Private Equity

Contributing editor
Bill Curbow

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GETTING THE DEAL THROUGH

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Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the British Virgin Islands, Canada, Colombia, Egypt and Thailand. The report is divided into two sections: the first deals with fund formation in 22 jurisdictions and the second deals with transactions in 23 jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume

GETTING THE
DEAL THROUGH

London
February 2019

Turkey

Noyan Turunç and Kerem Turunç

TURUNÇ

1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

The grand majority of private equity transactions in Turkey are stock purchases or subscriptions in privately owned companies. The acquisition of controlling or significant stakes is most common, although 100 per cent acquisitions are sometimes seen too.

Structures used in more developed markets, such as asset purchases, mergers, tender offers and leveraged buyouts are rather infrequent.

Most investments use a special purpose vehicle (SPV) formed outside Turkey, often in Luxembourg or the Netherlands. Some investments also employ a second SPV formed in Turkey to sit between the foreign SPV and the target company. In some cases, significant shareholders may together move their shareholding structure up to the SPV level for tax reasons or concerns surrounding the enforceability under Turkish law of certain provisions in their shareholders' agreements.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

Going-private transactions involving publicly traded companies and private equity funds are virtually unheard of in Turkey.

More often than not, a private equity investment in a Turkish company means more stringent corporate governance standards for the target company. While Turkey has made significant advances in its corporate governance regime for privately held companies, widespread inadequacies continue. Some problematic practices that persist are off-the-books transactions, tax non-compliance and extensive (and often non-arm's-length) related-party transactions. These practices make due diligence, valuation, the decision to invest and post-closing operations difficult for private equity investors. Accordingly, transaction documents normally include extensive representations and warranties, and indemnity provisions, as well as conditions precedent such as the elimination of related-party transactions and post-closing covenants such as the adoption of IFRS accounts.

3 Issues facing public company boards

What are some of the issues facing boards of directors of public companies considering entering into a going-private or other private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

Defensive tools

Generally speaking, statutory and practical tools such as poison pills and the ability to shop the company used in certain jurisdictions are not generally available in Turkey. Accordingly, it is difficult for the board or management of a public company to protect itself against third-party bidders. Furthermore, a significant number of publicly traded companies in Turkey have concentrated shareholding structures and small public floats, hence the board and the management are often direct representatives of the shareholders.

Transfers of both publicly traded and privately held shares in public companies may normally be made by shareholders without any restrictions. The limited exceptions to this rule include:

- the company's right to approve transfers of registered shares that have not been fully paid up where there are doubts about the acquirer's ability to pay for the shortfall (and the acquirer has not posted security if requested by the company); and
- the company's approval right as specifically included in the company's articles of association.

Each of these cases is subject to certain exceptions relating to inheritance and marital property rules, and enforcement actions.

Directors' duties

In addition to the general duties of directors to act in the best interests of the company, avoid conflicts of interest and not compete with the company, which apply to public and private company directors alike, public company legislation contains more specific rules that directors must follow in dealing with the protection of minority shareholders, related-party transactions and risk management. As in any other type of transaction, these duties and rules apply when dealing with private equity investors.

Under article 202 of the Turkish Commercial Code (TCC), controlling shareholders must not use their control in a way that would harm the interests of the company. Such harm is defined broadly and includes, among other things, any act or decision that may adversely affect the company's productivity, restricting the company's investments and forcing the company to enter into adverse financial transactions. Minority shareholders who suffer losses as a result can request compensation. Additionally, the TCC also specifically references M&A transactions and states that if an M&A transaction (and certain other significant transactions) is undertaken by a company as a result of the use of control rights but the transaction does not have a clear rational purpose, shareholders who voted against the transaction or objected to the board's relevant decision in writing can request the controlling entity, through court action, to purchase their shares, or request compensation for their losses. If the company's shares are listed on a stock exchange, the applicable purchase price will be the prevailing trading price. If the shares are not traded on an exchange or if the trading price is not fair, the purchase price will be their true value or a price calculated under a generally accepted method.

Tender offers

A tool available to the target company's board is the report it is required to prepare in connection with a voluntary tender offer. In this report, the board must discuss, among other things, the offeror's strategic plans relating to the target company including the potential impact of the offer on the company's employees. The board can issue, within the confines of its statutory duties, an unfavourable report if it believes that the tender offer is not in the best interest of the company. The report is made available on the Public Disclosure Platform (PDP), the online system through which public disclosures required by capital markets legislation, including Borsa Istanbul rules and regulations, are made.

In voluntary tender offers, the Capital Markets Board (CMB) can lengthen the offer period up to 30 business days if the target company requests to hold a general assembly meeting to enable the shareholders to evaluate the tender offer. Thus, if timing is of the essence for the offeror, the board may be able to prevent a successful tender by holding a general assembly.

Other considerations

Under Turkish law, all parties and stakeholders to a potential transaction are always subject to the overarching article 2 of the Turkish Civil Code, which requires that they act in good faith and adhere to fair dealing principles.

Finally, it would not be possible for a bidder to conduct thorough due diligence unless the board and management cooperate, although this would be unusual as a practical matter because bidders ordinarily negotiate with the controlling shareholder or shareholders, who can procure the cooperation of the board and management.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

Shareholding reporting thresholds

Pursuant to the Communiqué on Material Events, No. II-15.1, issued by the CMB, if the shares held by a real or corporate person in a publicly traded Turkish company reaches or falls below the thresholds of 5, 10, 15, 20, 25, 33, 50, 67 and 95 per cent, the Central Securities Depository (CSD) will automatically make a public announcement of this fact. If such thresholds are triggered due to indirect holdings, voting rights or a group of persons acting together, such persons must make a disclosure on the PDP.

For private companies with publicly traded securities on an exchange, the applicable disclosure thresholds are only 25, 50 and 67 per cent. The CSD also maintains an up-to-date table of holders of 5 per cent or more shares and voting rights in publicly traded companies.

The TCC also has reporting requirements applicable to all capital stock companies. Pursuant to article 198 of the TCC, if an undertaking's (affiliate's) direct or indirect shareholding in a company reaches or falls below the thresholds of 5, 10, 20, 25, 33, 50, 67 and 100 per cent, such affiliate must notify the company in which it holds the relevant shares as well as any applicable public authorities within 10 days. Information on any such triggering transactions must be made available on the company's website, and included in the company's annual activity and audit reports. Furthermore, board members and managers of the company and the referenced affiliate, and their respective spouses and dependent children, who hold at least 20 per cent of shares of the company or the affiliate must disclose such holdings. The disclosure will be registered with and announced by the trade registry. Failure to fulfil any of the TCC obligations described in this paragraph results in the freezing of all voting and other rights in the relevant shares. There is debate among practitioners and academia as to how to rectify the loss of these rights.

Capital markets legislation

The CMB disclosure requirements are twofold: general disclosure requirements that govern material, non-public information and specific disclosure requirements applying to enumerated transactions. The general disclosure requirements apply to, among other things, inside information (ie, non-public events and developments that may have an effect on price or the investment decision of investors) subject to certain exceptions, and the confirmation or denial of rumours (eg, press coverage of a material event). These are primarily regulated by the Communiqué on Material Events.

The Communiqué on Mergers and Demergers requires the disclosure of, among other things, corporate resolutions regarding the contemplated transaction, the merger or demerger agreement or plan, applicable financial statements and a merger or demerger report prepared (individually or jointly) by the parties to the transaction.

The Communiqué on Takeover Bids, which regulates mandatory and voluntary tender offers, requires the disclosure of information on, among other things, calculation of the tender offer price, source of funds to be used in the share purchases under the tender offer, offeror's strategic plans regarding the target company and tender procedures (eg, time frame, number of shares subject to the tender).

Other considerations

Additional disclosure requirements may be applicable depending on the specific sector involved or the particular type of transaction.

The requirements described above are not affected by a private equity investor's being a party to the relevant transaction.

5 Timing considerations

What are the timing considerations for negotiating and completing a going-private or other private equity transaction?

The setting up of SPVs, investment committee approvals and securing of financing may add some additional time to a transaction involving a private equity investor. Otherwise, the usual due diligence, drafting and negotiation timing considerations apply.

Merger clearance, if required, normally takes several weeks and requires the submission of an executed or late-stage transaction document.

There may also be various waiting periods applicable to a transaction, stemming from the TCC, public disclosure requirements, rules protecting creditors, trade registry filings and CMB approvals (eg, tender offer documentation), among other things.

A change of control in a public company triggers a mandatory tender offer, which requires the bidder to file certain documents and information with the CMB, including among other things, the source of funds, the agreements (if any) that triggered the mandatory tender offer and agreements with intermediary institutions. Changes of control can occur through the direct or indirect acquisition by a shareholder (or a group of shareholders acting together) of a majority of the voting rights in the company or the power to nominate a majority of the company's board, except for cases where such shareholders are unable to control the company owing to the existence of privileged shares held by others. The mandatory tender offer requirement is also triggered if shareholders enter into an agreement (eg, voting agreement) that leads to joint control even if there is no change in the shareholding structure.

For example, the information required to be publicly disclosed pursuant to the Communiqué on Mergers and Demergers as described in question 4 must be made available publicly at least 30 days prior to the general assembly meeting where the transaction will be approved. Pursuant to the TCC, in merger and demerger transactions, companies participating in a merger or demerger must publish an announcement in the Turkish Trade Registry Gazette and on their websites announcing that the transaction documents (ie, agreements, reports and financial statements) have been made available at the registered address of the company for inspection by the shareholders. These documents must be made available at least one month prior to the relevant general assembly meeting for mergers and at least two months before the relevant general assembly meeting for demergers.

There are also additional notification periods set out by law for the protection of creditors. As such, creditors are entitled to claim security for their receivables within three months following a merger transaction being registered. In demerger transactions, the company must invite creditors to declare any receivables they have, and allow them to claim security their unsecured or insufficiently secured receivables, by making three consecutive announcements in the Turkish Trade Registry Gazette with seven-day intervals prior to the demerger transaction.

6 Dissenting shareholders' rights

What rights do shareholders of a target have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

Shareholder approvals

Merger and demergers, and sales and leases of a significant portion of, or all, assets are considered to be significant transactions for public companies, and are subject to shareholder approval (two-thirds of voting rights present and voting at the general assembly, unless a higher quorum is required by the company's articles of association). Shareholders who vote against such transactions at the relevant general assembly meeting can request the redemption of their shares by the company at a price equal to the average of the weighted average trading prices of the company's shares for the last 30 days prior to the announcement of the relevant transaction. This right will also be accorded to shareholders where the company fails to fulfil its duties related to the convention of the general assembly (ie, unduly preventing the shareholder from attending the meeting, or failing to perform necessary call or agenda publication procedures).

Squeeze-out transactions

Pursuant to Squeeze-Out Communiqué No. II-27.2, issued by the CMB, if the voting rights held by a shareholder (or a group of shareholders acting together) reaches 98 per cent through a tender offer or otherwise, or such shareholders acquire additional shares when they are already above this threshold, then the minority shareholders will have the right to sell their shares to the controlling shareholders, and the controlling shareholders will have the right to squeeze out any remaining minority shareholders.

Once their right to sell is triggered, minority shareholders must notify the company of their intention to use their right to sell within three months. The right remains available even if the controlling shareholders lose their 98 per cent voting right during the three-month period. The company must notify the controlling shareholders of the intended use of minority rights within one month, and must also prepare a valuation report. The controlling shareholders then have three business days to deposit with the company funds in consideration of the shares to be purchased, and the company must transfer these funds to the selling shareholders within two business days. A minority shareholder exercising its put right must exercise it for all of its shares.

After the expiry of the three-month exercise period of the minority shareholders, the controlling shareholders will have the right to squeeze out any remaining minority shares. The controlling shareholders must notify the company of their intention to use their squeeze-out right within three business days of the expiry of the three-month period. The notification must be accompanied by a bank letter of guarantee or evidence of blocked funds sufficient to exercise the squeeze-out right. For publicly traded shares, the squeeze-out price will be the 30-day average of the weighted average price of the same class of shares on the stock exchange prior to the controlling shareholders reaching 98 per cent or, if already above 98 per cent, prior to the public announcement of the additional purchase by the controlling shareholders. For non-listed companies, the price will be determined through a valuation report. The actual exercise of the squeeze-out may be made only after approval by the CMB, which will normally add several days to the process. Upon the CMB's approval, the controlling shareholders have three business days to deposit the consideration with the company.

The described put and squeeze-out rights cannot be exercised during the first two years after the initial listing of a company's shares on a stock exchange.

Another squeeze-out method is available under TCC article 141, pursuant to which the merging entities (public and private alike) in a merger transaction may decide in the merger agreement either to:

- pay cash consideration to the shareholders of the non-surviving entity pro rata to their shareholding interests; or
- offer to those shareholders the choice between such cash consideration or shares in the surviving entity pro rata to their shareholding interests.

In order for such a clause to be valid, the merger agreement needs to be approved by shareholders holding at least 90 per cent of the voting rights in the non-surviving company (TCC article 151/5).

The TCC also includes an additional squeeze-out right (applicable to public and private companies alike) in article 208, pursuant to which a controlling entity (ie, the right may not be used by individual shareholders) holding at least 90 per cent of the shares or voting rights in another company may be able to squeeze out the minority, through a court proceeding, if the minority is 'preventing the operation of the company, acting against the principle of good faith, creating discernible hardship or acting recklessly'. If the company's shares are listed on a stock exchange the applicable purchase price will be the prevailing trading price. If the shares are not traded on an exchange or if the trading price is not fair, the purchase price will be their true value or a price calculated under a generally accepted method (ie, the same calculation method as applies to the minority exit right under TCC article 202 described in question 3).

7 Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

International-style transaction agreements are the norm in private Turkish equity transactions. Transaction documents normally include extensive representations and warranties, indemnities, as well as price-adjustment, escrow and holdback mechanisms.

In deals involving one or more non-Turkish parties, the language of negotiations and the transaction documents is most commonly English, the SPA and SHA are generally modelled after UK and US precedents in style and content, and international arbitration is commonly selected as the method of dispute resolution (although the jurisdiction of Turkish courts is sometimes seen, too). While parties to a contract are, as a general rule, free to choose the governing law and dispute resolution provisions of the contract so long as there is a foreign element to the relationship, most private equity acquisition agreements in the Turkish market are governed by Turkish law. Even if foreign law governs the agreements, certain Turkish law provisions will always be binding on the parties and the target company regardless of the governing law of the contract, for example, formalities regarding share transfers, statutory minority rights and corporate governance.

8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity acquirer should discuss management participation following the completion of a going-private transaction?

As described in question 3, a significant portion of publicly traded companies in Turkey has concentrated shareholding structures and small public floats. Privately held companies similarly have concentrated shareholding structures, usually in one or a small number of families. Accordingly, fully independent management or management shareholdings are rare in Turkey. Having said that, many private equity transactions include certain incentives such as employment agreements for the founders and key personnel, stock options, as well as earn-out mechanisms.

9 Tax issues

What are some of the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

There are no specific tax considerations applicable to private equity transactions as such. Usual considerations such as the applicability of and potential exemptions from capital gains tax apply equally to private equity and other transactions alike.

One consideration for private equity investors is to form their SPV in a jurisdiction where the withholding on dividend payments will be minimised (thanks to the double-taxation treaty between such country and Turkey).

In stock sales, capital gains tax is normally applicable with certain partial and full exemptions available, depending on the parties involved and the applicable holding periods.

Stamp duty also used to apply to stock purchase agreements until 2016, when the applicable legislation was amended to exempt such agreements from stamp duty. Sales of public company shares are also exempt from VAT. It is possible to structure mergers and demergers as corporate tax-free transactions provided certain conditions are met. Tax-free mergers and tax-free demergers meeting certain conditions are also exempt from VAT. Generally, taxable mergers and asset transactions are subject to VAT at 18 per cent, and certain assets may be subject to different rates. The tax residency of foreign parties may also change certain tax treatments under double taxation treaties or otherwise.

Share acquisitions cannot be classified as asset acquisitions for tax purposes.

10 Debt financing structures

What types of debt financing are typically used to fund going-private or other private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Many private equity deals use domestic or international financing, usually in the form of secured loans. Private equity investors will also often want the target to refinance its existing indebtedness or minimise its number of lenders (many Turkish companies use short-term financing in the form of 'general credit agreements' from a large number of domestic banks).

The TCC includes strict restrictions on financial assistance, a concept borrowed from Council Directive 77/91/EEC, which has since been amended and replaced to give member states more flexibility in permitting certain forms of financial assistance. However, the TCC follows the original directive and states that a joint-stock company (public or private) may not advance funds, make loans or provide security with a view to the acquisition of its shares by a third party (borrowed almost verbatim from the original directive). Exceptions to the prohibition also follow the original directive, and are limited to transactions by banks and other financial institutions in their ordinary course of business, and transactions undertaken for the acquisition of shares by the employees of the company or the employees of one of its subsidiaries. However, these exceptions may not be used if they have the effect of reducing the reserves of the company below mandatory statutory thresholds or limits set by the company's articles of association, or if they prevent the creation of statutorily mandated reserves or, otherwise, the use of such reserves. Read broadly as generally agreed by practitioners to be the legislative intent of the article, this provision essentially rules out the use of acquisition financing by a target operating company, and the market has shied away from trying to employ alternative structures (for example, the merger of the operating company with the holding company in a financed transaction). Furthermore, while many jurisdictions that have financial assistance legislation permit companies to provide financial assistance for the acquisition of their shares as long as certain conditions, such as arm's-length terms, the approval of shareholders, and the maintenance of prescribed net asset and reserve thresholds are met, Turkish law has no such exceptions.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements for private equity transactions? What other documents typically set out the financing arrangements?

Transactions documents typically do not include the securing of financing by the private equity investor as a condition subsequent to closing. Having said that, larger deals may include 'financing out' provisions.

Update and trends

Private equity is still a relatively new market in Turkey. Private equity investments in Turkey averaged around US$30 million per year between 1995 and 2005. The market really began developing from 2006, with a significant jump in the monetary value of investments (eg, approximately US$2.2 billion in 2006). The past several years have seen somewhat inconsistent levels of investment (eg, approximately US$340 billion in 2014, US$1.6 billion in 2015, US$330 million in 2016 and US$1.2 billion in 2017). Because private equity is still a relatively young sector in Turkey, there have been much fewer exits than investments. As such, we are likely to see more exits than usual in the next few years, and we expect customary exit practices to develop further.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving debt financing raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Typical fraudulent conveyance issues that arise in jurisdictions such as the United States are usually not encountered in Turkey, in large part because of the strict restrictions on financial assistance described in question 10.

An overarching provision in the Turkish Enforcement and Bankruptcy Law is that if a business (or all or a substantial part of its assets) is acquired for the purpose of preventing creditors from enforcing their rights, the creditors can apply to the court for the annulment of the transaction.

13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms or other equity co-investors? Are there any statutory or other legal protections for minority shareholders?

International style shareholders' agreements are normally used among co-investors and private equity investors and the remaining shareholders. Typical provisions include drag-along rights, exit priority in favour of the fund and minority veto rights (usually more extensive if the private equity investor is the minority). Private equity investors will normally not grant rights of first refusal to the remaining shareholders although they sometimes grant rights of first offer and, more often, tag-along rights. Call and put options are also used in many transaction documents. Please note, however, that there is ongoing debate among practitioners and in academia with regard to the effective enforceability (read: specific performance) of some of these clauses under Turkish law.

Subject to certain procedures and prerequisites, shareholders holding at least 5 per cent of shares in public companies, and shareholders holding at least 10 per cent of shares in private companies have the following rights:

- to request the board of directors to call a meeting of the general assembly of shareholders or, if a general assembly meeting is already scheduled, to add items to the agenda. If the board of directors does not honour this request, such shareholders have the right to request the court to order the same;
- to request the postponement of the discussion of financial statements and related items at the general assembly of shareholders;
- to file a lawsuit to replace the company's auditors for a valid reason; and
- to file a lawsuit for the dissolution of the company for valid reasons.

Minority shareholders also have certain information rights. For example, the financial statements of the company, consolidated financial statements (if applicable), the annual activity report prepared by the board, audit reports (if applicable) and board's dividend proposal (if applicable) must be made available to all shareholders at least 15 days prior to the relevant general assembly meeting at the company's headquarters and branches. Furthermore, at the general assembly meeting, shareholders can request the board to provide information about the operations of the company, and the work and findings of the auditors; such a request may be denied only if there is a risk of divulging trade secrets of the company or prejudicing another interest of the company.

Normally, unless otherwise prescribed by law (see below) or the articles of association, the meeting quorum for the general assembly of shareholders of a joint stock company is 25 per cent of shareholders and decisions can be taken by a simple majority of those attending the meeting. If the quorum is not attained in the first meeting, no quorum is required in the second (rescheduled) meeting. However, certain decisions of the general assembly are subject to heightened quorum and voting requirements, and such requirements may not be lowered by contract or otherwise. For example, merger and (subject to certain exceptions) split-up decisions are subject to the following requirements:

- private companies: 75 per cent of those present at the meeting must approve the transaction and such votes must constitute a simple majority of all shareholders; and
- public companies: no quorum requirement; however, two-thirds of those present and voting at the meeting must approve the transaction provided that if at least half of all eligible votes are present at the meeting, simple majority to approve the transaction.

14 Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

Private equity funds are normally subject to the same rules as other investors. However, the limited tools available to the board and tender offer requirements, each as described in question 3, must be taken into account.

15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity acquirer?

Private equity investors will almost always secure the right to determine the timing and manner of their exit from the company. This normally means the inclusion of customary exit-related provisions such as drag-along rights and the right to require the company to undertake an IPO (see also question 13).

16 Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

Corporate governance rules applicable to publicly traded companies are likely to invalidate or supplement certain negotiated rights among the shareholders. For example, publicly traded companies are subject to significantly more robust reporting obligations than privately held companies. Some negotiated governance rights, however, may survive an IPO. For example, the articles of association of the company may include provision granting the minority the right to appoint members to the board of directors. However, the number of such members may not exceed half of all seats on the board of a public company.

Private equity investors typically include the right in the applicable shareholders' agreement to force the company to undertake an IPO. Such right will also normally include an exit priority in favour of the private equity investor in any IPO. Lock-up restrictions are common, in particular if the original shareholders are still part of the management.

Having said that, IPO exits are the exception, not the norm, when it comes to private equity exits in Turkey.

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in industry focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

Private equity investors invest in a wide range of industries in Turkey. In terms of the size of targets, larger transactions have become less frequent in recent years.

Private equity firms are not subject to specific restrictions. See also question 18.

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or other private equity transaction?

No specific laws and regulations apply to private equity transactions as such. Furthermore, Turkey has no capital controls, or restrictions on or different treatment of foreign ownership of company shares, subject to limited exceptions such as certain share transfer approval requirements and foreign ownership thresholds in regulated industries. Such industries include, among others, asset management, aviation, banking, consumer finance, factoring, energy, insurance, investment management, media, mining, private security services and telecommunications. Share transfers in companies operating in these industries may be subject to the preliminary approval of the relevant

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regulatory authority. Such approval requirement may be absolute or triggered by percentage thresholds depending on the sector. In addition, there are some maximum shareholding percentages that apply to foreign investments in certain strategic sectors, such as media, aviation and private security.

There are also limited restrictions on the ability of companies containing foreign capital to purchase and hold title to some real estate, and certain post-acquisition clearances of existing real estate ownership by the target company if it becomes at least 50 per cent foreign-owned.

Post-transaction, it is important to keep in mind that companies containing foreign capital are required to provide periodical reports on the details of the foreign shareholding in the company to the General Directorate of Incentive Implementation and Foreign Investment.

There may also be certain variations in the taxation of capital gains and dividend distributions depending on tax residency. Also see question 9.

19 Club and group deals

What are some of the key considerations when more than one private equity firm, or one or more private equity firms and a strategic partner or other equity co-investor is participating in a deal?

Club deals are fairly common in the Turkish private equity market. Transactions involving private equity firms and strategic co-investors are rare. There is no specific regulation governing club or group deals. More often than not, co-investors will form their own SPV outside Turkey and invest into the target through that SPV.

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity acquirer related to certainty of closing? How are these issues typically resolved?

Private equity investors normally include extensive conditions precedent, including, often, the receipt of internal approvals for the closing to occur. Material adverse change clauses are also standard, although their form and scope often get negotiated heavily.

In general, at the very least, the parties will be expected to use their commercially reasonable efforts to satisfy the closing conditions. Where a condition is placed on one party, the other party will usually be expected to cooperate as needed to help satisfy the condition. The statutory obligation to deal in good faith also places an obligation on the parties to satisfy the conditions.

Subject to general rules applicable to publicly traded companies (eg, significant transactions, board duties), it is possible under Turkish law to negotiate break-up fees and reverse break-up fees. While such fees are not the norm in the overall M&A market, many private equity funds will at the least include provisions relating to the recovery of their due diligence expenses in cases where the sellers abandon the transaction.

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