

# Expert Guide

[www.corporativewire.com](http://www.corporativewire.com)

## Foreign Investment

October 2012

CORPORATE *LiveWire*



Baker & McKenzie

Patton Boggs

DealMarket

Ernst & Young

Trinity International

# Newly Adopted Turkish Commercial Code & Its Innovative Provisions on Mergers & Acquisitions, De-Mergers & Form Conversions

By Emine Basci Devres & Simge Akyüz



**D**ue to their structures, mergers and acquisitions, de-mergers and form conversion transactions of corporations within the Turkish law system concern and comprise more than one field of law. Within this broad legal spectrum, the concerned transactions have their reflections and consequences most common among others in law of obligations, commercial law, capital markets law and competition law. Despite commercial law regulations also comprise fundamental applicable provisions that the parties frequently refer to while performing these transactions, the commercial law aspect of mergers and acquisitions, de-mergers and form conversions were not been regulated as dense and in thorough detail as it should have been in the previous Turkish Commercial Code numbered 6762.



Recently, the Republic of Turkey enacted a new Turkish Commercial Code numbered 6102 that is in effect since 01.07.2012. Turkish Commercial Code numbered 6102 is actually a “longed for” revision in Turkish legislation which brings a totally new approach to the formerly applicable Turkish Commercial Code numbered 6762, introducing brand new formulations to major legal acknowledgements including the legal requirements of formation of joint-stock companies and limited companies as well as setting for noteworthy regulations in detail with respect to mergers and acquisitions, de-mergers and changes that companies undergo in their legal forms. The newly introduced provisions of Turkish Commercial code in respect hereof include the fundamentals of mergers and acquisitions, de-mergers and conversions of legal forms, the principles of process auditing while providing the rights, entitlements and obligations of the shareholders under such circumstances.

Under Turkish Commercial Code merger and acquisition transactions are structured as ipso iure acquisitions of all of shares of the transferee by the shareholders of transferor in exchange of ipso iure acquisition of the assets and liabilities of transferor upon a certain parameter by the transferee. Subsequent to this transaction, transferee acquires the assets and liabilities of the transferor as a whole, in return of which the transferor ceases to exist and de-registered from the trade records.

De-mergers, in principle are considered under Turkish Commercial Code as the transfer of a portion or all of the assets of an equity company or a cooperative to another equity company or a cooperative through full subrogation and without going under liquidation so that in return the shareholders of the de-merged company acquire shareholder positions in the transferee companies.

Furthermore, again as per the provisions of Turkish Commercial Code enterprises can also convert into other legal forms by preserving the legal and economic integrity of the enterprise without going into liquidation.

Protection mechanisms anticipated in Turkish Commercial Code in favour of the shareholder of the transferor in mergers and acquisitions, de-mergers and form conversions ground on an essential principle which aims to preserve the associate status of that shareholder also within the shareholder structure of the transferee or within the converted enterprise, since mergers and acquisitions, de-mergers and form conversions can most of the time be used as a means of jeopardising the associate status, rights and benefits entitled to that shareholder. Therefore, regulations of recently enacted Turkish Commercial Code and accordingly introduced types of actions outlined below target for the prevention of such unfair attempts.

## Action for the Protection of Shareholder Interests & Rights

In case the shareholder interests and rights of the shareholder were not protected properly subsequent to the transacted merger and acquisition, de-merger or form conversion and were derogated instead, then each shareholder may apply to the competent commercial court within two months following the publication of the resolution on the related merger and acquisition, de-merger or form conversion in Turkish Trade Registry Gazette with a request of an equitable offset payment.

## Action for Cancellation of Merger & Acquisition, De-Merger & Form Conversion

Non-compliance with the particular provisions of Turkish Commercial Code regulating mergers and acquisitions, de-mergers and form conversions by enterprises participated to the referred transactions would result in filing of cancellation lawsuits within two months following the publication of the resolution on the transactions in Turkish Trade Registry Gazette by those shareholders who have used dissentive votes and registered such in the minutes of the General Assembly

## Action for Damages

Any person (company executives, company personnel, consultants etc.) participated in mergers and acquisitions, de-mergers, form conversions shall be liable to the companies and to their shareholders and creditors for damages that they cause upon their faulty actions, thus in addition to the granted actions for protection of shareholder interests and for cancellation of the transactions, Turkish Commercial Code also provides for the benefit of the shareholders right to claim compensation from the liable parties.

The right to request compensation is restricted with a time statute, however and the prejudiced party has to raise this claim within two years after becoming aware of the occurred damage and of

the liable party but in any case the compensation will be challengeable within five years following the occurrence of the actions giving rise to such claim.

Last, but not least we should conclude in summary that newly enacted Turkish Commercial Code anticipates a new and remarkably positive approach to the Turkish commercial law by comprising general regulating provisions with respect to mergers and acquisitions, de-mergers and form conversion of corporations while concurrently providing innovative protective measures for the benefit of the shareholders whose rights are being impaired from those transactions.

*Emine Basci Devres, admitted to the bar in 1988, renders her legal practice and services at her own Office Devres Law Office in Istanbul. As the firm's senior lawyer since 2001, Ms Devres works with a network of affiliates based all over Turkey, active primarily in project finance and infrastructure law, but also as the author of several articles on intellectual property rights. As a litigation lawyer, she represents clients at arbitration tribunals and the courts of Turkey. Emine Basci Devres can be contacted by phone on +90 212 291 59 33 or alternatively via email at [emine@devres.net](mailto:emine@devres.net)*



*Simge Akyüz, admitted to the bar in 2010, is an associate at Devres Law Office. She is active in broad range of legal services that Devres Law Office provides to its clients both as a corporate and a litigation lawyer. She concurrently continues to her L.L.M studies in the field of international transportation law at University of Istanbul, Faculty of Law. Simge Akyüz can be contacted by phone on +90 212 291 59 33 or alternatively via email at [simge.akyuz@devres-law.com](mailto:simge.akyuz@devres-law.com)*

