

TAKEOVERS UNDER THE DRAFT TURKISH COMMERCIAL CODE

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DRAFTING HISTORY

- Scientific Committee: 2000-2005
 - Parliamentary Committees: 2005 - 2007
 - Parliamentary discussions expected to begin Mid June 2008
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TURKISH COMMERCIAL CODE

- Appr. 1500 provisions
 - Company law
 - Types of companies
 - Applicable to both public & private companies
 - Other
 - Commercial Enterprise & Agency, Negotiable Instruments, Insurance, Transportation, Maritime Laws
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RULES RELEVANT FOR TAKEOVERS

- ACQUISITION OF SHARES
 - MERGERS
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ACQUISITION OF SHARES

- DISCLOSURE
 - RESTRICTIONS ON SHARE TRANSFERS
 - ACQUISITION OF A COMPANY'S OWN SHARES
 - FINANCIAL ASSISTANCE
 - CROSS-SHAREHOLDINGS
 - GROUP OF COMPANIES
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Disclosure

- Disclosure required when the following thresholds of shareholding are crossed:
 - % 5, 10, 20, 25, 33, 50, 67 and 100
 - Disclosure must be made to:
 - Commercial registry, Company, CMB, other relevant bodies,
 - No voting rights or other rights may be exercised until such disclosure is made
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Restrictions on share transfers

- Share transfers may be made contingent on the company's approval
 - Absence of approval invalidates the acquisition.
 - For private companies, restriction in two cases:
 - Due to reasons stated in the articles of association, or
 - By proposing to acquire such shares on real value
 - For companies whose shares are listed at a stock exchange, restriction in two cases:
 - Cap of maximum share holding percentage allowed per shareholder, or
 - Refusal by the acquiror to disclose on whose behalf the shares are acquired
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Acquisition by a company of its own shares

- In line with the 2nd Company Law Directive
 - A company may acquire its own shares representing up to 10% of its capital, provided that:
 - Shares are fully paid up
 - Following the acquisition net assets do not fall below the subscribed capital and reserves which may not be distributed
 - All rights attaching to the company's own shares are suspended.
 - Same rules apply to the acquisition of a company's shares by its daughter companies.
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Prohibition of Financial Assistance

- A company may not advance funds, make loans or provide security to a third party for the purpose of acquisition of its shares. Such agreements are null and void.
 - Prohibition covers financial assistance both before or after the acquisition.
 - Exceptions: Transactions by banks and other financial institutions in the normal course of business & financial assistance for employee stock option plans.
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Cross-shareholdings

- Cross-shareholdings below 25% of the capital are not regulated.
 - If a company knowingly leads to the existence of a cross shareholding exceeding 25% of the capital, such company may only exercise $\frac{1}{4}$ of its rights on all its shares of the other company.
 - **Except:** If a daughter company acquires the shares of a mother company, this will be equivalent to a company's acquisition of its own shares.
 - No rights on the shares held by the subsidiary may be exercised.
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Groups of companies

Relevance for takeovers:

- A takeover may result in the application of the rules on groups of companies if it leads to the existence of dominance over another company.
 - Takeovers involving a group company (under dominant influence) may lead to the liability of the mother company if the minority suffers from the takeover.
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Law on groups of companies – Purpose & Main regulations

- Purpose: Resolving the conflict between the interests of the group and that of individual companies
 - Main regulations:
 - Definition of "group"
 - Liability due to unlawful exercise of dominance
 - Sell out – squeeze out rules
 - Reporting & Audit
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Definition of "group of companies"

- Key concept: "Dominance"
 - Ability to have influence on a company
 - Acquired by
 - Owning shares
 - (Holding the majority of votes or capital or being able to appoint a majority of directors)
 - Contract or otherwise
 - Direct/indirect dominance by one company over another leads to the existence of a group
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Limits in the Exercise of Dominance

- The mother company may be liable for unlawful exercise of dominance regarding:
 - Actions and transactions of the daughter company
 - Important shareholder resolutions of the daughter company
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Liability for the daughter's actions and transactions

- The mother company may not exercise its dominance in a way that may cause a loss for the daughter company
 - Exception: Economic rationale
 - Duty to compensate loss
 - Shareholders have a claim for the compensation of the company's damages or the acquisition of their shares by the mother company (**sell out right**)
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Liability for shareholder resolutions including mergers

- Liability for important shareholder resolutions such as merger, dissolution or other important amendments to the articles of the daughter company,
 - which are clearly not in favour of the company and
 - which are adopted due to the exercise of dominance
 - Shareholders may have a claim for compensation or the acquisition of their shares by the mother company (**sell out right**)
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Squeeze-out

- The mother company may purchase the shares of the minority, provided that:
 - The mother company holds 90% of the capital and voting rights of the daughter company.
 - The minority disrupts the proper functioning of the company or acts in bad faith.
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Reporting & Audit

Reporting

- By the daughter company
- By the mother company

Audit

- Independent audit of consolidated accounts and annual reports
 - Special audit for specified issues
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International company groups

- The same rules apply provided that at least one of the group companies is located in Turkey
 - Turkish courts have special jurisdiction
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MERGERS

- By acquisition or incorporation
 - The Acquiror assumes all the assets and liabilities of the Target.
 - The Target Company ceases to exist without being wound up.
 - Shareholders of the Target Company are entitled to receive a consideration in exchange of their shares.
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Consideration for shares

- Shares of the Acquiror
 - Shares + up to 10% cash
 - Other valuable consideration equivalent to the real value of the shares
 - Shares of other companies, cash, any other valuable consideration
 - **Squeeze out** – 90% majority
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Merger Procedure - 1

- **Merger Contract**
 - Prepared by the Board of Directors, approved by the General Assembly
 - Mandatory content: Share exchange ratio, consideration, etc.
 - **Merger Report**
 - Evaluation of the Board on the purpose and consequences of the merger, valuation methods, share exchange ratio, shareholders rights etc.
 - **Independent Audit**
 - Independent audit of the merger agreement, report and balance sheets regarding the suitability of the valuation method, share exchange ratio, rights granted to shareholders, etc.
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Merger Procedure - 2

Inspection by shareholders and stakeholders

- All documents published on the Company's webpage 30 days before the Shareholders Meeting.

Approval of the Shareholders

- 75% of the votes represented at the meeting + the majority of the capital
- Listed companies: majority of the votes represented at the meeting + 25% of the capital must be present
- Squeeze out: %90 of all the votes
- Ultra vires: %75 of the capital

Registration at the Commercial Registry

Protection of creditors

Creditors may demand security

- Within three months following the merger
 - No security necessary if the auditor reports that there is no risk of non-payment
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Facilitated mergers (short-form-mergers)

- **Small companies :**
 - Merger agreement and shareholder approval are sufficient
 - Annual sales of less than 12 million YTL
 - Max 50 employees
 - Total assets less than 6 million YTL
 - **Wholly owned companies**
 - Only a simple merger agreement
 - **90% owned subsidiaries**
 - No merger report or shareholder approval necessary, but audit and inspection rights remain
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Shareholder protection

- Action for claiming the **real value** of shares
 - Action for **cancellation of merger**
 - Action for **liability of directors & auditor**
 - Extra protection in groups of companies – **sell out** right
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Thank you...

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