

Postponement of Bankruptcy

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Abstract: *The activities of cooperatives and capital companies are directly affected by the structure of bankruptcy law depending on the country's economy. The law systems aimed at minimizing the effects of financial, economic and social crisis of both regional and global must be consistent with the bankruptcy and enforcement law, commercial law, obligation law and labor and social security law. To be parallel to this purpose, the law system should be regulated and altered depending on statistical results according to the needs of period. Therefore, this study focused to investigate regression and correlation analysis of relationships with gross natural income, per capita income, companies applied to postponement to bankruptcy and companies admitted bankruptcy decision in a range of specified time period in Turkey by utilizing Statistical Package for Social Science (SPSS) software program. Analysis results have demonstrated that there is a high degree of correlation between those parameters.*

1. THE POSTPONEMENT OF BANKRUPTCY

Bankruptcy Law, different from the enforcement of a partial legal action, is a legal regulation that structures the liquidation. In other words, the decision given by the Trade Court about forcibly liquidating all the possible assets that can be levied and protection of the rights of all creditors from this can only possible according to the legal procedures of the bankruptcy law¹.

"Running out of the money," or in another words "bankruptcy" in the forced enforcement law terminology² defined as a trial of confiscating all of the levied assets of the debtor and regulating the allocation of the payment of the claims of creditors and this legal structure is known as "bankruptcy law".

According to bankruptcy law, creditors - if their debtor is subject to bankruptcy - despite being able to follow through bankruptcy, in some cases, the debtor personally may be required to ask the bankruptcy of his own. One of the cases of this obligation is when the company has more liabilities. In addition, as stated in Article 177 of EBL, creditors, without the need to follow pre-execution (of their debtor subject to bankruptcy) may ask the bankruptcy.

If the liability of the corporation and cooperative companies with debts that exceed the assets was declared to management and representation authorities and if the court has been determined this situation the decision of bankruptcy without prior enforcement proceedings may be given. However, one of the authorized representatives of the company or any creditors of the company may request a postponement of bankruptcy by offering improvement projects to the court that through which it would possible to improve the financial situation of the company or cooperative company. If the court finds the project serious and credible, it may decide on request (EBL A. 179).

The activities of the cooperative company and corporation companies are directly related to the national economy. Therefore, for the health and maintenance of a stable economy, in the implementation of the bankruptcy law legislation we believe it would be appropriate to give to the relevant and competent judicial officials the authority to investigate and examine ex officio in wider context.

Many businesses in Turkey has adversely affected from the recent global crisis.

The legislation that aims to minimize regional and global financial and economic crisis's negative effects are needed more than ever³. In our opinion, Execution and Bankruptcy Law, and especially the bankruptcy law and regulations must be set to comply with legal principles and criteria of commercial labor and social security, and obligations laws and socio-economic measures must be addressed first to bring into force the relevant legislation.

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¹ Baki Kuru, Ramazan Arslan, Ejder Yılmaz, İcra İflas Hukuku, 2005, pp. 497.

² It was taken from the ground of changes made in the Law No:4949 and Bankruptcy and Enforcement Law Article No:179.

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For this purpose (on 17.7.2003) to strengthen the "the structure of the bankruptcy law" in the Law on the Execution and Bankruptcy Law No. 4949 significant changes were made. For a debtor who is financially in a deep debt and continues normal activities while in this state, the amendment aims to fully or partially eliminate the danger of the rights of those who lend him without knowing the heavy debt situation along with especially the creditors whose receivables will mature lately and who file foreclosure later than others.

However, administrators or commissioners who have the representation or a creditor can ask the court for postponement of bankruptcy by offering an improvement project that through which it is possible to improve the financial situation of the company or the cooperative company.

By doing so, the company or the cooperative company that has potential to improve the financial situation can continue their activities. Bankruptcy postponement request cannot be undone. If the court finds the project, the information and the documents serious and credible and when required, by listening administrators or commissioners who have the representation or a creditor it may decide to postpone the bankruptcy.

The court is imposed to review it rapidly to prevent the use of bad faith. The postponement of bankruptcy is different from concordat in two respects. For one thing, postponing the bankruptcy can provide a wider field of action for the judge and the people involved.

In fact, in the article no constraints or guidance was declared for the debtor to apply remedies to improve the financial situation.

Secondly, the bankruptcy postponement institution does not provide any assistance or support to the borrower in terms of implementation of the measures for the improvement of the financial situation⁴. This application shows parallelism with the application in Switzerland. According to lawyers in Switzerland too "stock companies, commandite companies that capitals are divided by shares, limited liability companies and cooperatives' bankruptcies, - without legal proceedings - are decided by the relevant court in line with the Code of Obligations"⁵.

Law acknowledges the debtor and creditor as a counter balance. Therefore EBLA 154 the competent authority in bankruptcy proceedings is the legal executive office where the debtor's center of transaction. The place of the competent legal authority office for the commercial businesses that their headquarters are located abroad is where their branch in Turkey and if more than one branch exists then it is the location of the center branch.

EBL. A. 158 regulate the decision of the court in the insolvency proceedings by listening to creditors and debtors⁶. This arrangement is appropriate. The court asks for follow-up file and performs according to the file and follows the simple proceedings and investigates appeals and defenses and concludes the bankruptcy petition. During the trial and evaluation proceedings it is important to establish the final judgment within the framework of fundamental principles (like the principle of saving, principle of bringing the case by the parties, the obligation to be honest and tell the truth and the application of the law on the principles of ex officio) which dominate the proceedings.

Also recently it is seen that international financial institutions such as the World Bank and the IMF try to create an international structure in the area of Obligation and Commercial Law including Execution and Bankruptcy Law (EBL).

Countries like China, Indonesia and Korea have tried to demonstrate the globalization of law in order to support the financial cycle and financial institutions as referred to above⁷. In our country, legal regulation studies are required to be integrated with international financial legislation and financial institutions.

⁴ It was taken from the ground of changes made in the Law No:4949 and Bankruptcy and Enforcement Law Article No:179.

⁵ Selçuk Öztekin, "İflasın Ertelenmesi", Bankacılar Dergisi, S. 53, 2005.

⁶ Mustafa S. Özbek, "İflas Davasının Hukuki Mahiyeti" Ankara Üniversitesi Hukuk Fakültesi Dergisi, S. 61, C. 1, 2012.

⁷ Terence C. Halliday, Bruce G. Carruthers, "The Recursivity of Law: Global Norm Marking and Nationality Lawmarking in the Globalization of Corporate Insolvency Regimes", AJS Volume 112 Number 4 (Januar 2007): 1135-1202.

As a result, to contextualize the Law of Obligations, Commercial Law and Bankruptcy Law will be the most effective tool⁸.

Turkish Commercial Law (TCL) 136, TCL18 and 20, TCL 324, describe the legal responsibilities related companies and cooperatives. The TCL 269 regulates the responsibilities of capital companies and cooperatives' share capital in the case of heavy debt and bankruptcy. EBL 333 and 335/a determine the criminal responsibility.

2. THE POSTPONEMENT OF BANKRUPTCY

Bankruptcy concept is essentially one of the conditions for the termination of a legal entity of the company. Hindering capital companies and cooperatives to end by bankruptcy the postponement of bankruptcy institution is possible in certain cases.

The legal arrangements designed to prevent some of the negative consequences of bankruptcy that may arise under certain conditions can support the efforts to fix financial situation of companies that under financial distress⁹.

However, firms are requesting the postponement of bankruptcy, must prepare appropriate reports in accordance with the basic principles and concepts of accounting and accounting standards¹⁰.

Along with the above described objects, accounting, finance, human resources and management and the regional and national benefits that may happen in the short, medium and the long term of legal persons who are subject to the postponement of bankruptcy must also find a place in the formation of opinion of the decision maker.

When considering improving capital companies and cooperatives credible projects must be submitted to the related court. For improvement projects addressing financial and administrative measures clearly and revealing the contribution of the projects for the country's economy in terms of the related sector make the case more convincing. The dimension of management of accounting, finance and human resources will contribute to the company¹¹.

During periods of financial crisis and in the context to protect the rights of debtors and creditors some measures can be foreseen to minimize the problems created by the crisis¹². Revealing these measures by legal entity, managers and the expert evidence will shed light on the postponement of the bankruptcy for the court.

Indeed, the Supreme Court's provision of "requests for postponement of bankruptcy contain the reasons and concrete expectation of debt recovery project of the company with share capital and the declaration of insolvency" is important from a legal point of view¹³.

The Supreme Court's dictum safeguards the rights of creditors and debtors by the postponement of the bankruptcy under the assumption that there are tangible improvements in line with the justified expectations. Taking the case as a whole in the country and examining the decision carefully not only protect the rights of the relevant parties but also will make legal and economic structure of the country more powerful.

Therefore, potential relationship between costs and benefits of bankruptcy proceedings related with overall performance of the national economy and with per capita income¹⁴. Examination of the law with the quantitative data and making the necessary analysis is inevitable in this regard.

⁸ Azzem Özkan, H. Pınar Kaya, "İflas Erteleme Sürecinde Ödenmemiş Sermaye Borçları" Niğde Üniversitesi İİBF Dergisi, 2013, C. 6, S. 2, s. 194-203.

⁹ İsrail Zor, İbrahim Bozkurt, Sezai Öksüz, "İflasın Ertelenmesi Taleplerinin Karara Bağlanmasına Yönelik Bir Öneri: Firma Değeri Temelli Yaklaşım", Atatürk Üniversitesi İİBFD, C. 30, S. 1, 2016.

¹⁰ Muharrem Samur, "İflasın Ertelenmesi ve Batıklık Bilançosunun Hazırlanmasında Finansal Kiralama ile Satın Alınan Duran Varlıkların Kayıt ve Değerlendirilmesinde Muhasebenin Temel İlke ve Standartlarına İlişkin Yaklaşımlar", Tekirdar SMM Odası Sosyal Bilimler Dergisi, S. 3, 2014.

¹¹ Mahmut Özdevecioğlu, "İflasın Ertelenmesi Sürecinde Şirket İyileştirme Projeleri: İşletmecilik Açısından Bir Değerlendirme", *Business Economic Research Journal* Volume 1, Number: 3, 2010.

¹² Claessens, Stijn, Klapper, Leora F, "Bankruptcy Around The World Paper Series; Explanations of its Realitive Use", Technical Report, 2002, Center for Economic Institutions Working Paper Series, No: 2002-17.

¹³ Recep Akcan, "Şirket Kayıtlarında Yer Almayan Çeklerin Borca Batıklık Bilançosunda Gösterilmesi", *Erzincan Üniversitesi Hukuk Fakültesi Dergisi*, C. XVI, S. 1-2, 2012.

Indeed, some commercial businesses during their economic activities, are faced with the danger of losing economic assets in the economic crisis¹⁵. The study that conducted on this subject in our country for the 1999-2001 economic crises and for 42 commercial banks has revealed the possible negative consequences of bankruptcy can create¹⁶.

In our study, for the 2002-2015 period, to examine the statistical relationship between the general indicators of our country's economy of gross national income and per capita income levels with the number of bankruptcy postponement applicant companies and the number of companies admitted bankruptcy decision taken.

Between the number of companies applied for the bankruptcy and GDP ratio high correlation of 0.93 was determined. Also high correlation of 0,92 (0,99 confidence level) was determined between the number of companies applied for the bankruptcy and the number of companies admitted bankruptcy decision. Similar relationship with respect to per capita income has been identified by high correlation of 0.94.

Between GNP and the postponement of the bankruptcy companies simple linear regulation modeling carried out and the correlation coefficient is calculated as 0.95, while GNP per capita is calculated as 0.97.

And between the numbers of bankruptcy opened companies and GNP and GNP per capita simple linear regulation was used and the correlation coefficient of 0.95 and 0.90 calculated respectively.

Similar relationship has investigated between the number of bankruptcy opened companies and the number of companies applied for postponement of the bankruptcy and the correlation coefficient is found as 0.95. All analyzes performed were performed at 0.99 confidence level by using SPSS

All these and similar studies will contribute greatly to not only to set out the legal and economic aspects of the postponement of bankruptcy but to modernize the bankruptcy, to secure the legal process, to ensure the development of extra-judicial business life and to be supported by the opinion of insolvency experts and participants¹⁷.

3. THE CONSEQUENCES OF BANKRUPTCY POSTPONEMENT

It is essential that the legal proceeding prior to the decision of suspension of bankruptcy would stop by itself and therefore, within the period of postponement no new follow-up legal proceeding can be done. In such cases, the TCL (Turkish Commercial Law) and related clauses of EBL will be activated. Including those made according to the Law on Collection Procedure of Assets article 6183, Execution and Bankruptcy Law's 179 / B-1 is an important provision¹⁸. Therefore, upon the decision of postponement no legal proceedings may be held against the debtor, and while previously held proceedings will be stopped timeout and foreclosure periods will not continue.

Continuing to the legal proceedings for moveable and immovable assets during the postponement can be done for economic reasons. In this respect, although the EBL 179 authorizes the judge to take any measures it brings limitations in two areas. The first, it has to protect the assets of the debtor; and the second one it has to provide opportunities in terms of the realization of economic recovery programs¹⁹.

After the emergence of the creditors after the bankruptcy of the postponement decision, the assessment on the amount of the reported debt list and receivables and in the case of failing to notify the creditor sand due to the inconsistent acts of the debtor for removing the bankruptcy postponement can be decided ²⁰.

¹⁴ Azzem Özkan, H. Pınar Kaya, "İflas Erteleme Sürecinde Ödenmemiş Sermaye Borçları" Niğde Üniversitesi İİBF Dergisi, 2013, C. 6, S. 2, s. 194-203.

¹⁵ Tamer Budak, Metin Saban; " Turkish Tax Low/ Accoutingi Boon of Economic Crisis: Postmonement of Bankruptcy 1" European Journal of Social Sciences, January 2011, Volume 18, Number 4.

¹⁶ Birsan Eygi Erdoğan, " Bankruptcy Prediction of Turkish Commercial Banks Using Financial Ratios", Applsed Mathematical Siciences, Vol:2, No: 60 2973-2982, January 2008.

¹⁷ Oğuz Atalay, Borca Batıklık ve İflasın Ertelemesi, İzmir 2006, s. 51; Hakan Pekcanitez, Anonim Ortaklıkların İflası, Ankara 1991, s. 48.

¹⁸ Kemalettin Yüksel, İflasın Ertelemesi Kararının Sonuçları, Bankacılar Dergisi, S. 59, 2006.

¹⁹ Ömer Gören, "İflasın Ertelemesi Tedbir Talepli İflas Davasıdır", Ankara Barosu Dergisi, Y. 65, S. 2, 2007.

²⁰ Kemalettin Yüksel, İflasın Ertelemesi Kararının Sonuçları, Bankacılar Dergisi, S. 59, 2006.

TCL 376/3 EBL and 179 / A and B clauses can be seen as aiming to keep the company alive instead of bankruptcy and to escape from company's mismanagement by paying the debts. Accordingly, prior to the decision on the bankruptcy, if the company makes the ordinary withdrawal agreement with the creditors in the amount that will balance the deficit in the balance sheet and debt submergence situation then the bankruptcy petition becomes unnecessary. However, the reality and validity of this statement or propriety of the contract made by the Board for bankruptcy claims must be verified by the court-appointed expert witnesses. Otherwise, the application made to the court for expert examination, is considered a declaration of bankruptcy²¹.

In the case of postponement of the bankruptcy process starts, to demonstrate the effect of submergence, outstanding capital debt liabilities which are on the liability side of the balance sheet are not deducted from the equity but are shown in the asset side under outstanding capital debt from the partners²².

At the end of the deferment of bankruptcy, enabling methods or measures to improve the company is only temporary protection²³.

The main purpose of delaying bankruptcy, on one side is to protect the assets of the debtor company or a cooperative and on the other hand is to protect creditors from the bankruptcy's negative effects. In the next legislative period which is after the postponement of the bankruptcy decision and when the "improvement" measures provide positive result, the creditors will be saved from bankruptcy's serious consequences, capital companies or cooperatives will continue to pursue their economic activities ; employees will be spared from being unemployed.

Bankruptcy postponement results on financial leasing companies, which is a special case, has been put forward in old FKK's 6333 and 3224 in no. 9 and 10 clauses²⁴.

4. RESULTS AND DISCUSSION

This study focused to investigate statistical relationship between numbers of companies applied to postponement of bankruptcy and admitted bankruptcy decision from those companies by considering gross natural income and per capita income general indicators of Turkey's economy for the period of 2002-2015.

It is demonstrated that there is a ratio of 0,93 (0,99 confidence level) in relationship between gross natural income and the number of companies applied to postponement to bankruptcy. Furthermore, the correlation between the number of companies applied to postponement to bankruptcy and the number of companies admitted bankruptcy decision was determined 0,92. Similar correlations identified in the relationships between per capita income and the number of companies admitted bankruptcy decision.

A basic linear regression model was performed between gross natural income and the companies applied to postponement to bankruptcy and a correlation coefficient of 0,95 was determined. Moreover, a correlation coefficient of 0,97 between gross natural income and per capita income was evaluated. Finally, relationship of 0,95 between the number of companies admitted bankruptcy decision and companies applied to postponement to bankruptcy was calculated. Statistical Package for the Social Science (SPSS) was utilized for all analysis.

As it can be understood from the statistical results, there have been a significantly compatible correlation and the most efficacious relationship between the companies admitted postponement of bankruptcy and the companies decided bankruptcy decision. This situation has been revealed a balance in terms of legal and economic. This situation reveals a balance in terms of judicial and economical.

²¹ Nilüfer Boran-Güneysu, M. Sadık Çapa, "Borca Batıklık ve İflasın Önlenmesi Yolu Olarak Sıradan Çekilme Anlaşması", İnönü Üniversitesi Hukuk Fakültesi Dergisi, C. 5, S. 1, 2014.

²² Azzem Özkan, H. Pınar Kaya, "İflas Erteleme Sürecinde Ödenmemiş Sermaye Borçları" Niğde Üniversitesi İİBF Dergisi, 2013, C. 6, S. 2, s. 194-203.

²³ Oğuz Atalay, Borca Batıklık ve İflasın Ertelenmesi, İzmir 2006, s. 51; Hakan Pekcanitez, Anonim Ortaklıkların İflası, Ankara 1991, s. 48.

²⁴ Azzem Özkan, H. Pınar Kaya, "İflas Erteleme Sürecinde Ödenmemiş Sermaye Borçları" Niğde Üniversitesi İİBF Dergisi, 2013, C. 6, S. 2, s. 194-203.

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