

Company Mergers in Turkey

Introduction

1 In parallel with the globalization, companies have a tendency to develop and implement new strategies to compete successfully in national and international markets. One of the main strategies that companies develop and implement to compete is providing growth, either internally or externally. Merger is an important way of external growth and may be defined as combining two or more companies under an undertaking. As their contribution is important for the economy, in order to encourage both domestic and foreign investors, Turkish government has adopted many reforms regarding merger transactions.

In Turkish legislation, there is not a specific regulation which governs mergers. Thus, the principles and procedures of merger transactions shall be mainly subject to provisions of Turkish Commercial Code (“TCC”) and Turkish Code of Obligations (“TCO”). There are also other particular regulations that must be paid regard to and abided by within the process of merger transactions, i.e. the Law on the Protection of Competition, the Capital Markets Law and the Corporate Tax Law.

In this article, principles and procedures of merger transactions shall be detailed in respect of TCC provisions.

Merger Transactions

As stated above, related provisions of the TCC and TCO shall apply to merger transactions. There are no strict restrictions or requirements related to merger transactions stipulated under TCC. On the other hand, shareholders of a company may be free to determine restrictions for merger transactions under the articles of association.

Mergers may be defined as combining two or more companies under a single undertaking. The company which is transferred to another company is called “assignee” and the company which takes over the transferred company with its rights and obligations is called “transferee”. Shareholders of the assignee may automatically acquire the shares of the transferee with the exchange rate depending the assets of the assignee, through the merger. Acquisition is the purchase of shares of a company by another company, in other words purchase of ownership of a company by another.

2 Mergers under TCC

As per TCC, capital companies may merge with capital companies and cooperatives. In addition, provided that the transferee is a capital company, it may merge with unlimited liability and commandite companies.

There is not a specific definition made under TCC for merger, but the methods are determined. Companies may be merged mainly in two ways;

- Acquisition of a company by another company (Merger by acquisition)
- Combining two or more companies under a new company (Merger by formation of a new company)

Merger by Acquisition

Merger by acquisition is one method of mergers determined under TCC. In this method, a company (“assignee”) is transferred to another company (“transferee”) with its rights and obligations; and

as a result of this transaction, assignee loses its legal personality and the said company is removed from trade registry.

Transferee shall increase the company capital for the required amount to protect the shareholders of assignee for the merger.

Merger by Formation of a New Company

Merger by formation of a new company is the second method of merger. In this method, two companies merge under a newly established company (hereinafter may be denoted as “target company”). In such a situation, both the transferee and the assignee companies lose their legal personality and accordingly, the newly established company shall take over the rights and obligations of both companies as a whole through merger.

Procedures of Merger Transaction under TCC

The required documents, procedure and process of a merger are set out mainly under TCC. Boards of directors of the companies are obliged to prepare the required documents and to conduct the procedure determined under TCC.

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Merger Agreement

Merger agreements shall be prepared for both merger by acquisition and by formation of a new company. TCC stipulates that a merger agreement is regarded as valid on the condition that it is executed in a written form. Otherwise, it shall not be valid, be it represents true wills of both parties or carries the consent of the persons authorized to represent and act on behalf of both companies.

Merger agreements shall be signed by the authorized signatories of each companies participating in the merger. In addition, merger agreements shall be approved by the general assembly of these companies.

A standard merger agreement shall include the below provisions as stipulated under TCC:

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- Trade names, legal types, headquarters of the companies participating in the merger and in case of merger by formation of a new company, trade names, legal type and headquarter of the target company;
- Exchange rate of shares, if determined, the equalization amount; explanations regarding shares and rights to be acquired by the shareholders of the assignee company in the transferee company of;
- Rights granted by the transferee to the privileged shareholders, the holders of non-voting shares, and the holders of dividend shares;
- Exchange method of company shares;
- The date that shares acquired by merger are entitled to the profit of balance sheet of transferee or target companies and all particulars regarding this claim;
- If required, the squeeze-out fee determined in respect of article 141 of TCC;
- The date on which the transactions and actions of the assignee shall be deemed to have been made on the account of the transferee;
- Special benefits granted to the managing bodies and partners;
- Names of unlimited liable shareholders, if required.

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Merger Report

Boards of directors of the companies participating in the merger shall prepare a merger report. Merger report aims to provide detailed information regarding merger to the shareholders of these companies.

TCC sets out the mandatory components of this report as follows:

- The purpose and the results of merger,
- Merger agreement,

- Exchange rates of shares, and if determined, the equalization payments; rights granted in transferee to the shareholders of assignee
- If determined, the amount of squeeze-out fee and the reasons of determining squeeze-out payments instead of granting shareholding,
- Principles regarding the valuation of shares for determining the exchange rate,
- If required, the amount of capital increase to be made by transferee,
- If determined, information regarding additional payment and other personal performance obligations and personal liabilities to be imposed on the shareholders of the transferee through merger,
- In case of a merger of different type of companies, liabilities to be imposed on shareholders due to the new type of the company,
- Effects of merger on the employees of the companies participating in the merger, and, if possible, the content of a social plan,
- Effects of merger on the creditors of the companies participating in the merger,
- If required, approvals of the relevant authorities.

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In case merger is made by formation of a new company, articles of association of the new company shall be attached to the merger report.

In case all shareholders approve, small and medium sized enterprises may decide not to prepare a merger report.

Inspection Right

For providing the transparency through the merger process, TCC grants the inspection right to the shareholders, holders of dividend right certificates and other related persons. Thus, every company participating in the merger shall submit below mentioned documents to the attention of relevant persons in their

headquarters and branches, 30 days prior to general assembly meeting:

- Merger Agreement,
- Merger Report,
- Year-end financial statements of the last three years, annual activity report, and, if required, interim financial statements.

In case all shareholders approve, small and medium sized enterprises may decide not to exercise inspection right.

General Assembly Meeting for Approval of Merger

The board of directors submits the merger agreement to the general assembly, and the general assembly discusses the agreement and decision of merger.

In joint stock companies, general assembly may approve the merger with three quarters of existing votes at general assembly provided that they represent majority of the capital. In limited liability companies, general assembly may approve the merger with three quarters of the votes of all shareholders provided that they represent at least three quarters of shares representing the capital.

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Registration and Legal Results of Merger

Once the companies participating in merger approve the merger, board of directors of these companies shall apply to the trade registry for registration.

Merger becomes valid upon registration at the trade registry. With registration, all assets and liabilities of assignee shall be automatically transferred to the transferee. Assignee company dissolves upon registration of merger.

In case creditors of the companies participating in the merger request within 3 months as from registration date of the merger, transferee company shall secure their receivables. If it is ascertained that other creditors are not damaged, instead of providing a security, transferee may pay the receivables.

Simplified Procedure for Merger

TCC allows the simplified procedure for merger of the companies in case, (i) the transferee company holds all shares bearing voting right of assignee company or (ii) a company or a person or group of people bound by law or contract, have all shares bearing voting right of companies participating in the merger.

In this procedure, provided that one of the above situations exists, companies participating in the merger are not obliged to prepare a merger report or to regard inspection right. In addition, these companies are not obliged to present the merger agreement to the general assembly for its approval.

TCC also regulates another situation for simplified procedure. In case the assignee holds at least 90% of the shares bearing voting rights of the transferee, the simplified procedure may be conducted provided that below conditions are fulfilled in favor of minority shareholders:

- Providing the offer of the shares of the transferee equivalent to the above-mentioned shares and also cash corresponding to the actual value of the company shares,
- No additional obligation for payment or no personal performance obligation or liability would arise because of merger.

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