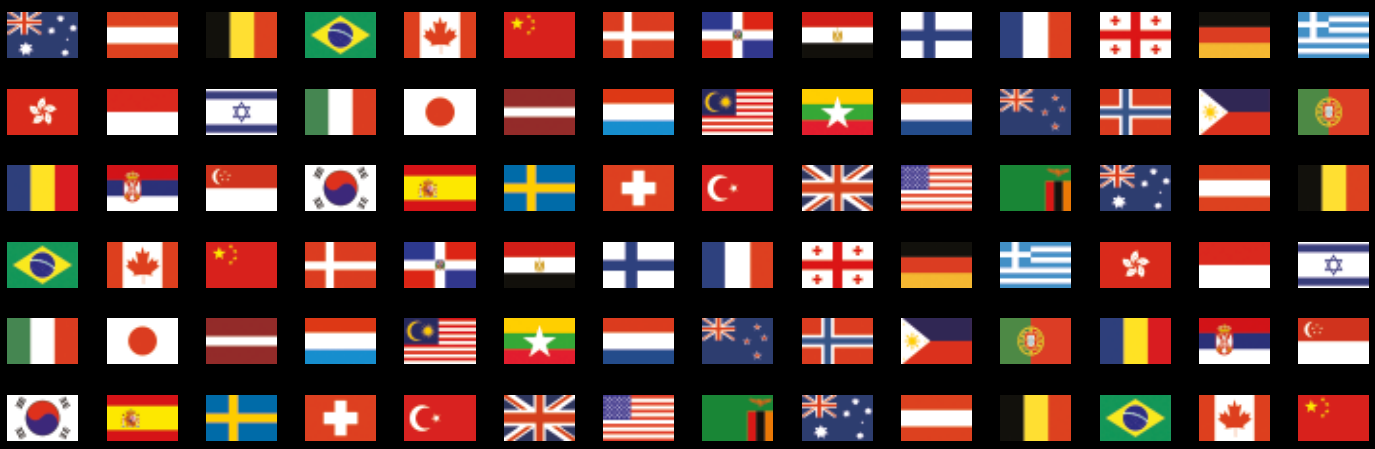
PRIVATE M&A 2023

Contributing editors
Will Pearce and Louis L Goldberg



LEXOLOGY
Getting the Deal Through

Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Matthew Bridgewater
matthew.bridgewater@lbresearch.com

Head of business development
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Holborn Gate, 330 High Holborn
London, WC1V 7QT, UK

First published 2017
Sixth edition
ISBN 978-1-83862-550-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

PRIVATE M&A 2023

Contributing editors
Will Pearce and Louis L Goldberg
Davis Polk & Wardwell LLP

Lexology Getting the Deal Through is delighted to publish the sixth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Brazil, Japan, Romania and Zambia.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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 editors,Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

LEXOLOGY
Getting the Deal Through

London
September 2022

Contents

Turkey

Noyan Turunç, Esin Çamlıbel and Kerem Turunç

Turunç

STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

A typical private M&A transaction process in Turkey follows customary international practices, although more often than not there is a single potential buyer, especially in smaller deals. Where there are multiple potential buyers, an auction process similar to that commonly conducted in jurisdictions such as the United Kingdom and the United States may be undertaken. There are no specific Turkish laws or regulations pertaining to private auctions.

A typical private M&A process includes the following main steps:

- the buyer and the seller negotiate and execute a term sheet, which will outline the major terms to be included in the final transaction documents;
- the prospective investor and its advisers conduct their due diligence of the target company;
- while due diligence is ongoing, the main transaction documents and any ancillary documents (eg, seller's disclosure letter and executive employment agreements) are negotiated (and normally finalised following the completion of due diligence);
- the transaction documents are executed;
- any consents and approvals are obtained; and
- the closing occurs.

The principal transaction document will typically be a share purchase agreement (SPA), asset purchase agreement or subscription agreement. In cases where less than the entire company or the business is being acquired, a shareholders' agreement (SHA) will also normally be executed.

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). It is also not uncommon for the transaction documents to be governed by a foreign jurisdiction's law (in many instances, England's), but Turkish law is increasingly becoming the norm. The preference for international arbitration and foreign governing law is often motivated by the fact that certain customary terms, such as tag-along rights, drag-along rights and rights of first offer and refusal, are of questionable enforceability under Turkish law, and most Turkish courts do not have extensive experience with such terms and clauses or with cross-border M&A documentation in general.

In recent years, it has become more common for sellers to hire an M&A adviser, prepare information memoranda for prospective buyers and, in some instances, undertake vendor due diligence.

Legal regulation

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

The primary pieces of applicable legislation are the following:

- the Commercial Code (Law No. 6102);
- the Code of Obligations (Law No. 6098);
- the Corporate Tax Law (Law No. 5520);
- the Labour Law (Law No. 4857); and
- the Law on the Protection of Competition (Law No. 4054).

Other laws (eg, relating to banking, intellectual property and data privacy) and secondary legislation promulgated under such laws and the laws specified above may also apply to the transaction.

There is no general rule that the acquisition of shares or assets in a company or a business be governed by Turkish law, and provided that the transaction involves a 'foreign element' (eg, a foreign party), the parties may agree that the law of a foreign jurisdiction govern an acquisition or part of it (this sometimes occurs) and that disputes related to an acquisition be resolved through arbitration (this often occurs).

Such preferences have to do with what is considered to be a grey area in Turkish law with respect to common exit-related provisions, such as drag-along and tag-along clauses (even though the widespread view within the M&A bar is that such rights are valid), as well as the speed and the perceived lack of relevant experience of Turkish courts. Many parties believe that if Turkish law is agreed as the governing law, then there is no guarantee that a Turkish court will enforce such provisions because the Commercial Code, which governs such transactions, does not specifically mention (except certain references with respect to limited companies) or provide for the ability of parties to such agreements to contract away standard shareholder rights provided for in the law, and there is a lack of sufficient binding or persuasive jurisprudence on this question.

Nevertheless, while the parties are free to choose a foreign law and agree on arbitration, certain Turkish law provisions will always be binding on the parties and the target company, such as formalities regarding share transfers, statutory minority rights and corporate governance. Furthermore, there are some recent court decisions invalidating certain arbitration provisions in SHAs on the basis that they relate to statutory corporate governance issues among the company and the shareholders (ie, not just among the shareholders). Such decisions suggest that parties may also face difficulties in enforcing certain arbitration awards.

Accordingly, governing law and dispute resolution clauses must be drafted carefully in order for them not to run afoul of binding Turkish law provisions. In particular, in the case of SHAs, good practice may dictate that the target company be a party to the agreement whenever feasible.

Legal title

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

If the shares of a joint-stock company are issued as registered share certificates, they must be endorsed in the name of the buyer for the buyer to acquire title.

For bearer shares of joint-stock companies, physical possession alone used to be sufficient until recently to have title and exercise related shareholding rights. With a recent legislative change, ownership information relating to bearer shares must now be registered with the Central Securities Depository (CSD) of Turkey. Any transfers of such shares must also be notified to the CSD. Additionally, the board of directors of joint-stock companies must approve the share transfer, and the acquirer must be registered in the share ledger in order for the transfer to be perfected against the company.

In limited companies, a share transfer deed or SPA must be executed in the presence of a notary public, and the relevant trade registry must approve and register the share transfer for the transfer of title to be effective. The share transfer must be approved by a resolution of the general assembly of shareholders (unless the articles of association allow for transfers without such approval) and the acquirer must be registered in the share ledger.

As long as there are no encumbrances on the shares being transferred, the buyer will acquire the shares in the same manner. It is also possible to transfer encumbered shares (eg, pledged shares) with the buyer also assuming such encumbrances.

Holders of beneficial title must be registered in the share ledger of the company in the same way that holders of legal benefits are. If not recorded, the holder of beneficial title may not exercise voting rights as a shareholder against the company.

In asset transfers, certain formalities may need to be followed for some assets (eg, land) but others (eg, computers) may be transferred without such formalities. As with shares, encumbrances on assets may normally be assumed along with the underlying asset by the buyer.

While the passing of legal title to shares, assets or the business is a matter of statutory law, the SPA will contain customary warranties and indemnification provisions relating to title, encumbrances and the relevant sale.

Multiple sellers

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

In private M&A transactions, there is no requirement that a buyer buy (or offer to buy) all shares or that all shareholders agree to the sale. Having said that, in particular where there are minority shareholders, buyers generally prefer to get them aboard, too. While existing SHAs or a company's articles of association, or both, may provide for drag-along rights or other forced sale provisions, there is no guarantee that such provisions will be enforced (or enforced sufficiently swiftly) by Turkish courts if they have jurisdiction over the relevant contracts. Even if they do, the process may take too long for the potential buyer to maintain its interest in the deal.

Turkish law provides for squeeze-out rights of majority shareholders under very limited circumstances. Relevant to private mergers and acquisitions, the following types of squeeze-out rights are prescribed by law (different rules apply to public companies):

- in joint-stock companies, shareholders that are part of the same group of companies and own 90 per cent or more of shares of the joint-stock company may squeeze out the minority shareholders if the minority shareholders violate the principle of good faith, cause significant problems in the company, act recklessly or prevent the company from performing its functions; and
- in mergers of two corporate entities, where the merging entities agree to such terms, majority shareholders holding 90 per cent or more of the entity that will cease to exist post-merger may squeeze out the minority shareholders of that entity by way of the minority shareholders being paid cash proceeds in lieu of shares in the surviving entity.

Exclusion of assets or liabilities

5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

Pursuant to article 202 of the Code of Obligations, when assets constituting a commercial enterprise (including a line of business) are transferred in a transaction, the liabilities of that enterprise may not be excluded from the transfer. Specifically, all tax liabilities and encumbrances are transferred along with the enterprise. The seller remains jointly and severally liable for debts of the enterprise for two years following the transaction.

Similarly, with respect to employees, pursuant to article 6 of the Labour Law, in the case of a transfer of a business (or part of a business), all existing employment contracts will pass on to the buyer along with all rights and obligations therein. For the purposes of calculation of employment entitlements of the transferred employees based on seniority, the buyer is legally required to make the calculations based on the date on which employees started work for the seller prior to the transaction. For a period of two years following a transaction, both the seller and the buyer remain jointly responsible for liabilities to the transferred employees that accrued prior to the transaction.

Key contracts of the company may contain special change of control provisions or other provisions requiring that the counterparty be notified of, or consent to, the transaction in order for the seller to avoid being in breach of contract.

Consents

6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Except for certain limited formalities, there are no general statutory restrictions on the transfer of shares, a business or assets.; however, regulated sectors such as banking, financial services, energy and media may require approval of a share transfer by the relevant regulatory authority.

Additionally, for transactions resulting in a change of control where the parties to the transaction surpass statutory revenue thresholds, one party or both parties together must apply to the Turkish Competition Board for approval of the transaction. The triggering revenue thresholds are as follows:

- total revenues of the transaction parties in Turkey exceeding 750 million Turkish lira, and revenues of at least two of the transaction parties in Turkey each exceeding 250 million Turkish lira; or
- the asset or activity subject to an acquisition transaction, or at least one of the parties of the transaction in merger transactions having revenues in Turkey exceeding 250 million Turkish lira, and at least one other party to the transaction having a global revenue exceeding 3 billion Turkish lira.

In acquisitions of technology companies operating or conducting research and development in Turkey, or providing services to users located in Turkey, the 250 million Turkish lira thresholds in both tests above are ignored. The reason behind this recent change is to allow the Turkish Competition Board to examine potential killer acquisitions. The definition of 'technology companies' for this purpose is broad and includes companies operating in the fields digital platforms, software, gaming software, financial technologies, biotechnology, pharmacology, agrichemicals and health technologies.

There is no general restriction on foreign investment or foreign ownership of shares in Turkey. With very limited exceptions, foreign investors are treated the same as domestic investors under the law, and a company that is partially or fully owned or controlled by foreign shareholders has the same legal standing and rights as a company owned or controlled by domestic shareholders. Accordingly, a Turkish company may be fully foreign-owned, and only certain sectors such as media and aviation have restrictions on foreign investment.

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.

7 | Are any other third-party consents commonly required?

Other than the consent of shareholders required for the transfer of limited company shares (no shareholder approval is required by law for the transfer of joint-stock company shares) and any contractually required notifications or consents to be made or obtained by the seller or the company (eg, under lease contracts or credit agreements), there are no general third-party consents required by law to undertake a private M&A transaction.

While sellers and buyers remain jointly and severally liable to creditors of the enterprise for a period of two years following a transaction, the creditors' consent to a transaction is not statutorily required. Similarly, while employees are transferred with the enterprise, their consent, or any special notification to them, is also not normally required.

However, in asset transactions involving the transfer of a line of business, the transferred employees generally have the right to terminate their employment contracts owing to their unwillingness to be transferred, in which case the employees are due any unpaid employment benefits to date and any severance payments earned for which they make a claim.

Nevertheless, in the case of a merger or transfer of the company's shares, wholly or partially, the transferor or transferee is not authorised to terminate the employment contract solely because of the merger or transfer of the company, nor does the transfer usually entitle the employee to terminate the contract for just cause.

Regulatory filings

8 | Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

In deals involving joint-stock companies, there is no requirement that transaction contracts be filed, registered or notarised, and share transfers in joint-stock companies are not subject to registration with a trade registry unless the share transfer results in there being a sole shareholder in the company. In joint-stock companies, any transfer of bearer shares must be notified to the CSD of Turkey. Additionally, the board of directors of joint-stock companies must approve the share transfer, and the acquirer must be registered in the share ledger in order for the transfer to be perfected against the company.

There are also some notification requirements with the trade registry for share transfers resulting in certain shareholding thresholds being exceeded (or falling below such thresholds) by a group company holder of such shares.

In limited companies, a share transfer deed or SPA must be executed in the presence of a notary public, and the relevant trade registry must approve and register the share transfer in order for the transfer of title to be effective.

Asset sale and purchase agreements for the sale of a commercial enterprise must be filed with the relevant trade registry and announced in the Trade Registry Gazette to enter into force. In limited companies, a share transfer deed or SPA must be executed in the presence of a notary public, and the relevant trade registry must approve and register the share transfer for the transfer of title to be effective. Trade registry filings and notarisations are subject to fees.

If a capital increase is part of the transaction structure, a general assembly meeting must be held to amend the articles of association of the company. The general assembly decision and the amendment to the articles must be registered with the trade registry, approved and announced in the Trade Registry Gazette, for which certain fees apply. Any general assembly meeting where the shareholders resolve on a capital increase (or, similarly, merger or demerger) must be attended by a government observer who will attest to the due approval of such resolution.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 | In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Parties usually appoint accountants and financial advisers in addition to their external legal advisers. It is common in Turkey for small and medium-sized businesses to maintain their books in accordance with Turkish accounting standards only, of which the standards are tax code-based and differ from the International Financial Reporting Standards (IFRS) and other globally accepted accounting standards.

This presents a problem for valuation in deals where an investor prefers to perform valuation based on IFRS calculations. In such cases, the accounting team of the seller (and in some cases of the buyer) works on translating the accounting records into IFRS values that the parties can use for valuation of the transaction. Financial advisers assist with providing valuation advice and performing financial and tax due diligence. In many cases, the tax team and the financial team are separate and prepare separate diligence reports.

Buyers sometimes also engage commercial advisers or industry experts, who may conduct commercial diligence in addition to providing general or specialised advice.

The engagement of advisers usually follows international practices. In the case of M&A advisers in particular, the fee structure will depend on the value of the transaction as well as the complexity of the transaction, and normally include a periodic retainer fee plus a success fee (typically with a minimum nominal amount where the retainer is deductible from the success fee amount).

Duty of good faith

10 | Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

Yes. Article 2 of the Civil Code requires the parties to act in good faith and adhere to fair dealing principles at all times.

Furthermore, article 369 of the Commercial Code sets the level of duty of care and duty of loyalty to which company directors must adhere. Specifically, directors are required to act as 'cautious executives' within the principles of corporate governance and protect the interests of the company while performing their duties in good faith. These duties also apply when directors are negotiating contracts.

Documentation

11 | What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

Private M&A transactions, whether the deal involves the acquisition of shares or a line of business or assets, typically entail the execution of the following documents:

- a term sheet (or a simpler letter of intent) that outlines major terms to be included in the share purchase agreement (SPA) and the shareholders' agreement (SHA) (if applicable), and also contains confidentiality and exclusivity provisions;
- if no term sheet is executed, a separate confidentiality agreement or exclusivity agreement, or both, for the purposes of due diligence and negotiations;
- an SPA tailored to the nature of the deal;
- a disclosure letter in which disclosures are made by the seller qualifying the representations and warranties made in the SPA;
- an SHA, if the acquisition is partial;
- where necessary, a transition services agreement under which the seller agrees to (continue to) provide certain services for a certain period following the closing; and
- where necessary, employment agreements for key employees and sellers who are staying on as executives post-closing.

12 | Are there formalities for executing documents? Are digital signatures enforceable?

For a contract to be enforceable, it needs to be signed by duly authorised individuals. Both original wet ink signatures and secure digital signatures are enforceable except in the case of credit and other bank agreements containing surety provisions, which are generally required to be executed in wet ink.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 | What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

Most typically, the scope of due diligence will include legal, financial and tax matters. Commercial due diligence is also sometimes undertaken, in particular in more niche industries. Environmental, social and governance due diligence exercises are also becoming increasingly common in line with the increasing interest of international finance institutions and development finance institutions in the Turkish M&A market.

Legal due diligence generally covers the following:

- due incorporation of the entity;
- legal solvency of the entity;
- corporate governance;
- terms of contracts binding the entity, including leases and credit agreements;
- key suppliers and distributors where applicable;
- litigation and disputes;
- employee matters including contracts, benefits and disputes;
- intellectual and real property;
- physical assets;
- permits and licences; and
- compliance with the law including specialised areas such as competition law and data privacy.

Financial and tax due diligence aims at providing an accurate picture of the company's financial and tax statuses to assist with valuation, deal structuring and certain share purchase agreement (SPA) provisions.

Depending on the size of the target, and its sophistication and level of preparedness, the diligence process can take anywhere between several weeks to several months.

It is not very common for sellers to provide due diligence reports to prospective buyers, although comprehensive information memoranda are often available to prospective buyers if an M&A adviser is involved on the sell side.

Liability for statements

14 | Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

If a party's fraudulent act causes the other party to enter into an agreement, the agreement will normally not be binding on the party who was victim to the fraud, even if the consequence of the fraud is not material. As such, a seller is normally liable for pre-contractual misrepresentations amounting to fraud, regardless of any limitations the parties may include in the SPA.

Aside from fraud, SPA terms can normally limit a seller's liability for pre-contractual statements, although it may not always be statutorily permitted to limit the knowledge of the buyer to specific disclosures in cases where the buyer knows or should know of a defect.

Publicly available information

15 | What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Turkish companies are required to make filings with the trade registry in the sub-national jurisdiction in which they are domiciled. Each trade

registry maintains public records that include the information listed below; however, the manner in which such records are maintained and made available may differ from trade registry to trade registry, especially for older records. Accordingly, the speed and ease with which such records are obtainable may vary from jurisdiction to jurisdiction.

In addition to the trade registries, certain government agencies also maintain public records relating to private companies. The following information regarding Turkish private companies is generally publicly available and is often searched for during the buyer's preliminary due diligence:

- articles of association;
- scope of the business;
- amount of capital;
- changes in the capital since incorporation;
- former and current shareholders (always publicly available for limited companies; in joint-stock companies, the identities of the founding shareholders are publicly available, but subsequent shareholders will normally not be publicly available unless there was a triggering event that required registration with the trade registry);
- former and current board members;
- those board and general assembly resolutions that are required by law to be registered with the trade registry; and
- patents and trademarks held.

Real estate held by a private company can sometimes be found through public searches, but it is not always possible for a party not affiliated with the entity to access such information. Generally, information regarding court cases to which a private company is a party and court decisions implicating a private company are not public information in Turkey.

Impact of deemed or actual knowledge

16 | What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

A buyer's knowledge of a misrepresentation or undisclosed conditions normally precludes it from making claims against a seller regarding such under Turkish law. While many SPAs include sandbagging provisions allowing claims by the buyer regardless of knowledge, such provisions (at least in their strict forms) are of questionable enforceability under Turkish law.

PRICING, CONSIDERATION AND FINANCING

Determining pricing

17 | How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

EBITDA multiple valuation is the most common method used, although other techniques such as discounted cash flow, comparable company analysis and precedent transaction analysis are also sometimes used.

Both closing accounts and locked-boxed structures are used although many smaller deals include no such mechanisms. While many fund investors prefer to use locked boxes, closing accounts are generally more common in the wider market.

Form of consideration

18 | What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Consideration is most commonly cash. Multiple sellers are normally paid the same type and amount of consideration, although the payment of different consideration amounts or types is possible, subject to applicable good faith, fair dealing and possible tax considerations.

Payments are sometimes made in instalments, either tied to a certain payment schedule, or delivery of performance targets or milestones.

Earn-outs, deposits and escrows

19 | Are earn-outs, deposits and escrows used?

Earn-out mechanisms are common, in particular where the purchaser is a private equity fund, as are holdback provisions, especially in industrial companies where delivery of the pipeline revenues and project profitability may be key factors in the investment decision and the valuation.

Escrow arrangements are also commonly used as security for claims relating to representations and warranties.

Deposits are not very common.

Financing

20 | How are acquisitions financed? How is assurance provided that financing will be available?

Smaller deals are generally not financed, while many larger deals use financing (which generally means bank financing). In larger auction deals, the buyer may ask the potential buyers to include information on financing plans in their letters of intent or other process documents. It is also common for share purchase agreements to include a representation by the buyer that it has the requisite financial resources to undertake the acquisition.

Limitations on financing structure

21 | Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

The Commercial Code includes a prohibition on financial assistance, a concept borrowed from Council Directive 77/91/EEC regarding the formation of public limited liability companies and the maintenance and alteration of their capital, which was amended in 2006 by the current Directive 2006/68/EC; however, the Commercial Code follows the original Directive and states that a joint-stock company 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).

The 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, those 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 the use of such reserves.

Read broadly, which is 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 generally shied away from trying to employ alternative structures,

such as the merger of the operating company with the holding company in a financed transaction.

Because Turkish law follows the original Directive, the prohibition applies to all companies, including private ones. Furthermore, whereas the current Directive permits companies (whether publicly or privately owned) to provide financial assistance for the acquisition of their shares as long as certain conditions, such as, among other things, 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.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 | Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Signing and closing can occur simultaneously but usually do not, in which case the share purchase agreement (SPA) normally includes conditions precedent. Closing conditions to be satisfied by the seller typically include the following:

- change of control approvals;
- accuracy of representations and warranties;
- no material adverse effect having occurred;
- no litigation or violation of law preventing the closing;
- the target company obtaining a certificate of no bankruptcy and no winding up from the relevant trade registry;
- the target company obtaining a letter from the tax authority indicating that it has no outstanding tax debts;
- the target company obtaining a letter from the social security agency indicating that it is not delinquent in social security payments for its employees;
- a pre-closing tax opinion (rarer); and
- delivery of closing accounts.

Closing conditions are not always imposed on the buyer; when they are, they may include items such as no breach of the SPA and evidence of funds.

The Competition Board's approval will also be included as a condition precedent where the relevant thresholds are exceeded.

23 | What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

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

Pre-closing covenants

24 | Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Pre-closing covenants on the part of the seller and interim controls are common. Sellers normally agree to operate the business in the ordinary course of business between signing and closing, and commonly also agree to take or not take specifically enumerated actions relating to the operation, legal structure and finances of the business. Such matters usually relate to, among other things, major transactions, taking on of material indebtedness, major expenditures, entering into capital commitments and the dismissal of key employees. Monetary limits and materiality thresholds can be established to set the parameters for permitted and non-permitted interim actions.

The remedies for breach may include termination rights, post-closing adjustments and indemnification.

Termination rights

25 | Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Generally, parties do not have the right to terminate a transaction prior to the set long-stop date unless a condition precedent is deemed incapable of being fulfilled or it has not been fulfilled by the applicable deadline. While breaches of representations and warranties or other provisions of the SPA rarely trigger a termination right, material breaches, force majeure events or fraud claims sometimes lead parties to (try to) terminate the transaction.

26 | Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees and reverse break-up fees are not common, although many private equity funds will include provisions (including in term sheets) relating to the recovery of their due diligence expenses in cases where the sellers abandon the transaction.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 | Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

Sellers typically give customary representations, warranties and indemnities to buyers, consistent with international norms in form and substance, although certain Turkish law and market-specific provisions may also be included. For example, a common theme is whether all required government-issued permits and licences (eg, the operating licences for all retail stores of the target) are properly in place and whether there is a risk of any of them being revoked, owing to the jurisdiction's tendency for certain irregularities and complexities in compliance with, and enforcement of, the relevant regulations.

Turkish law will also normally provide the buyer with certain implied representations and warranties relating to the purchased asset.

Limitations on liability

28 | What are the customary limitations on a seller's liability under a sale and purchase agreement?

The share purchase agreement will normally include a cap on the aggregate liability of the seller, as well as de minimis amounts and baskets. The overall cap is often equal to the purchase price (or a high percentage of it), while de minimis amounts and baskets are generally negotiated, and there are no clear market standards.

The liability of the seller is also normally limited by time, usually one to two years after the closing, although claims under fundamental warranties such as title to the shares are often not time-barred or subject to thresholds, and claims under tax and social security warranties usually match the applicable statute of limitations (including any extensions).

Other limitations typically include knowledge qualifiers and materiality thresholds in the representations and warranties, the contents of the disclosure letter, and other customary limitations such as no double recovery.

Sellers will often want to qualify the representations and warranties and limit their liability by the contents of the entire data room. Where sellers have not used a professionally managed data room, as is frequently the case in smaller deals (where sellers may email documents or store them on a mass market provider such as Dropbox or Google Drive), this request will typically lead to protracted negotiations among the lawyers involved.

Transaction insurance

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Transaction insurance of this nature is available but still not common in Turkey. There have been efforts to introduce this type of insurance into the market and educate local M&A professionals about it, but these efforts are still at a very early stage.

Turkish insurance legislation, which enumerates types of policies and insurance products that may be offered by insurance companies operating in Turkey, does not specifically include representation and warranties insurance as a type of product that may be offered. As such, the prevailing interpretation within the Turkish insurance industry is that this type of insurance is not allowed to be offered by Turkish insurance companies. Currently, such insurance can normally be acquired only through foreign insurance companies acting through local brokers.

Post-closing covenants

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Non-compete and non-solicitation clauses are common post-closing covenants made by sellers. Both types of clauses must be of a reasonable geographical, sectoral and temporal scope to be upheld by Turkish courts.

The deal may also include conditions subsequent, such as the perfection of certain pledges or the assignment of receivables in connection with financing.

TAX

Transfer taxes

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

No transfer tax is applicable; however, capital gains tax is normally applicable, with certain exemptions available.

TURUNÇ

Noyan Turunç
nturunc@turunc.av.tr

Esin Çamlıbel
ecamlibel@turunc.av.tr

Kerem Turunç
kturunc@turunc.av.tr

Teşvikiye Caddesi 19/11
Teşvikiye
34365 Istanbul
Turkey
Tel: +90 212 259 4536 / 37
Fax: +90 212 259 4538
www.turunc.av.tr

Corporate and other taxes

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Tax-free mergers and tax-free demergers meeting certain conditions are exempt from value added tax (VAT). Generally, taxable mergers and asset transactions are subject to VAT at 18 per cent, and certain assets may be subject to different rates.

Asset deals transferring real estate or shares held by a company for at least two years are normally exempt from VAT. Sales of joint-stock company shares are exempt from VAT, while sales of limited company shares are exempt from VAT, provided that the acquired shares are not disposed of for a period of two years following the transaction. Sales of shares by an individual are not subject to VAT.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

In cases of the transfer of a business or part thereof, all existing employment contracts will pass onto the buyer, along with all rights and obligations thereof.

In transactions involving a transfer of a line of business, the transferred employees generally have the right to terminate their employment contracts and to be entitled to unpaid employment benefits and severance payments.

Notification and consultation of employees

34 | Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

Subject to certain rights of employees (eg, the right to terminate their employment relationship in transactions involving a transfer of a line of business) and any contractual requirements (eg, arising out of collective bargaining agreements), there is no general requirement to notify or obtain the consent of employees for private M&A transactions. That being said, it is standard practice to provide courtesy announcements and notifications to employees regarding an impending transaction that will affect their employer.

Transfer of pensions and benefits

35 | Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

Automatic continuity of employee benefits and pensions is required by Turkish law. All employee benefits, along with all contractual employee rights and obligations, automatically transfer with the employees. To the extent that private benefit plans have been obtained by the seller, the buyer must provide the same or substantially similar benefits post-transaction.

UPDATE AND TRENDS

Key developments

36 | What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

The Turkish M&A market has recently seen a surge in inbound and domestic technology deals. Funds and strategic players are both active in this space.

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Digital Business
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

ISBN 978-1-83862-550-4