

Protection of Creditors and Employees and Personal Liabilities of Shareholders in Mergers

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Synergies and increase in the assets of the merging companies are aimed at mergers. However, a merger may at the same time result in the increase of the liabilities of the merging companies. Further, in some cases the financial standing of the absorbed company in a merger may not even show positive figures thus such a merger may present a potential risk on the creditors of especially the surviving company. Due to the fact that creditors of the merging entities do not have a veto right against a merger, there arises the need for a specific protection tool for the creditors. A merger may also negatively affect the employees of the merging entities, again especially the ones of the absorbed company. On the other hand, “over-protection” may defeat the purpose of the merger concept so a fairly balanced protection mechanics is essential. This article focuses on the means of protection of creditors and employees, and personal liabilities of shareholders in mergers, as regulated by the Turkish Commercial Code (“TCC”).

I. Protection of Creditors

Unlike the legislation preceding the TCC, which provided the creditors of the absorbed company with the right to object to the merger¹, with a more practical approach article 157 of the TCC entitles creditors of the companies participating to a merger with the right to claim security for their receivables.

Pursuant to the said article, creditors are entitled to claim security for their receivables within the three months following the date on which the merger becomes legally effective (i.e. registration of the merger decision with the relevant trade registry). Companies participating to the merger shall notify their creditors of their rights through an announcement to be made in the Turkish Trade Registry Gazette three times, with a minimum of seven-day intervals, and through an announcement to be placed on their websites (provided that they are obliged to set-up a website as per the relevant provisions of the TCC²). The announcement should clearly mention that the creditors may request the surviving company to secure their receivables, and shall also indicate the statutory claim period the creditors have³.

If creditors of the companies participating to the merger make a claim within three months following the date on which the merger becomes legally effective, for having their receivables secured, the surviving company shall so secure their receivables⁴. In practice, personal guarantees (e.g. by shareholders) and collateral guarantees (such as pledge or assignment) are given as security⁵. If a creditor fails to make such claim within the statutory period of three months, such creditor shall be deemed to have waived from its right to claim security⁶.

¹ Article 150 of the Turkish Commercial Code numbered 6762.

² Article 157/2 of the Turkish Commercial Code numbered 6102.

³ Prof. Dr. Hasan Pulaşlı, *Şirketler Hukuku Genel Esaslar*, 2nd Edition, Ankara 2013, pg. 86.

⁴ Article 157/1 of the Turkish Commercial Code numbered 6102.

⁵ Prof. Dr. Hasan Pulaşlı, *Şirketler Hukuku Genel Esaslar*, 2nd Edition, Ankara 2013, pg. 85-86.

⁶ Fenna İpek Kayalı, *Türk Ticaret Kanununa Göre Birleşmeler*, İstanbul 2014, pg. 316.

Although a creditor may have failed to benefit from such right, the creditor's other rights are reserved⁷.

As an alternative to posting security, the surviving company may choose to pre-pay the payable, if it is evident that the other creditors of the surviving company will not suffer a loss due to such early payment⁸. In such case, a report to be prepared by an expert shall be obtained in order to evidence that the early payment does not jeopardize the rights and receivables of other creditors⁹. Above all, if any dispute arises around the early payment, the court will render a decision on the early payment of receivables¹⁰.

II. Personal Liabilities of Shareholders

Scope of personal liabilities of shareholders in relation with merger is regulated under article 158 of the TCC.

Liabilities of the shareholders of the absorbed company, who were personally liable for the debts of the absorbed company before the merger, shall continue after the merger provided that the obligation underlying such personal liability has been incurred before the announcement of the merger resolution in the Turkish Trade Registry Gazette¹¹.

Personal liabilities of shareholders for the obligations of the absorbed company shall be barred by a statute of limitation of three years, starting from the date of announcement of the merger resolution. However, if an obligation becomes due after the announcement date, such statute of limitation period shall commence as of the due date. This limitation does not apply to the responsibilities of shareholders who are personally liable from the obligations of the surviving company¹².

There is also a special regulation under the TCC concerning bonds and debentures publicly issued by the absorbed company. Personal liabilities of the absorbed company's shareholders for the publicly issued bonds and debentures shall continue until the date of their redemption, unless otherwise was specified in the offering circular¹³.

III. Protection of Employees

Mergers have a direct impact also on the rights of the employees of the absorbed company. Article 178 of the TCC, regulating the transfer of company's business activities in case of a split-up or spin-off, shall also apply to the transfer of company's business activities through merger. Employment agreements that the absorbed company is a party to shall be transferred to the surviving company, with all rights and debts attached to them, if the employee concerned does not have any objections against the merger¹⁴. As explained in more detail below the "employee's objection against the merger" shall however be interpreted as the

⁷ *Ibid.*

⁸ Article 157/3 of the Turkish Commercial Code numbered 6102.

⁹ Preamble of Article 157/3 of the Turkish Commercial Code numbered 6102.

¹⁰ *Ibid.*

¹¹ Article 158/1 of the Turkish Commercial Code numbered 6102.

¹² Article 158/2 of the Turkish Commercial Code numbered 6102.

¹³ Article 158/3 of the Turkish Commercial Code numbered 6102.

¹⁴ Article 178/1 of the Turkish Commercial Code numbered 6102.

“employee’s right to terminate the employment relation”, rather than as a means to block the merger.

If an employee objects to the change in its employer/workplace, the employment agreement shall be deemed terminated by the employee at the end of the legal notice period for termination¹⁵.

As it is in the case of creditors, employees (inherently qualifying as “creditors” under their employment agreements) may also request from the surviving company to secure their receivables those are due as well as the ones that will become due, on the day of transfer of the employment agreements as a result of the merger (i.e day of registration of the merger with the relevant trade registry)¹⁶.

The absorbed company, being the former employer, and the surviving company being the new employer shall be severally liable for the employees’ receivables that became due before the date of the merger (i.e day of registration of the merger with the relevant trade registry), and also for the employee’s receivables which shall become due within the period that the employment agreement (applicable for agreements executed for a limited period) is to expire under ordinary circumstances or the date of termination due to the employee’s objection to the merger¹⁷.

Personal liabilities of the shareholders of the absorbed company, as discussed above, shall also apply in the case of employment agreements.¹⁸

IV. Conclusion

Whilst companies largely grow through mergers or acquisitions, mergers will inevitably continue to be a hot topic from the perspectives of creditors and employees since a merger has interactive results on their respective rights. On the other hand, mergers shall not be blocked by lack of consent of creditors and employees. TCC provides means for striking the balance between protecting the rights of the creditors and employees of absorbed companies, and giving way to mergers, one of the fundamental tools for inorganic growth of businesses.

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¹⁵ Article 178/1 - 2 of the Turkish Commercial Code numbered 6102.

¹⁶ Article 178/5 of the Turkish Commercial Code numbered 6102.

¹⁷ Article 178/3 of the Turkish Commercial Code numbered 6102.

¹⁸ Article 178/6 of the Turkish Commercial Code numbered 6102.