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1 Relevant Authorities and Legislation

1.1. What regulates M&A?

Mergers and acquisitions (M&A) are regulated under the Turkish Commercial Code (TCC) No. 6102. Pursuant to the TCC, companies may be merged in two ways: firstly, the acquisition of a company by another company, technically called a "Merger by Acquisition"; and secondly, the union of multiple companies under a new company, technically called "Merger by Formation of a New Company".

Although mergers and acquisitions in Turkey are subject to the provisions of the TCC, the provisions of other legal regulations such as the Turkish Code of Obligations No. 6098, the Capital Markets Law No. 6362, the Law on the Protection of Competition No. 4054, and the Labor Law No. 4857 shall be taken into consideration during each process of a merger and acquisition. When required in the specific regulations within the scope of the company type and action, permission from institutions such as the Energy Market Regulatory Authority, the Competition Authority, and the Capital Markets Board shall be obtained.

1.2. Are there different rules for different types of company?

Under the Turkish Law, companies are divided into two groups: Stock Company and Private Company. A Stock Company may be a Joint Stock Company or a Limited/Commandite Company. A private company consists of an Ordinary Company, Limited Liability Partnership, or General Partnership.
The TCC examines mergers in three categories. Accordingly, the TCC specifies the conditions under which companies may be merged with others. Pursuant to Article 137 of the TCC entitled "Valid Mergers", the following may be merged:

- Stock Companies with a) Stock Companies, b) Cooperatives and c) Collective or Cooperative Companies on the condition that the company is a transferred company.
- Private Companies with a) Private Companies, b) Stock Companies on the condition that the Private Company is an acquired company and c) Cooperative Companies on the condition that the Private Company is acquired.
- Cooperatives with a) Cooperatives, b) Stock Companies and c) Private Companies on the condition that the Cooperative Company is a transferred company.
- In addition, there are special arrangements within the scope of the publicly held corporation, one of the types of joint stock companies. Namely, except the shareholders whose shares are traded on the stock market and the shareholders who collect money from the public through crowd-funding, the number of shareholders exceeding 500 shares in the joint stock companies are considered to be public offer. In this context, except for those collecting money through crowd-funding platforms, joint stock companies whose shares are publicly offered or considered to be offered publicly, are publicly held companies.

In addition to the TCC regulations for mergers and acquisitions for publicly held corporations, pursuant to Capital Markets Law No. 6362, the Provisions of Communiqué on Merger and Demerger numbered II-23.2, which regulates the procedures and principles to be followed in the merger and division procedures where at least one of the parties is a publicly held cooperation, shall be applied.

It should be noted that the merger process is specified as among one of the important transactions of publicly held companies. In this context, the Communiqué on Common Principles Regarding Significant Transactions and the Retirement Right numbered II-23.1 should be considered.

As mentioned above, transactions carried out for publicly held companies without the relevant requirements shall be abolished by the board. In this context, an administrative fine shall be imposed, and a lawsuit shall be filed within the frame of the provisions on annulment of the resolutions of the general assembly of the TCC.

1.3. Are there special rules for foreign buyers?

In accordance with Foreign Direct Investment Law No. 4875, which regulates the principles for promoting foreign direct investment, there is no special regulation within the scope of specific legislation. For foreign buyers, there are equal opportunities and they have the same rights as domestic buyers.

1.4. Are there any special sector-related rules?

In general, mergers and acquisitions are performed when the conditions are provided in accordance with the TCC and other related Turkish legislations. However, some sectors are subject to specific rules, especially in banking, energy, insurance, telecommunications, and similar sectors. Permission may be required by applying to institutions such as the Banking Regulation and Supervision Agency, the Energy Market Regulatory Authority, the Competition Authority, the Capital Markets Board, or the General Directorate of Civil Aviation.

1.5. What are the principal sources of liability?

The primary liabilities of the transfer of the commercial enterprises are regulated in the Turkish Code of Obligations and the TCC. In accordance with Article 202 of the Turkish Code of Obligations, the legal entity transferring the company and the transferee have joint responsibility for two years together.

Pursuant to Article 153 of the TCC, the merger becomes effective by registering to the trade registry. At the time of registration, all the assets and liabilities of the acquired company pass automatically to the buying company. The partners of the acquired company become the partners of the transferee company. The merger decision is also announced in the Turkish Trade Registry Gazette.

Pursuant to Article 158 of the TCC, the shareholders that are responsible for the debt of the transferred company before the merger have a liability for the same after the merger. The requests for the personal responsibility of the partners arising from the debts of the transferred company are subject to statutory limitation after three years from the date of the announcement of the merger decision. If the assets become due after the date of announcements, the statutory limitation period starts from the due date. This limitation does not apply to the responsibilities of the partners who are personally responsible for the debts of the acquiring company.

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Mechanics of Acquisition

2.1. What alternative means of acquisition are there?

The acquisition of a company could be realized by way of a purchase of some or all shares of the company by the other company or by way of the merger or demerger of the company. All the processes and methods of the acquisition, including the information regarding the documents, should be submitted to the Turkish Trade Office and other authorities according to the TCC.

2.2. What advisers do the parties need?

The companies generally need support on the drafting and reviewing of agreements, the negotiation of the merger (acquisition) of the company, legal consultancy regarding due diligence, a detailed, comprehensive, and specific review of the tax and financial position of the company, and preparation of the reports.

2.3. How long does it take?

According to the TCC, there is no specific period for this process. This period varies according to the size of the buyer and seller companies, point of view, structure of the agreement, and the duration of the agreements to be executed. The process begins with the buyer's offer and continues into the due diligence reports, negotiations, and if required, obtaining the permits from the relevant institutions, etc., until the completion of the process.

2.4. How much flexibility is there over deal terms and price?

Parties are free to deal with the price in the mergers and acquisitions of the companies, and there are no obstacles with regard to the Turkish Law. Financial and legal due diligence of the target company has great importance in order to determine the parties' trumps in the purchase and mergers. As we know, with the due diligence period, the deficiencies are determined accordingly, and the prices negotiated will be based on those results.

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2.5. What differences are there between offering cash and other consideration?

In the Turkish Law, although there is no legislation for that, it is common to pay cash. In addition, it may be possible to put the real capital in the merging company in case of merger.

2.6. Do the same terms have to be offered to all shareholders?

The basic principle accepted in the TCC is the continuation of the privity. Within this rule, each partner of the assignee company has a right to request their shares and rights – that would correspond to the current privity shares and rights – from the transferee company. TCC 140/1 is in favor of all the partner companies in cases of mergers and acquisitions as new establishments. While determining the assignee company's shareholders' scope of request of the given rights (alteration rate), the calculations will be made according to the real value of the companies by taking all the important aspects into consideration. The legislator clearly mentioned the aspects considered important, the value of the attending companies' property holdings and distribution of the rights to vote. The shareholders of the assignee company keep their partnership position in the transferee company within certain alteration ratios. Nevertheless, according to Article 141 of the TCC under the caption "buyout", there is an exception to this rule. According to the exception, the shareholders might be eligible for the real value of the shares as a buyout instead of the shares they would obtain in the transferee company (Mandatory Buyout – TCC 141/2); or the choice of shares or buyout might be left to the shareholders (Optional Buyout-TCC 141/1).

2.7. Are there obligations to purchase other classes of target securities?

Unless otherwise stated in the articles of association (AoA) of the target company, there is no legal obligation to purchase other classes of target securities in the Turkish Law system.

2.8. Are there any limits on agreeing terms with employees?

According to Article 158 and 178 of the TCC, in case the workplace is transferred partially or completely, the employment contracts of the seller are transferred with all the employees with all rights and obligations to the buyer provided that all employees do not object to this period. In case the employee objects, the period of the employment agreement will be terminated at the end of the legal notice period.

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2.9. What role do employees, pension trustees, and other stakeholders play?

Unless otherwise stated in the AoA, employees, pension trustees, and stakeholders do not play an active role in the acquisition process. However, as stated in question 2.9, the employees have the right to object the transfer to the buyer company.

2.10. What documentation is needed?

Generally, the due diligence requested documents are delivered by the seller to the buyer in order to commence the process. Also, a letter of intent and a promise of sale or confidentiality agreement are signed between the parties. In case the buyer accepts to buy the shares of the company, the Share Purchase Agreement or Merger Agreement and then the Shareholders Agreement are signed between the parties. If required, AoA is amended by taking a general assembly resolution and by the registration of this decision to the Trade Registry. Also, the submission of the merger agreement, merger report, and latest balance sheet is required by the Turkish Trade Office.

2.11. Are there any special disclosure requirements?

Only publicly held companies have the obligation of disclosure in the process of mergers and acquisitions. In the event that the company is a publicly held company, investors have to publicly announce important material events that may directly or indirectly affect capital market instruments. The following are to be announced in public companies: taking the decision of the merger or division process; applying to the board regarding the merger or division process; signing of the expert opinion; signing of the merger or division agreement or the division plan; preparation of the merger or division report.

2.12. What are the key costs?

The main cost is the stamp duty for the acquisition process. Tax is updated every year for each original document. VAT may be applied for asset transfers, and also income/corporation tax may be applicable depending on some of the transfer characteristics. In addition, there should be a consultancy fee, and notary, translation, trade registry application fees etc., regarding all these transactions.

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2.13. What consents are needed?

As per Article 12 of Communiqué numbered 2010/4, the merger and acquisition transactions that are in the scope of the communiqué should be approved by the Competition Authority. Therefore, if the relevant turnovers of the parties exceed the amounts specified in the M&A Communiqué, it is essential to obtain the approval of the Competition Authority by presenting all required documents of the parties with their financial and legal information. With respect to the regulatory approvals, depending on the sector and the kind of target company, the approval of the Energy Market Regulatory Authority, the Banking Regulation and Supervision Authority, the Radio Television Supreme Council, the Information and Communication Technologies Authority, the Capital Markets Board, or the Ministry of Trade will be required.

2.14. What levels of approval or acceptance are needed?

The mergers and acquisitions to be notified to the Competition Authority in accordance with the procedures are negotiated by the board within 15 days following the preliminary examination. As a result of the negotiation, the board shall grant permission to perform the operation or to start a final investigation. In the case of a final decision, the board has the right to take the necessary measures related to the transaction. Mergers and acquisitions that are not reviewed within 30 days from the application date are deemed to be authorized and these mergers and acquisitions shall be legally valid.

In the event that the mergers and acquisitions are not notified, the Competition Authority shall examine the transaction in cases where the board informs of such mergers or acquisitions. If the transaction is not considered to be contrary to the Communiqué No. 2010/4 as a result of the examination, the transaction will be allowed, but a penalty shall be applied to the company as there was no notification. In case the transaction is deemed contrary to the Communiqué, the board takes the necessary measures to initiate and start an investigation.

2.15. When does cash consideration need to be committed and available?

Principally, cash consideration needs to be committed as of the execution of the share purchase agreements and it needs to be available on the closing date of the merger and acquisition transaction. However, this matter and the conditions of the cash should be determined in the agreement signed between the parties.

Information

3.1. What information is available to a buyer?

The seller may not allow all information to be given to the buyer, but the buyer may still have some information by reviewing the Chamber of Commerce for obtaining the details of the company, especially the company's articles of association and any documentation relating to the registration, which could also be examining the patent, trademark, tax, land, and debt enforcement proceedings registered before the relevant institutions.

3.2. Is negotiation confidential and is access restricted?

There are no rules preventing the buyer from negotiating with the seller. Generally, it is accepted for negotiations to be conducted on a confidential basis. Unless the parties mutually agree otherwise, all the information shall be kept confidential.

3.3. When is an announcement required and what will become public?

There are some regulations for the protection of creditors and third parties' rights. For the effectiveness of the merger, the merger agreement, the merger report, the activity reports of the companies, the latest balance sheets of the companies, and the resolutions with respect to the merger are required to be announced in the Turkish Trade Registry Gazette. Also, an announcement is made by the merged parties in order to inform the creditors three times with intervals of seven days.

3.4. What if the information is wrong or changes?

Parties generally stipulate the relevant provision in their agreement for protecting their interests such as providing security payments or bank guarantee letters. Should any damages be incurred due to wrong information, the loss or damages are compensated by the parties in accordance with their agreement

4 Deal Protectio

4.1. Are break fees available

The parties at their discretion could determine to b
contract unless it will be forcing or equitable.

4.2. Can the target agree not to shop the company or its assets?

The target company has the right to sell the company or its assets to a third party, and there is no provision in the Turkish Law which **inhibits this right. However, the parties could agree on whether not to shop the company or its assets to the third party by adding the "no shop" or "exclusivity" provisions to the agreement. In case such a provision has been added and the target company has not complied with this provision, the penal clause may be put into effect.**

4.3. Can the target agree to issue shares or sell assets?

Issuing of shares or selling of the assets of the company could be realized in case the company's shareholders give consent for such an operation.

4.4. What commitments are available to tie up a deal?

In order to prevent the parties from terminating the agreement, high amounts of fines and mortgages may be imposed as a penal clause. In addition, stock pledge is an effective method used to avoid the termination of the agreement.

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Bidder Protection

5.1. What deal conditions are permitted and is their invocation restricted?

Within the scope of the Turkish Law, there is no restriction on any specific terms and conditions unless the terms are contrary to the Turkish Law.

5.2. What control does the bidder have over the target during the process?

The Turkish Law does not regulate any type of authorization to the bidder for controlling the target company during the process; however, the parties may agree on any restriction about the target company's actions during the process.

5.3. When does control pass to the bidder?

Control may pass to the bidder according to the type of company that is transferred the shares. In a joint stock company, stock certificates have to be endorsed to the bidder and possession is required to transfer. Then, share transfer shall be registered with a share ledger so the control passes to bidder. The Turkish Commercial Code does not regulate the registration of share transfer to the Turkish Trade Registry in the joint stock company.

However, in a limited liability company, share transfer may be valid by an executed notarial deed and affirmative decision of the general assembly. Then, share transfer has to be registered to the Turkish Trade Registry. If there is an issued share certificate, it must be endorsed, and possession is required to transfer. Only then does control pass to the bidder.

5.4. How can the bidder get 100% control?

Although the Turkish Commercial Code regulates different quorums to get a general assembly resolution for different decisions, it can be said that the bidder may get 100% control

of the target company when it has all the voting rights by purchasing the shares.

6 Other Useful Facts

6.1. What are the major influences on the success of an acquisition?

It is crucial that an acquisition obtain all relevant statutory approvals, permits, and licenses pursuant with the legislation. The acquired firm should be evaluated and considered in detail. Additionally, legal and financial due diligence should be performed.

6.2. What happens if it fails?

Parties generally stipulate the relevant articles in case of a failure of the transaction. As a matter of course, if the failure is based on the non-compliance of the party, the party should compensate the loss or damages of the other party. Also, if the parties determined a penalty regarding the failure of the acquisition, they should pay this penal clause.

7 Updates

7.1. A summary of any relevant new law or practice in M&A

Within the scope of Turkish Commercial Code No. 6102 and Capital Markets Law No. 6362, many innovations have been made relating to mergers and acquisitions. For example, according to the TCC, it is possible for a company in liquidation or a company that has lost its capital or submerged in debt to participate in the merger. In addition, according to the TCC, the parties may decide in the merger agreement to allocate the shares and rights of the new company between shareholders of the transferring company and/ or pay indemnity for exclusion equivalent to the actual value of the company shares to waive the shareholder. The related legislation is being developed day by day.

Disclaimer

This guide provides corporate counsel and international practitioners with a comprehensive legal analysis of the laws and regulations of mergers and acquisitions in Turkey. The chapters in this guide are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Whilst every effort has been taken to ensure the accuracy of this guide, the editors and authors accept no responsibility for any inaccuracies or omissions contained herein. Financial, tax, or legal advice should always be sought before engaging in any transaction or taking any legal action based on the information provided. Should you have any queries regarding the issues raised and/or about other topics, please contact the authors of this guide.

All information in this guide is up to date as of 15.07.2019.