Simplified Mergers in Turkey under Turkish Commercial Code

Authors: Gönenç Gürkaynak, Esq., Nazlı Nil Yukaruç and Defne Kahveci, ELIG Gürkaynak Attorneys-at-Law

I. Introduction

Merger, in general, is a complex procedure which requires detailed and long formalities. Simplified merger creates an option for the joint stock companies to merge in a faster way without being subject to certain transactions.

In order to shorten merger procedures for companies that already own at least 90% or more of the voting rights, the Turkish Commercial Code numbered 6102 ("**TCC**") has adopted the concept of simplified merger from Swiss Merger Law and incorporated similar provisions contained therein. The underlying reason for narrowing the shareholding percentages was that the risks that may arise for the minority shareholders in case of a merger of two companies with a prior shareholding relationship are usually lower or less significant.[1]

However, the TCC also limits the type of companies that can benefit from the simplified merger procedures. Preamble of TCC expressly states that simplified merger procedure is only applicable to capital stock companies (i.e. joint stock companies and limited liability companies).

Simplified mergers of capital stock companies are categorized into two types under the TCC. In the first group the acquiring company owns 100% of the voting rights of the acquired company and in the second group it owns 90% of the voting rights of the acquired company.

II. Types of Simplified Mergers and Facilitations Under Turkish Commercial Code

(a) Mergers Where the Acquiring Company Owns All of the Voting Rights of the Acquired Company

Pursuant to first paragraph of Article 155, simplified mergers where the acquiring company holds 100% of the voting rights of the acquired company are divided into two sub-categories:

(i) Acquiring company holds all (100%) of the shares with voting rights of the acquired company; or
(ii) A company or a real person or a legally or contractually connected group of persons hold all (100%) of the shares of the merging companies.

[1] Pulaşlı, Hasan, Şirketler Hukuku Şerhi, 3rd ed., Book 1, January 2018, pg.273

Under the first option where the acquiring company holds all of the shares with voting rights, the merging companies are generally parent and subsidiary companies. However, it is usually the parent company who acquires the subsidiary and a reverse merger is not likely to happen under simplified merger procedures.[2]

Under the second option where a company or a real person or a legally or contractually connected group of persons hold all of the shares with voting rights, the merging companies are generally two sister companies or subsidiaries. For example, if a joint venture or a holding company owns all of the voting rights of both Company A and Company B and those two merge, such merger will be subject to the rules of a simplified merger.[3]

When compared with the ordinary merger procedures, companies are under lesser obligation to provide documentation and in granting rights to the shareholders when they merge in accordance with the first paragraph of Article 155 of the TCC. For example, in ordinary mergers, merging companies have to prepare a merger report that explains the purpose and consequences of the merger and a merger agreement (which will be submitted for the general assembly's approval) and should subsequently submit the merger agreement and merger report in their head offices and branches for the shareholders to inspect.

Instead, in simplified mergers defined under this section, companies are not obliged to prepare a merger report or grant shareholders the right to inspect the merger agreement and merger report. Nevertheless, the companies are still obliged to prepare a merger agreement containing fewer clauses, which will be explained in detail below. However, they have the option to not submit the agreement for the general assembly's approval.

In any case, the merging companies have to have the balance sheet audited, which is the basis of the merger as year-end balance sheet, by an independent auditing company, alongside its year-end financial statements.[4]

For the validity of the merger agreement, it is sufficient to include the information mentioned below:

(i) Trade names, legal status, headquarters of companies participating in the merger; in the case of a merger by formation of a new company, type, trade name and headquarters of the new company,
(ii) Cash payment for withdrawals in accordance with Article 141, if necessary,
(iii) Date on which the transactions and activities of the acquired company is considered as performed on the account of the acquirer company,

[2] Pulaşlı, Hasan, Şirketler Hukuku Şerhi, 3rd ed., Book 1, January 2018, pg.274
[3] Id.
[4] Pulaşlı, Hasan, Şirketler Hukuku Şerhi, 3rd ed., Book 1, January 2018, pg.276

(iv) Special benefits granted to managing bodies and managing partners,
(v) Names of the shareholders with unlimited liability, if necessary.

(b) Mergers Where the Acquiring Company Owns Shares with At Least 90% Voting Rights of the Acquired Company

Pursuant to the second paragraph of Article 155, a merger where the acquiring company holds at least 90% of shares of the acquired company that has voting rights will be subject to the rules of simplified merger provided that:

(i) the minority shareholders are offered, in addition to the participation rights in the acquiring company, a cash or other compensation payment in accordance with TCC, which is equivalent to the real value of the participation rights; and

(ii) no additional payment or personal performance liability or personal responsibility of minority shareholders arise due to merger.

Similar with the first type of simplified merger, companies do not have to prepare certain documents. Pursuant to the second paragraph of Article 156, merging companies are not obliged to prepare a merger report. However, the companies are obliged to grant shareholders right to inspect and prepare a merger agreement containing fewer clauses. The company should grant the right to inspect 30 (thirty) days before the application to the trade registry for the registration of the merger. On the other hand, the company has the option to not to submit the agreement for the general assembly's approval.

For the validity of the merger agreement, it is sufficient to include the information mentioned below:

(i) Trade names, legal status, headquarters of companies participating in the merger; in the case of a merger by formation of a new company, type, trade name and headquarters of the new company,
(ii) Transfer rates of company shares, and, if provided, equalization amount; explanations regarding shares and rights of shareholders of the acquired company in the acquiring company,
(iii) Cash payment for withdrawals in accordance with Article 141, if necessary,
(iv) Date on which the transactions and activities of the acquired is considered as performed on the account of the acquirer,
(v) Special benefits granted to managing bodies and managing partners,
(vi) Names of the shareholders with unlimited liability, if necessary.

III. Conclusion

The simplified merger implemented by the TCC has created a more convenient and time efficient merger structure for companies that are already in a shareholding relationship. Thus, the simplified merger procedure has become more preferable for such companies, especially since ordinary merger procedure results in unnecessary delays and higher costs.

Article contact: Gönenç Gürkaynak, Esq. Email: gonenc.gurkaynak@elig.com

(*First published by Mondaq on June 19, 2019*)