Overview of Mergers and Acquisitions in Turkey (2015)

22 May 2015

1. Types of transactions

Mergers are regulated under the Turkish Commercial Code in two types (TCC; article 136 onwards): establishment of a new company after merger of two or more companies; or takeover of one or more companies by another company.

Demergers: It is possible to split a business-line from one company and merge it with another company by undertaking a demerger (article 134, TCC).

Acquisitions can be realised through share transfers, capital increases, asset transfers or business transfers.

Joint ventures (JV) occur through execution of a joint venture agreement, which may include contractual business operation principles, or include provisions requiring incorporation of a special purpose vehicle company (SPV) to carry out business operations.

2. Statutes and regulations

The primary legal framework includes:

- Turkish Commercial Code No. 6102. Enforced by the Ministry of Customs and Trade, it outlines general corporate law provisions for company incorporations, acquisitions, mergers and takeovers.
- the Capital Market Law No. 6362 (CML). Enforced by the Capital Markets Board, it outlines general rules applicable to business combinations for public companies.
- the Capital Market Communiqués and Stock Exchange Regulations:
- Communiqué on Mergers and Demergers (Serial II, No. 23.2). Regulates procedures and principles for mergers and demergers where at least one party is a public company;
- Communiqué on Takeover Bids (Serial II, No. 26.1). Outlines general rules for mandatory and voluntary public bids;
- Communiqué on the Principles Regarding Significant Transactions and Squeeze Out Right, Serial II, No: 23.1 (Communiqué on Significant Transactions); and
- ?stanbul Stock Exchange Stock Market Regulation;
- the Turkish Code of Obligations No. 6098;
- Corporate Tax No. 5520 (Corporate Tax Law);
- the Labour Law No. 4857 (Labour Law);
- the Law on Protection of Competition No. 4054 (Competition Law); and
- the Communiqué Concerning Mergers and Acquisitions Calling for the Authorisation of the Competition Board No. 2010/4 (Communiqué No. 2010/4).

3. Governing law

<u>Acquisition</u>

Parties to an agreement which includes a foreign element can determine the agreement's governing law. However, Turkish law must be directly applied in certain circumstances stipulated by the International Private and Civil Procedure Law No. 5718. Accordingly, Turkish laws will still apply regarding (but not limited to) following, even if a non-Turkish law is chosen as the applicable law:

- competition and unfair competition;
- title to shares or assets and their transfer procedures;
- notices under the agreement; and
- arbitration clause.

Furthermore, share transfers in Turkish companies shall be made in accordance with the TCC regardless of the governing law. For instance, the board of directors must approve the share transfer and the transfer must be recorded in the company's share ledger and share certificates must be endorsed to show the transfer and physically delivered to the transferee. To execute a share transfer in a limited liability company, a share transfer agreement must be executed before a notary public, a shareholders resolution must be adopted and the transaction must be registered with the Trade Registry and publicly announced.

Mergers and demergers

If a non-Turkish law is chosen as the applicable law for a merger or demerger agreement, certain provisions of Turkish Law will still apply. Parties can agree to provisions different to the statutory minimums, provided these remain in line with the mandatory rules.

Initiation of merger and demerger transactions must be made by a resolution from the managing bodies of companies which are party to the transactions. The parties must then follow the TCC's steps and quorum requirements for such transactions.

Joint ventures

JVs can be formed as a commercial company under TCC (usually joint stock or limited companies) or an ordinary partnership under the Code of Obligations (TCO). Either way, JVs must comply with Turkish legislation and corporate regulations.

Parties execute a JV agreement to regulate the:

- intended corporate structure;
- relationship between the parties; and
- details on the JV.

Parties can include protection mechanisms in the JV agreement as contractual obligations, but the agreement must comply with TCC and TCO requirements.

4. Filings and fees

Filing and fee requirements depend on the parties, type of entities (real person, company, cooperative, branch office, liaison office, etc) and type of business combination.

Mergers, acquisitions and joint ventures that result in a permanent change of control are subject to the Competition Board's approval, provided that they exceed the applicable turnover thresholds. Communiqué No. 2010/4 provides a definition of control (article 5). Control may be acquired through rights, agreements or any other instruments which, separately or jointly, allow de facto or de jure exercise of decisive influence over an undertaking, and consist of ownership right or operating right over all or part of the assets of an undertaking, and those rights or agreements granting decisive influence over the structure or decisions of the bodies of an undertaking. Control may be acquired by persons or undertakings that are the holders of the rights, or entitled to the rights under the agreements concerned, or while lacking such rights and powers, have de facto power to exercise such rights.

Turnover thresholds must be evaluated if a permanent change in control occurs. The thresholds a transaction must exceed to trigger the filing requirement under the Turkish merger control regime are (article 7, Communiqué No.

2010/4):

- aggregate turnovers of the transacting parties in Turkey exceeding 100 million lira, and turnovers of at least two of the transacting parties in Turkey each exceeding 30 million lira;
- the Turkish turnover of the asset or businesses subject to acquisition in acquisition transactions exceeding 30 million lira, and at least one of the merger transaction parties having a Turkish turnover exceeding 30 million lira; and
- a global turnover of the other party exceeding 500 million lira.

Additional requirements to obtain governmental and regulatory authorisations may apply for each type of business combination (questions 11 and 17).

Acquisitions

Typically, acquisitions via share transfers in joint stock companies are not subject to any registration requirements, although depending on the characteristics of a share transfer in joint stock companies, these transactions may require registration, filing, or approval.

Share transfers in limited liability companies are subject to notarisation and registration with the Trade Registry.

Notification to Trade Registry may be required for share transfers over a certain shareholding percentage in group companies (questions 5 and 6). If the target becomes the sole shareholder company due to an acquisition, this must be registered to the Trade Registry.

Stamp tax must be paid on all agreements which include a price, including share transfer agreements. Capital gains on a share sale must be included in a company's taxable profits; subject to corporate tax at a rate of 20 per cent (Corporate Tax Law). Further discussion in question 18.

Profits made by real persons from share transfers are subject to income tax. Sellers of target company shares are only required to pay income tax if they are Turkish tax residents. Otherwise, tax liability is addressed by laws in their own country.

A transaction (ie, capital increase) may require amendment of the target company's articles of incorporation (AoI). Incorporation and AoI amendment is subject to approval of the Ministry of Customs and Trade for certain types of companies (question 11).

During incorporations and capital increases, an additional payment to the Competition Authority is required as a contribution fee (0.04 per cent of company capital).

For publicly held companies, if a change in management control occurs due to an acquisition, a mandatory offer to acquire all remaining shares must be made. Such offer must be approved by the Capital Markets Board (article 13, Communiqué on Takeover Bids Serial II, No. 26).

Mergers

The necessary filings and fees depend on the transaction type. The requirements and implications of the TCC, Capital Markets legislation, COB, Labour Law, and tax legislation must be considered during the merger process, as well as requirements in special legislation which may apply to the merger parties.

The main TCC procedural requirements are the merger agreement, including all details regarding transaction, must be approved by shareholders of all merger parties and must be registered with the Trade Registry Office and publicly announced in the Trade Registry Gazette.

For publicly held companies, an announcement must be submitted for the Capital Markets Board's approval. Depending on the company type, additional governmental filings and approvals may be required (question 11).

Before registering a merger, 0.04 per cent of the capital must be paid to the Competition Authority (contribution fee).

The value contributed to the surviving entity from the dissolving entity (the merger profit) is subject to corporate tax. However, merger transactions which fulfil certain conditions under the Corporate Tax Law are considered tax-exempt for corporate tax. If the transaction meets these conditions, it will also be exempt from stamp tax, legal fees and VAT (question 18).

Demergers

The TCC basically contemplates two demerger types (article 159):

- pure demerger - All assets of a company are split into units and transferred to an existing or new company; or
- partial demerger - Part of a company's assets are transferred to an existing or new company.

Different procedures and requirements under the TCC shall be followed depending on the type of demerger and transaction structure. If the parent company's shareholders acquire shares in the acquiring company as a result of a demerger, further procedures to decrease the parent company's capital may be required.

Filings and fees for merger transactions must also be completed for demergers, where applicable. These may include Capital Markets Board approval, registration and announcement to the Trade Registry, as well as governmental approvals (see question 11).

Demerger transactions may be realised on a tax-free basis if conditions in the Corporate Tax Law are fulfilled; no taxes would apply to demerger profits. Tax free demergers also receive exemption from VAT, legal fees and stamp duty obligations (question 18).

Joint ventures

In general, JV agreements do not require any filings, except for obtaining approval from the Competition Authority and paying stamp tax for the agreement. However, JV transactions usually include establishment of a SPV under Turkish law (TCC). Establishing an SPV requires notarisation of its AoI, registration of the AoI with the relevant Trade Registry Office, and announcement in the Trade Registry Gazette. The SPV must also be registered with the tax office and acquire a tax number in order to start operations.

Governmental filings and approvals may be needed, depending on the SPV's type. Incorporation and amendment of AoI is subject to approval of the Ministry of Customs and Trade for some company types (question 11).

5. Information to be disclosed

Information which must be publicly disclosed will generally depend on the type of business combination, as well as the company types involved (publicly held or private). Disclosure requirements mainly apply to publicly held companies. Details in relation to a transaction may need to be submitted to regulatory authorities (for example, during a competition filing).

Certain regulations require all companies to register and announce transactions, regardless of the company type. For example, under the TCC, merger and demerger transactions, capital increases in joint stock and limited liability companies, and share transfers for limited liability companies must all be registered with the Trade Registry, as well as announced in the Trade Registry Gazette.

All merchants (including real persons and legal entities) must register their commercial enterprise and trade name with a Trade Registry Office (TCC; Trade Registry Regulation). All records must be registered and publicly announced in the Trade Registry Gazette, including change of address, trade name, field of activity, or capital increase.

Joint stock companies must register and publicly announce the following information in the Trade Registry Gazette: corporate structure, articles of association, persons who are entitled to bind and represent the company, termination of the company, becoming a sole shareholder company, and liquidation status. Annual company accounts and reports are not normally registered with the Trade Registry Gazette.

Disclosure requirements for publicly held companies are primarily regulated by the Communiqué on Material Events (Serial II, No. 15.1). Accordingly, publicly held companies must disclose the following information on the Public Disclosure Platform and on the company's website:

- inside information - material information which has not been publicly disclosed but which may influence the value of a capital market instrument or investor decision; and
- ongoing information - all other information which must be publicly disclosed and is not inside information.

The Capital Markets Board issued a Guideline on Material Events which outlines the circumstances which must be disclosed to the public as inside information. Merger and takeover bids are both noted as inside information which must be publicly disclosed if the bid is likely to have any effect on a capital market instrument's value or investor decisions (article 5.5, Guideline on Material Events).

Mergers and demergers

Publicly held companies must disclose certain information and documentation in relation to merger or demerger transaction on the public disclosure platform and the websites of the companies (article 8, Communiqué on Mergers and Demergers). These may include:

- announcement text approved by the Capital Markets Board;
- merger agreement or demerger agreement or plan;
- merger or demerger report;
- financial reports and information; and
- independent audit reports of the past three years (if any).

Additional disclosure requirements may arise depending on the structure of the merger, demerger, or any additional transactions planned within it.

Acquisitions via takeover bids

As per the Communiqué on Takeover Bids, bidders must publicly announce a takeover bid immediately after deciding to make the bid. The bidder's disclosure requirement may include - alongside others - the following:

- number and amount of the listed and unlisted shares at the end of each trading day during the offer period, and the number of shareholders responding to the offer;
- total number and amount of shares acquired, as well as the total number of shareholders responding to the offer at the end of the offer period;
- the target company's detailed shareholding and management structure; and
- renouncement of obtaining shares through a voluntary bid.

6. Disclosure of substantial shareholding

Group companies are subject to a specific disclosure requirement (article 198, TCC) whereby they must notify, register and announce their participation in another company, or a decrease of shares in companies already participated in. The notification obligation has two elements:

If the enterprise (parent company) holds 5, 10, 20, 25, 33, 50, 67, or 100 per cent of the shares of another company (affiliate), or the share ratio of the parent company decreases below one of those thresholds, the company is required to notify the affiliate and relevant authorities within 10 days of completing the transactions.

Acquisition or transfer of shares in this way must be disclosed in the company's annual activity and audit reports under a separate heading and disclosed on the company's website.

Board members and managers of the enterprise (parent company) and the company (affiliate) must notify of shareholdings of 20 per cent or more which are held by themselves, their spouses or their dependent children.

Notifications must be made in writing, as well as registered with and announced in the Trade Registry Gazette. Failure to register and announce will cause rights associated with those shares to freeze, including voting rights. Even if these rights are exercised somehow, the votes will be deemed null and void.

Changes in the shareholding structure and management control in publicly held companies are deemed ongoing information, which must be publicly disclosed (Communiqué on Material Events).

Publicly held companies must disclose:

- a person's direct or indirect shareholding in a public company, acting alone or with others, exceeds or falls below 5, 10, 15, 20, 25, 33, 50, 67 or 95 per cent of the issued share capital or voting rights; or
- Voting rights relating to shares traded on a stock exchange that can be acquired by direct or indirect ownership of a capital market instrument reach, exceed or fall below these thresholds.

Private companies with shares traded on a stock exchange through a public offer must disclose a person's direct or indirect shareholding in the target which exceeds or falls below 25, 50 and 67 per cent of the issued share capital or voting rights.

The Communiqué on Material Events regulates the general information to be disclosed. The Communiqué states that real persons and legal entities directly having 5 per cent or more of capital shares or voting rights in the publicly traded issuers (and any changes) must be immediately updated on the Central Registry Agency and published in the Public Disclosure Platform (article 16, Communiqué on Material Events).

Publicly held companies which are party to a business combination have additional disclosure requirements relating to inside information depending on the transaction's structure (question 5).

7. Duties of directors and controlling shareholders

For joint-stock companies, members of the board of directors and all other third parties responsible for management of a company must perform their duties diligently, protecting the company's interests and they are prohibited from competing or dealing with the company for their own benefit (articles 395 and 396, TCC). Directors are prohibited from participating in discussion of matters concerning their own interests (or their relatives' interests) which conflict with the company's interests (article 393, TCC).

For limited companies, managers and other persons responsible for management of the company must perform their duties with utmost diligence, protecting the company's interests (article 626, TCC).

Additional diligent management obligations are determined for publicly held companies. A board of directors must balance the corporation's risk at the most appropriate level through strategic decisions, as well as manage and represent the corporation by primarily protecting the long-term benefits through prudent risk management (Communiqué on Corporate Governance Principles). A publicly held company's board of directors is also obliged to keep inside information confidential and not disclose or use the information until it is publicly disclosed.

Accordingly, management of the companies shall put the company's interests before the personal interests of themselves, the shareholders, their relatives, other members of the board of directors, or any third parties when making decisions, if a conflict of interest exists.

Further, certain restrictions might apply if a controlling shareholder is also the parent company of a corporate group (article 195 onwards, TCC). A parent company must not exercise its control in a way which would cause the affiliate to incur loss (article 202(1), TCC).

If the parent company abuses its dominance over an affiliate, minority shareholders of this affiliate are entitled to request the purchase of their shares from the controlling shareholder (article 202(2), TCC; question 14).

8. Approval and appraisal rights

Acquisitions

As a general rule, shares in joint-stock companies can be freely transferred, except as otherwise provided under a company's AoI. Therefore, such transfers are not subject to approval by the management body or other shareholders.

For limited liability companies, a share transfer requires execution of the share transfer agreement before a notary public, adoption of a shareholders resolution, and registration of the transaction with the Trade Registry. The majority of shareholders must approve a share transfer in limited companies, unless otherwise stipulated in the company's AoI (article 620, TCC).

Management of joint stock and limited liability companies can be granted a refusal right in certain circumstances (question 10). If any shareholder is also represented in the management, they can reject share transfers by exercising these rights.

If the transaction requires financing via a share capital increase of the target company, shareholders' approval is required. Sale of company assets in significant amounts is also subject to general assembly approval (article 408, TCC).

For publicly held companies, transfer of the whole or an important part of the company's assets is defined as a ‘significant transaction' (CML; Communiqué on Significant Transactions) and shareholders' approval is required. Accordingly, affirmative votes of at least two-thirds of shares with voting rights participating in the corporation's general assembly are required for the approval of significant transactions (article 29, CML).

Mergers and demergers

Mergers and demergers are subject to the approval of the general assembly of shareholders. To resolve on merger of a joint stock company, approval of the shareholders representing at least three-quarters of the shares present in the general assembly is required (provided the quorum represents the majority of share capital). For limited companies, three-quarters of the shares present at the general assembly meeting is required (provided the quorum represents at least three-quarters of the share capital).

For publicly held companies, merger and demerger transactions are determined to be significant transactions and specific quorum requirements must be met (CML; Communiqué on Significant Transactions). As a rule, affirmative votes of at least two-thirds of shares with voting rights participating in the corporation's general assembly are required for approval of significant transactions (article 29, CML).

Qualified quorums are regulated for squeeze-out mergers under the TCC, including 90 per cent of shareholders being required to approve a merger. Affirmative votes of minority shareholders are likely to be required to reach the TCC's qualified quorum.

Joint ventures

If the JV agreement requires incorporation of a new SPV in Turkey, all shareholders must sign and approve the SPV's AoI.

JV agreements can include matters requiring shareholder approval for share transfers, such as right of first refusal, tag-along, or drag-along. However, as a general rule, such clauses are only binding among the shareholders and cannot be imposed on third parties as per TCC's ‘sole obligation' principle, which stipulates that shareholder obligations should be limited to the amount of capital subscribed by them. Consequently, shareholders may only claim compensation for contractual breaches, rather than breaches of legislative or regulatory rights.

9. Hostile transactions

There are no specific regulations under Turkish law addressing acquisition of control in a company via a hostile transaction. Hostile bids are not common in Turkey because most public and private companies are controlled by a single shareholder or a small group of shareholders.

That being said, the regulations applicable to public companies may allow acquisition of a company's shares without collaboration with its management in certain circumstances. A voluntary bid or a competing bid may be used to purchase company shares without its management's collaboration. In such case, company's management must prepare a report stating its opinion on the bid and reasons for the opinion, including its opinion on the voluntary bidder's strategic plans for the target and their likely effects on the target's activity and employees.

Since a hostile bid is presented against the will of the target company's management, the management board may choose not to cooperate with the bidder. As the management body is obliged to protect the best interests of stakeholders and the company, it must take all necessary measures to prevent a hostile takeover if such takeover is against stakeholder interests.

If the management body refuses to cooperate, the bidder cannot carry out full due diligence of the target, nor obtain comprehensive and sufficient information on the target's financial situation. The market price may not reflect the real share value and the bidder is prevented from determining a fair and accurate bid price. The bidder is vulnerable to hidden risks and must rely on other sources, such as publicly available information.

A limited or joint stock company's management body can reject share transfers made contrary to the company's AoI (TCC). The management body can include an approval requirement for transfer of registered shares by setting out explicit clauses in the company's AoI. For publicly held companies, the management body may only reject registration of transfer of registered shares, if the AoI sets forth a limit for the registered shares that can be acquired (article 495, TCC; question 10).

10. Break-up fees - frustration of additional bidders

Break fees

Break fees are not addressed under takeover regulations in Turkey. However, parties may agree on penalties for breach of contractual obligations or other contractual arrangements, which would serve as a break fee. The claiming party is not required to prove damages in order to claim compensation under such a clause; proving a breach of the agreement's terms is sufficient.

Limitations on protecting deals from third-party bidders

Generally, share transfers in joint stock companies are not subject to approval by the target company's management. Certain limitations apply:

Registered shares which have not been totally paid-in may only be transferred with the target company's approval (article 491, TCC).

The target company can refuse to approve a share transfer if the transferee's financial ability raises doubts and if the transferee fails to provide any security requested by the target company. Certain exceptions apply to share transfers realised by inheritance, marital property regime between spouses, or enforcement procedures.

The AoI may require registered shares to be transferred with the company's approval (article 491, TCC). However, the target company may only refuse the share transfer (article 493, TCC):

- on the basis of an important reason related to the company's economic independence or shareholder composition. The grounds for refusal must be explicitly included in the company's AoI; or
- by offering to purchase the shares from the transferring shareholder for their actual value at the time of the purchase request, on behalf of the company, its shareholders or third parties.

Transfer of registered shares in a publicly held company can only be restricted in specific circumstances (detailed by article 495, TCC). The management board can only decline approval of a share transfer if the company's AoI impose a limit on the acquisition of registered shares and this limit has been exceeded.

The restrictions outlined above can be incorporated into a company's AoI to give management an ability to protect the company from third-party bidders.

Share transfers in limited liability companies are subject to approval by the shareholder general assembly, provided the company's AoI does not stipulate otherwise. Share transfers can be banned or restricted by the company's AoI (article 595, TCC).

For publicly held companies, another method to prevent a hostile tender offer is by presenting a preferable offer to shareholders as a competing bid. Following a hostile tender offer, the management body could arrange for a third party to make a competing offer at a higher rate than the hostile tender offer.

Financial assistance restrictions

Granting shares in a target company as an advance, loan, or security to finance the acquisition of its own shares is prohibited (article 380, TCC), thus preventing leveraged buy outs to a great extent. Any transaction including purchase of shares in a target by presenting the target company shares as security to third parties (ie, financial institutions) will be deemed invalid. Transactions involving provisions contrary to the financial assistance restrictions will not be deemed invalid as a whole but any loan transactions involving advance payment, loan or security contrary to article 380 will be deemed invalid. However, this should be evaluated on a case-by-case basis.

The restriction does not apply where the transaction:

- is a regulated transaction conducted by credit and finance institutions; or
- enables the company's employees (and employees of the company's affiliates) to purchase the company's shares, by transactions between the company and the employees in order to grant an advance, loan or security.

These two exemptions are invalid if they reduce or adversely affect the company's capital reserves as defined under articles 519 and 520 of the TCC.

11. Government Influence

Certain sectors are regulated with specific legislation and subject to oversight by separate governmental institutions, including IT, energy, banking, financial services and insurance (question 17). Unless a restriction is specifically provided by law, direct foreign investment is unrestricted in Turkey; foreign investors and investments are treated equally (article 3(a), Direct Foreign Investment Code). However, foreign investments are subject to restrictions to prevent foreign capital majorities in strategic sectors:

Foreign shareholding of media service providers cannot exceed 50 per cent of the registered capital. Further, foreign persons cannot be shareholders of more than two media service providers, nor be granted privileged shares (article 19-f, Establishment of Radio and Television and Broadcasting Services Code).

Majority shareholders of civil commercial aviation operators with authority to carry passengers and cargo on scheduled or unscheduled flights must be Turkish (article 9, Regulation on Commercial Air Transportation).

Restrictions apply if the nature of the business association includes the transfer of a real estate. Foreign real persons can acquire real estate or limited real rights (rights in rem) subject to certain restrictions (Land Registry Law, article 35).

Incorporation and amendment of AoI for the following companies are subject to Ministry of Customs and Trade approval:

- banks;
- financial leasing companies;
- asset management companies;
- companies providing consumer financing and credit card services;
- insurance companies;
- holding companies; and
- independent auditing companies.

An official Ministry of Customs and Trade representative must attend all general assembly meetings for companies listed above. For other companies, an representative must attend meetings where the agenda includes AoI amendments regarding increasing or decreasing capital, adopting or leaving the registered capital system, increasing the registered capital ceiling, changing the company's field of activity, merger, split or change of company type.

According to the Land Registry Law, foreign companies are entitled to acquire real estate in Turkey, provided the company operates within:

- the Turkish Petrol Law;
- the Tourism Encouragement Law; and
- the Industrial Regions Law.

Further requirements apply to purchasing real estate in military forbidden zones, military security zones or strategic zones (Land Registry Law).

12. Conditional offers

Generally, no specific regulations address conditional offers in the context of business combinations. Nevertheless, transaction documents can include different condition types which could lead to cancellation of a transaction if some event is not completed (freedom of contract principle). Such conditions could be included in letters of intent, memoranda of understanding, or as conditions precedent in actual transaction documents.

In cash acquisitions, transaction documents may include financing as a pre-condition. Financial assistance restrictions should be considered while structuring financing pre-conditions (article 380, TCC; question 10).

Article 463 of the TCC provides a conditional capital increase system in cash acquisitions under which the company's AoI must explicitly regulate the following issues (article 465, TCC):

- nominal value of the contingent capital increase;
- share numbers, nominal values and types;
- classes which benefit from right of exchange or purchase;
- that pre-emptive rights of existing shareholders have been abolished, and the respective amount;
- privileges granted to certain stock groups; and
- limitations for transfer of new registered shares.

Conditional mandatory offers are prohibited for publicly held companies (Communiqué on Takeover Bids). However, a voluntary bid can be made for all (or part) of the target's shares. In a partial offer, if the number of shares the shareholders wishes to sell is more than the bidder's offer, the number of shares to be sold must be determined on a pro rata basis, ensuring equal treatment of the target's shareholders. Otherwise, no explicit provisions exist that allow, require or prohibit pre-conditions in voluntary takeover bids. Any condition of this type would require clearance from the Capital Markets Board before announcement of the bid document.

13. Financing

Conditions and representations regarding future financing or re-financing of the transaction are usually incorporated into transaction documents. Transaction documents usually state which valuation (EBITDA multiplier) the capital increase will use, the upper limit for the capital increase or the valuation, and financing method. Financing risk may be borne by the buyer by stipulating representations and warranties that the buyer is capable of providing financing by itself.

Buyers may receive loans from financial institutions to raise funds for an acquisition. In such case, the financer (usually a bank) may also attend the due diligence phase, or ask the buyer for additional securities in exchange for the loan.

Sellers do not have any obligations to assist the buyer's financing other than to generally act in good faith. Financial assistance restrictions of TCC should be considered while structuring financing of the transaction (article 380, TCC; question 10).

14. Minority squeeze-out

Squeeze-out in public takeovers

If shares acquired through a bid or some other way (including with others) reach or surpass a specified ratio of voting rights in a public company, the persons holding these shares gain the right to squeeze out shareholders who have become a minority (article 27, Capital Markets Law). The ratio is determined by the Capital Markets Board.

Within a certain period, these persons can request cancellation of the minority shareholders' shares and force sale of new shares to themselves, which are issued corresponding to the cancelled shares. The sale price is determined based on the average stock exchange price in the previous 30 days before public announcement of the squeeze-out (article 24, Capital Markets Law).

Squeeze-out in mergers

The TCC includes a squeeze-out fee in mergers, allowing compulsory purchase of minority shares in certain cases. Merger parties can determine a squeeze-out fee on a pro rata basis against the shareholding of squeezed-out shareholders. A provision can be included in the merger agreement which requires the approval of 90 per cent of the transferor entity's shareholders (article 141, TCC). The squeeze-out fee corresponds to the actual value of the acquired shares.

Specific provisions are made for the squeeze-out right for shareholders who have attended the general meeting on the merger, voted against it, and had their dissent recorded in the minutes (article 12, Communiqué on Significant

Transactions). Shareholders can exercise their squeeze-out right by selling their shares in the public held company. On the shareholder's request, the company must purchase these shares at the average stock exchange price in the 30 days before the merger was publicly disclosed. The squeeze-out fee under the TCC has no impact on the squeeze-out right under the Communiqué on Significant Transactions.

Squeeze-out in corporate groups

The TCC stipulates specific rights for shareholders of an affiliate against certain significant transactions (ie, merger, demerger, important change in the AoI), which are realised through an unlawful exercise of control. If a parent company abuses its dominance over an affiliate, minority shareholders of this affiliate can request the controlling shareholder purchases their shares (article 202(2), TCC). If the parent company conducts certain identified transactions without a valid reason and by exercising its majority rights in a way which causes damage to the affiliated company's shareholder, the shareholder is entitled to either claim compensation for damages, or demand the shares be purchased (squeeze-out).

Losses incurred by affiliates in such circumstances can be remedied by a counter balance payment or a claim of equivalent value for the remedy of its losses within the same financial year. A specific explanation must be provided of how and when this loss will be recovered.

If the parent company directly or indirectly holds at least 90 per cent of shares in its affiliate, the parent company can purchase the minority shareholders' shares and squeeze them out if the minority shareholders do any of the following (article 208, TCC):

- prevent the company from performing its functions;
- contradict the principle of good faith;
- cause noticeable problems; and
- act carelessly.

15. Cross-border transactions

No specific laws or regulations apply to cross-border transactions. Establishment of a SPV is the most commonly used method since it enables access to special legislative provisions in relation to the incorporation of a company (provided the SPV will operate in Turkey).

Before beginning negotiations in Turkey, the rights or obligations granted or prohibited by Turkish laws should be considered. Turkish companies must comply with TCC. Therefore, incorporations, share transfers, mergers and demergers must be in compliance with the TCC (question 4).

Tax risk should be carefully structured in a cross-border transaction (question 18).

In principle, foreign direct investments are unrestricted in Turkey and treated equally to local investments (article 3(a), Foreign Direct Investment Code). Turkish commercial companies can be 100 per cent owned by foreign investors. After a foreign investment occurs, the target must notify the Undersecreteriat of Foreign Investment for statistical purposes.

Some sectors are considered strategic and are subject to restrictions on foreign parties holding controlling stakes (question 11).

16. Waiting or notification periods

Depending on the type of transaction, business combinations require notification or waiting periods to protect stakeholder rights.

Acquisitions

A business or asset transfer must be announced to creditors by an announcement published in the Trade Registry Gazette for commercial enterprises (article 202, Code of Obligations). Otherwise, an acquisition must be announced in any newspaper with national circulation.

Transfers of commercial enterprises are subject to an announcement and registration requirement (article 11, TCC).

Bids for public companies must have Capital Markets Board approval. Applications for approval must be made within six working days after the date shares are acquired that provide control of a public company (article 13, Communiqué on Takeover Bids).

Merger and demerger

Companies participating in mergers must provide certain merger documents for stakeholder inspection (at their business centre) 30 days prior to the general assembly meeting at which the merger will be approved (article 149, TCC).

Shareholders have a legislative inspection right during demerger transactions (article 171, TCC). Companies subject to the demerger must provide certain documents (ie, demerger agreement, financial statements) for shareholder inspection (at their business centre) two months before the general assembly meeting at which the demerger will be approved.

Companies participating in a merger or demerger must publish an announcement in the Trade Registry Gazette and on their websites stating the documents are available for shareholder inspection.

Publicly traded companies must also make publications and announcements as required by Capital Markets regulations. Certain documents (ie, merger or demerger agreement, merger or demerger report, financial statements) must be disclosed on the Public Disclosure Platform and the companies' websites 30 days prior to the general assembly meeting.

The TCC envisages notification periods for securing creditors. Following registration of the merger transaction, companies participating in the merger must notify creditors of their rights through an announcement published in Trade Registry Gazette and on their websites (article 157, TCC). Creditors must make a claim for payment or securing credits within three months of the merger transaction being registered.

For demerger transactions, creditors must be invited to declare their receivables and demand security for the respective receivables (article 174, TCC). The invitation must be published as an announcement in the Trade Registry Gazette and on their websites. Creditors must make claims within three months of the date of the last announcement. If the parent company's shareholders acquire shares in the acquiring company as a result of a demerger, further procedures may apply in order to decrease the parent company's capital.

Additional requirements of announcement and notification to stakeholders may also be required for acquisition, merger or demerger of a financially distressed target. If these aren't complied with, creditors might ask for annulment of the transaction (question 20).

17. Sector-specific rules

Companies in specific industries are often subject to additional regulations and statutes. Regulatory approvals are required for IT, energy, banking, and financial services. Approval may be required for takeovers or mergers either before or after the transaction (industry dependent). Authorities that regulate specific industries include:

- the Capital Markets Board;

- the Energy Markets Regulatory Authority;
- the Banking Regulation and Supervision Agency;
- the Information and Communication Technologies Authority;
- the Mining Affairs General Authority; and
- the Incorporation and amendment of AoI is subject to approval of the Ministry of Customs and Trade for certain types of companies (question 11).

Publicly held companies must comply with Capital Markets Board regulations. For example, a bid for a public company must be approved by the Capital Markets Board and merger transactions where at least one of the parties is a publicly held are subject to Capital Markets Board review and approval.

18. Tax issues

Acquisitions

Stamp tax must be paid on all agreements which include a price, including share transfer agreements. The 2015 stamp tax rate is 0.948 per cent, calculated on the highest amount in the agreement and paid for each copy of the document which is subject to stamp tax.

Capital gains on share sales must be included in a company's taxable profits and are subject to tax at the corporate tax rate of 20 per cent (Corporate Tax Law).

Seventy-five per cent of the capital gains from the sale of shares held by a tax-resident entity are exempt from corporate tax for a period of at least two years before the sale.

Non-tax residents should consider whether a double taxation treaty applies to their particular circumstances.

Mergers

Corporate tax exemption

The value contributed to the surviving entity by the dissolving entity (merger profit) is subject to corporate tax. Merger transactions which meet certain conditions in Corporate Tax Law are defined as ‘takeover' transactions and are considered tax-free for corporate tax. The following are required for a tax-free merger:

- The legal or business centres of the merger companies are located in Turkey.
- The assets and liabilities of the dissolving entity must be transferred to the surviving entity, over their balance sheet values as of the date of merger (the date the surviving entity's merger resolution and authorised organs are registered with the competent Trade Registry Office).
- The dissolving entity's corporate income tax return must be submitted to the competent tax authority within 30 days of the merger announcement in the Trade Registry Gazette.
- The surviving entity must undertake payment of the dissolving entity's tax obligations which have and will accrue, as well as duly perform the dissolving entity's other fiscal and tax obligations.

If these pre-conditions are fulfilled, only the profits derived by the dissolved company before the acquisition date will be subject to taxation; merger profits will not be subject to corporate tax.

Deduction of carried-forward losses of dissolving entity by the surviving entity

In a tax-free merger, the dissolving entity's losses which do not exceed its equity capital on the merger date may be deducted from the surviving entity's taxable base. If the merger does not meet the conditions under the Corporate Tax Law, the dissolving entity's carried-forward losses will be lost.

To deduct such losses, the following conditions must be met:

- losses carried forward for up to five years should be separately indicated in the corporate income tax return on an annual basis;
- both the dissolving entity's and surviving entity's corporate tax returns pertaining to the past five years must have been filed within the required legal periods; and
- the surviving entity must continue the dissolving entity's business activities for at least five years from the accounting period during which the merger is realised.

If these conditions are not fulfilled, deduction of losses from the surviving entity's taxable base would be considered tax loss. Administrative taxation and additional tax fines would apply to the surviving entity.

Other tax advantages

- VAT exemption: Tax-free mergers under the Corporate Tax Law are considered exempt from VAT (Value Added Tax Code);
- stamp duty exemption: Documents issued due to the merger transaction are exempt from stamp duty (article 9, Stamp Duty Code); and
- legal fee exemptions: Transactions made as a result of a merger are exempt from the legal fees (article 123, Law on Legal Fees).

Pure Demergers

Demerges that meet Corporate Tax Law conditions are deemed to be pure demergers and receive the related tax exemptions. Pure demergers involve transfers of all assets, receivables, and undertakings of a fully responsible tax payer equity company to two or more existing (or to be established) fully responsible taxpayer companies by dissolution, without liquidation process over the book value of the subject assets, receivables, and undertakings. To be deemed a pure demerger such transfers must be made in consideration for acquisition of the transferee company's shares by the existing shareholders of such transferor company. Further conditions for being considered a tax-free demerger are the same conditions as noted above for tax-free mergers. Tax-free pure demergers also benefit from all tax exemptions applicable to tax-free mergers.

The Corporate Tax Law outlines three types of partial demergers transactions:

- transfer of real estate existing in the balance sheet of a fully responsible taxpayer company or permanent representative of a foreign institution qualified as a company;
- transfer of participation shares, which have been held for at least two years; and
- transfer of one or more production or service enterprises as capital in kind over their book values to an existing (or to be incorporated) fully responsible taxpayer company.

Income arising from partial demergers is tax-free, as well as exempt from VAT, legal fee and stamp duty obligations.

19. Labour and employee benefits

Business acquisitions

If a workplace is wholly or partially transferred to a third party based on a legal transaction, all employment agreements in force with respect to the workplace will be transferred, including all rights and obligations which exist on the transfer date (article 6, Labour Law).

If a transfer occurs, the transferor and the transferee are jointly liable for obligations that arose prior to the transfer date and that exist as of the transfer date. The transferor employer's liability for these obligations is limited to two years after the transfer date. However, the provisions regarding joint liability will not apply if a company ceases to have legal status owing to a merger, takeover or conversion.

The transfer will not constitute a just cause for terminating employment agreements, either by the employer or by the employee. Severance and notice payments must be paid to employees if the employer terminates the employment contract solely on the basis of the transfer, without any just cause. In these circumstances, the transferor and transferee employers' rights are reserved to terminate employment agreements based on economic and technical grounds, changes in business organisation or immediate termination on just grounds.

Mergers and demergers

If an acquisition occurs by way of a merger or demerger, the TCC allows employees (including key employees) to object to the transfer of their employment agreements to a new employer. If an employee does not raise any objections during a merger or demerger process, the employment agreement will be deemed to be transferred, including all rights and liabilities (article 178, TCC). If an employee raises objections to the transfer of their employment agreement, the employment agreement will be deemed to have ceased at the end of the legislative notice period.

Therefore, although employee's prior consent is not legally required in merger or demerger transactions, obtaining this is common practice in Turkey.

20. Restructuring, bankruptcy or receivership

The TCC allows companies in liquidation and financial distress to be a party of a merger transaction under certain conditions:

- company in liquidation (article 138, TCC): A company in liquidation may take part in a merger transaction, if:
- distribution of its assets has not begun; and
- the company in liquidation will be the acquired company (transferee) in the merger.
- capital loss or insolvency (article 139, TCC): A company that has lost half of its total capital and statutory reserves, or is insolvent, may take part in a merger if:
- the acquiring company has freely disposable equity capital sufficient to meet the lost capital or the insolvency situation;
- it is the acquired company in the merger; and
- companies in bankruptcy cannot become involved in mergers or demergers because during bankruptcy, the right to dispose the company's assets is vested in the bankrupt estate, not the company itself. Additionally, if the target company is in concordatum, the court may rule on specific precautionary measures for sale of the company's shares (article 285, Enforcement and Bankruptcy Law).

If an acquisition is made in bad faith to prevent creditors from claiming their debts, an annulment claim could be made under (article 277 and following articles, Enforcement and Bankruptcy Law). An annulment claim allows the creditor to annul creditor disposals made in bad faith, preventing assets being liquidated and negatively impacting the claimant creditor.

21. Anti-corruption and sanctions

The primary legal instrument in Turkey against corruption is the Turkish Penal Code (TPC). The TPC identifies and criminalises certain offences, including embezzlement, malversation, bribery, money laundering and influence peddling, among others.

Bribery is defined as securing an undue advantage from a public official or from another person indicated by the public official, to perform or not to perform a task with regard to his duty (article 252, TPC). Both bribe giving and taking are criminal offences and attract identical sentences, including imprisonment for between four and 12 years. Bribery as a criminal offence also includes bribery actions.

Criminal behaviour exists where representatives of the following are involved in bribery:

- companies with public entity status;

- companies established with the partnership of the public entities or professional organisations which have public entity status;
- foundations operating within public entities or professional organisations which have public entity status;
- public benefit associations;
- cooperatives; and
- publicly traded joint-stock companies.

Enterprises that benefit from a bribe will also be punished with security measures, such as invalidation of licences granted by public authorities or seizure of pecuniary benefits related to the bribery. If an entity has secured an undue advantage from bribery and is involved in money laundering, it could have its licence cancelled.

If an offence is subject to six months' imprisonment or more and involves either of the following, this would constitute money laundering (article 282, TPC):

- transferring assets to a foreign country which were acquired from an offence; or
- carrying assets to a foreign country where they will be subject to transactions intended to hide an illegal source of these assets (giving the impression of a lawful source).

If convicted of money laundering, offenders are liable for imprisonment of between three and seven years, and will also be liable to a punitive fine of up to 20,000 days.

The liability of legal persons and civil legal persons in Turkey for bribery and money laundering is regulated by the Code of Misdemeanours numbered 5326 (article 43(A)). The Code outlines administrative fines of between 10,000 lira and 2 million lira for bribery undertaken by a legal person or its representative.

Legal persons can only be held administratively liable under Turkish law (no criminal liability exists). However, other sanctions may be applied to legal persons for foreign bribery, such as:

- confiscation of the bribe (property used for committing an intentional offence) (article 54, TCC);
- confiscation of the proceeds of bribery (material gain obtained through the commission of an offence) (article 55, TCC);
- banning and prohibition from receiving public subsidies (article 11, Public Procurement Law numbered 4734); or
- dissolution by revoking the legal entity's operating licence as a special security measure (article 60, TPC).

Corruption has severe consequences for regulated sectors such as capital markets, energy, and banking.

Turkey is a party to several international treaties addressing anti-corruption matters, including:

- the United Nations Convention Against Corruption;
- the Council of Europe Criminal Law Convention on Corruption;
- the Council of Europe Civil Law Convention on Corruption; and
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

By signing these international treaties, Turkey undertakes to harmonise local laws with the international treaties. Accordingly, Turkey has introduced various judicial reform packages in relation to bribery. Turkey is continuing to synchronise certain laws with international treaties.

Updates and trends

M&A deal volume in Turkey during 2014 sat at around US$21 billion, with 236 closed transactions. Privatisations made their highest contribution ever to Turkey's annual deal value, representing 41 per cent of the total volume in 2014 (total deal value of US$8.6 billion across 12 transactions). Foreign investors increased their deal volume by 54 per cent in 2014 compared with 2013. A majority of transactions took place in the middle market with 179 transactions (76 per cent of total closed deals) during 2014 having a deal value of less than US$50 million, yet representing only around 12 per cent of the total deal value. Manufacturing and energy were the most active sectors. Turkish elections in June 2015 and expected changes in the government policies are both likely to effect the M&A market. (Source: Deloitte, Annual Turkish M&A Review 2014).

No fundamental legislative changes are planned for the regulatory and statutory framework applicable to business combinations. The main applicable regulations were adopted relatively recently. Parts of secondary legislation are expected to be enacted, but no fundamental change is expected or planned.

Related Practices

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