

**IMPROVING THE FINANCIAL SITUATION OF COMPANIES DURING SUSPENSION
OF BANKRUPTCY PROCESS****Melek YARDIMCIOĞLU**

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ABSTRACT

Suspension of bankruptcy is a process regulated by Turkish Code of Commerce (TCC) (Article 324) and Bankruptcy and Enforcement Law (BEL) (Article 179), which enables deeply indebted corporations and cooperatives to finalize this period positively. In order for a company to request suspension of bankruptcy, it should be deeply indebted and the improvement project presented to the court for restoring the financial situation should be robust and credible. In this study, the concept of suspension of bankruptcy, legal nature, namely the place of suspension of bankruptcy in the regulations (in TCC and BEL) are presented, and information on material conditions in order to be able to request of suspension of bankruptcy is given. The companies which should request suspension of bankruptcy are emphasized in detail, and finally, information about the improvement project for the financial situation of companies is presented.

Key Words: Suspension of Bankruptcy, Submersion in Debt, Turkish Code of Commerce (TCC) (Article 324), Bankruptcy and Enforcement Law (BEL) (Article 179), Improvement Project

1. INTRODUCTION

Bankruptcy is known as the end of existence for a company. However, the impact of bankruptcy spreading out to other areas is more important than end of the company. Bankrupting companies affect company employees, buyers, sellers, creditors and most importantly the economy as a whole in a negative way. In order to avoid this adverse situation, methods to save companies from bankruptcy and improvement projects have been developed. In Turkey, companies whose financial status deteriorated and came to the brink of bankruptcy are being improved instead of being closed down, in order to address the common interest of the whole society.

A capital company whose assets are submerged deep in debt should request for bankruptcy. However, if there is a possibility for the company requesting bankruptcy to improve, and this possibility is fostered with a robust and credible improvement project, in this case suspension of bankruptcy can be requested from the commercial court where the bankruptcy request was made (Yılmaz, 2015).

Normally, according to Article 324 of TCC, in a company whose assets do not compensate for the debt, if the current assets are not sufficient to clear the debt board of directors of the company should immediately inform the court about this situation. The court then decides for the bankruptcy of the company in this case. However, if the situation of the company is in position to improve, in this case a second chance can be granted to the company, and suspension of bankruptcy can be decided for a period of one year. By this decision, execution proceedings against the company are suspended in order to prevent the company to get worse (Yaltı, 2009).

According to Turkish Code of Commerce Article 324 and Bankruptcy and Enforcement Law Article 179/a, suspension of bankruptcy which is applied if the necessary conditions are met, is viewed as a chance given to the bona fide indebted company.

Two fundamental conditions for suspension of bankruptcy in capital companies and cooperative are submersion in debt and the court finding the presented improvement project robust and credible (Uzay, 2009).

In order to win the court case for suspension of bankruptcy, it is not necessary to persuade the creditors, but rather the court official. As a result of the positive ruling given by the court official, it is certain that an expert investigation will be requested as well.

2. CONCEPT OF SUSPENSION OF BANKRUPTCY

Suspension of bankruptcy is a process comprising of measures taken in order to prevent bankruptcy of companies whose debts are more than their assets or holdings, namely companies submerged in debt. The most important aspect of suspension of bankruptcy is that the decision of bankruptcy and the impact of this decision undergoing a waiting period (Yüksel, 2006:110).

Since the bankruptcy, that is the ending of the existence of the company affects all parties in a negative manner, suspension of bankruptcy and later taking legal measures in order to ensure cancellation of bankruptcy are processes applied in Turkey as well as many other countries in the world. In Turkey, besides suspension of bankruptcy, there exist other instruments for this aim such as concordatum, restructuring of capital companies by means of reconciliation and opportunity to benefiting from extraordinary delay term (Öztek, 2005: 30).

According to the Supreme Court, suspension of bankruptcy is temporarily postponement of bankruptcy of a capital company or cooperative submerged in debt, provided that certain conditions are satisfied. The most important aspect of suspension of bankruptcy is that the decision of bankruptcy and the impact of this decision undergo a temporary waiting period, in other words a kind of improvement period (Yüksel, 2006:110).

The two fundamental aim of suspension of bankruptcy are ensuring the continuity of the existence and operations of a company as a legal entity. Suspension of bankruptcy is a process comprising of measures taken in order to prevent capital companies and cooperatives from going bankrupt (Deliduman, 2008:8-21; Muşul, 2010: 30-35).

Suspension of bankruptcy can be requested by the board of directors of the company (persons with administrative and representative authority) or by liquidating agent or by one of the creditors. As a result of the submersion in debt situation that is reported and confirmed by the court, a direct bankruptcy decision should be taken for a joint stock company or a limited liability company. As a result of presenting the court with an improvement project prepared with the aim of improving the financial situation by the board of directors or one of the creditors and the court finding the project as serious and credible, suspension of bankruptcy decision is given.

As a result of suspension of bankruptcy, all proceedings including claims subject to law no. 6183 are frozen, and this is called the holiday effect of the suspension. The basic logic behind the suspension of bankruptcy is protecting the debtor from creditors during the suspension period and preventing the decay of assets of the debtor. In reality, if each creditor takes away a piece of assets from the debtor as a result of individual proceedings, no piece of asset may remain behind in order to be able to operate the company. In order to prevent this situation, all proceedings, including public claims are frozen. However, since the creditors cannot pursue their rights through proceedings, period of limitations are also frozen during this suspension period.

Suspension of bankruptcy is not a goal, but rather a means to be used in order to improve the financial situation. Decision of suspension is not final, but has rather a temporary nature.

Suspension of bankruptcy is not permanent. It is given for at most a year, and it cannot exceed four years in total with the time extensions. At the end of the suspension period, if the suspension decision is revoked and an improvement is made, the company resumes its operation; if the improvements did not take place, the court can decide on the bankruptcy of the company (Erdem, 2009).

In the case of the company fixing the financial situation by the end of the suspension period, the decision of suspension is deemed successful in achieving its goal. In this case, in accordance with the report prepared by the curator the decision of suspension can be revoked by the court (Kumkale, 2007).

3. SUSPENSION OF BANKRUPTCY IN THE REGULATIONS

Suspension of bankruptcy is included in the existing legal system of Turkey, and it was introduced as part of the framework of regulations established in 17 July 2003 with law number 4949 in the Bankruptcy and Enforcement Law. Suspension of bankruptcy is regulated with Article 324/2 of the Turkish Code of Commerce and still being actively used today. Before the amendment no 4949, suspension of bankruptcy was a part of Turkey's law, however in practice judges did not apply suspension of bankruptcy. In this respect, there was no clause in TCC stating that the proceedings are halted when the suspension of bankruptcy decision is given. Thus, suspension of bankruptcy was an instrument that has a place in the legal system, but had no place in practice (Öztek, 2005: 24). With the law no. 4949, clauses related to the application of this instrument are implemented and enabling the practice of this instrument was aimed. In fact, the aim of these new regulations which are also called the Istanbul Approach was keeping the indebted companies in operation and hence enabling a higher collecting and satisfaction opportunity for the creditors.

Suspension of bankruptcy which is included in the Turkish legal system is regulated by provisions in the Article 377 of the New Turkish Code of Commerce with law number 6102 and Article 179 of the Bankruptcy and Enforcement Law.

According to the justification of Article 377 of TCC, Article 377 regarding suspension of bankruptcy includes four fundamental rules (Küçüköner, 2006).

First of them is suspension of bankruptcy with the improvement project.

Second rule is related to the mandatory content of the improvement project. It is mandatory for the improvement project to include auditor suggestions in accordance with Article 376 of the Law, and realistic sources for these Suggestions should be presented. The suggestions of the auditor should be prepared by taking the suggestions of the Early Diagnosis Committee in accordance with the Article 378 of the Law. Project owners cannot dismiss these suggestions and implement their own suggestions in the project. Moreover, the project should indicate the necessary objective resources in order to actualize the suggestions and sufficient own resources for these suggestions should be present. The Law is based on the fact that a joint stock company can recover from bankruptcy situation by being provided own resources, namely by shareholders' capital and fund contributions. The sacrifice should be made by the shareholders. Otherwise, suspension becomes an instrument that stalls the creditor. Decree by first paragraph of Article 179 of Bankruptcy and Enforcement Law is cited for decree. The first reason for this is to ensure that both decrees are applied together, and second reason is to state that the conditions needed for the project as stated in Bankruptcy and Enforcement Law are also valid for Turkish Code of Commerce.

According to the third rule, the court should immediately appoint a curator after the request of suspension of bankruptcy. The company is deemed bankrupt with this decision.

The fourth rule states that in the case of suspension of bankruptcy, the court should take the precautions stated in the third sentence and the curator should prepare reports in every three month period.

Third paragraph: The decree emphasizes the importance of the report, by stating that in the case of suspension of bankruptcy request coming from the creditor, the report from the auditor will be taken as a basis.

4. CONDITIONS FOR REQUESTING SUSPENSION OF BANKRUPTCY

There are formal and material conditions for suspension of bankruptcy. These are listed below in categories (Uzay, 2009).

Formal Conditions for Suspension of Bankruptcy	Material (Fundamental) Conditions for Suspension of Bankruptcy
1- Requesting condition (requesting suspension of bankruptcy), 2- Presenting the court with balance sheet of submersion in debt, 3- Presenting the court with statement of submersion in debt, 4- Depositing the necessary fees to the court treasury, 5- Presenting the court with the improvement project.	1- The company requesting suspension of bankruptcy should be “submerged in debt”, 2- The company should have an improvement project for the financial situation, 3- The rights of the creditors should be protected.

In order for the court to give the decision for suspension of bankruptcy, the capital company or cooperative should be submerged in debt (ÇavdarandBiçkin, 2006: 77-81; Toraman, 2007: 72-75).

A capital company or cooperative which proved its submersion in debt can request bankruptcy from the authorized court, as well as suspension of bankruptcy.

It is not possible for the court to give decision for suspension of bankruptcy for capital companies and cooperatives which are undergoing liquidation process. Because in article 446/2 of TCC which regulates the statement of submersion in debt for joint stock companies, states that the bankruptcy of the corporation is decreed upon the report of liquidator agent presented to the court. However, suspension of bankruptcy as stated in article 324/2 in TCC is not mentioned in this case.

Since the purpose of the suspension of bankruptcy instrument is to give a last chance to the company in order to improve its financial situation, it is not compatible with a company which is in the state of liquidation. Request for suspension of bankruptcy is fundamentally beyond limits of authority of the company in the liquidation process (Yilmaz, 2015).

5. MATERIAL CONDITIONS FOR SUSPENSION OF BANKRUPTCY

5.1. SUBMERSION IN DEBT

The most important and primary condition for suspension of bankruptcy is that the company being submerged in debt. A company which is not submerged in debt cannot request for suspension of bankruptcy. Instead of submersion in debt, the expressions “current assets of the company not compensating for the debt to creditors” (article 324/2 of TCC) or “the debts of the company being more than its current assets and receivables” (article 179 of BEL), or “the debt of the company being more than its current assets” (article 446/2 of TCC) are used (Özkan and Kaya, 2013; 194-203).

While determining the submersion in debt the following conditions should hold (Kayar, 2009);

- ✓ Balance sheet (interim) for submersion in debt should be prepared
- ✓ Submersion in debt should be investigated ex officio by the court, statement of submersion in debt cannot be renounced, suspension request can be renounced
- ✓ Determination of submersion in debt should be made by expertise

- ✓ Submersion in debt should be definitely confirmed
- ✓ Current values of all assets are taken in consideration while determining submersion in debt
- ✓ Debts should appear in the account books
- ✓ Fictitious debts in order ensure submersion in debt should be taken into consideration
- ✓ Events happening after the court date are taken into consideration in determining submersion in debt
- ✓ Whether the warranty debts should be included in accounting for submersion in debt
- ✓ The company requesting for suspension having outstanding capital debt.

Submersion in debt and insolvency to pay are the two concepts which are frequently confused for each other in the Turkish law and court decisions. This confusion stems from the fact that while the legislators describe the concept of insolvency to pay, they do not clearly distinguish the difference from submersion in debt. Insolvency to pay is described as a person apparently continuously losing the potential to pay a significant portion of his/her due debts. If losing of potential to pay is temporary, or the deficit in liquid assets do not compensate for a significant portion of due debts, then it is a case of insolvency to pay due to insufficient liquidity. The main reason for insolvency to pay is liquidity insufficiency which is persistent and prevents from fulfilling a significant portion of debts; in other words it is the cash flow deficit in the company. A company being submerged in debt does not mean that it is also in insolvency to pay situation. Submersion in debt is not a mandatory condition for insolvency to pay. For example, if a the corporation which can pay its due debts because of having sufficient liquid assets but is not actually in debt was denied due to bankruptcy, normally the current deficit between assets and debts would keep increasing until the actual bankruptcy, and this would put other debtors whose rights are not fulfilled(Yılmaz, 2015).

If there is a doubt that the company is in an unfavorable condition, the board of directors should prepare an interim balance sheet based on the sale price of the assets. This balance sheet is the asset balance sheet that identifies the actual assets and actual debts of the company.

In the assets column of the balance sheet, the current assets of the company based on the current price are listed. In terms of liabilities, not only the due debts, but all of the debts of the corporation are listed. Because in this case the focal point of investigation is not whether the corporation is in the state of insolvency to pay, but rather would the assets of the corporation be sufficient if the corporation had to pay all its debts on the date the balance sheet was prepared. The debts of joint stock companies should be stated in the liabilities as of the amounts based on the date the balance sheet is prepared.

Registered capital and contingency reserves that are normally stated under the liabilities in the annual balance sheet do not enter the submission in debt balance sheet since they are not counted as company debts.

A balance sheet prepared in this fashion can indicate three results;

- ✓ Debts exceed the assets.
- ✓ Debts have equal value as the assets.
- ✓ Debts are less than the assets.

If the interim balance sheet indicates that the financial situation of the company is not bad, there are no legal measures to be taken. If the interim balance sheet indicates that a portion of the capital is lost, there will be a selection from different cases such as board of directors taking improvement measures or board of directors settle with one third of the capital, or complete the deficit capital, depending on the proportion of the lost capital(article 376 of TCC).

In the interim balance sheet indicates that the assets of the company is in no condition to compensate for the debt of the company, the status of submersion in debt is in effect, and the board of directors should immediately inform the Commercial Court of First Instance of this situation(Özkanand Kaya, 2013;194-203).

6. IMPROVEMENT PROJECT FOR THE FINANCIAL SITUATION OF THE COMPANY

6.1. The Concept of Improvement

The concept of improvement implies different meanings in economy and law. The concept of improvement in economy field includes all structural and financial measures taken in order to help remove the submersion in debt situation that a company can have and bring the company back to profiting situation(Atalay, 2006: 84).

Legally, the concept of improvement is approached separately by commercial law and bankruptcy law. In the bankruptcy law it is described as a precaution measure in order to prevent the bankruptcy or easing the results or making the liquidation process more convenient; and in the commercial law it is described as bringing the assets to a better state than they are at the time of statement of submersion in debt or removing the state of submersion in debt and bringing about a better situation(Özekes, 2007: 475).

6.2. Improvement Expectation

For suspension of bankruptcy, Article 179 of BEL mandates for the expectation of improvement of the financial situation. In other words, there should be common view based on objective statements that the expectation for the company to avoid submersion in debt and continue its regular operations. The company which request the suspension is responsible for demonstrating the existence of expectation of improvement, namely whether the expectations can be fulfilled or not(Atalay, 2006 s.88).

In order for the court to come to a conclusion whether the expectation of improvement of financial situation exists, an improvement project should be presented to the company together with the request for suspension. In order for the suspension decision to be made, the project presented to the course should be in accordance with the meaning of the improvement concept, not only ensuring avoidance from submersion of debt situation but also ensuring that continuity of the company as a legal entity.

According to Article 377/1 of TCC, whether the board of directors or one of the creditors requesting for suspension of bankruptcy, they should also present the court with an improvement project together with the request for suspension. Moreover, Article 179 of TCC mandates that the improvement project should be presented together with the documents the project is based on(Dedeğaç, 2012).

The purpose of suspension of bankruptcy is enabling the company resume its commercial activities, not only improving the situation of its creditors. Therefore one cannot mention of improvement in terms of the company at the end of the suspension of bankruptcy when only the debts to the creditors are guaranteed and there is nothing left of company's assets. In this respect, selling all the assets of the company or cooperative in order to pay all its debts cannot be counted as an improvement measure. As a matter of fact, the Supreme Court emphasized this notion by stating that "If the improvement in the financial situation of the indebted company has been achieved by externally selling the items in the current assets of the company, this action results in the liquidation of the company, and cannot be counted as an improvement in the context of suspension of bankruptcy instrument."(Yılmaz, 2015).

6.3.Determination of Improvement and Measures

Since determining whether the measures in the improvement project are suitable for improving the financial situation of the company or cooperative requires specific and technical information, the

court answering the suspension of bankruptcy request should call for an expertise investigation. In addition to the analysis of assets and liabilities in the balance sheet for submersion in debt, the experts should also perform a dynamic balance sheet analysis, should prepare a cash flow chart, and should try to determine whether the project is suitable for improving the financial situation based on the data at hand. Expertise report stating that the improving project is serious and credible should be open to the auditing of the Supreme Court, in detail and justifiable. (19th Civil Chamber of Supreme Court).

There is no clarification or description, or any given example for improvement measures in the Bankruptcy and Enforcement Law, on the contrary the court judge is provided with a vast discretionary power.

It can be observed that in general, methods ensuring profitability and efficiency should definitely be included among the improvement measures.

Measures that can be taken in order to ensure improvement can be categorized as follows (Sudarsanamvd, 2001: 185-187)

- ✓ Restructuring the Management
- ✓ Operational Restructuring
- ✓ Restructuring of the Assets
- ✓ Financial Restructuring

6.4. The Proof of Improvement Possibility not being Demanded

Submersion in debt, which is one of the material conditions for suspension of bankruptcy should ex officio investigated and clearly confirmed by the court, because submersion in debt is a cause for bankruptcy. On the other hand, as for the other material condition of suspension of bankruptcy, the certain proof of the improvement project being serious and credible is not strictly demanded. This is because the issue that is being proven is actually a “project”. Therefore it is necessary and sufficient for the court to be convinced that the presented projects are serious and applicable, and they can restore the company from being submerged in debt. Thus, the necessary information and documents should be presented to the court(Article 179 of TCC).

The 19th Civil Chamber of Supreme Court does not demand certain proof of the improvement possibility by using expressions such as “the expectation of improvement being highly plausible”, “high probability of improvement in the financial situation of the company”, “existence of a detailed and justified expertise report regarding the expectation of improvement”, “the improvement of the financial situation being confirmed by expertise investigation”; and deems near proof sufficient (Kayar, 2009).

6.5. Protecting Creditor’s Rights

Although at first suspension of bankruptcy seems as in favor of the debtor, it in fact contains provisions protecting the interests of the creditors as well.

The purpose behind establishing such procedures is satisfying the creditors to a better extent. If this special bankruptcy cause was not prescribed, since the debtors would call for suspension of debt which would later cause the creditors less satisfaction of their interests during liquidation due to a bankruptcy in the future. If the company resumes its operations despite the submersion in debt, especially the creditors whose rights are not sufficiently guaranteed will be exposed to a serious risk. Since the assets of the corporation do not sufficiently compensate for its debts, some creditors will receive payments before others, and this will cause the other creditors to experience a larger loss. Also, if the corporation keeps being indebted during this process, the debt deficit will increase. Thus the bankruptcy law which comes into force with the statement of submersion in debt enables

protection of the creditors as a whole, and ensures the possibility that the creditors receive their payments equally and as much as possible(Yılmaz, 2015).

As of the decision for suspension, the improvement measures should ensure that the values of the company assets are protected or at least to the extent that they are the same with the values determined at the time of the decision.

Improvement does not necessarily mean to compensate the debts to the creditors in full. During the period of suspension, the creditors may endure loss to some extent, however the loss that the creditors endure due to suspension of bankruptcy should be less than the loss endured if the bankruptcy is announced immediately(Atalay (2006) p. 97; Toraman(2007) p. 212; ÇavdarandBiçkin(2006) p. 99.).

6.6. Success of the Improvement

Öztek (2007) states that, in order for the improvement to be deemed successful, the state of being submerged in debt should definitely be removed.

There are two main approaches to the success of the improvement: modern and classical. In the classical approach, success is generally expressed in terms of finance and accounting. On the other hand, the modern approach demands that only finance and accounting aspects are not sufficient for the improvement to be deemed successful, a structural (real) improvement should also be observed.

While the classical approach accepts a company whose assets exceed its liabilities after the period of suspension as successful; the modern approach acknowledges the improvement of the company as restoring the profit capacity of the company to the former full extent in other words transforming “cash drain” to “cash flow”(Öztek,2007).

According to Borger in the Swiss doctrine, the following conditions should exist together after improvement

- ✓ There should be no loss of capital,
- ✓ There should be no concerns for submersion in debt,
- ✓ There should be no liquidity problem that cannot be prevented,
- ✓ There should be no danger of ceasing of operations,
- ✓ Shareholders and board of directors should be in agreement for the continuation of business.

7. CONCLUSION

A company being sustainable and continuing its activities without restriction of time is beneficial for all parties having business relations with the company. However, nowadays many companies cannot keep its sustainability against high competition and drift to bankruptcy.

Since bankruptcy is an undesirable situation for companies, Turkish legal system contains a series of regulations in order to save the companies which are having financial troubles. Suspension of bankruptcy is an instrument established for this purpose.

In order for a capital company or cooperative to request suspension of bankruptcy, in addition to some formal conditions, it should also prove its submersion in debt and get a credible improvement project approved.

After the suspension of bankruptcy decision is given, the bankruptcy is suspended and legal consequences start as of the date of the decision.

The court which decides on suspension of bankruptcy takes necessary precautions for protecting the company assets such as inventory (the ledger indicating the items in company assets) keeping, and curator appointment.

The organs of the joint stock company or limited company for which the suspension of bankruptcy is decreed, keep their duties and authorities since they will continue their legal existence.

The rights and debts of the company whose bankruptcy is suspended arising from the contracts made before suspension of bankruptcy are still applicable.

The fact that the suspension of bankruptcy is decreed does not prevent continuation of previously opened court cases or having new court cases being opened during the suspension period.

As a rule, during the period of suspension, no proceeding, including proceeding in accordance with the Law on Collection Procedure of Public Receivables with law no 6183 (collection of tax receivables etc.) can be performed, and all previous proceedings are halted.

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