SCREENING CHAPTER 6
COMPANY LAW

AGENDA ITEM : DIVISION OF PUBLIC LIMITED LIABILITY COMPANIES

Country Session : The Republic of Turkey
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Division of public limited liability companies under the current law

- No provisions in the **Turkish Commercial Code** (TCC) No. 6762
- Joint Communiqué of the Ministry of Finance and Ministry of Industry and Trade On the Partial Division of Companies Limited by Share and Companies With Limited Liability (Division Communiqué)

Overview of the system under the Division Communiqué

- Only partial division is regulated.
- Division may include assets such as immovables, participations, production facilities, intellectual property.
- Production facilities or an enterprise may only be transferred as a whole.
- Assets may be transferred to companies as capital in kind based on their book value.
- The transferring company or its shareholders must be given shares in the acquiring company. Cash consideration is not permitted.
- If shares are given to shareholders rather than the transferring company itself, the transferring company must reduce its capital.

Procedure of the division under the Division Communiqué

- Draft terms of division
- Interim balance sheet (maximum six months interval is allowed between the date of the balance sheet and the date of the general assembly where the division shall be approved)
- Inspection of the balance sheet and the division by an expert appointed by the court
- Increase and/or decrease of capital
- Approval of the division by the concerned companies
- Registration of the division in the commercial registry
- The assets are transferred *ipso iure* upon registration

Protection of the creditors under the Division Communiqué

- Creditors are invited to make their claims.
- They can demand payment of their matured claims and a guarantee to be given for other claims.
- If debts are not paid or guarantees are not given or approval of the creditors is not obtained, the division may not be registered in the commercial registry.

Division of companies under the Draft Turkish Commercial Code

- **Scope:**
  - All capital companies and cooperatives are covered by the Draft, however, only companies limited by shares will be reviewed here.
  - Both public and private companies limited by shares are covered
- **Types of division:** (Art. 159 Draft TCC)
  - **Partial division:** Part of the assets of one company are transferred to one or more companies. The shareholders of the transferring company receive shares of the acquiring company
  - **Complete division:** All the assets of a company are divided and transferred to other companies. The shareholders of the transferring company receive shares of the acquiring companies. The transferring company dissolves and is deregistered.

Rights of shareholders in case of complete division -1 (Draft TCC)

- The shareholders of the transferring company have the right to claim shares in the same value in the acquiring companies.
  - If shares are non-voting, such shares will be given in the acquiring company.
  - If 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.
- 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.

Rights of shareholders in case of complete division- 2 (cont.)

- Shareholders of the transferring company may
  - receive shares in all of the acquiring companies in proportion to their existing shareholding or
  - receive shares in one or more of the acquiring companies not in proportion to their existing shareholding

  (Arts. 161, 140 Draft TCC)

Division procedure under the Draft TCC - 1

- Drawing up of the balance sheet (there must be maximum six months interval until the drawing up of the draft terms)
- Drawing up of the draft terms, which must include:
  - Inventory of the assets to be transferred and the way they are divided
  - Share exchange ratio and cash payment, if any
  - Rights to be granted to shareholders with special class rights or holders of benefit certificates
  - The date new shares will be entitled to profit
  - Special benefits granted to managers or auditors
  - The list of business relationships that are transferred to the acquiring company after the division
  - The date as of which transactions done by the transferring company shall be deemed to be done on behalf of the acquiring company

(Arts. 166, 167 Draft TCC)

Division procedure under the Draft TCC – 2

- Report of the board of directors of the companies participating in the division, containing legal and economic explanations and reasoning of the following:

  - The purpose and consequences of the division
  - The terms of division
  - The share exchange ratio, the particulars of the valuation of the shares, rights to be granted to shareholders
  - The effects of the division on the employees of the companies participating in the division, and if any, a social plan
  - The effects of the division on creditors of the dividing companies

  (Art. 169 Draft TCC)

Division procedure under the Draft TCC – 3

- As in mergers, the balance sheet, terms of division and the directors' report must be reviewed by an expert "transaction controller".
- 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.
- Terms of division, directors' report, the report of the transaction controller and the financial statements and annual reports of the preceding three years must be disclosed at least two months before the date of the general assembly. Stakeholders may obtain copies free of charge.

Division procedure under the Draft TCC – 4

- Approval of the terms of division at the general shareholders meeting with the affirmative votes at least three quarters of the shares represented at the assembly, which must constitute the majority of the capital (If shareholders receive shares not in proportion to their existing shareholding, 90% of the shareholders must approve).
- Increase or decrease of capital
- Registration of the division in the commercial registry – Assets shall be transferred *ipso iure* to the acquiring company upon registration.
- Publication in the Commercial Registry Gazette.

(Arts. 170-173, 179 Draft TCC)

Protection of creditors and employees during division (Draft TCC)

- Creditors are invited to make their claims. They may demand a guarantee for their claims. If the transaction controller declares that the companies have sufficient freely disposable assets to cover the credits, guarantee is not required. (Art. Draft TCC 175)
- The division may not be submitted to the general assembly for approval unless creditors are provided with sufficient guarantees (Art. Draft TCC 173)
- If the companies who acquire debts do not honour them, other companies participating in the division shall be jointly and severally liable, provided that the debt was not guaranteed and it is no longer possible to pursue the acquiring company. (Art. 176 Draft TCC)

Protection of employees during division (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.
- The former employer and new employers are jointly and severally liable for all claims of the employee arising out of the employment contract whether before or after the transfer.

(Art. 178 Draft TCC)

THANK YOU FOR YOUR ATTENTION