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Overview of Public Mergers and Acquisitions in Turkey (2014)

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M&A activity

1. What is the current status of the M&A market in your jurisdiction?

In 2013, the number of mergers and acquisitions in Turkey was 336, and 135 of them were publicly disclosed. The total value of deals in Turkey was US$13.7 billion. Four of those were above $1 billion, accounting for 40 percent of the total transaction volume — a study by Ernst&Young Turkey,

They were the following public sector deals:

- The Toroslar EDA? bid: won by EnerjiSA for $1.7 billion.
- The Haliçport bid: won by Sembol Uluslararas? Yat?r?m-Ekopark, Turizm-Fine Otelcilik Joint Venture for $1.3 billion.
- The Istanbul Anadolu Yakas? EDA? (AYEDA?) bid: won by EnerjiSA for $1.3 billion.
- Ba?kent Do?algaz Da??t?m bid: won by Torunlar G?da for $1.2 billion.

The privatization bid for Bridges and Highways, won in 2012 by the Koç Holding-UEM Group Berhad-Gözde Venture Capital Joint Venture for $5.7 billion (46 percent of public sector transaction volume in 2012), was cancelled in 2013 by the Privatization Council (Özelle?tirme ?daresi Ba?kanl???). If this transaction had been excluded from the 2012 figures, a substantial increase in public sector deals would have occurred in 2013.

The acquisition of Yap? Kredi Sigorta by Allianz SE for $931 million was one of the major private sector deals.

In the top 10 deals, the energy sector ranked first by transaction volume and number of transactions, followed by manufacturing, transport and financial services.

Foreign investors formed 24 percent of the total transaction volume, while domestic investors had a 76 percent share, due to their activity in privatization bids. The largest transactions made by foreign investors were the Yap? Kredi Sigorta-Allianz SE and Viko-Panasonic transactions.

According to the 2013 M&A report released by the Competition Authority (www.rekabet.gov.tr):

- 213 transactions with a total value of TRY260 billion were notified to the Competition Authority.
- In 141 of these transactions, with a total value of TRY41 billion, the target company was established in Turkey.
- 19 privatisations constituted almost half (TRY20 billion) of these Turkey based transactions.

2. What are the main means of obtaining control of a public company?

Control of a public company can be obtained through:

- Acquisition of the majority shareholding/controlling shareholding or privileged shares conferring rights to gain control. Share purchases through private acquisitions are the most common way to obtain control of a public company. Most public companies in Turkey are controlled by a single shareholder or a small group of shareholders.
- Voluntary takeover bid (used to acquire minority shares of public companies when taking a public company private). However, this is rarely used.
- Mergers or demergers (not commonly used due to strict Capital Markets Board regulations).
- The voting agreement under which two or more shareholders pool their voting shares for a common purpose.

Public companies are defined as joint stock companies, the shares of which are offered to the public or deemed to be offered to the public under the Capital Market Law (No. 6362, dated December 6, 2012, Official Gazette 30 December 2012, No. 28513).

Joint stock companies with more than 500 shareholders are deemed to have been offered to the public. They are subject to the provisions applicable to public joint stock companies.

Control of companies means any of the following *(Article 26(2), Capital Market Law and Article 12, Communiqué on Takeover Bids, Serial II, No. 26.1):*

- Holding directly or indirectly more than 50 percent of the voting rights of the company, alone or with persons acting in concert.
- Holding privileged shares, which grant the right to appoint the majority of the board of directors.
- Holding privileged shares, which grant the right to nominate the majority of the board of directors in the general meeting of

shareholders.
A bid for a public company must be approved by the Capital Markets Board. The application for approval must be made to the Capital Markets Board within six working days following the acquisition date of shares providing control of a public company (Article 13, Communiqué on Takeover Bids).

Hostile bids

3. Are hostile bids allowed? If so, are they common?

There are no regulations specifically naming a method for acquiring control of a public company as a hostile bid. However, the regulations concerning takeover bids can be considered a major method for hostile bids as they allow acquisition of the shares of a company without the collaboration of its management. Essentially, hostile bids serve the purpose of market efficiency by eliminating a management that is not able to perform its management duties, which may lead to an increase in the value of the company.

In practice, hostile bids are not common as most public companies in Turkey are controlled by a single shareholder or a small group of shareholders. However, the number of hostile bids may increase in the future, mainly due to private equity investments and/or exits from them. In addition, the increasing number of listed companies and their complex shareholder composition will also probably increase hostile bids.

Provisions in the Communiqué on Takeover Bids on voluntary bids apply to recommended bids and hostile bids because realization of voluntary bids is not subject to approval of the management body of the company. Therefore, the management body cannot prevent a voluntary takeover. However, if the management body does not cooperate, the bidder cannot carry out full due diligence and obtain sufficient information on the financial situation and share price (see Question 5). The market price may not indicate the real value of the shares and the bidder cannot determine a fair and accurate bid price. Due to this and the market and shareholder structure in Turkey, hostile takeovers by using voluntary bids are not preferred.

Apart from voluntary bids, Article 23 of the Communiqué on Takeover Bids regulates competing bids. A third party can make a competing bid during the offer period of an earlier voluntary bid. Therefore, the third party may be able to prevent the takeover by making a competing bid and the management body of the target cannot block it. Hostile takeovers through competing bids are probably more common because the bidder can determine a fair price for the shares, due to its knowledge of the price of the first bid.

To prevent hostile takeovers, the management body can include an approval requirement for the transfer of registered shares in the company's articles of association, as per Article 495 of the Commercial Code. However:

- Most shares of listed companies are bearer shares rather than registered shares.
- The shares of a company to be subject to an initial public offering (IPO) cannot have any restrictions on their transfer (see Question 23).

Regulation and regulatory bodies

4. How are public takeovers and mergers regulated, and by whom?

The legal framework regulating takeovers and mergers involving public companies consists mainly of the following:

- The Capital Markets Law entered into force on December 30, 2012, and is enforced by the Capital Markets Board (www.cmb.gov.tr). It covers the general rules applicable to public companies and capital markets transactions.
- Capital Market Communiqués, in particular the:
  Communiqué on Takeover Bids (Serial II, No. 26.1). This provides the general rules for mandatory and voluntary public bids, for example price, period, documentation and exemptions;
- Communiqué on Mergers and Demergers (Serial II, No. 23.2). This regulates the procedures and principles for mergers and demergers where at least one party is a public company;
- Communiqué on Material Events (Serial II, No. 15.1). This regulates the disclosure requirements for public companies to ensure the fair and transparent functioning of the capital markets through providing timely and accurate information to investors, shareholders and other related persons.
- Commercial Code (No. 6102, 13 January 2011). This is enforced by the Ministry of Customs and Trade. It sets out the general corporate law provisions for mergers and takeovers, although it does not specifically cover public takeovers. Therefore all mergers and acquisitions are affected by its general corporate law provisions as applied to different types of companies.
- Competition Law (No. 4054, dated 07.12.1994). The Competition Authority enforces the Competition Law and its secondary legislation. Whether public or private, if the takeover or merger meets the merger control thresholds, the Competition Board must also be notified (see Question 25). The Communiqué Concerning Mergers and Acquisitions Calling for the Authorization of the
- Competition Board No. 2010/4 also applies.

Takeover mergers in certain regulated sectors (such as banking, insurance, IT and energy) are subject to specific regulations (see Question 25).

Pre-bid

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

Since most public companies in Turkey are controlled by a single shareholder or a small group of shareholders, it is rare for a bid targeting a listed company to be triggered or recommended by the target's board. However, it is common for a bidder to conduct initial due diligence by reviewing publicly available information on the target, before approaching the target.

In theory, the main due diligence commences when a letter of intent, memorandum of understanding or term sheet is signed by the parties. In a recommended bid, the parties would usually sign a confidentiality agreement when due diligence requests are made and before receiving non-public information.

Comprehensive financial, tax, operational and legal due diligence is usually carried out when acquiring public companies. Due diligence is likely to be more limited compared to acquisitions of private companies since most information requested is publicly available as required by law.

A bidder's legal due diligence usually focuses on:

- Existence, good standing and ownership
- Corporate governance
- Material agreements (financing agreements or any agreements material to the target's business) Assets
- Liabilities (such as those arising from definite court judgments and administrative fines)
- Contingencies (such as those that may arise out of pending, potential or threatened claims, lawsuits or administrative inspections or investigations)
- Regulatory issues (based on the main business of the target)
- Environmental issues
- Competition compliance
- Insurance
- Employment
- Intellectual property

Hostile bid

As a hostile bid is presented against the will of the target company's management body, the management board is free to not co-operate with the bidder. Therefore, the bidder cannot conduct full due diligence on the target and obtain comprehensive information about it. The bidder is vulnerable to hidden risks relating to the target and must rely on other sources, especially publicly available information. This is one of the main reasons why hostile bids are not common (see Question 3).

In Turkey, a hostile bid can be made through a voluntary bid and a competing bid (see Question 3). In this case, the management body of the company must prepare a report stating its opinion on the bid and reasons for it, including the strategic plans of the voluntary bidder for the target and their likely effects on the activity and employees of the target. This report must be disclosed to the public by the target and is an essential information document for the bidder.

Public domain

The following must be registered with the trade registry and published in the trade registry gazette for all Turkish companies whether public or not:

- The articles of association. The articles include the amount of the initial share capital, the address and duration of the company and information on shareholders and the management board.
- Resolutions by the management board (board of directors or managers) and the shareholders' meeting if the agendas of these are subject to registration under the Commercial Code.
- Minutes of general assembly meetings.

Public companies are also required to maintain a corporate website and make certain corporate information available on it. The content of the website is provided under the Regulation regarding the websites of Capital Stock Companies (*Official Gazette No. 28663, 31 May 2013)*. The following information must be published on the websites of public companies continuously:

- MERSIS number (MERSIS is the Turkish electronic trade registry)
- Trade name
- Location of the headquarters
- Committed and paid up share capital
- Board members of joint stock companies and managers of limited liability companies
- Names, surnames, residence addresses and registered branches, if any, of the auditors
- With regard to group companies, information on share transfers or acquisitions by an undertaking in a group of companies, for the amounts stated in Article 198 of the Commercial Code the disclosure must be made within five days of the transaction date.

With regard to listed companies, certain further information is recommended to be disclosed under the Communiqué on Corporate Governance Principles (Serial II, No17.1). The corporate governance principles include:

- Mandatory principles, which listed companies must comply with.
- Comply or explain basis. It is not mandatory to comply with these, but it is recommended. If companies do not comply, they must explain the reasons for the non-compliance in a corporate governance compliance report, the content of which is determined by the Capital Markets Board, issued as a part of the annual report.

In relation to the comply or explain approach, the following must be published on the website of listed companies;

- Trade registry information
- Up-to-date information relating to the shareholding and management structure
- Information in relation to privileged shares of the company
- The final version of the articles of association, along with the Trade Registry Gazette information in relation to amendments of it
- Public disclosures on material events
- Financial statements and annual reports
- Prospectus and further documents subject to public disclosure
- Agendas, attendance list and minutes of general assembly meetings
- Form for proxy voting at the general assembly meeting
- Mandatory information forms prepared for proxy solicitation and similar forms
- Takeover bids
- Buy-back policy of the company, if any
- Distribution of profit policy
- Information policy
- Information on related party transactions
- Ethical rules formed by the company
- Frequently asked questions and answers to them

In addition, information on assets registered in the following public registries is publicly available:

- Ownership and encumbrance data of properties can be checked through land registry offices
- Information about trade marks, patents, industrial designs and utility models registered in the Patent Institute is public and can be obtained through its website (www.tpe.gov.tr/portal/default_en.jsp)
- Ship registries
- Owners of domain names obtained through nic.tr, which provides domain names with the tr extension, can be reached from the website of nic.tr (www.nic.tr/index.php?lang=TR_LANG&PHPSESSID=1410875009159220744478755)

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

Persons who have access to material information, which must be disclosed under the Communiqué on Takeover Bids, must keep this information confidential until disclosure is made to the public (Article 25, *Communiqué* on Material Events). Further, listed companies should avoid disclosing information which does not affect the value of a capital market instrument or investor decisions, which is not therefore considered inside information. Disclosure and/or use of such information may trigger insider trading or criminal market manipulation rules, depending on the circumstances.

The following must be disclosed to the public on the Public Disclosure Platform *(Kamu Ayd?nlatma Platformu*) (www.kap.gov.tr/en/about-pdp/general-information.aspx) and the company's website (*Communiqué on Material Events):*

- Inside information. This is material information that may influence the value of a capital market instrument or investor decision that has not been disclosed to the public. A reasonable investor would take it into account in his investment decisions, it would bring an advantage to the investor in possession of the information and it may influence the price of the capital market instrument or investor decision.
- Ongoing information. This is all other information apart from inside information that must be publicly disclosed.

The Capital Markets Board has issued a Guideline on Material Events within the scope of the Capital Markets Law and the Communiqué on Material Events, which indicates the circumstances that must be disclosed to the public as inside information. A merger and a takeover bid are inside information that must be disclosed (provided that certain conditions are met) (see Question 12). However, a merger or takeover, or appointment of a consultant in relation to it, may not be deemed material information if they do not have any effect on the value of a capital market instrument or decisions of investors (Article 5.5, Guideline on Material Events). In this regard, the importance level of each transaction should be evaluated within the framework of inside information, which are the effect on the value of capital market instruments and investors' decisions.

Provided that the above conditions are met, listed companies must disclose inside information at a stage when the information comes to a concrete level of certainty, even without a guarantee that the disclosed transaction will be concluded. As long as it is not misleading, such disclosure does not guarantee that the transaction will be completed and it is not yet binding for the parties.

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

A bidder commonly requests the selling shareholders to enter into a memorandum of understanding, whether exclusive or not. The memorandum of understanding is not a binding agreement and does not oblige the shareholders to sell their shares. The main objective of signing a memorandum of understanding is to determine the framework of a more complete share purchase agreement, and possibly a shareholders' agreement.

If the content of a memorandum of understanding meets the criteria for public disclosure, it must be disclosed to the public in accordance with the inside information rules under the Communiqué on Material Events (see Questions 6 and 8). However, whether this disclosure requirement is triggered must be determined on a case-by-case basis since the content of the memorandum of understanding differs in each transaction.

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

Inside information and ongoing information must be disclosed to the public under the Communiqué on Material Events (see Question Changes in the shareholding structure and management control are deemed ongoing information, which must be disclosed to the public.

Public companies must disclose the following:

- A person's direct or indirect shareholding acting alone or with others in a public company exceeds or falls below 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67% or 95% of the issued share capital or voting rights. The person must make public disclosure by 8 a.m. at the latest on the third business day after the transaction, through the standard form drafted by the CMB as an annex to the Communiqué on Material Events.
- 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 the above thresholds. In this case, the person must make disclosure immediately following the transactions.

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 exceeding or falling below 25%, 50%, and 67% of the issued share capital or voting rights.

Further, the table that states a real or legal person's direct shareholding (as disclosed on the Public Disclosure Platform) must be immediately updated if there is a change in that shareholding equal to, or exceeding, 5 percent of the issued share capital or voting rights of a listed company.

If the bidder intends to build a stake in the target through a direct shareholding or using derivatives, and the percentage of shares or voting rights acquired by the bidder reaches the above thresholds, the share transfers must be publicly disclosed as ongoing information (see Question 6).

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

Since most public companies in Turkey are controlled by a single shareholder or a small group of shareholders it is rare for a bid for a listed company to be triggered or recommended by the target's board. Further, a voluntary bid cannot be placed in the stock market without approval from the Capital Markets Board. Therefore, it is not common for the target's board to execute a formal agreement with the bidder before the bid becomes official.

However, takeovers are commonly negotiated between the selling shareholders and the bidder. In this case, especially if the selling shareholders control the target, the bidder commonly executes a pre-agreement or memorandum of understanding with the selling shareholders. In these documents the bidder usually asks for exclusivity and no-shop clauses from the selling shareholders, which would indirectly prevent other offers or bids.

Break fees

10. Is it common on a recommended bid for the target or the bidder to agree to pay a break fee if the bid is not successful?

Break fees are not regulated under the takeover regulations. Under general principles of Turkish law, penalties for breach of contractual obligations or other contractual arrangements that would serve as a break fee may be agreed among the parties. However, the bidder can withdraw from the acquisition of the target's shares until the offer period starts (Article 20(2), Communiqué on Takeover Bids) and a bidder and a target would probably not restrict their ability to do this. Since public bids are not common it is not possible to assess how the practice will evolve.

Committed funding

11. Is committed funding required before announcing an offer?

Committed funding is required before announcing the takeover bid information form (offer document) to ensure payment of the consideration at the end of the buying period. The offer document must include the source and amount of funds to be used to purchase the target's shares (see Question 14).

The Capital Markets Board can require payment of the consideration to be guaranteed by a local bank or third parties.

The bidder must carry out the offer through intermediary institutions. An agreement between the bidder and the intermediary institution must be executed and must include the following:

- The number and nominal value of the target's shares
- Whether the shares are registered or bearer shares
- Whether the shares are privileged or not
- Start and end date of the actual offer period
- Amount to be paid for each share
- Takeover fee, commission, and further benefits
- The amount to be deposited with the intermediary institution by the bidder, information on the procedure if this amount is
- inadequate and liability of the intermediary institution in this respect
- Information on the party responsible for providing adverts, announcements, notices and notifications to the Capital Markets Board and related liability.
- Information on the parties to the agreement, authorized signatories and the execution date of the agreement

The Capital Markets Board can grant private companies an exemption from acting with an intermediary institution if there is a mandatory offer (see Question 16).

Announcing and making the offer

Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

Under the Guideline on Material Events, a merger and a takeover bid is considered inside information to be disclosed. A public company must make these transactions public, subject to the inside information disclosure rules (see Question 6).

Mergers

The following must be disclosed to the public on the Public Disclosure Platform and the websites of the relevant companies, in addition to any other requirements for disclosure of inside information (*Article 8, Communiqué on Mergers and Demergers):*

- Resolution by the managing body with respect to the merger
- Application to the Capital Markets Board regarding the merger
- Execution of the expert institution opinion
- Execution of the merger agreement
- Preparation of the merger report

The above items must be disclosed to the public immediately.

The following documents must be disclosed to the public at least 30 days before the date of the general meeting in which the merger is to be approved, on the Public Disclosure Platform and the websites of the relevant companies:

- Announcement text approved by the Capital Markets Board
- Merger agreement
- Merger report
- Financial statements of the last three years
- Expert institution report
- Estimated opening balance sheet after the merger
- Independent audit reports of the last three years, if any
- Interim financial statements, if any
- Real estate valuation report, if any

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

Takeover bid

The Capital Markets Law regulates voluntary bids and mandatory bids. Both are subject to the same disclosure requirements. The bid must be made public by the bidder immediately after the decision to make a bid. The following matters must also be disclosed to the public by the bidder:

- Triggering of a mandatory offer, whether the company can benefit from the exemptions from this, and the article of the Communiqué on Takeover Bids, which is the basis of the exemption
- Amount of the takeover bid, and information in relation to the methods to be used for determining the amount

- Application to the Capital Markets Board for the exemption or takeover bid
- Capital Markets Board decision in relation to the request for exemption or takeover bid
- The executive summary or conclusion of the valuation reports that determine the takeover bid amount
- 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 and total number of shareholders responding to the offer at the end of the offer period
- The detailed shareholding and management structure of the company subject to the offer
- Renouncement of obtaining shares through a voluntary bid
- Transactions made to ensure the offer price equity, if the offer price is restated in line with the Communiqué on Takeover Bids

Any amendments relating to publicly disclosed internal information must also be disclosed.

Competing bids

The offer timetable can be altered if there is a competing bid (see Question 3), subject to the Capital Markets Board's approval. If a competing bid is made, the offer period of the first bid can be extended to the end of the competing bid offer period at the request of the first bidder.

The bidder can increase the voluntary bid price until one day before the end of the actual offer period. The new price will be effective following notification to the Capital Markets Board and disclosure to the public. The offer period will be extended by two weeks.

Offer conditions

13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

The Communiqué on Takeover Bids prohibits conditional mandatory offers (see Question 16). Accordingly, mandatory offers cannot be subject to conditions.

A voluntary bid can be made for all or part of the target's shares. In a partial offer, if the number of shares that the shareholders want to sell is more than the bidder's offer, the number of shares to be sold must be determined on a pro rata basis, to ensure equal treatment of the target's shareholders.

Otherwise, there is no explicit provision which allows, requires or prohibits pre-conditions in voluntary takeover bids. Any kind of condition would need to be cleared by the Capital Markets Board before the announcement of the bid document.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

The documents do not differ between a recommended and a hostile bid. The main document received by the target's shareholders is the bid information form (offer document). Its content is determined by the Capital Markets Board and issued as an annex to the Communiqué on Takeover Bids.

Bid applications to the Capital Markets Board must be completed and submitted using the offer document. The Capital Markets Board can request further information to be inserted into the offer document.

The offer document must include information on the following:

- Business name, trade register number, phone and fax of the target and the bidder
- Current shareholding and management structure of the target and the bidder
- In a mandatory bid, the shareholding and management structure before the acquisition of shares which triggers the mandatory bid
- Relationship between the bidder and the target
- Incidents that have triggered the mandatory bid or the reasons, purposes and conditions of the voluntary bid, whether the shares are registered or bearer shares and whether there are privileged shares and, if so, the type of privilege
- Offer price for each share
- A calculation method for the consideration
- Payment method for the consideration
- Source and amount of funds to be used to purchase the target's shares
- The bidder's strategic plans for the target
- Commercial name, address and telephone of the intermediary institution that will realize the purchase
- Transactions and procedures for the bid
- Start and end date of the offer period
- Governing law and jurisdiction for the agreement to be executed between the bidder and the target's shareholders
- Opinions of other public authorities, if any
- Any further information requested by the Capital Markets Board

The following must also be provided to the Capital Markets Board in a bid:

- Share purchase agreement that triggers the mandatory offer, if any, other agreements relating to it and a translation, if necessary.
- Agreement with the intermediary institution (see Question 11).
- If the bidder is a legal person, information on its area of activity, shareholding structure, members of its board of directors and so on
- If the bidder is a real person, his identity number, resident address, detailed curriculum vitae, contact information and information on companies where he is a member of the managing body
- Information on determining the bid amount
- Valuation report on determining the bid amount, if necessary
- Any further documents and information requested by the Capital Markets Board

The offer document must be signed by the authorized representatives of the bidder and the intermediary institution. In practice, it is also signed by the target.

If the offer document is approved by the Capital Markets Board, it must be:

- Disclosed on the Public Disclosure Platform and on the target's website, if the target is listed
- Published in at least one national or local newspaper and on the website of the Capital Markets Board and the target (if the target is unlisted, within three business days of the date of approval of the Capital Markets Board)

A copy of the newspaper in which the offer document has been published must be delivered to the Capital Markets Board within six business days of publication of the offer document.

The Capital Markets Board will approve the offer document if the information in it is adequate, clear and complete. If it is later determined that information in the offer document is inaccurate, misleading or missing, the bidder and the authorized representatives of the intermediary institution who have signed the offer document are liable.

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

There are no requirements for a target's board to inform or consult its employees about a mandatory or voluntary offer. The offer is publicly disclosed (see Question 6).

If an employee does not raise any objections to the transfer of his employment agreement in a merger and demerger, the employment agreement will transfer to the surviving entity, together with all related rights and liabilities (Article 178, Commercial Code, by reference to Article 158, Commercial Code). However, if the employee does not grant his approval to the transfer of his employment agreement, the employment agreement will cease at the end of the statutory dismissal period.

Mandatory offers

16. Is there a requirement to make a mandatory offer?

A mandatory offer to acquire all remaining shares must be made if shares or voting rights granting management control of a public company are acquired (see Question 2).

The following exceptions to the mandatory offer requirements apply:

- Management control is acquired following a voluntary offer to all shareholders, for all shares they hold Management control is acquired through specific written agreements without acquiring any shares, provided that both:
- this agreement is approved by the general meeting; and
- squeeze out rights are granted to shareholders who vote against the agreement in the general meeting and who have their dissenting opinion recorded in the meeting minutes
- The shareholding percentage of a shareholder with management control has fallen below 50 percent but, before management control of the company is obtained by third parties, the shareholder reacquires 50 percent or more of the shares or voting rights of the company
- Voting rights granting management control have been acquired due to a transfer within a group controlled by the same real or legal person

A person obliged to make a mandatory offer must apply to the Capital Markets Board within six days of the acquisition of the shares entitling it to management control. It is mandatory to start the bid within two months following the offer being triggered. Otherwise, the voting rights of the person who must make the offer or a person acting with this person are suspended without any further decision by the Capital Markets Board. The suspension ends on the first day following the offer being completed.

Consideration

17. What form of consideration is commonly offered on a public takeover?

The consideration can be in the form of cash or securities, if the requirements are met (Communiqué on Takeover Bids). The general principle is full payment in cash in Turkish lira. However, the consideration can be paid fully or partly in securities, provided that the written consent of the selling shareholder is obtained during the offer period. If the consideration is in securities, the securities must be publicly traded.

18. Are there any regulations that provide for a minimum level of consideration?

A minimum level of consideration is not required in voluntary offers unless those who individually or jointly acquire shares or voting rights of a company, directly or indirectly which provides a change in management control, block individual share transfers (Article 15, Communiqué on Takeover Bids). If so, a minimum level of consideration is mandatory.

In mandatory offers, the consideration cannot be less than both:

- The average stock exchange daily price in the six-month period following public disclosure of the share transfer agreement if the target's shares are listed.
- The highest price paid by the bidder alone or with the persons acting in concert for the target's shares of the same group in the six-month period before the date of the offer.
  If there is an indirect change in the management control of the target the offer price must be at least the highest of:
- A price determined in a valuation report to be prepared in line with Capital Markets Board regulations, to determine the price of the shares. The offer price which triggers the mandatory offer must be taken into account.
- The highest price, if any, the bidder paid for the target's shares in the six-month period before the date of public disclosure of the share transfer agreement which triggers the indirect change in the management control.
- Where the target is listed, the average stock exchange daily price of the target's shares for the six-month period before the date of public disclosure of the agreement concerning the sale of the shares.
  If the target's share capital is divided into more than one class of shares the offer price for a class of shares not subject to the share transfer which triggered the offer must be at least the highest of:

- A price determined in a valuation report prepared in line with Capital Markets Board regulations, to determine the price of the shares. This must take into account the concessions of each class.
- The highest price, if any, that the bidder paid for the shares, including the class not subject to the share transfer, in the six month period before the date of public disclosure of the agreement concerning the sale of the target's shares.
- Where the target's shares including the class not subject to the share transfer are listed, the average stock exchange daily price of the target's shares for the six-month period before the date of public disclosure of the agreement concerning the sale of the shares.
  If the offer price cannot be determined according to these principles, the Capital Markets Board can request a valuation report to determine the offer price based on the transfer date of the shares.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are no specific restrictions or requirements on the consideration that a foreign bidder can offer to shareholders. If the mandatory offer price is made in foreign currency, by a foreign or local bidder, the offer price is the amount equal to the highest amount in Turkish lira listed by the Turkish Central Bank on the date of both:

- The share transfer which triggered the public offer requirement
- The business day before the offer was made

Post-bid

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

Squeeze out in public takeovers

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

These persons can request, within a period determined by the Capital Markets Board, the cancellation of the shares of the minority shareholders and the sale to themselves of new shares to be issued corresponding to the cancelled shares. The sale price is determined by taking into account the average stock exchange price in the previous 30 days before declaration of the squeeze out is made public (Article 24, Capital Markets Law).

Squeeze out in mergers

The Commercial Code introduced the squeeze out fee in mergers to allow the compulsory purchase of minority shares in certain cases. The parties to a merger can determine a squeeze out fee pro rata to the shareholding of the squeezed out shareholders by including a provision in the merger agreement, which requires the approval of 90 percent of the shareholders of the transfer entity (Article 141, Commercial Code). The squeeze out fee is the amount of the actual value of the acquired shares.

Article 12 of the Communiqué on the Principles Regarding Significant Transactions and Squeeze Out Right, Serial II, No: 23.1 (Communiqué on Significant Transactions) also regulates the squeeze out right of shareholders who have attended the general meeting on the merger and voted against it, and had their dissent recorded in the minutes. They are entitled to exercise their squeeze out right by selling their shares in the public company. The company must purchase these shares on demand of the shareholder at the average stock exchange price in the 30 days before the merger has been disclosed to the public. Exercise of the squeeze out fee under the Commercial Code does not affect the squeeze out right under the Communiqué on Significant Transactions.

Corporate squeeze out in group companies

If the controlling company holds directly or indirectly at least 90 percent of the shares in its subsidiary, it can purchase the minority shareholders' shares and squeeze them out of the company if the minority shareholders do any of the following (Article 208, Commercial Code):

- Prevent the company from performing its functions
- Contradict the principle of good faith
- Cause noticeable problems
- Act carelessly

Restrictions on new offers

21. If a bidder fails to obtain control of the target are there any restrictions on it launching a new offer or buying shares in the target?

There is no restriction under Capital Markets Board regulation on making a new offer or buying shares in the target if a bidder fails to obtain control of the target.

De-listing

22. What action is required to delist a company?

The requirements for delisting are set out in the Communiqué on Significant Transactions. The pre-condition for delisting a public company is that the total voting percentage of the requesting shareholder or group of shareholders acting jointly reaches or exceeds directly or indirectly 95 percent or more in the company.

To delist a public company, both the board of directors and the general assembly must pass a resolution to delist, according to the requirements in Article 7 of the Communiqué on Material Events. This is the approval of two-thirds of shares with voting rights participating in the general meeting, without any meeting quorum requirement.

In a mandatory offer, a delisting application must be made by the controlling shareholder to Borsa ?stanbul (www.borsaistanbul.com/en/home-page), within five business days of the general meeting resolution approving the delisting. If the application is approved the Capital Markets Board resolves to delist the company and this resolution becomes applicable following the announcement of delisting in the Public Disclosure Platform.

The following must be announced in the Public Disclosure Platform:

- The resolution of the board of directors on the de-listing of the company
- The general meeting approval of the above board of directors' resolution
- The simultaneous applications to the Capital Markets Board and the Borsa ?stanbul
- Each stage of the offers regarding the delisting

These disclosures must include at least the following:

- A detailed explanation of the reasons for delisting.
- The anticipated date of the application to the Capital Markets Board and Borsa ?stanbul
- Explanation regarding the offer price.
- The period and duration of the dates when the offer must be made in relation to the Capital Markets Board's decision
- The amount of reserved funds for the offer
- Transactions for purchasing shares not purchased during the offer in the three years following de-listing, and an amount to be held at the capital markets clearing bank (Takasbank) for these three years

Target's response

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Commercial Code and capital markets legislation do not stipulate hostile bids, and there are no specific regulations on the actions that can be taken by the target's board to defend a hostile bid (see Question 3).

The board of directors can restrict the transfer of shares under certain circumstances to prevent hostile takeovers. The transfer of registered shares in a public company can only be restricted in the circumstances set out in Article 495 of the Commercial Code. Within the scope of Article 495, a management board can only decline the approval of a share transfer if the articles of the company impose a limit on the acquisition of registered shares and this limit has been exceeded. However, most shares of a public company are floating and bearer shares and not registered shares. Further, this provision is relatively recent and the Capital Markets Board does not allow such restrictive clauses in the articles in practice in an IPO since Article 6 of the Communique on Shares (Serial VII, No. 128.1) states that the shares of a company to be subject to an IPO cannot bear any restrictions on their transfer.

Another method would be the prevention of a hostile tender offer by a preferable offer to be induced as a competing bid. Following a hostile tender offer the board of directors can ensure that a third party will issue a competing offer at a higher rate, which would lead the shareholders to sell their shares to a party deemed preferable by the board of directors.

Tax

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

Stamp tax must be paid on all agreements that include a price, including share transfer agreements. The stamp tax rate for 2014 is 0.948 percent, calculated on the highest amount in the agreement and paid for each copy of the document subject to stamp tax.

Further, under Corporate Tax Code No. 5520, capital gains on a share sale must be included in the taxable profits of a company, and are subject to corporate tax. The applicable corporate tax rate is 20 percent.

75 percent of the capital gains from the sale of shares held by a tax resident entity for at least the two year period before the sale are exempt from corporate tax.

A share sale is exempt from tax if the shares are sold in consideration for other shares. Therefore, if the buyer acquires the shares of the seller using its own shares as consideration, the share sale is exempt from tax.

For companies that are not tax resident in Turkey, applicable treaties to prevent double tax should be considered.

Share sales are exempt from value added tax.

Other regulatory restrictions

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

Regulatory approvals are required for certain industries such as telecommunications, energy, banking and financial services. Whether prior or post approval is required for takeovers and mergers depends on the industry. The time frame to obtain such approvals differs for each regulatory authority. The approval process usually takes about one or two months. If prior approval is required, an application for approval is generally made after signing of the transaction agreement, and at least one month before the intended completion date of the transaction.

The merger control regime applies to all industries. Competition Authority authorization is required for mergers or takeovers when either:

- The total turnover of the transaction parties in Turkey exceeds TRY100 million, and the turnover of at least two of the transaction parties in Turkey each exceeds TRY30 million
- At least one of the transaction parties has a global turnover exceeding TRY500 million and:
- for takeovers, the turnover in Turkey for the asset or operation being acquired, besides the party noted above, exceeds TRY30 million; or
- for mergers, the turnover in Turkey for at least one of the transaction parties, besides the party above, exceeds TRY30 million.

There are also specific methods of turnover calculation for certain industries. These apply to banks, special financial institutions, leasing companies, factoring companies, securities agents and insurance companies.

There is no specific deadline for making a notification to the Competition Authority. The notification can be made when the documentation adequately proves the intention of finalizing the transaction. However, since a merger or takeover subject to merger control does not become legally valid until a decision is taken by the Competition Board, and the Competition Board is required to respond to notifications within 30 days, notifications are usually filed at least 45 days before the intended completion date of the transaction.

For acquisitions through privatizations, it is also mandatory to file a pre-notification with the Competition Authority before the public announcement of tender specifications by the Privatization Council, if the turnover of the undertaking or unit intended for production of goods or services to be privatized exceeds TRY30 million.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

In principle, foreign direct investments are not restricted and are treated equally to their local counterparts (Article 3(a), Foreign Direct Investment Code (5 June 2003 No. 4875)). After the investment is performed, the target notifies the Undersecreteriat of Foreign Investment for statistical purposes.

The following sectors are considered strategic and made subject to restrictions on foreign shareholders in respect of controlling stakes:

- Foreign shareholding of media service providers cannot exceed 50 percent of the registered capital. Further, foreign persons cannot be shareholders of more than two media service providers and foreign shareholders cannot be granted privileged shares (Article 19-f, Establishment of Radio and Television and Broadcasting Services Code dated 15 February 2011 and no. 6112).
- Majority shareholders of civil commercial aviation operator companies with authority to carry passengers and cargo on scheduled orunscheduled flights must be Turkish (Article 9, Regulation on Commercial Air Transportation, Official Gazette 16 November 2013 no. 28823).

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no specific restrictions on repatriation of profits or exchange control rules for foreign companies. Foreign investors can freely transfer abroad (Article 3, Foreign Direct Investment Code):

- Net profits, dividends, proceeds from a sale or liquidation, of all or part of an investment
- Compensation payments
- Amounts arising from a licence
- Management and similar agreements
- Reimbursements and interest payments from foreign loans through banks or special financial institutions

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

A change in the shareholding structure and management control of a target where the thresholds are exceeded through a transaction carried out by a person alone or with other persons must be disclosed to the public as ongoing information (see Question 6). This requirement applies to both the bidder and any person acting with the bidder.

Following the announcement of the offer, the bidder must disclose each step of the offer period and disclose inside information, if required (see Questions 6 and 12).

Additional disclosure requirements may arise depending on the structure of the offer or any additional transactions.

Reform

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

The takeover regulations are not expected to be further amended in the near future due to a lot of recent reforms such as the Commercial Code, the new Capital Markets Law and the Communiqué on Mergers and Demergers.

Related Practices

- Corporate
- Mergers and Acquisitions
- Foreign Investment and Business Set-up
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