry



Special rules on companies limited by shares - 3

● Protection of the creditors:

- One-sided protection: Only the creditors of the acquired company are protected.
- Invitation of the creditors to list their claims.
- Claims due and payable will be paid, guarantees shall be supplied for claims which have not become due and for disputed claims.
- Creditors may also accept the transferee company as the debtor and may give up their right to a guarantee
- Another protection of the creditors is realised through the principle regarding the equities of the merged companies as separate. Equities will be managed separately until the time when it is assumed that it is possible to distribute the assets of the company limited by shares among the shareholders (Art. 451 TCC)



Mergers of the companies under the Draft Turkish Commercial Code

The Draft TCC was submitted to the Presidency of the Turkish Grand National Assembly (TGNA) by the Council of Ministers on 9.11.2005. Currently negotiations have been completed at the sub-commission of the Justice Commission of the TGNA. The Draft will be negotiated in the plenary session of the TGNA after reviewed by the Justice Commission.

- **Scope:**

- All commercial companies and cooperatives are covered by the Draft. However, only companies limited by shares will be reviewed here (both public and private).



(cont.)

- Exception (1): Companies that have lost half of their capital and statutory reserves, or that are insolvent, may only merge with companies that have sufficient freely disposable assets, which may cover for the loss or insolvency (Art. 139 Draft TCC).
- Exception (2): A company that is in the state of liquidation may only participate in a merger as the company to be acquired, provided that it is not at the stage of distribution of assets to the shareholders (Art. 138 Draft TCC).
- **Types of merger:**
 - Merger by acquisition
 - Merger by formation of a new company



Rights of the shareholders and other right holders - 1 (Draft TCC)

- The shareholders of the acquired company have the right to claim shares in the same value in the acquiring company.
 - ◆ If the shares are non-voting, such shares will be given in the acquiring company.
 - ◆ If the shares have class rights, either shares with class rights or an appropriate compensation shall be given.
- Owners of benefit certificates shall receive the same rights or their certificates shall be acquired at real value.



Rights of the shareholders and other right holders - 2

- When share exchange ratio is calculated, a cash payment in a maximum amount of one-tenth of the share value may be given, in order to avoid fractional shares.
- The Draft Terms may stipulate that shareholders may choose to receive full cash payment at real value instead of new shares.
- The Draft Terms may also stipulate that shareholders shall only be given cash payment instead of shares (“Squeeze-out”) (This term must be approved at the general assembly at least with an affirmative vote of 90% of the share capital).
(Arts. 140, 141 Draft TCC)



Merger Procedure – 1 (Draft Law)

- **Drawing up of an interim balance sheet** (Maximum six months of interval is allowed between the drawing up of the interim balance sheet and the conclusion of the terms) (Art. 144 Draft TCC)
- **Terms of Merger, containing:** (Arts. 145, 146 Draft TCC)
 - Share exchange ratio
 - Rights of shareholders in the acquiring company
 - Rights granted to shareholders with class rights, non-voting shares and owners of benefit certificates
 - If any, cash payment to be made to shareholders
 - Date on which the shares given to shareholders of the acquired company may benefit from the profit of the acquiring company
 - If any, benefits granted to directors



Merger Procedure - 2

- **Merger Report to be prepared by the board of directors of the merging companies, containing legal and economic explanations and reasoning of the following: (Art. 147 Draft TCC)**
 - The purpose and consequences of the merger
 - The terms of merger
 - The share exchange ratio, the particulars of the valuation of the shares, rights to be granted to shareholders
 - The effects of the merger on the employees of the merging companies, and if possible, a social plan,
 - The effects of the merger on the creditors of the merging companies



Merger Procedure - 3

- The inspection of the balance sheet, merger terms and merger report by an expert “transaction controller” (Art. 148 Draft TCC)
- The transaction controller must state his opinion on, *inter alia*,
 - Whether the planned capital increase by the acquiring company is sufficient to cover the rights of the transferring shareholders
 - Whether the share exchange ratio or cash payment is fair
 - A comparison of the method of calculation of the share exchange ratio with at least three other generally accepted methods and whether the method chosen was fair



Merger Procedure - 4

- Merger terms, merger report, the report of the transaction controller and the financial statements and annual reports of the preceding three years must be disclosed at least one month before the date of the general assembly. They must also be placed on the web page of the companies. Stakeholders may obtain copies free of charge. (Art. 149 Draft TCC)
- Approval of the merger terms at the general shareholders assembly with the affirmative votes at least three quarters of the shares represented at the assembly, which must constitute the majority of the capital. (Art. 151 Draft TCC)
- Registration of the merger in the commercial registry
- The assets of the acquired company shall be transferred *ipso iure* to the acquiring company upon registration. (Arts. 152-153 Draft TCC)
- Publication in the Commercial Registry Gazette. (Art. 154 Draft TCC)



Protection of creditors and employees (Draft TCC)

- **Creditors:** (Art. 157 Draft TCC)
 - Creditors may demand a guarantee for their credits within three months following the merger. If the transaction controller declares that the merging companies have sufficient freely disposable assets to cover the credits, guarantee is not required.
- **Employees:** (Art. 178 Draft TCC)
 - Employment contracts shall be transferred to the acquiring company with all the rights and debts.
 - The employee may terminate the contract upon the expiry of the legal term of notice.
 - The employees may demand a guarantee for their matured claims.



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