Public mergers and acquisitions in Turkey: overview

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M&A ACTIVITY

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

In 2015, the Turkish M&A market performed slightly better than expectations despite political instability following repeated general elections and regional unrest. Accordingly, the number of transactions remained almost the same as 2014, slightly increasing from 318 to 319 (Ernst & Young Mergers and Acquisitions Report Turkey 2015) and from 236 to 245 (Deloitte Annual Turkish M&A Review 2015).

Although the number of transactions increased slightly, the volume of transactions dropped significantly, showing that investors’ interest in large companies is decreasing while interest in small- and medium-sized enterprises is still very active in the market.

Only two deals exceeded US$1 billion in value and the total amount of the ten highest-value deals was US$8.1 billion in 2015. These included the acquisition of:

- 99.8% of Finansbank’s shares by Qatar National Bank for US$2.9 billion.
- 13% of Socar Turkey’s shares by Goldman Sachs for US$1.3 billion.

In 2015, the most active sectors by deal number were in manufacturing, energy, service and technology, while the energy and financial services sectors were the largest in terms of deal volume.

It has been observed that the private sector’s contribution to the M&A market has increased, as the total deal value of privatisations remained around US$1.8 billion (one fourth compared to the previous year) and representing 11% of the total deal volume. As with previous years, private sector M&A was mostly driven by foreign investors (at 75%). Again, like previous years, the most active investors originated from Europe, North America and the Gulf region.

While the markets expected 2016 to be a slow year in terms of M&A transactions, our observation is that both strategic investors and private equity funds are still active, mostly in mid-size deals. There are also a few on-going big-ticket transactions.

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

The main legislation regulating public companies is the Capital Markets Law. According to this law, public companies are joint stock companies, which either:

- Have more than 500 shareholders.
- Are publicly traded.

The Capital Markets Law and Communiqué on Tender Offers issued by the Capital Markets Board (see below, The regulatory authorities define “control” as holding either/both:

- More than 50% of the voting rights of a company.
- Privileged shares of a company (that is, shares which grant the power to appoint or nominate the majority of such company’s board of directors without being subject to the 50% holding threshold above, directly or indirectly, alone or together with the persons acting in concert).

However, the Capital Markets Law and the Communiqué also state that even if the above conditions are present, a person will not be deemed to have control over a company if such person cannot control the management of the company due to the existence of privileged shares.

Accordingly, control of the public companies can be obtained by means of:

- Acquisition of privileged or regular shares privately, which may trigger further mandatory tender offer requirements if control is acquired through a private acquisition.
- Acquisition of regular shares through a voluntary tender offer,
- Entering into management or voting agreements.

HOSTILE BIDS

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

Although there is no explicit mention of hostile bids under Turkish law (specificially within the regulations of Capital Markets Board), such bids have not been specifically prohibited by law. The Communiqué on Tender Offers regulates both:

- Mandatory tender offers, which require the person who acquires the control of a company to offer the same price to other shareholders of the company.
- Voluntary tender offers, which is the legal foundation for hostile bids under Turkish law.

The Communiqué on Tender Offers does not provide the target company’s management with the authority to prevent voluntary tender offers, but only grants a right to the management of the company to lengthen the process by calling a general meeting of the shareholders.

On the other hand, a competing bid can be made by a third party during the purchase period of the first voluntary bid.

Hostile bids are not common in Turkey. This is mostly due to the composition of shareholding structure of Turkish companies. Most publicly traded companies in Turkey have low floating percentages.
and the shares that are not publicly traded are held by persons that are members of the same family group or groups that act in concert. This diminishes the chances of a hostile bidder to acquire control of a publicly-traded company. With the increasing number of financial and strategic investors in Turkish market, we expect to see more hostile takeovers appearing in the market in the future. In addition, since there has been an increase in public offerings and shareholder confidence in Turkish capital markets, hostile takeovers are likely to increase due to higher floating percentages.

REGULATION AND REGULATORY BODIES

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

In Turkey, public companies are joint stock companies established under the Turkish Commercial Code (which also regulates mergers and acquisitions for all companies, whether public or private).

The general principles regarding public companies are regulated under the Capital Markets Law. Capital Markets Board is the regulatory and supervisory authority for the securities markets in Turkey, and is the ultimate enforcer and interpreter of the Capital Markets Law (www.cmb.gov.tr).

In addition to the Commercial Code, public companies are subject to Capital Markets Law and the communiqués enacted by the Capital Markets Board. The following communiqués are applicable on public takeovers and mergers of public companies:


If the transaction value is above certain thresholds, competition law will also apply to mergers and acquisitions, whether public or private. The Competition Law is enforced by the Competition Authority and clearance decisions for M&A transactions are granted by the Competition Board (see Question 25).

Companies operating in regulated sectors (such as banking, insurance and energy) will also be subject to the approval of the relevant authority under specific laws.

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

In a recommended bid, the bidder typically conducts a financial, tax and legal due diligence study on the target, which may either be extensive or red flag study depending on the nature of the bidder (that is, whether the bidder is a financial investor or a strategic investor).

The main areas of legal due diligence study on the target generally relate the following:

- Corporate aspects, including the ownership and the validity of entity's shares.
- Regulatory aspects, which are likely to be more extensive if the target operates in a regulated area such as energy, banking, insurance.
- Environmental issues.
- Material agreements.
- Indebtedness (such as in relation to the target’s loan agreements and any securities granted for such loans).
- The entity's assets (for example, in relation to the entity's ownership of them and any encumbrances on key assets).
- Employment.
- Insurance.
- Intellectual property (IP) rights.
- Litigation.

To initiate the due diligence process, the bidder customarily provides a confidentiality undertaking to the target and the shareholders. The findings of the due diligence studies are reflected in the transaction documents which are subsequently executed among the shareholders, the bidder and the target. The due diligence documents for recommended bids also include the documentation referred to under our explanations for hostile bids below.

Hostile bid

In a hostile bid, the bidder cannot conduct a comprehensive due diligence on the target (unlike in a recommended bid). The due diligence documentation is therefore limited to what is publicly available.

All joint stock companies, including public companies, are incorporated by registering before the relevant trade registry. The company's articles of association (articles) or any changes made to them, including the amount of capital share and information concerning shareholders and board of directors, resolutions of the general assembly and meeting minutes, are also registered with the trade registry and such information is published in the Trade Registry Gazette. This information is therefore publicly available.

The Communiqués of Capital Markets Board imposes both:

- On-going reporting requirements mostly relating to financial status of the target (such as external audit reports) and the shareholding structure of and voting rights in the target.
- Special event disclosures that can have an effect on the share price or the investors' decision to purchase securities.

This information must be published on the target's website and on the Public Disclosure Platform (www.kap.org.tr/en/).

Information on the stock market and daily data on securities and share prices can also be found on Borsa Istanbul's website (www.borsaistanbul.com/en/).

Information on corporations is available at the website of MERSIS electronic trade registry (http://mersis.gunрутkicaret.gov.tr/).

In addition, certain assets of the company are subject to registration with registries, such as the title deed registry, ship registries and the intellectual properties (www.tpe.gov.tr/TurkPatentEnstitusu/?lang=en). These are also open to public.

Finally, it is possible (to some extent) to conduct searches at court houses investigate whether the target is a party to any litigation.
Secrecy

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

Non-public information, events and/or developments that could affect the value or price of securities or the investment decisions of investors are defined as “inside information” (Communiqué on Material Events Disclosure). This information must be disclosed to public unless its disclosure is deferred by complying with certain principles set out under the legislation. Under the Capital Markets Law, the practice of conducting capital markets transactions based on undisclosed information and benefiting from them is deemed market abuse and will be subject to imprisonment or a judicial fine.

According to the Guideline on Material Events Disclosure issued by the Capital Markets Board, mergers and acquisitions and tender offers are regarded as inside information when the transaction is at the stage when a rational investor would evaluate that the closure of the transaction is probable. Accordingly, when an acquiring entity decides to proceed with the takeover, the tender offer decision must be disclosed to the public, as it may affect the value or the price of the securities or the decision of the investors. Until disclosure of inside information, persons who are in possession of such information must keep such information strictly confidential.

The persons who are obliged make the disclosure can also choose to defer the disclosure through a board decision provided the information is kept confidential. However, if there is reason to believe that the confidentiality has been jeopardised, a disclosure must be made immediately. The Capital Markets Board has the authority to examine the justification of the deferral if it deems necessary.

Inside information and any changes in such information which have previously been disclosed to public must also be disclosed by targets, shareholders or bidders whenever they emerge or are learned.

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?

In Turkey, most acquisitions occur through recommended bids. Therefore, the target’s shareholders and directors are usually involved in the process. It is customary to obtain a memorandum of undertaking before initiating the due diligence process. The memorandum of understanding is customarily non-binding except for in relation to exclusivity and confidentiality undertakings.

Under the Communiqué on Material Events Disclosure and the Guideline on Material Events Disclosure, mergers, acquisitions and tender offers are regarded as inside information when the transaction is at a level, at which a rational investor would evaluate closing of the transaction probable (see Question 6). Accordingly, the execution of a memorandum of understanding or similar document may not necessarily be sufficient in relation to the transaction being probable, whereas the execution of a legal document after satisfactory negotiations would be sufficient to serve such purpose. Therefore, each case must be evaluated on its merits by the parties.

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?

Bidders must immediately disclose to the public any decision to make a tender offer if the decision is taken simultaneously with information on tender offer price or with information on how the price will be determined.

In addition, an investor must disclose the following situations to public:

- When the direct or indirect number of shares owning rights held by a real person, or legal persons acting alone or in concert with others, in the capital of a publicly-traded company reaches or falls below 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67% or 95%.
- When the direct or indirect number of shares owning rights of an investment fund held by a founder in a publicly-traded company, reaches or falls below 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67% or 95%.

Among the above thresholds, only 25%, 50% and 67% will trigger disclosure requirements in private corporations that have offered its capital markets instruments to public.

The above mentioned disclosures can be made until 8.00 am of the third business day from closing of the transaction (Communiqué on Material Events Disclosure). Companies must also disclose the same information on their website within the next business day at the latest.

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?

In Turkey, recommended bids are usually led by the controlling shareholder of public companies and it is common for these parties to enter into an agreement to regulate the acquisition process. The agreement is usually in the form of a letter of intent or memorandum of understanding and covers (among other things):

- Exclusivity with an expiry date.
- Due diligence obligations.
- Confidentiality.
- Non-solicitation.
- Other high-level business terms.
- Whether the selling shareholder will remain with the company.
- The parties’ veto rights.
- Any rights of first refusal.

It is also common to insert restrictions on the acquiring party’s stock exchange activities during the exclusivity period. After the execution of the initial agreement, the parties will negotiate and enter into a share purchase, share subscription or merger agreement, covering the detailed transaction and shareholder structure.
While the process is led by the controlling shareholder, the target company is usually requested to become a party to the final agreement whereby it agrees to abide by the veto rights of the parties set out in the agreement, which is likely to include execution of an agreement that can result in the acquisition of the company’s shares.

**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?

All merchants can agree to penalties and break fees and contract out of being subject to the protection provided under the Turkish Code of Obligations (whereby the competent court can rule that a penalty amount is excessive and invalid) (*Commercial Code*). In addition, the capital markets legislation does not regulate break fees in cases of unsuccessful tender offers. Therefore, it is possible for parties to agree on a penalty amount in the case of an unsuccessful recommended bid. However, it is rare in Turkish practice for the target to be the party that initiates and/or proceeds with the bid process, and there have not been enough cases to properly evaluate the common practice among investors/targets.

**Committed funding**

11. Is committed funding required before announcing an offer?

A person intending to conduct a tender offer (whether voluntary or mandatory) must make its application to the Capital Markets Board, stating the source and amount of funds that have been allocated to the tender offer (*Communique on Tender Offers*). The bidder must take all measures to ensure payment of the bid price in whole before making any disclosure of the bid to the public. Accordingly, the Capital Markets Board can request a guarantee from a local bank or a third party for the same. In addition to the bid price, the guarantee must also cover compensation for any loss suffered by a person who accepted the bid.

In addition, an underwriting agreement must be entered into with an intermediary institution, unless an exemption is provided by the Capital Markets Board. The underwriting agreement should include:

- Amount that will be transferred to the intermediary institution for payment of the bid price.
- Measures to be taken and the intermediary institution’s obligations if such funds are not sufficient.

**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?

The bidder must make a public disclosure when it decides to conduct a tender offer or when a mandatory tender offer is triggered (*Communique on Tender Offers*). This disclosure must also include either/both:

- The tender offer price.
- Information in relation to how the price will be determined.

A disclosure must also be made when the bidder applies to the Capital Markets Board for the relevant tender offer and when Capital Markets Board renders its decision on the application.

Unless a communiqué stipulates otherwise, all disclosures must be made immediately when the relevant circumstance arises.

To disclose a bid, an information form should be filled out and sent to Public Disclosure Platform. In this form, the bidder must also disclose:

- A summary or conclusion of the valuation reports prepared for determination of the bid price.
- The number of shareholders that have responded to the tender offer by stating the number and amount of the shares, whether traded or not, at the end of each trading day during the offer period.
- The total number and amount of shares acquired as a result of the tender offer.
- Any withdrawal of the voluntary tender offer.
- Any transactions conducted to stabilise the share price.

In the case of a competing bid (see Question 3), if the acceptance period of the first bid expires before the end of acceptance period of the competing bid, the acceptance period of the first bid can (if requested) be extended until the end of purchasing period of the competing bid.

**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)?

Bidders are prohibited from imposing conditions on a mandatory tender offer (*Communique on Tender Offers*). However, a voluntary tender offer can be made for all of the target’s shares or a certain portion of them provided the equality principle is observed during the offer, and, if the number of shares which the current shareholders have accepted to sell in the tender are more than the portion that the bidder wishes to purchase, a pro rata calculation is made to ensure equality among the relevant shareholders (*Communique on Tender Offers*).

In addition, the form which will be submitted to the Capital Markets Board requires the bidder to submit information on the conditions of a bid. Therefore, it is implied that certain restrictions may be imposed on voluntary tender offers.

Apart the rules stated above, there is no explicit provision under the Communiqué on Tender Offers that allows or prohibits pre-conditions. In any case, since voluntary bids are subject to the approval of the Capital Markets Board, any conditions set out by the bidder must also be approved by the Capital Markets Board.

**Bid documents**

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

As the Communiqué on Tender Offers does not explicitly regulate hostile takeovers the documentation requirements set out below are applicable to both recommended and hostile bids.

In an application for tender offer to the Capital Markets Board, the applicant must fill out and submit the information on the form provided within Annex 1 of the Communiqué on Tender Offers. The form should jointly be signed by the bidder and the underwriter licensed by the Board.
The form should be published on the Public Disclosure Platform, following approval by Capital Markets Board. The form must contain the following information:

- Company name, trade registry office and trade registry number, address, telephone number, fax number, information on shareholding structure of the target and the bidder.
- Information on the relationship between the target and the persons making the tender offer.
- Information on the event leading to mandatory tender offer or justification of voluntary tender offer.
- Information on the conditions of voluntary tender offer.
- Information on the shares covered by tender offer, such as the number and nominal value, group, registered or bearer, whether privileged or not and if so, nature of privileges.
- Information on the tender offer price offered for a share with a nominal value of TRY 1.
- Method of determination of the tender offer price.
- Payment means of the tender offer price.
- Information on the source and amount of funds to be used for financing of the bid.
- Information on the strategic plans of the bidders of the tender offer with regards to the target.
- The company name, address, telephone and fax numbers of the intermediary institution acting as a broker in tender offer.
- Processes and procedures applicable in tender offer.
- Starting and ending dates of tender offer.
- Governing law and jurisdiction applicable to the agreements to be signed between the bidder and the shareholders of target as a result of tender offer.
- The opinions of other public entities on tender offer (if any).

The Communique on Tender Offers also requires the following documents to be submitted along with the form:

- The agreement that triggered the mandatory tender offer (if any), and any other agreements relating to it.
- The agreement that was entered into with the intermediary institution.
- 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, the identity number, resident address, detailed curriculum vitae, contact information, and information on companies where the bidder is a member of the managing body.
- Information on the determination of the bid amount.
- Valuation report on determination of the bid amount, if necessary.

The Capital Markets Board may request inclusion of additional information in the form and delivery of additional documents.

The bidder is liable for submitting and accuracy of the above information. In cases where an intermediary institution is involved, the intermediary institution may disclose such information. However, the liability remains with the bidder.

### Employee consultation

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

There is no obligation by the target’s board to inform or consult its employees about the offer, transfer of the company’s shares to a third person or change of control of the company.

However, if the employer of the employee changes as a result of a merger or demerger, all rights and obligations of the transferred/dissolved company are acquired by the transferee company as a whole, including employee rights. If the entity transferring the employees survives, the entity remains jointly liable with the transferee for a period of two years from either the:

- Notification or publication of the transaction.
- Date of maturity for the debts that are not due on the date of notification or publication.

Accordingly, the transferring employee’s obligations in relation to an employer’s rights expire in two years, except for severance payment. The employees would still have the right to request their severance payment from the transferring entity if they become entitled to severance payment under the relevant labour laws.

### Mandatory offers

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

If a person or persons acting in concert acquires the shares or voting rights in a publically-held company which entitles them to direct or indirect management control, such person(s) must launch a tender offer to purchase the shares of the other shareholders, including but not limited to the holders of publically-traded shares (Capital Markets Law).

The concept of “management control” is defined in both the Capital Markets Law and the Communique on Tender Offers. Under these laws, the acquisition of management control is the acquisition of either/both:

- More than 50% of the voting rights of a company alone or together with persons acting in concert.
- Privileged shares, which enables the right to elect the simple majority of the board of directors, or the right to nominate the same in the general assembly of the company.

However, the obligation to launch a tender offer does not arise in the following cases (Communique on Tender Offers):

- Where management control is obtained as a result of a voluntary tender offer made for all shares by all existing shareholders.
- Where management control is obtained through a written agreement approved by the general assembly and that the shareholders who have had their objections recorded in the minutes of the general meeting of the shareholders have been granted the right to exit.
- Where the share percentage of the shareholder holding management control of the company falls below 50% and such shareholder acquires enough shares to hold more than 50% of the voting rights before losing management control.
- Where the voting rights entitling management control have been acquired through transactions conducted between the group of shareholders, which already hold the management control.
• Where, as a result of the transaction, the acquiring person holds equal (or less) management control together with the person/s holding management control through a written agreement and the purchase of less than 50% of the voting rights of the company from the person/s holding management control.

The Capital Markets Board can, on request, grant an exemption from the obligation to launch a mandatory tender offer if it concludes that one of the conditions listed under the Communiqué on Tender Offers (above) is present.

CONSIDERATION

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

For public takeovers, payment in full and in cash is a requirement under the Communiqué on Tender Offers. However, partial or full payment via securities is also available provided written consent from the shareholder selling the shares is obtained and the offered securities are traded on the stock market.

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

The mandatory tender offer price for the shares of the target cannot be for less than the:

• Average daily share price during the six-month period prior to the date of disclosure to the public of the agreement relating to the sale of the shares.

• Highest price paid by the bidder (or persons acting in concert) for the same group of shares of the target within the six-month period prior to the bid.

In the case of an indirect change in control of the target, the tender offer price cannot be for less than the highest one of any of the following:

• The price specified in the assessment report prepared within the frame of regulations of the Capital Markets Board in relation to the target’s share price assessment.

• The highest price by the bidder (alone or with persons acting in concert) in purchases of shares of the target during the six-month period prior to the date of disclosure to public of the agreement relating to the indirect change in control of the target.

• If the shares of the target corporation are traded on the stock market, the arithmetical average of daily weighted average share price that occurred during the six-month period prior to the date of disclosure to public of the agreement relating to sale of the shares.

If more than one type of shares are available, the tender offer price of the shares for the groups not subject to the transfer of shares that triggers the obligation to make a tender offer must not be for less than the highest one of the following:

• The price specified in the assessment report prepared within the frame of regulations of the Capital Markets Board in relation to the target’s share price assessment, as well as the privilege differences between share groups.

• The highest price by the bidder alone or with persons acting in concert in purchases of shares including the groups not subject to the transfer of shares which trigger the obligation to make a tender offer, during the six-month period prior to the date of disclosure to public of the agreement (if any) relating to sales of shares leading of the target.

• If the shares (including the groups not subject to the transfer of shares leading to the obligation to make a tender offer) are traded on the stock market, the arithmetical average of daily weighted average share price that occurred during the six-month period prior to the date of disclosure to public of the agreement (if any) relating to the sale of the shares.

However, there is no minimum level of consideration necessary for voluntary offers, as long as a mandatory bid is not triggered.

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

Bidders are prohibited from rendering a mandatory tender offer subject to any conditions (Communiqué on Tender Offers).

The Communiqué on Tender Offers provides for an interest rate in the case of late payment and requirements on currency if the bid price is determined in a foreign currency.

POST-BID

Compulsory purchase of minority shareholdings

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

The Commercial Code foresees four squeeze-out procedures for public and non-public companies. In addition, a further squeeze-out procedure was introduced by the Capital Markets Law, which is applicable to public companies. Two of the four procedures under the Commercial Code and the procedure introduced by the Capital Markets Law are mandatory on the bidder, and one of the remaining grants an exit right to the bidder as well as a squeeze-out right for the bidder, and the other remaining one is an exit right granted to the bidder.

The following transactions are deemed material transactions and will trigger a right in favour of the shareholders who attend the relevant general meeting of the shareholders and object to the decision to sell their shares in the target and exit the company (Communiqué on Common Principles Regarding Material Transactions and the Exit Right):

• Merger, demerger, conversion or liquidation.

• Transfer, lease or granting encumbrance of all or material portion of assets of the company.

• Change in the area of activity wholly or in a material manner.

• Granting privileges to certain shares or expansion in the existing privileges.

• De-listing of the company (see Question 22).

• Acquisition or lease material assets from related parties.

• Capital increase for an amount that is more than the current share capital of the company if the payment of such a capital increase, wholly or partially, will be made by debts to related parties arising from transfer of assets other than cash.

In addition, any shareholders who were unjustly prevented from attending the general assembly meeting relating to the material transaction can also use the exit right.

In a merger squeeze-out, the merging companies can grant the minority shareholders the option to sell their shares under the merger agreement with 90% affirmative votes representing the share value of the dissolving company's share capital. The fair value of the shares which is equivalent to the shares that the minority would have held in the merged company must be paid.
A squeeze-out can be foreseen as mandatory under the merger agreement.

In public companies, if the shares held by a shareholder acting alone or acting in concert with others reach 90% of the voting rights, the shareholder can require the bidder to purchase its shares and these shareholders can squeeze-out the minority shareholders.

In group companies, the controlling company that holds at least 90% of the shares and voting rights directly or indirectly, can purchase the shares of the minority at the stock market value or at the value determined by court, if the minority shareholders:

- Prevent the company from conducting its business.
- Do not act in good faith.
- Create noticeable disruption.
- Act in a careless manner.

**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 are no restrictions on a bidder who fails to obtain control of the target to launch a new offer or buy the shares of the target.

**De-listing**

22. What action is required to de-list a company?

De-listing a company is considered to be a material transaction under Communique on Common Principles Regarding Material Transactions and Exit Right (see Question 20). Therefore, the procedure below must be followed to de-list a company.

Acquiring and holding, directly or indirectly, 95% or more of voting rights of the corporation alone or with the persons acting in concert is as a prerequisite for de-listing.

To de-list a company, the decision to de-list must be made a general meeting of the shareholders, with the affirmative vote of at least two-thirds of voting shares represented in the general assembly meeting regardless of the meeting quorum. However, if the meeting is attended by at 50% of the voting shares representing the capital, decisions are taken by affirmative vote of majority of voting shares present in the meeting, unless the company’s articles clearly impose a heavier quorum.

Following the de-listing decision from the general meeting, an application to the Istanbul Stock Exchange for de-listing of its shares should be made within five business days. The controlling shareholder should also apply to the Capital Markets Board to fulfill its obligations of mandatory tender offer and exit right under the Communique on Common Principles Regarding Material Transactions and Exit Right.

The following should be disclosed on the Public Disclosure Platform:

- The decision of the de-listing by the general assembly.
- The application to Borsa Istanbul and Capital Markets Board for de-listing.
- All process of tender offer relating to de-listing.

The disclosure to the Public Disclosure Platform should also include the following:

- Detailed reasons of the intention to be de-listed.
- Information on when application will be filed to the Istanbul Stock Exchange and the Capital Markets Board for de-listing.
- Explanations for the tender price to be submitted.
- The time period that the tender will remain valid.
- Information that an amount equal to the tender price for the shares exit right of which have not been used will be blocked before Takasbank for three years following the date of de-listing.

**Target’s Response**

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

The management of the company cannot prevent voluntary or competing takeover bids. Although the Commercial Code allows for preventing the transfer of shares in some certain cases, these restrictions cannot be applied to public companies. For public companies, shares cannot be encumbered through any restrictions on transfer, circulation or use of rights by shareholders (Communique on Shares).

The target may choose to enter into an agreement with a third party to submit a competitive bid with better financial conditions.

**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

Capital gains on a share sale must be included in the taxable profits of a company and are subject to corporate tax at 20% (Corporate Tax Law).

However, 75% 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. Also, share swaps are exempt from corporate tax. In addition, sales of publicly-traded shares by real persons are not subject to income tax.

Stamp tax must be paid on all agreements that include consideration (including share purchase and share subscription agreements) (Stamp Tax Law). The current stamp tax rate is 0.948%, calculated on the highest amount or the sum of all undertakings in the agreement. The stamp tax accrues per each executed copy.

The Corporate Tax Law sets out certain tax exemptions for mergers and demergers, provided the transaction is within the scope of the conditions set out in the law itself. If these conditions are fulfilled, merger profits are not subject to corporate tax, VAT, stamp duty or registration fees.

Furthermore, companies that are not tax resident in Turkey can also benefit from double taxation treaties.
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?

If the relevant thresholds stated are exceeded, M&A transactions will be subject to the merger control regime regulated by the Law on Protection of Competition. An M&A transaction will be subject to the merger control regime if either of the following thresholds is exceeded:

- The combined income of all parties to the transaction exceeds TRY100 million in Turkey, and the individual annual income of at least two parties to the transaction exceeds TRY30 million separately in Turkey.
- The global annual income of at least one of the parties to the transaction exceeds TRY500 million and one of the following applies:
  - for acquisitions, the annual income of the entity/asset/activity exceeds TRY30 million in Turkey; or
  - for mergers the annual income of at least one of the parties exceeds TRY30 million in Turkey.

The following transactions are exempt from the requirement to obtain prior approval from the Turkish Competition Authority:

- Transactions not leading any change of control within a group.
- Securities acquired with the purpose of re-selling by the enterprises with the line of activity of entering into transactions of securities, provided the voting rights obtained through the securities are not used in a manner which could affect the company’s issuing the securities competition policy.
- Where the company is acquired due to liquidation, dissolution, financial difficulties, or special agreement by a public enterprise.

If a transaction exceeds the thresholds and falls outside of one of the above mentioned categories, an application must be made to the Competition Board for review and clearance of the transaction. The merger or acquisition transaction in question is not valid until the Competition Board renders a clearance decision.

For certain transactions, the approval of a sector specific industry sector must be sought (such as in banking, energy and mining sectors and so on). The timetables for obtaining the approvals are set out within the relevant authority’s regulations. The approval of more than one authority may be required, depending on the nature of the transaction and line of activity of the company of which the shares are acquired.

There are also limitations on the acquisition of real estate for the companies with foreign capital, regulated by the Title Deed Law and the Regulation on Acquisition of Real Estate by Companies with Foreign Capital. Similarly, acquisition of a Turkish company holding real estate by a foreign entity is also subject to certain restrictions and processes.

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?

The Direct Foreign Investment Law regulates the rules concerning foreign investments. Under this law, foreign investors and local investors must be treated equally unless imposed otherwise by international treaties or other domestic laws. However, certain restrictions apply to foreign shareholders under specific laws for sectors such as media and civil aviation.

Companies with foreign capital must make on-going reporting requirements to the Undersecretariat of Treasury.

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 (Direct Foreign Investment Law).

Foreign investors can, subject to the applicable tax laws and/or double taxation treaties, transfer the net profits, dividends, proceeds from sales or liquidation, compensation amounts, payments to be collected in exchange for licence, control or similar agreements, interest payments arising out of activities performed in Turkey through banks or private finance 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?

See Questions 6 and 12. Disclosure requirements may also be triggered at any time an incident which may have an effect on the share price or the investors’ decision to purchase securities arises.

The communiqués impose the disclosure requirements on both the:

- Bidder (and persons acting in concert with the bidder).
- Target, when the target becomes aware of an incident that was not disclosed to public by other responsible parties.

REFORM

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

The regulations concerning takeover bids came into force recently and there have been minor amendments to those regulations in 2015.

The Capital Markets Board has not published any draft amendments to the legislation mentioned in this article.
THE REGULATORY AUTHORITIES

Capital Markets Board
W www.cmb.gov.tr

Main area of responsibility. The Capital Markets Board of Turkey is the regulatory and supervisory body for capital markets and public companies. Most of its legislation and guidelines are available in English.

Borsa İstanbul
W www.borsaistanbul.com/en/home-page

Main area of responsibility. Formerly Istanbul Stock Exchange, Borsa İstanbul hosts all exchanges operating in the Turkish capital markets.

Turkish Competition Authority

Main area of responsibility. The Turkish Competition Authority is the regulatory and supervisory body for the transactions that fall under Law on Protection of Competition.

ONLINE RESOURCES

Borsa İstanbul
W www.borsaistanbul.com/en/home-page

Description. The Borsa İstanbul is the security exchange operation of Turkish capital markets.

Capital Markets Board
W www.cmb.gov.tr

Description. The Capital Markets Board of Turkey is the regulatory and supervisory authority in charge of the securities markets in Turkey.

Turkish Competition Authority

Description. The Competition Authority prevents any threats to the competitive market, ensures a fair allocation of resources by protection of the competitive process.

Public Disclosure Platform
W www.kap.org.tr/en

Description. The Public Disclosure Platform is an electronic system where the notifications required by the Capital Markets Board and Borsa İstanbul regulations are publicly disclosed.

Central Registry Agency Inc

Description. The Central Registry Agency Inc is the central securities depository for capital market instruments which are decided by Capital Markets Board to be dematerialised.
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Professional qualifications. Turkey, 2008
Areas of practice. M&A, corporate, commercial and capital markets

Recent transactions
• Advising major strategic and financial investors in a large
  number of sectors, including retail, telecommunications, energy,
  exhibitions, manufacturing, cements, and chemicals.
• Representing underwriters, issuers and/or selling shareholders,
  most recently for electricity and telecommunications companies.
• Advising major IT and e-commerce companies in their day-to-
  day businesses in connection with corporate, commercial,
  regulatory, employment and real estate matters.

Professional associations/memberships. Istanbul Bar Association.

Professional qualifications. Turkey, 1999
Areas of practice. M&A, corporate, private equity; energy,
infrastructure, competition

Recent transactions
• Advising major international and Turkish clients, both strategic
  and financial, in a large number of sectors, including retail, food
  and beverages, energy, banking and insurance, manufacturing,
  cements, and chemicals.
• Advising on a wide range of corporate and finance transactions
  with a particular focus on M&A, private equity, energy projects
  and competition law.

Professional associations/memberships. Istanbul Bar
Association.