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MERGER OF JOINT STOCK COMPANIES ACCORDING TO THE NEW TURKISH COMMERCIAL CODE*

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Özet

Birleşme ekonomik güçlerin bir araya gelerek mevcut ya da yeni bir şirket çatısı altında güçlerini birleştirmelerini ifade eder. 6102 sayılı yeni TTK, kaynağını İsviçre Birleştirme Kanunundan ve AB 78/855/ECC sayılı şirketler Hukuku 3. Konsey Yönergesinin birleşmeye dair hükümlerinden alan yeni bir birleşme düzeni oluşturmuştur.

Bir anonim şirket birleşmesinden söz edebilmek için en az iki (anonim) şirketin bulunması zorunludur. Birleşmede bu iki şirketin malvarlığının birleşmesi ve devrolunan şirketin ortaklarına devralan şirketin paylarının değiş tokuş oranına göre kendiliğinden iktisap edilmesinin mecburi olması durumu söz konusudur. Böylece birleşmede malvarlığı birleşmesi ile birlikte ortaklar birleşmesi de sağlanarak pay sahipliğinin devamlılığı ilkesi güvence altına alınmış olmaktadır. Yeni kanun bu ilkeye ayrılma akçesi başlığı altında, m.141'de istisna da getirmiştir. Diğer yandan birleşme tasfiyesiz sona erme ve külli halefiyet ilkesine göre gerçekleştirilir. Yeni TTK'da tasfiyesiz sona ermenin alacaklıları ve ortakları mağdur etmemesi için, inceleme hakkı ve alacakların teminat altına alınması gibi, özel hükümler öngörülmüştür. Birleşmenin külli halefiyet ilkesine göre gerçekleşmesinin anlamı ise, şirketin bütün aktif ve pasiflerinin, malvarlığı ve işletmelerinin bir bütün halinde kendiliğinden ve başka hiçbir işleme gerek olmaksızın devralan ya da yeni kurulan şirkete geçmesidir.

Anahtar Kelimeler: 6102 sayılı TTK, birleşme, anonim şirketlerin birleşmesi, ayrılma akçesi

Summary

Merger is the amalgamation of the economical powers under an existing or a new company. The new TCC numbered as 6102 constituted a new merger regulation by taking its origin from Switzerland Merger Act and the merger provisions of the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies.

There must be at least two (joint stock) companies to constitute a merger. In a merger, it is a must that the amalgamation of the assets of these two companies and the acquisition of the acquirer company shares automatically by acquired company shareholders in accordance exchange ratios. By this way, shareholding continuousness principle is assured and also asset merger and shareholder merger is provided. The new Code has brought an exception to this principle called "leaving money" under the article 141. On the other hand, a merger is realized in accordance with the principles of termination without liquidating and complete succession. The new TCC provides special provisions like examination right and securitize of the credits to prevent creditors and shareholders from getting harmed by termination without liquidating. The realization of the merger in accordance to complete succession refers to the transfer of all the assets and liabilities and the enterprises of the company as a whole to the acquirer or the newly existed company automatically and without needing any other transaction to be made.

Key Words: TCC numbered as 6102, merger, merger of the joint stock companies, leaving money.

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I. IN GENERAL

In a globalizing world, merger is one of the economical and legal tools to lessen the negative effects of the globalization for companies and to reverse these effects to positive.

Merger is the amalgamation of the economical powers under an existing or a new company. In the first situation, the company which is acquired loses its legal identity while in the second situation all companies in the merger loses their legal identities.

Mergers are prompted in many countries. Additionally, the will of the companies to be strong and big against the economical and financial crises leads them to merge with other companies. As a result of a merger, the position of a company gets stronger in the market. Furthermore, the competition between the merged companies is disappeared, overstuffed employment can be prevented, expenses can be reduced and the technological development can be provided through mergers.

A merger affects not only the commercial companies but also the shareholders, company creditors, employees, and, if they exist, holders of special right. Therefore, the interests of the above mentioned parties must be balanced. This balance is provided by legal rules which are produced by legislator. The most important thing is the completion of the merger in a fast and safe way which means there must be no blockage in the process. Thus, the aim of the legal regulations is to render companies to obtain legal structures which help them to adopt the changing market conditions in a quick, inexpensive and easy way.

Despite The Commercial Code numbered as 6762 includes merger, it provides different provisions in the same subject due to the presence of the two different law systems. Thus, it leads the problems to occur in practice in merger issue.

The New Turkish Commercial Code No 6102 preferred a regulation which use Switzerland Merger Act and the merger provisions of the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies as a source instead of including provisions of The Code No 6762 that involves provi-

sions which are disconnected to each other and unable to meet the actual necessities.

The surveys and reports state that the new code will increase the number of mergers. For instance, according to " Turkey M&A Outlook: Identifying Opportunities in a Changing Market", a report prepared by a Turkish survey company called Mergermarket and KPMG jointly, in 2011 mergers will increase tremendously and the increase will happen mostly in the energy sector.

The report states that the changes in the new TCC which will come into force in 2012 will play a crucial role to facilitate the merger and acquisitions by dealing the factors which cause investors to refrain from entering the country before.

The report states that most of the participants (% 92) expect the new TCC will affect the investor's sensitivity directly[1].

The communiqué will emphasize not only the merger of all companies[2] but also the merger of joint stock companies via acquisition and explain merger procedure elaborately.

II. CONCEPT OF MERGER

Merger is the transfer of one or more commercial companies (joint stock companies) into another commercial company (joint stock company) or the transfer of at least two commercial companies (joint stock companies) into a new commercial company that will found by them without liquidating their assets of their own accord in accordance to complete succession. As a result of this, company share of the newly found company or merged company will be given to the shareholders of the terminated company (joint stock company) according to the determined exchange ratios.

The presence of at least two joint stock companies is a must to form a merger. The amalgamation of the two joint stock companies' assets and the acquisition of the acquirer company's shares automatically by the shareholders of the company which is acquired in accordance exchange ratio is compulsory. By this way shareholding continuousness principle is assured and also asset merger and partner merger is provided.

[1] Istanbul Ticaret Gazetesi dated 22 April 2011

[2] 6102 sayılı TTK hükümlerine göre Ticaret Şirketlerinin Birleşmesi konusunda ayrıntılı bir çalışma için bkz. Şengül Alkılıç; Türk Ticaret Kanunu Tasarısına Göre Ticaret Şirketlerinin Birleşmesi, İstanbul 2009.

The new TCC art. 136/3 and 140 ensures this principle clearly. According to these provisions "partnership merger is the transfer of the acquired company's assets to the acquirer company or to the newly found company in return to render the shareholders of the acquired company to be the shareholder in the acquirer company or in the newly found company automatically according to exchange ratio determined by taking into consideration the assets of the both companies.

The new TCC brought an exception to this principle. The new TCC article 141, under the title of leaving money, enables the shareholders of the acquired company to make a choice between to be a shareholder in the acquirer company and to take the money equal to the real value of the share (leaving money) in case of it is mentioned in the merger contract. (art. 141/1) In addition to this, only giving a leaving money to the shareholders of the acquired company can be decided in the merger contract. (141/2)

Merger is realized by the principle of the termination without liquidating the assets and the principle of the complete succession. The Code brings special provisions for preventing the principle of termination without liquidating the assets from harming the creditors and the shareholders. While TCC art. 149 regulated the examining right of the creditors (the beneficiaries and other related ones), the art. 157 regulated securitize of the credits.

Acquired company is terminated without liquidating the assets via the registration of the merger to the trade registry. (art. 152/ III) At the same time it is deleted from the registry. (art.136/ IV) At this point, it is not possible that creditors can prevent the conclusions of the merger to be realized by objecting the merger or the governance of the acquired company's assets can be done separately for a while. Merger becomes valid when it is registered. (art.153). However, the creditors have the right to apply the acquirer company to secure their rights in three months from the merger becomes valid legally. (art. 157/I)

The realization of the merger in accordance to the principle of complete succession refers to the transfer of the company's all assets, liabilities and enterprises as a whole into the acquirer company or to the newly found company automatically without the need to do any other transaction. By this way, not only the shareholders' rights and debts but also the rights and the debts of the third parties who were the creditor or the debtor of the acquired company will pass to acquirer company or to the newly found company. (art. 136/ IV, 153/I)

III. PROCEDURE FOR THE MERGER FORMED AS AN ACQUSITION

1. Preparation Phase

a. To give authorization to prepare the merger contract

The joint stock companies which intend to merge would seek a settlement on financial issues at first. The realization of the merger can be provided by solving the existing financial problems. There for it is a must that the parties negotiate in advance of merger is realized. In the wake of these negotiations, it will be clear whether the merger will realize or not.

The managing body of the companies has the authority on the examination of the financial condition of the companies and the carrying out the transactions which are related in which form and conditions the merger will take place. This authority is belonged to the board of directors. The board of directors may do the necessary preparations considering the merger and prepare a merger contract draft by evaluating the possibilities regarding to merger principles and estimates. The preparation phase and the draft refers to the agreement on the merger principles of the managing bodies via negotiations and rendering the merger issue to be mature enough to be brought to the general assembly.

By this way, authorized managing bodies of the companies which intend to merge demand from the company's general assembly for granting authority to their selves to prepare a merger contract before they sign a contract concerning to this issue. This authority is just a regulate, therefore, it does not have a bounding character. Despite this authority, it is possible that both the merger decision and the merger contract can be rejected by both companies' general assembly.

b. The determination of the assets of the merging companies by an expert

The acquirer company gives shareholding title to the acquired company or its shareholders in accordance exchange ratio determined by taking into consideration of the acquired company or companies' assets. The acquirer company makes capital increase in the ratio of the acquired company's assets. (art.142) If a difference occurs between the shares given in accordance to exchange ratio and the shares obtained in the acquired company, equalizing money will be paid to the acquired company shareholders on condition that the money do not exceed one-tenth of their share given in the acquirer company. (140/II) On the other hand, if it is not mentioned election right or obligatory leaving money for shareholders, it is a must to determine the pay-

off for this leaving. Thus, it is necessary that explanation of how the mentioned shares and estimations determined must be written in the merger contract and in the merger report. Additionally, they must be inspected by process auditor. Thus, to estimate the real asset value of the companies which participate in the merger process is a must. The standards which are used in this evaluation must be the same in both companies to provide objectivity and equality criteria.

The experts which are appointed by the courts are authorized to determine the asset value. The expert report must be prepared before the merger contract completed and report's content must be represented in this contract.

c. Preparing the merger contract

According to the Code, the authority to prepare and to sign a merger contract is belonged to the managing body. (art.145/II) In other words, merger contract must be in written by board of directors. The board of directors makes this contract in written after taking the authority from general assembly for preparing and signing a contract. The content of the merger contract is regulated in the TCC article 146 clearly. According to this a merger contract must contain the information stated below.

The trade names, legal types and headquarters of the companies which participate in the merger process.

The changing ratios of the company shares, equalization price (if it is provided), the statements of the shareholders of the acquired company about their shares and rights in the acquirer company.

The rights given by the acquirer company to the privileged and non-voting shareholders and dividend share holders.

The method of changing company shares.

The date that the shares, which are obtained through merger, entitle accounting profit of the acquired company and all qualifications related to this demand.

In the need of, according to article 141, the leaving money

The date that is assumed as acquired company's transactions and acts would be treated as if they are the transactions and the acts of the acquirer company.

The special advantages given to managing bodies and manager shareholders.

Shareholders will give positive or negative vote for merger in the general assembly according to the information contained in the merger contract. Thus, the purpose of the contract is to provide reliable information regarding to merger for the people who can be affected from the merger. The agreement on the contract is not enough to generate the merger's effects. Additionally, general assembly must approve the contract and take a merger decision. Furthermore, this decision must be registered in the trade registry.

d. Preparation of the Text of Amendment to the Articles of Association

In the mergers which take place in acquisition form, the acquired company or companies are terminated without liquidating and they transferred their assets as a whole into the acquirer company when the merger realized. In return, they enable their shareholders to obtain the shareholder title in the acquirer company. While the merger concludes with termination for the acquired company, it causes some structural changes in the acquirer company. First of all, due to the fact that the principal capital will increase, the changes will be needed to be done in the articles of association. The text of amendment to the articles of association will be prepared by the managing body of the acquirer joint stock company must be prepared in a way that covers the matters stated in the merger contract and all the differences are occurred due to the merger.

The text of amendment to the articles of association, includes the principle capital increase which is going to be done, must be approved in the general assembly which the merger voting takes place in or must be approved in the other general assembly. This draft articles of association also must be submitted to the shareholders' examination. Since the principle capital increase of the acquirer company generated from the merger, the increased principle capital will not be transferred to the shareholders of the acquirer company instead will transferred to the shareholders of the acquired company in return for their acquired assets. Therefore, planned principle capital increase removes the preemptive rights for the shareholders of the acquirer company implicitly. This matter can be stated clearly in the draft of text of amendment to the articles of association. This is the right preparation of the draft of text of amendment to the articles of association. However, as it mentioned above, in the case of presence of unclearness in the contract, the same result will be reached implicitly.

e. Preparation of merger report

The new TCC article 147 requires the managing bodies of the companies which intend to merge to write a report concerning the merger separately or together. The origin of this provision is the 9th article of the Third Council

Directive of EEC. This report must contain detailed, reasoned and satisfied statements concerning the issues related to the merger. In this report, especially the share exchange ratio must be explained with its economical and legal aspects and if the problems occurred regarding the evaluation during the determination of the exchange ratio, they also must be mentioned. The report must include the issues stated below.

- The aim and the results of the merger

- Merger contract

- The share exchange ratios and, if it is provided, equalization price, the shareholder's rights given to shareholders of the acquired company

- In the need of cost of leaving money and the reasons of giving leaving money instead of giving share holder right in the company.

-The Qualifications related to the share evaluation for determination of the exchange ratios.

-The amount of the principle capital increase of the acquired company.

- The effects of the merger on employees of the companies which participate in merger process and if it is possible a social plan

-The effects of the merger on the creditors of the merger parties

-In the need of the certifications from the related offices

The purpose of preparing a merger report is giving information which describes the tangible merger to the merger parties' shareholders. The companies' perceptions, expectations and what extend these expectations coincide with the shareholder's interests will be clearly understood by this report and the merger contract. This report will be inspected by the process auditor.

g. The Auditing of the Merger Contract and the Merger Report

After the merger contract and merger report is prepared by the merging companies' board of directors, the contract, the report and the balance sheets which will be used in the merger will be inspected by the process auditor who is expert on that issue. The origin of this provision is The Third Directive of EEC article 10. In his report regarding to the merger, the process auditor will examine the matters stated below and make an explanation about it. (new TCC art.148/III)

If they find enough the principle capital increase by the acquirer company to protect the acquired company's shareholders rights.

If the exchange ratio and the leaving money is fair or not

Which method used for determining the exchange ratio, the fairness of the method must be shown by comparing at least three different generally acceptable methods

The values which may occur in the case of applying the other generally accepted methods.

In the case of balancing, if it is fair or not

The qualifications which are taken into consideration in the evaluation of the shares for determination of the exchange ratios

The purpose of this audit is to protect shareholders, minorities and creditors. The merging parties have to give every kind of information and document regarding to this audit to the process auditor.

h. The Rights and Liabilities in the Preparation Phase

-The right of examination

The companies which participate in the merger has to keep

Merger contract

Merger report

The audit report prepared by the process auditor

The year-end financial statements of the last three years and in the need of interim financial statement

available thirty days before the merger decision taken in the general assembly for the beneficiaries, who will be effected from the merger, to be able to examine the documents.

2. Decision Phase

After the completion of the transactions needed to be done for the merger in the preparation phase, the merger contract must be approved by each merging companies' general assembly and it must be concluded with the quorum determined in the new TCC article 151. Merger becomes valid by the approval of the both general assembly.

The new code regulates the quorum necessary for the merger decision elaborately. Since both the acquirer and the acquired companies are joint stock

companies, the merger decision must be taken by three-fourths of the votes in the general assembly on the condition that the votes represent the majority of the principle capital or increased principle capital. (TCC art. 151/I,b.a)

If the merger brings privileged shares, this issue must be voted separately in the generalassembly and the seventy five percent of the principle capital must cast positive vote to conclude it.

If the acquirer or the acquired joint stock company shares traded at exchange, mentionequorum lessens and the presence of the shareholders meet the one-fourth of the principle capital starts the general assembly and the merger decision can be taken with absolute majority of the shares in the assembly. (TCC art 421/5b)

3. Finalization Phase

Merger contract becomes bounding for the parties after the contract is approved in accordance the quorums which the code seeks for in the related companies' general assemblies. However, the merger decision must be registered to trade registry by the related companies' bodies to enable the merger to generate conclusions legally. (TCC art. 152) After the application for the registration, registry official will do the necessary examination and register the merger decision. With the registration, merger is realized for the companies. The company acquired like this dissolves and its assets transferred to acquirer company as a whole without liquidation and the shareholders of the company automatically becomes the shareholders of the acquirer company.