Turkey: M&A

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This country-specific Q&A gives an overview of mergers and acquisition law, the transaction environment and process as well as any special situations that may occur in Turkey.

It also covers market sectors, regulatory authorities, due diligence, deal protection, public disclosure, governing law, director duties and key influencing factors influencing M&A activity over the next two years.

This Q&A is part of the global guide to Mergers & Acquisitions. For a full list of jurisdictional Mergers & Acquisitions Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/mergers-acquisitions/

1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

The key laws relevant to M&A transactions in Turkey are (i) the Turkish Code of Obligations (regulating the contractual aspects between the parties), (ii) the Turkish Commercial Code (governing the corporate governance, mergers and spin-off transactions and the transfer of shares), (iii) the Capital Markets Law (specifically applicable to listed companies), (iv) the Corporate Tax Law (setting forth specific tax-related provisions regarding the merger and spin-off transactions) and (v) the Law on the Protection of Competition (aiming to prevent transactions restricting the competition).

In general terms, there is no obligation to obtain the approval of a public authority regarding M&A transactions.

However, in some cases, the approval of a public authority is mandatory depending on the specificity of the relevant M&A transaction. In this respect, the key regulatory authorities are (i) the Turkish Competition Authority in charge of approving the transactions which might have an adverse impact on competition in Turkey and (ii) the Capital Markets Board of Turkey overseeing the public takeovers.

Prior approval of certain public authorities is also required when the M&A transaction occurs in a specifically regulated sector and meets given thresholds and/or criteria, e.g. (i) the Banking Regulation and Supervision Agency, (ii) the Undersecretariat of Treasury of the Prime Ministry (insurance), (iii) the Energy Market Regulatory Authority, (iv) the Radio and Television Supreme Council (media), (v) Information and Communication Technologies authority (telecommunication), (vi) Tobacco and Alcohol Market Regulatory

Authority and (vii) General Directorate of Mining Affairs.

2. What is the current state of the market?

In the absence of big-ticket deals in 2016 (mainly due to political tensions at national level and increasing geopolitical issues in the region), the market was mainly dominated by mid-sized transactions. In this context, the total M&A deal volume in 2016 reached only USD 7.7 billion through 248 transactions, which is the lowest level since 2009. The deal volume was USD 22 billion in 2012, USD 17.5 billion in 2013, USD 18 billion in 2014 and USD 16.4 billion in 2015. While the total deal number remained more or less flat from 2012 to 2016, total deal value in 2016 dropped significantly by 53% as compared to 2015. (Source: Deloitte, Annual Turkish M&A Review, 2016).

3. Which market sectors have been particularly active recently?

In terms of deal number, the most active five market sectors in 2016 were the followings: (i) internet and mobile services with 16.1% of total deals, (ii) technology with 15.3%, (iii) energy with 11.7%, (iv) manufacturing with 10.5% and (v) financial services with 9.3%.

In terms of deal value, the most active five market sectors in 2016 were the followings: (i) energy with 26.8% of total deal value, (ii) entertainment with 8.9%, (iii) financial services with 6.6%, (iv) food and beverage with 4.8% and (v) manufacturing with 4.2%. (Source: Deloitte, Annual Turkish M&A Review, 2016).

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

In the context of unstable and unpredictable geopolitical developments in neighboring countries, the status of the Turkish economy and its attractiveness to foreign investors might be difficult to assess on the mid-term. This being said, structural reforms at macroeconomic level, easing of domestic political tensions (especially after-effects of the constitutional referendum) and relative stabilization of the regional geopolitical context might positively impact the perception of international investors and consequently boost the flow of FDIs into Turkey in the short term. Nevertheless, small/medium-sized local M&A transactions should still keep the market busy as consolidations and restructurings can be reasonably expected.

5. What are the key means of effecting a merger?

Pursuant to the Turkish Commercial Code, companies can be merged through:

- takeover of a company by another, i.e. merger in form of a takeover; or
- incorporation of a new company where existing companies will merge into, i.e. merger in form of a new incorporation.

As a result of the merger, the transferred company will be dissolved without liquidation and its assets will be wholly acquired by the receiving company.

Basically, the merger process requires (i) the preparation of a merger agreement, (ii) the preparation of a merger report (which can be avoided in small and medium sized enterprises), (iii) the publication of an announcement in the Trade Registry Gazette of Turkey informing the interested persons about their right to audit the merger agreement, the merger report and the financial statements (which can be avoided in small and medium sized enterprises), (iv) the preparation of a certified public accountant report attesting that the merger is performed in compliance with the minimum equity ratios, (v) an increase of the share capital of the acquiring company (as the case may be), and (vi) the approval of the merger agreement by the general

assemblies of the companies participating in the merger.

In case the acquiring company owns the entirety of the shares (granting voting rights) of the transferred company or a same person holds the entirety of the shares (granting voting rights) of companies participating to a merger transaction, a simplified merger procedure may apply: the merging companies can avoid (i) the preparation of a merger report, (ii) the right of audit of interested persons and (iii) the approval of the merger agreement by the general assemblies. Instead, the management bodies (e.g. board of directors) will be entitled to approve the merger agreement.

The merger will take effect upon its registration with the competent Trade Registry Office.

As for merger transactions involving listed companies, the Communiqué on Merger and Spin-off (II-23.2) issued by the Capital Markets Board also sets forth further provisions regarding the merger process, e.g. preparation of an announcement text to be approved by the Capital Markets Board, specificities of the financial statements to be used, obtaining of an expert opinion regarding the assets' value and the exchange ratio, public disclosure, mandatory content of the merger agreement / report, protection of shareholders, etc.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

Speaking about joint-stock companies and limited liability companies (the two legal forms most commonly used in M&A transactions), the articles of association (with any amendments thereto) are publicly available, including information at least regarding the founders, trade name, purpose and scope of activity, registered address, nominal value of the share capital, capital in kind (if any), total number of shares and number of shares subscribed by each founder, composition of the management body, representation and commitment modalities, activity period, dividend distribution mechanism and announcement rules.

For joint-stock companies, the articles of association must also contain information regarding the modalities for convening the general assembly and the voting rights, type of share certificates (i.e. bearer or registered), privileges granted to different groups of shares and share transfer restrictions.

One should note that in joint-stock companies, the transfer of shares is not subject to registration with the Trade Registry and thus publicly available articles of association may not be up-to-date regarding the shareholding structure. This being said, for limited liability companies, publicly available articles of association should always be up-to-date since the transfer of shares must be registered with the competent Trade Registry.

Furthermore, operations modifying the legal structure of the company or requiring the information of shareholders / creditors so as to allow them to use their legal rights, are also announced in the Trade Registry Gazette of Turkey and, if the company is subject to a mandatory independent audit because it exceeds some thresholds set by the Council of Ministers, on its internet site.

Specific assets of the company may also be subject to registration with registries, such as land title registry, ship registry, patent and trademark office, etc.

It is also mandatory for companies operating in some regulated market sectors to announce in their internet site information aiming to inform the shareholders, creditors and public, such as the annual activity report, financial statement and audit reports.

In case the target is a listed company, the potential acquirer can also rely on specific disclosures made through the company's internet site and the Public Disclosure Platform, an electronic system through which

electronically signed notifications required by the Capital Markets Board regulations are publicly disclosed. There three principle categories of disclosure: (i) disclosure of consolidated and unconsolidated financial reports / financial statements, (ii) disclosure of any material events giving rise to insider information (i.e. material information that may influence the value of a capital markets instrument or the decisions of the investors) and continuous information (i.e. any other material information that must be publicly disclosed) and (iii) disclosure of any other events required to be publicly disclosed.

It is also worth mentioning that disclosure of diligence related information to the extent possible would relieve the seller(s) of future responsibility.

7. To what level of detail is due diligence customarily undertaken?

The level of detail of a due diligence exercise depends on the specificity of the relevant M&A transaction.

In addition to customary financial and tax due diligence, the scope of legal due diligence in a private acquisition is rather broad and, focuses, from a legal perspective, on matters including but not limited to corporate governance, commercial contracts, financial contracts, assets, regulatory, environmental, employment, intellectual property, insurance, litigation.

In a private tender process, the scope of the due diligence is usually limited at first stage where the potential acquirers are allowed to generally review the target. In the following stage, a more detailed due diligence review may be allowed for those acquirers having submitted an offer. Finally, the preferred acquirer may be granted the opportunity to perform an in-depth due diligence review before signing the transaction agreements.

That being said, one should note that the scope of legal due diligence review is generally limited in case the target is a state owned / semi-state owned company and subject to a public tender process.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

The management and representation is ensured (i) in a limited liability company, by one manager or by a board of managers and (ii) in a joint-stock company, by the board of directors consisting of one or more members. The duties and powers of the management body include all matters which are not specifically referred to the general assembly of shareholders by virtue of laws or articles of association. In particular, the top management of the company is among the inalienable duties and powers of the management body.

Strictly speaking of M&A transactions:

In a merger transaction, the general assembly of shareholders is the ultimate corporate body of approval in both limited liability companies and joint-stock companies, except where simplified procedure is applied (see Question 5 above). In this respect, the merger agreement must be approved by the general assembly (i) of a limited liability company with affirmative votes of 3/4 of the shareholders representing at least 3/4 of the total share capital and (ii) of a joint-stock company with 3/4 of the votes present at a meeting, representing majority of the total share capital.

As for a share transfer transaction, in limited liability companies, the transfer of shares must also be approved by the general assembly of shareholders (with majority of the votes present at the meeting) in order to be valid.

The transfer of shares in joint-stock companies is in principle not subject to any restriction / approval. However, it is possible that a provision be included in the articles of association of a joint-stock company,

requiring the approval of the company (the board of directors) for transfer of registered shares (in limited situations to be defined in the articles of association).

9. What are the duties of the directors and controlling shareholders of a target company?

As indicated above, the management and representation is ensured by the board of directors in joint-stock companies and by the manager(s) in limited liability companies. These corporate bodies must fulfill their duties with care in a prudent manner and protect the benefits of the company in accordance with the principle of good faith. In case of breach of their obligations arising from the laws or the articles of association, they shall be responsible towards the company, the shareholders and the creditors of the company, for damages caused. Therefore, the management body must act in the best interest of the company and duly evaluate the merits and risks of a potential M&A transaction.

Controlling shareholders of a target company do not have specific duties (see question 8 regarding the approval rights of shareholders).

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

In a merger transaction, stakeholders must be invited through an announcement made in the Trade Registry Gazette of Turkey to audit the merger agreement, merger report and financial statements before the approval of the merger agreement by the general assemblies, unless the announcement is avoided in a small or medium sized enterprise or due to application of the simplified procedure (see Question 5 above). Furthermore, the registration of the merger with the competent Trade Registry Office is also announced in the Trade Registry Gazette of Turkey. Upon request of the creditors of the merging companies within three months from registration of the merger transaction, their receivables must be secured.

As for employees, unless the employee objects, the employment relationship will be automatically transferred to the acquiring company. In case of objection of an employee, his/her employment will be terminated at the end of statutory notice period, until which the acquiring company and the employee will continue the employment relationship.

In case of a share transfer transaction, however, employees / stakeholders do not have similar rights.

Also, in case of a business transfer (in the form of an asset deal) resulting in the transfer of a workplace from an employment law standpoint, employment relationships are automatically transferred to the acquirer, and the transferor continues to be liable during a period of two years together with the acquirer for employees' rights accrued until the transfer date.

11. What regulatory/third party approvals are required and what waiting periods do these impose, if any?

A merger transaction becomes effective upon registration with the competent Trade Registry Office. Please refer to our explanations above (under Question 5) regarding the main formalities to be performed before a merger transaction can be submitted to the competent Trade Registry Office. The registration process itself takes a few business days (in practice 3 to 5 business days) depending on the work load of the Trade Registry Office.

Besides, M&A transaction must be notified to the Turkish Competition Authority if the thresholds provided in the Communiqué of the Competition Authority relating to the notification of mergers and acquisitions are met.

This Communiqué provides that an acquisition transaction shall be subject to the approval of the Competition Authority in case:

- the aggregate turnover in Turkey of the parties exceeds TRY 100 million and the individual turnover in Turkey of at least two of the parties exceeds TRY 30 million; or
- the worldwide turnover of at least one of the parties exceeds TRY 500 million and the Turkish turnover of one of the parties to a merger or the Turkish turnover of the acquired assets or business in an acquisition exceeds TRY 30 million.

In practice, the examination process by the Turkish Competition Authority may take four to six weeks as from the filing of the notification with the Competition Authority depending on its workload, provided that the application file is complete and the transaction does not need any specific review due to the market share/turnover/market situation of the parties.

Furthermore, sector specific regulatory approvals may also be necessary prior to M&A transactions, in market sectors such as banking, insurance, energy, media and telecommunication. In practice, these approvals can be obtained within periods of time varying between 1 to 3 months.

12. To what degree is conditionality an accepted market feature on acquisitions?

The Turkish Code of Obligations specifically regulates conditions precedent as a possible feature of contractual transactions. In this context, potential acquirers are entitled to place offers which are subject to realization of certain conditions and completion of M&A transactions are also usually subject to standard conditions precedent. Such conditions may relate to voluntary issues regarding the target / the parties (e.g. performance of an action by the seller / purchaser, remedy of an irregularity concerning the target, etc.) which can be waived by the parties or mandatory issues such as the approval of a regulatory authority, as the case may be.

However, conditionality is prohibited in the scope of mandatory purchase offers relating to listed companies.

13. What steps can an acquirer of a target company take to secure deal exclusivity?

It is common in Turkey that, prior to the beginning of an M&A transaction, a letter of intent be submitted by a potential acquirer or a memorandum of understanding be signed between the parties. Such documents, without obliging the parties to finalize the M&A transaction, may include an exclusivity clause usually and reasonably limited in time, prohibiting the seller to seek further potential acquirers.

14. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

The parties of a potential M&A transaction may also agree on (i) a forfeit money, where the party that paid the sum may withdraw from the contact by relinquishing it and the party that received it by returning twice the amount, or (ii) a break-up fee requiring the seller / target to pay the costs of the preparation / negotiation phase or even a penalty.

15. Which forms of consideration are most commonly used?

Cash is the most common consideration in a private M&A transaction. Less commonly, shares of the acquiring company may also be used as consideration.

In case of listed companies, payment in full and in cash is a requirement. However, partial or full payment via securities is also possible upon written consent of the shareholder selling the shares and if the offered securities are traded on the stock market.

16. At what stages of an acquisition is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

In a merger transaction (both for joint-stock companies and limited liability companies), the shareholders and other stakeholders must be notified through an announcement made in the Trade Registry Gazette of Turkey about their right to audit the merger agreement, merger report and financial statements at least before 33 days before the approval by the general assemblies of the merger agreement. See our above explanations (under Question 5) regarding the conditions for avoiding such announcement. In any case, the merger transaction will take effect upon its registration with the competent Trade Registry, followed by an announcement in the Trade Registry Gazette of Turkey informing the creditors of merging companies.

In limited liability companies, once a share transfer transaction is approved by the general assembly (giving effect to the transaction), the transfer of shares must also be registered with the competent Trade Registry office and announced in the Trade Registry Gazette of Turkey.

In joint-stock companies, however, the acquisition of shares is, principally, not subject to any public disclosure mechanism. This being said, the direct or indirect acquisition of shares of a joint-stock company belonging to a group of companies must be registered with the competent Trade Registry and announced in the Trade Registry Gazette of Turkey where the shares subject to the transaction represent at least 5%, 10%, 20%, 25%, 33%, 50%, 67% or 100% of the total share capital. Otherwise, the voting rights of the acquirer will be suspended.

In case of listed companies, transactions performed by the main shareholder in relation to the shares of the company (once the threshold of TRY 250,000 per calendar year is reached) must be announced in the Public Disclosure Platform as an insider information (i.e. material information that may influence the value of the shares or the decisions of the investors) unless the disclosure is deferred by complying with certain principles set out under the legislation. Furthermore, in case the direct or indirect shareholding of a person exceeds or falls below 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67% or 95% of the total number of shares or voting rights of a company, the situation must also be announced in the Public Disclosure Platform as a continuous information.

17. Are there any circumstances where a minimum price may be set for the shares in a target company?

Principally, private M&A transactions are not subject to minimum consideration requirements in Turkey. The purchaser and the seller are free to decide on the amount of the consideration, in consideration of the arm's length principle.

In case of listed companies, shareholders (acting individually or in concert with third persons, directly or indirectly) holding more than 50% of the voting rights or the right to choose or nominate the majority of the members of the board of directors are deemed to hold control over the management. Shareholders who obtain management control are obliged to make mandatory purchase offers to other shareholders. The offer price for mandatory purchase offers may not be less than the arithmetic average of the daily weighted average price for a period of six months preceding the public announcement of the event triggering the mandatory offer, or less than the purchase price paid for the purchase of company shares within the six months preceding the mandatory offer. In the event of indirect acquisition of management control, the offer price should also not be less than the price specified in the valuation report to be prepared in accordance with

the rules established by the Capital Markets Board.

However, there is no minimum price necessary for voluntary purchase offers, as long as a mandatory purchase offer is not triggered.

18. Is it possible for target companies to provide financial assistance?

As per the Turkish Commercial Code, a legal transaction involving the grant of an advance, loan or security by the company to a third party for the acquisition of its shares is invalid. This rule applies to both private companies and listed companies. Although some alternative structuring solutions may be considered depending on the contemplated scope of the transaction, it is worth mentioning that the financial assistance prohibition of the Turkish Commercial Code remains untested before Turkish courts and there is no secondary legislation clarifying the scope of its implementation.

19. Which governing law is customarily used on acquisitions?

Pursuant to the Turkish conflict of laws rules, the law explicitly designated by the parties shall govern the contractual obligation relations, to the extent that the provision of the foreign law to be applied is not openly contrary to the public order of Turkey. In case of an M&A transaction, although the transfer of the ownership of shares shall be in any case governed by Turkish law, the rest of the contractual provisions can be submitted to a foreign law. While it is not uncommon to have share purchase agreements governed by Turkish law, the parties may also customarily prefer to apply Swiss law (due to its impartial character and similarity with Turkish law) or the English, French or German law (especially if the acquirer originates from one of these countries).

20. What public-facing documentation is it necessary for a buyer to produce in connection with the acquisition of a listed company?

In applications of a purchase offer to the Capital Markets Board, it is required to submit to the Board the following documents: (i) agreement (if any) relating to purchase of shares leading to a mandatory purchase offer and other agreements associated with that agreement, (ii) purchase offer information form, (iii) brokerage contract, (iv) if the purchaser is a legal entity, information on its fields of business, shareholding structure, directors, etc. and if the purchaser is a natural person, information on identity/tax number, residence address, detailed curriculum vitae, communication data, and companies under his management, (v) information on determination of purchase offer price, (vi) if and when deemed necessary, assessment report relating to determination of purchase offer price and (vii) other information and documents to be requested by the Capital Markets Board.

One should note that, among the above listed documents, the purchase offer information form shall be approved by the Capital Markets Board and announced in the Public Disclosure Platform. This document mainly contains the following: (i) information on target company, (ii) information on purchaser, (iii) information on relationship between the target company and the purchaser, (iv) information on the event leading to the mandatory purchase offer / justification of the voluntary purchase offer, (v) information on conditions of voluntary purchase offer, (vi) information on the shares covered by the purchase offer, (vii) information on purchase offer price, (viii) information on funds to be used for financing the offer, (ix) information on strategic plans of purchaser regarding the target company, (x) information on investment firm acting as a broker in purchase offer, (xi) processes and procedures applicable in purchase offer (xii) starting and ending dates of purchase offer, (xiii) governing law and jurisdiction enforceable in agreements to be signed between the purchaser and the shareholders of the target company, (xiv) if any, opinions of other governmental entities on purchase offer and (xv) any other necessary information.

21. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

In limited liability companies, the transfer of shares requires a share transfer agreement to be executed before a Notary Public and approved by the general assembly of shareholders. The resolution of the general assembly must then be registered with the competent Trade Registry and finally announced in the Trade Registry Gazette of Turkey. The transfer of shares must also be annotated in the share ledger of the company.

In joint-stock companies, (i) bearer shares certificates can be transferred by delivery of the share certificates to the acquirer, (ii) registered share certificates can be transferred by endorsement and delivery of the share certificates to the acquirer and (iii) shares which are not materialized in form of share certificates can be transferred by a written agreement transfer and assignment agreement. The transfer of registered shares must also be annotated in the share ledger of the Company.

In case of listed companies, the transfer of dematerialized shares is performed electronically through the Central Securities Depository.

Agreements relating to the transfer of shares of joint-stock companies or limited liability companies are not subject to any special tax. This being said, the transfer of shares by a legal person can be subject to a VAT of 18% in the following cases: (i) transfer of shares of a joint-stock company which are not materialized in the form of share certificates and which are held by the transferor for less than 2 years and (ii) transfer of shares of a limited liability company which are held by the transferor for less than 2 years.

It is worth mentioning that the formerly applicable stamp tax amounting to 0.948% of the transaction value (within a ceiling of TRY 1,865,946.80) applicable for each original copy of a contract is no longer applicable since 9 August 2016 as far as share transfers are concerned.

22. Are hostile acquisitions a common feature?

Hostile acquisitions are not explicitly mentioned under Turkish legislation, and thus such acquisitions are not prohibited.

However, hostile acquisitions are not common in Turkey because most of the listed companies in Turkey are controlled by a single shareholder or a small group of shareholders with absolute majority. Accordingly, management control usually rests with the majority or controlling shareholder.

23. What protections do directors of a target company have against a hostile approach?

There is no regulated protection mechanism against hostile acquisitions.

24. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

For listed companies, shareholders (acting individually or in concert with third persons, directly or indirectly) holding more than 50% of the voting rights or the right to choose or nominate the majority of the members of the board of directors are deemed to hold control over the management. Shareholders who obtain management control are obliged to make a mandatory purchase offer to other shareholders, including but not limited to the holders of publicly-traded shares. See also explications under Question 17 above.

25. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

Turkish Commercial Code mainly provides the following rights (under certain conditions) to the minority shareholders:

1. certain share groups or the minority may have the right to be represented at the board of directors (if foreseen in the articles of association);
2. shareholders holding 10% of the share capital in private companies and 5% in listed companies have the right to (a) convene the general assembly of shareholders to a meeting and (b) request the addition of new discussion items to the agenda of the general assembly meeting, (c) postpone for one month the discussion on financial statements at the general assembly, (d) request from the court the dissolution of the company based on valid grounds;
3. any shareholder may request the appointment of a special auditor for specific matters.

26. Is a mechanism available to compulsorily acquire minority stakes?

The Turkish Commercial Code provides the following squeeze-out rights which can be applicable under certain conditions: (i) in case of a merger transaction, the companies participating to the merger can propose to a minority shareholder of the transferred company to exit the shareholding in consideration for an appropriate compensation, (ii) in a group of companies, the mother company holding at least 90% of the share capital of its subsidiary can purchase the shares of a minority shareholder in such subsidiary in case the minority shareholder prevents the company from conducting its business, does not act in good faith, creates noticeable disruption or acts in a careless manner and (iii) in case the minority shareholder(s) request(s) from the court the dissolution of the company on valid grounds, the court may decide that the shares of such minority be purchased by the company.

In case of listed companies, if the shares held by a shareholder acting alone or acting in concert with others reach 98% of the voting rights, the controlling shareholder can squeeze-out the minority shareholders (while the minority shareholders have the right to sell their shares to the controlling shareholder).