INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

AIJA Deal Points Survey - Market Standards for Share Deals (M&A Commission)

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Executive Summary of Turkey

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1. General Statement

M&A deal volume in Turkey during 2014 sat at around US$21 billion, with 236 closed transactions. Privatizations made their highest contribution ever to Turkey's annual deal value, representing 41 per cent of the total volume in 2014 (total deal value of US$8.6 billion across 12 transactions). Foreign investors increased their deal volume by 54 per cent in 2014 compared with 2013. A majority of transactions took place in the middle market with 179 transactions (76 per cent of total closed deals) during 2014 having a deal value of less than US$50 million, yet representing only around 12 per cent of the total deal value. Manufacturing and energy were the most active sectors. Turkish elections in June 2015 and expected changes in the government policies are both likely to effect the M&A market. (Source: Deloitte, Annual Turkish M&A Review 2014). Due to consistent economic development and increase in the number of local investors and acquirers, there has been a shift in the Turkish market from a buyer's market to a seller's market since 2012. Therefore, sellers are now aware of the market and negotiation strategies.

Despite 2015 was a challenging year considering the political uncertainty due to elections, geopolitical tension, volatile exchange rates and diminishing consumer and investor confidence, the Turkish M&A market managed to remain largely flat as per Deloitte's Annual Turkish M&A Review 2015.

Out of 245 deals, 114 had a disclosed deal value adding up to c. USD 10.9 billion. Considering the estimated value of deals with undisclosed values, we estimate that total M&A volume was around USD 16.4 billion in 2015, representing a 9% decrease compared to 2014 (2014 – USD 18 billion via 234 deals). Small and middle market transactions shaped the overall M&A activity by deal numbers; foreign investors dominated the annual volume; and privatization deals dropped to one of the lowest levels in the last decade.

While foreign investors shared the total deal number almost evenly with local investors, they played a dominant role in the deal volume. In the lack of privatizations mostly driven by Turkish buyers historically and as opposed to the last couple of years, the contribution of foreign investors to the annual deal volume was very strong, at a level of 70% through 125 transactions with a total deal size of c. US$11.5 billion (including estimates for undisclosed values), corresponding to an increase of 44% compared to 2014. Besides, Turkish investors represented the remaining 30% of the annual deal value through 120 deals with a total deal value of c. US$4.9 billion (including estimates for undisclosed values), representing a decrease of 51% compared to 2014. Privatization activity which was noteworthy in recent years, remained limited at one of the lowest levels historically, due to postponed tender processes with respect to consecutive elections and thus pulled down the deal volume. Total deal value of privatizations remained low around US$1.8 billion (2014 – US$5.9 billion) through 7 deals, mostly being power generation assets, and represented c. 11% of the total deal volume. On another note, the private sector deal volume had a y-o-y growth of 25% and the contribution of foreign investors to the private sector deal volume was around 79%. Financial investors with various profiles

continued to play a major role in the M&A market and made up 19% and 21% of the total deal volume and the total number of deals, respectively (c. US$3.1 billion – including estimates for undisclosed values – in 52 deals). Although they pursued prudent strategies, their M&A activity outperformed 2013 and 2014 both in terms of deal number and value, due to the increasing number of deals by development banks and venture capital firms, including debt deal structures. (Source: Deloitte, Annual Turkish M&A Review 2015).

Angel investment is also promoted by the current Government through certain tax incentives and exemptions which may lead to a rapid increase in coming years.

No fundamental legislative changes are planned for the regulatory and statutory framework applicable to business combinations. No specific laws or regulations apply to cross-border transactions. Establishment of a SPV is the most commonly used method since it enables access to special legislative provisions in relation to the incorporation of a company (provided the SPV will operate in Turkey).

Before beginning negotiations in Turkey, the rights or obligations granted or prohibited by Turkish laws should be considered. Turkish companies must comply with Turkish Commercial Code (TCC). Therefore, incorporations, share transfers, mergers and demergers must be in compliance with the TCC. Tax risk should be carefully structured in a cross-border transaction.

Parties to an agreement which includes a foreign element can determine the agreement's governing law. However, Turkish law must be directly applied in certain circumstances stipulated by the International Private and Civil Procedure Law No. 5718. Accordingly, Turkish laws will still apply regarding (but not limited to) following, even if a non-Turkish law is chosen as the applicable law:

- competition and unfair competition;
- title to shares or assets and their transfer procedures;
- notices under the agreement; and
- arbitration clause.

Furthermore, share transfers in Turkish companies shall be made in accordance with the TCC regardless of the governing law. For instance, the board of directors must approve the share transfer and the transfer must be recorded in the company's share ledger and share certificates must be endorsed to show the transfer and physically delivered to the transferee. To execute a share transfer in a limited liability company, a share transfer agreement must be executed before a notary public, a shareholders resolution must be adopted and the transaction must be registered with the Trade Registry and publicly announced.

Typically, acquisitions via share transfers in joint stock companies are not subject to any registration requirements, although depending on the characteristics of a share transfer in joint stock companies, these transactions may require registration, filing, or approval.

Share transfers in limited liability companies are subject to notarization and registration with the Trade Registry.

Notification to Trade Registry may be required for share transfers over a certain shareholding percentage in group companies. If the target becomes the sole shareholder company due to an acquisition, this must be registered to the Trade Registry.

Stamp tax must be paid on all agreements which include a price, including share transfer agreements. The 2015 stamp tax rate is 0.948 per cent, calculated on the highest amount in the agreement and paid for each copy of the document which is subject to stamp tax. This plays an important role while drafting the agreements in terms of penalties and future commitments.

Capital gains on a share sale must be included in a company's taxable profits; subject to corporate tax at a rate of 20 per cent (Corporate Tax Law).

Profits made by real persons from share transfers are subject to income tax. Sellers of target company shares are only required to pay income tax if they are Turkish tax residents. Otherwise, tax liability is addressed by laws in their own country.

A transaction (ie, capital increase) may require amendment of the target company's articles of incorporation (AoI). Incorporation and AoI amendment is subject to approval of the Ministry of Customs and Trade for certain types of companies.

During incorporations and capital increases, an additional payment to the Competition Authority is required as a contribution fee (0.04 per cent of company capital).

In principle, foreign direct investments are unrestricted in Turkey and treated equally to local investments (article 3(a), Foreign Direct Investment Code). Turkish commercial companies can be 100 per cent owned by foreign investors. After a foreign investment occurs, the target must notify the Undersecretariat of Foreign Investment for statistical purposes. Some sectors are considered strategic and are subject to restrictions on foreign parties holding controlling stakes. Companies in specific industries are often subject to additional regulations and statutes. Regulatory approvals are required for IT, energy, banking, and financial services. Approval may be required for takeovers or mergers either before or after the transaction (industry dependent). Authorities that regulate specific industries include:

- the Capital Markets Board;
- the Energy Markets Regulatory Authority;
- the Banking Regulation and Supervision Agency;
- the Information and Communication Technologies Authority;
- the Mining Affairs General Authority; and
- the Incorporation and amendment of AoI is subject to approval of the Ministry of Customs and Trade for certain types of companies.

Publicly held companies must comply with Capital Markets Board regulations. For example, a bid for a public company must be approved by the Capital Markets Board and merger transactions where at least one of the parties is a publicly held are subject to Capital Markets Board review and approval.

For publicly held companies, if a change in management control occurs due to an acquisition, a mandatory offer to acquire all remaining shares must be made. Such offer must be approved by the Capital Markets Board (article 13, Communiqué on Takeover Bids Serial II, No. 26). As per the Communiqué on Takeover Bids, bidders must publicly announce a takeover bid immediately after deciding to make the bid. The bidder's disclosure requirement may include – alongside others – the following:

- number and amount of the listed and unlisted shares at the end of each trading day during the offer period, and the number of shareholders responding to the offer;
- total number and amount of shares acquired, as well as the total number of shareholders responding to the offer at the end of the offer period;
- the target company's detailed shareholding and management structure; and
- renouncement of obtaining shares through a voluntary bid.

As a general rule, shares in joint-stock companies can be freely transferred, except as otherwise provided under a company's AoI. Therefore, such transfers are not subject to approval by the management body or other shareholders.

For limited liability companies, a share transfer requires execution of the share transfer agreement before a notary public, adoption of a shareholders resolution, and registration of the transaction with the Trade Registry. The majority of shareholders must approve a share transfer in limited companies, unless otherwise stipulated in the company's AoI (article 620, TCC).

Management of joint stock and limited liability companies can be granted a refusal right in certain circumstances (question 10). If any shareholder is also represented in the management, they can reject share transfers by exercising these rights.

If the transaction requires financing via a share capital increase of the target company, shareholders' approval is required. Sale of company assets in significant amounts is also subject to general assembly approval (article 408, TCC).

For publicly held companies, transfer of the whole or an important part of the company's assets is defined as a 'significant transaction' (CML; Communiqué on Significant Transactions) and shareholders' approval is required. Accordingly, affirmative votes of at least two-thirds of shares with voting rights participating in the corporation's general assembly are required for the approval of significant transactions (article 29, CML).

2. Summary of Transaction Details

Four deals are reported. The minimum deal value amongst the reported deals is EUR 4.877.712 while the maximum deal value is USD 35.000.000 (around EUR 31.000.000).

Each deal involves acquisition of a different percentage of shares, including two deals where all the shares were sold. We also reported a deal where the purchaser aims to establish a joint venture with the remaining shareholders.

Two of the four targets operate in the energy industry, with the others involved in IT and manufacturing.

Only one buyer is Turkish, while other buyers are from The Netherlands, Japan and Singapore respectively.

The deals were realized without any auction.

50% of targets had more than 200 employees.

50% of the deal are private equity deals.

3. Letters of Intent

A letter of intent was signed for three deals, two letter of intent include an exclusivity clause. Only one exclusivity clause period lasted more than one month. Certain clauses under the letter of intents were binding; exclusivity is binding for two of four letter of intent.

4. Due Diligence

Vendor due diligence was not performed for the deals.

The documents were available in data room for the all deals. Three of four data rooms were virtual, while one was physical. Two virtual data rooms were managed by data room providers and one was managed by the seller. For each due diligence process, Q&A procedures were followed. Except in one deal, right to print/copy were granted.

5. Purchase Agreement

All the purchase agreements were signed in English, except for one.

Closing is completed after signing for 50% of the deals.

Consideration for each deal was in cash form. In 75% of deals, the purchase price was determined without price adjustment.

The payment method is different in each deal. The purchase price was paid in full on closing for one deal, whereas the purchase prices in remaining deals were paid in installments via different methods.

All deals were financed via equity.

100% of deals include a MAC clause, which is defined in each deal. Except for in one deal, the MAC clause does not contain a materiality threshold.

All purchase agreements contain a standard and extensive set of contractual representations and warranties. The warranties are repeated on closing for each deal.

50% of purchase agreements contain specific indemnifications for identified liabilities, as well as risks discovered during due diligence.

All the purchase agreements include tax indemnity and tax warranties.

One deals does not have a time limitation. Others in time, one is 120 months, one is 12 months and the other is 24 months.

Two of four deals have individual minimum claim amounts. The minimum claims amounts are respectively EUR 27.500 and USD 25.000. The deals which include individual minimum claim amounts include also aggregate minimum claim amounts. The aggregate minimum claim amounts are EUR 82.500 and USD 500.000.

Two of four deals have maximum liability caps, in the amount of respectively *(i)* EUR 1.145.500 or 62 % of purchase price and *(ii)* 25% of purchase price for claims other than fundamental warranty claims (i.e. capacity, ownership of shares, share capital, corporate information, interest in other undertakings, power of attorneys and authorities, licenses and compliance) and tax claims; 60% of purchase price for tax claims; 100% of purchase price for fundamental warranty claims.

There are no carve outs for specific indemnifications.

Two of four deals include disclosures against warranties and specific indemnities, while one deal has disclosures against warranties only.

Two of four deals included full data room disclosure with disclosed Q&A log. Disclosure schedule is signed only for one deal. The due diligence reports are undisclosed for three deals. In two deals, public information is not disclosed. In two of four deals, the disclosures made on signing are updated on closing.

6. Conditions Precedent

Merger filing was a CP for only one deal. The filing requirement applied to three jurisdictions.

One deal included third party consents as CP. All deals include bring-down of warranties and MAC clauses as CP. None of the purchase agreement required Seller's counsel's legal opinion as CP. Except one deal, the deals were not subject to the buyer obtaining bank financing. None of the deals included retention of key employees as CP.

7. Non-Competition/Non-Solicitation/Restrictive Covenants

Two deals do not include any non-competition, non-solicitation and restrictive covenants.

Two of four deals include a non-competition covenant, restricting the seller after closing. One covenant restricts the seller for 24 months and the other for the term of joint venture as well as two years post joint venture.

None of the deals are with non-embarrassment covenants, non-solicit clauses and non-disparagement covenants.

25 % of deals is with blue pencil clauses.

8. Governing law & Jurisdiction

Turkish law was chosen to apply for all deals.

The disputes for the deal where the parties are both Turkish will be settled by the courts of Istanbul.

Two of the remaining three deals is subject to ICC arbitration, while the other deal is subject to the London Court of International Arbitration.

In arbitration clauses, three arbitrators are required, with English as the arbitration language.

Two deal require preliminary mediation efforts.

Neither parties initiated any litigation procedures.

9. General Information

Three of four deals are cross border transactions. Kolcuoğlu Demirkan Koçaklı, Yüksel Karkın Küçük, Balta & Yurdakul Attorney Partnership and Nakagawa Yamakawa are the other law firms involved.

None of these transactions was referred to us by another AIJA member.

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