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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

There is no specific regulation exclusively governing mergers and acquisitions in Turkey. However, there are a number of primary laws that encompass various aspects one would expect to see in a typical mergers and acquisitions transaction. Such key laws and regulations that govern mergers and acquisitions in Turkey are:

(a) the Turkish Commercial Code No. 6102;

(b) the Turkish Code of Obligations No. 6098;

(c) the Capital Markets Law No. 6362;

(d) the Law on the Protection of Competition No. 4054;

(e) the Corporate Tax Law No. 5520;

(f) the Labour Law Code No. 4857; and

(g) the Trade Registry Regulation.

In some sector-specific deals, such as those involving an insurance company or an energy company, some other laws and regulations that govern such sectors may also become relevant. Although they are not directly related to mergers and acquisitions, they might have to be taken into consideration in a typical M&A deal.

It is also worth noting that if the transaction concerns a listed company, some other regulations and communiqués issued by the Capital Markets Board may apply. The most typical ones are as follows:

(a) The Communiqué on Mergers and Demergers Serial No. II – 23.2, which governs procedures and principles for mergers and demergers in listed companies;

(b) The Communiqué on Mandatory Tender Offers Serial No. II – 26.1, which governs general rules for mandatory and voluntary tender offers; and

(c) The Communiqué on the Principles Regarding Material Transactions and Exit Rights Serial No. II – 23.1, which lays out general principles governing conduct of material transactions and exit rights in listed companies.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

In general, mergers and acquisitions are not regulated by governmental bodies save for those concerning companies operating in regulated sectors. Sectors such as energy, telecommunications, banking, financial services and insurance are regulated by specific legislation and are subject to supervision of certain governmental institutions. Therefore, the parties to M&A deals involving companies operating in such sectors may need to obtain certain approvals and clearances from relevant government agencies. Although not exhaustive, some of the authorities regulating specific industries – and whose approval may therefore need to be sought in M&A deals – are as follows:

(a) the Energy Markets Regulatory Authority for the energy sector;

(b) the Banking Regulation and Supervision Agency for the banking sector;

(c) the Undersecretariat of Treasury for the insurance sector;

(d) the Information and Communication Technologies Authority for the telecommunications sector; and

(e) the General Directorate of Mining Affairs for the mining sector.

The Turkish Competition Authority is also relevant in M&A deals if the turnovers of the transaction parties exceed certain thresholds. Further details on anti-trust and competition law aspects of such deals are set out under Question 4 below.

Finally, parties to the deal usually have to complete certain procedural steps with the relevant Trade Registry and the Ministry of Customs and Trade for registration of governance actions. Appointment of Board of Directors members, amendments to company articles of association and similar corporate actions need to be registered with the relevant Trade Registry in order to complete and register the governance processes. In case of share acquisition by a foreign company, there is also a requirement to notify the General Directorate of Foreign Investments, which is a straightforward and simple process.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

There is no provision of law that puts forward an explicit restriction on hostile bids under Turkish law; however, hostile bids are practically not feasible in Turkey. This is due to the fact that the decision to sell the shares in a company eventually comes down to the relevant shareholder's discretion. Still, in a scenario where the Board of Directors is not cooperative, they have the ability to hinder or at least delay the deal by, for instance, not making company records available to the purchaser or refraining from adopting the necessary corporate resolutions to effectuate the deal.

It is also noteworthy that pre-emptive measures in hostile takeovers such as the "poison pill", the "white knight" or the "golden parachute" are not available under Turkish law. Some other customized deal protection measures can be introduced under the relevant share purchase agreement:

(a) The seller may grant the purchaser an exclusivity period where the parties mull the details of the envisaged transaction,

(b) Parties may agree on a "break fee" which becomes payable by the party that walks away unless certain conditions are not met, or

(c) Parties may render the deal contingent upon realization of a certain event (e.g., obtaining merger clearance from the Turkish Competition Authority).

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

The primary regulation that may have a restrictive effect on takeovers and mergers is the Communiqué Regarding Mergers and Acquisitions Requiring the Competition Authority's Approval ("Communiqué 2010/4"). Transactions exceeding certain thresholds established in Communiqué 2010/4 require the approval of the Turkish Competition Authority. A transaction is subject to the notification requirement if either of the following thresholds is met:

i. the domestic turnover (the turnover that is generated in Turkey) of the target exceeds TL 30 million, and the global turnover of one of the parties to the transaction exceeds TL 500 million; or

ii. the domestic turnover of the target and the acquirer exceeds TL 30 million and combined turnovers of all parties exceed TRY 100 million.

Furthermore, as explained above, M&A deals in regulated sectors, such as telecom, energy, insurance etc. may be subject to certain approvals or clearances to be obtained from the relevant government authority or the regulator.

5. What documentation is required to implement these transactions?

Typical M&A transactions mainly consist of three phases: (i) the pre-transaction phase, where the parties conduct preparatory actions; (ii) the transaction phase, where the deal is negotiated and prepared for closing; and (iii) the completion phase. The relevant documentation required for each phase is as follows:

(a) Pre-Transaction Phase

i. Vendor's due diligence investigation to identify any issues regarding the target company;

ii. Letter of intent or memorandum of understanding laying out intent of the parties;

iii. Non-disclosure or confidentiality agreement governing confidential aspects of the deal; and

iv. Term sheet setting out main terms that are to govern the deal.

(b) Transaction Phase

i. Buyer's due diligence checklist regarding the seller's documents and information that are to be reviewed;

ii. Drafting and negotiating the share purchase agreement;

iii. Documents that have to be prepared in line with the conditions precedent in the SPA (e.g., third party consents and other applications);

iv. Resolutions by the competent corporate bodies of the parties regarding the approval of the transaction;

v. If the acquisition is a partial takeover of the shares, the shareholder agreement that is to govern the company's management and governance after the takeover;

vi. if the transaction includes a merger or a demerger, a merger/demerger agreement with the corporate documentation required to register the merger at the relevant Trade Registry;

vii. if the transaction includes an asset transfer, a separate asset transfer agreement with the documents required to register the immovable properties at the Title Deed Registry;

viii. ancillary agreements and closing documents relating to the transactions (e.g., share certificates representing the target shares, management and consultancy agreements and employment agreements of key officers);

ix. if the transaction is subject to any specific legislation and/or clearance requirement, the approvals from the related government agencies and bodies;

x. carrying out closing actions to actually implement the transfer of shares or assets; and

xi. necessary post-closing notices (e.g., the notice pursuant to the Article 198 of the Turkish Commercial Code, the notice to the General Directorate of the Foreign Investment, etc.).

6. What government charges or fees apply to these transactions?

There are no specific charges or fees that apply to takeovers or mergers. However, depending on the type of the transaction and ancillary steps in the transaction, there may be certain nominal fees such as trade registry expenses, Competition Board contribution fee, etc.

7. Do shareholders have consent or approval rights in connection with a deal?

In general, there are two types of capital companies in Turkey:

(i) joint stock corporations, and

(ii) limited liability partnerships.

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Ümit Hergüner is the senior partner at Hergüner Bilgen Özeke, which he founded in 1989, and as head of the Corporate Practice Group, he is involved in every major M&A transaction, as well as lending his expertise on all project finance and strategic investment matters. He serves as a Member of the International Relations & European Union Center Advisory Board of the Union of Turkish Bar Associations (TBB) in Ankara.

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He has also been heavily involved in the Corporate Governance Association of Turkey (TKYD), having served as its President as well as serving on the TKYD Advisory Board. He is also a member of the Turkish Industrialists and Businessmen Association (TÜSİAD). Mr. Hergüner holds an undergraduate and a Master's degree from Istanbul University School of Law, as well as LL.M. degrees from American University Washington College of Law, and the University of Virginia School of Law.

In joint stock corporations, the approval of the other shareholders, through a general assembly meeting, is not required in share transfer transactions (unless otherwise required by the articles of association). In fact, contractual arrangements that restrict the transfer of shares such as call options, rights of first refusal, etc. are not enforceable at the company level, and are only binding between the parties. Therefore, in a typical share sale transaction, the relevant shareholder may freely transfer its shares. However, in an M&A deal that is to be carried out by way of transfer of certain assets of a joint stock corporation, a general assembly resolution approving the transfer may be required if the value of the assets to be transferred constitutes a material portion of the total value of the assets of the transferring company.

In limited liability partnerships, M&A deals, including transfer of shares as well as assets, require the approval of the other shareholders. Share transfers in limited liability partnerships only become binding when the transfer is approved by the general assembly of share-holders. Similarly, asset transfers in limited liability partnerships also need the approval of shareholders to be valid and binding.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

The members of the Board of Directors are required to play an active role during the sale process in connection with a deal, which includes (among others) such duties as approving the release of the company records, and objecting to the transaction if they believe the deal is against the company's interests. The articles of association of a company may only restrict the transfer of shares by subjecting the said transfer to the approval of the company. Such approval can be granted by the Board of Directors. However, this discretion is not unlimited, and the Board of Directors may decline consent to a transfer on the basis of two conditions: (a) if there exists an important ground for refusal as provided under the articles of association, or (b) if the company offers to purchase the transferred shares on its own or on other shareholders' or on third parties' behalf based on the "real value" of the shares at the time of the request for consent.

However, this discretion of the Board of Directors may not be effective if the selling shareholder is, at the same time, the majority shareholder, as the Board of Directors may be replaced through an extraordinary general assembly meeting by the majority shareholder at any time.

9. In what circumstances are break-up fees payable by the target company?

The share purchase agreement may set forth a break-up fee if one of the parties walks away from the deal without any valid grounds. There is no specific requirement for break-up fees to be enforceable and the parties may contractually agree on and customize break-up fee provisions.

10. Can conditions be attached to an offer in connection with a deal?

Yes, conditions can be attached to an offer in connection with a deal. In practice, these preconditions are specified as conditions precedent to closing under a typical share purchase agreement. For instance, obtaining merger clearance for a transaction from the Turkish Competition Authority or completion of certain corporate actions before the closing of the deal may be introduced as conditions precedent under the share purchase agreement.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

No specific financing requirement that must be satisfied in an M&A deal is set forth by law. However, the parties may contractually agree on a condition precedent that requires securing a minimum level of financing by the purchaser.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

In private companies, there are two mechanisms that permit the minority shareholders to be squeezed out: (a) squeeze-out by a majority shareholder who holds shares corresponding to at least 90% of the share capital of the company, and (b) squeeze-out in the case of a merger.

In the first mechanism, a majority shareholder can file a lawsuit to squeeze-out a minority shareholder if the minority shareholder(s) acts in a manner so as to obstruct the company's operations, acts in bad faith, creates perceptible disruption in the company, or acts recklessly.

In the second mechanism, the minority shareholders of a dissolving company that participates in a merger may be compelled to sell their shares in exchange for a compensation payment.

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Umut Özdoğan is an associate in the Corporate Practice Group of Hergüner Bilgen Özeke and he has been with the firm since 2013. His primary focus is on mergers & acquisitions and corporate support, and he specializes in joint ventures, restructuring, corporate governance, franchising & distributions, and contract management. Mr. Özdoğan holds an undergraduate degree from Galatasaray University School of Law, as well as an LL.M. degree in International Finance Law from King's College London.

In listed companies, there are also two different possibilities for triggering the squeeze out mechanism: (a) initiative of majority shareholder holding 97% of the voting rights in the target company, and (b) merger of two companies in accordance with the provisions of the Communiqué on Mergers and Demergers Serial No. II – 23.2, which sets forth a process similar to that of private companies with certain procedural differences stemming from the capital markets rules.

In the first option, a shareholder (one shareholder individually or multiple shareholders acting in concert) holding 97% of the voting rights may trigger a squeeze out in order to acquire the remaining shares of the target company.

In the second option, a majority shareholder may initiate the merger process. Pursuant to the Material Transactions Communiqué, mergers involving listed companies qualify as material transactions, and shareholders who have voted against material transactions are entitled to exercise their sell-out rights or they may receive shares in the surviving entity. However, even if the minority shareholders do not exercise their sell-out rights, they can be squeezed out by the majority shareholder in return for a compensation payment after the merger process is completed.

13. What is the waiting or notification period that must be observed before completing a business combination?

If the business combination is to be carried out by way of a share sale transaction, there is no mandatory waiting or notification period per se as required by the transaction. However, there may be certain notifications/approval periods in sector-specific deals as detailed under, amongst others, Question 2. There are also certain public announcement requirements to be satisfied in listed companies even though such requirements do not affect the validity of the transaction.

If the business combination is to be carried out by merger of two companies, an announcement to the creditors of the dissolving entities needs to be published in the Trade Registry Gazette three times in a three-month period. Typically, the merger can only be registered with the Trade Registry after such three-month period has expired.

14. Are there any industry-specific rules that apply to the company being acquired?

As also explained above, the approval of relevant regulators and/or government agencies may be required if the company being acquired operates in certain regulated sectors such as energy, telecommunications, insurance and banking.

For example, transfer of shares in a banking institution requires the approval of the Banking Regulation and Supervision Agency if the shares to be transferred exceed 10% of the share capital of the relevant bank.

Similarly, energy companies holding licenses issued by the Energy Market Regulatory Authority must obtain the approval of the EMRA if there is a transfer of shares corresponding to at least 10% of the share capital of private companies and 5% of the share capital of publicly-held companies.

15. Are cross-border transactions subject to certain special legal requirements?

Cross-border transactions are not subject to any special legal requirements. However, certain restrictions apply to foreign investments in strategic sectors. For example, if the acquirer is a foreign party and the transaction involves transfer of any real property, approvals of the relevant regulators may be required. Although any acquirer which is controlled by more than 50% foreign shareholders can acquire title to real estate or rights in rem (property rights other than ownership) in Turkey, there are restrictions such as (amongst others) real estate acquisition being listed among the Turkish company's purposes and within its scope (as stated in the Articles of Association). Further, pursuant to Article 36 of the Regulation on Land Registry Law, legal entities having at least 50% foreign shareholding must notify the government when they acquire real property in Turkey. In addition, for certain strategic sectors, the following restrictions apply:

(a) For media service providers, foreign shareholders may not have more than 50% of the registered capital. In addition, foreign persons may not be shareholders of more than two media service providers pursuant to the Article 19(f) of the Radio and Television and Broadcasting Services Code.

(b) For civil commercial aviation operators, the majority of the shareholders have to be Turkish nationals pursuant to the Article 9 of the Commercial Air Transportation Regulation.

(c) For purchase of real estate in restricted military areas, military security zones or strategic zones, further requirements may apply pursuant to the Land Registry Law.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Within the scope of share transfers, the Labor Code and/or other legislations under Turkish law do not regulate any changes in the employment relations of a company whose shares are transferred to a third party. Since the employer is the company itself and it remains the same following any share transfer, the employment relations between the employer and the employees remain unaffected. Therefore, the employees of a company whose shares are transferred will continue to be employed at the company without any changes/modifications in their employment status, including their rights and benefits, as a result of the share transfer.

Employee transfers carried out within the scope of an asset transfer, however, may require certain additional actions such as obtaining employee consents for any material changes in employment conditions or executing tripartite transfer agreements. Employees are not bound by such changes unless they consent to such changes within 6 business days.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

To overcome global economic stagnation, the Turkish government has been attempting to stimulate economic growth and ameliorate the business environment. To that end, it has introduced the Omnibus Law for Improvement of Investment Environment no. 6728 to reduce transaction costs and to contribute to investor welfare. The most prominent change introduced by the new law is the abolishment of stamp duties arising from agreements in relation to transfers of shares in joint stock companies and limited liability partnerships. Formerly, the parties were required to pay an onerous stamp duty corresponding to 0.948% of the highest amount stipulated in the agreement. Also, pursuant to the said new law, only one set of original transaction documentation is subject to the stamp tax obligation rather than each set.

Also, following the failed coup attempt in July 2016, the government had announced a resolution of "state of emergency" in accordance with Article 120 of the Turkish Constitution and the state of emergency is still in effect upon its extension for the fifth time in July 2017. In terms of legal environment, the main implication of the state of emergency has been the transfer of the authority to issue laws (in the form of decrees having the same effect as laws) from the Parliament to the Council of Ministers, which is otherwise not the legislative but the executive body within the State. This shift was related to the necessity to take the actions required to eliminate the events leading to the declaration of the state of emergency in the most efficient and rapid manner. In the state of emergency, once the Council of Ministers adopts a decree, it is immediately published in the Official Gazette, becoming immediately effective, and is only subsequently submitted to the approval of the Parliament. As a result, the relevant laws enter into force prior to having been blessed by the Parliament. The Parliament has 30 days to approve or disapprove such decree laws. In the meantime the decree remains legally binding.

In the past year, however, the state of emergency has not had any direct effect on commercial and financial affairs in the business realm. The measures taken were primarily limited to the measures necessitated by the coup attempt. The only repercussion of the state of emergency on commercial and financial affairs was that it initially caused some delays in communications with public institutions due to the purge of certain officials within various public bodies. Recently, the effects of such actions have been almost completely eliminated and the functions of institutions are back to normal.

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Hergüner Bilgen Özeke Attorney Partnership, is Turkey's leading independent business law firm. Since its establishment in 1989, it has been providing legal guidance to foreign and domestic clients on all aspects of international business law, and it is known as the firm which brought the 'full-service law firm' concept to Turkey. The firm has represented some of the world's largest and most well-known multinational corporations, international financial institutions, agencies and other notable clientele in various sectors over the last twenty years.

The legal team consists of approximately 90 lawyers, 15 of whom are partners, who come from a variety of educational and professional backgrounds and who routinely manage cases that require a full grasp of both Turkish and cross border transactions, as well as sensitivity to diverse business cultures. This size, experience, and local knowhow permits the firm to serve as a one-stop shop by offering specialized teams to clients who need a law firm for a variety of potential issues, but also one with a significant understanding of the local market and culture.

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