Private Mergers and Acquisitions in Turkey: Overview

by Görkem Bilgin and Ugur Erkirli, *Gün + Partners*

Country Q&A | Law stated as at 01-Apr-2024 | Turkey

Q&A guide to private mergers and acquisitions law in Turkey.

The Q&A gives a high-level overview of key issues including corporate entities and acquisition methods, preliminary agreements, due diligence, acquisition agreements and main documents, warranties and indemnities, acquisition financing, signing and closing, tax, employees, pensions, regulatory approvals, and environmental issues.

Corporate Entities

1. What are the main corporate entities commonly involved in private acquisitions?

In the context of private M&As, the most popular company structures among the various types available under the Turkish Commercial Code are:

- Joint stock companies (JSCs).
- Limited liability companies (LLCs).

The corporate veil principle applies to both JSCs and LLCs.

In a JSC:

- Shareholders can freely transfer their shares to others without the approval of the general assembly of shareholders (general assembly).
- A share transfer is not subject to procedures such as notarisation or registration, unless the company has issued bearer share certificates, which must be registered with the *Central Registry Agency* (*Merkezi Kayit Kurulusu*).

Registered share certificates (or interim certificates) are transferred by endorsement and delivery (see *Question 17*). While JSCs can issue registered share certificates or bearer share certificates to represent its shares along with bonds and similar debt instruments, LLCs cannot issue share certificates.

JSCs are the only type of company that can be subject to an initial public offering (IPO) and whose shares can be traded on the stock exchange.

LLCs cannot be offered publicly and their number of shareholders cannot exceed 50.

In an LLC, share transfers must be executed in writing before a notary public and on approval of the transfer by the general assembly, must be registered before the competent Trade Registry Directorate and published in the *Trade Registry Gazette*.

Ways to Acquire a Private Company

2. How are private acquisitions commonly structured and what factors apply to the choice of structure?

M&A deals In Turkish private practice can be structured in various ways, including:

- Share subscription.
- Joint venture.
- Share purchase.
- Asset purchase.
- Transfer of commercial enterprise.

The most common method is a share sale/purchase. Share sales can be more advantageous in terms of tax and require fewer procedural steps compared to asset sales (see *Question 3*). A share sale only requires the execution of a share purchase agreement (SPA).

In an asset sale however, in addition to signing an asset sale agreement, separate transfer agreements may be needed, depending on the type of asset being transferred.

An asset sale might be preferred, depending on the nature of the negotiations, the parties' needs, and the investment.

A demerger is also an option, which can be done as:

- A full demerger, where the company is split off into components for restructuring purposes, all the assets are sold, and the company is no longer a legal entity and automatically liquidates.
- A partial demerger, where the demerging company retains equity in the new company, which purchases some assets of the demerging company.

However, this process may require a capital increase or decrease, and also requires securing creditor's rights and registration with the competent Trade Registry.

See also *Acquisition Structures Toolkit (International).*

Share Purchases and Asset Purchases

3. What are the main advantages and disadvantages of a share purchase (compared to an asset purchase)?

Transfer of Assets/Liabilities

In a share sale, all assets and liabilities of the target company are automatically transferred to the buyer.

In an asset sale, the parties can generally select which assets and liabilities transfer. Some companies may wish to choose which assets are to be transferred instead of a full-on acquisition of another company, since the transferring liabilities will be limited to those related to the transferred assets or business.

Damages arising from these labilities can be recovered by the buyer company from the seller company through recourse mechanisms under transfer agreements.

There is no special form required by the law for asset transfer transactions. However, if the transfer of certain assets is subject to specific formal requirements (such as the transfer of real property, vehicles and IP) only those requirements and/or forms are required to be satisfied.

A transfer of a commercial enterprise agreement (see *Question 2*) is subject to certain requirements, for example it must:

- Comply with certain validity requirements.
- Be in writing, registered with the Trade Registry, and announced in the Trade Registry Gazette.

A commercial enterprise's assets (including real property) are transferred on the signing and registration of the transfer agreement. However, the parties can agree to exclude certain assets or liabilities from the purchase (Article 11(3), Commercial Code).

Neither an asset transfer nor a commercial enterprise transfer affect the shareholding structure of the transferor and the transferee and "change of control" clauses are not necessary in these types of deals.

Under the Commercial Code, the transfer of a substantial part of a company's assets requires approval from the relevant entity's general assembly.

Complexity of the Transaction

Transferring shares in a share sale is more straightforward than an asset sale. Asset transfers require a series of procedural steps and approval of/notifications to be made to creditors.

However, in LLCs, SPAs must be executed before a Turkish notary public and share transfers must be registered and announced in the relevant Trade Registry Gazette (see *Question 17*). Such requirements do not apply to JSCs.

In a share transfer, all the company's assets, including licences, permits, contracts and employees, along with all the relevant liabilities are acquired without third parties' consent (except for agreements with change of control clauses, which usually require third party notification or prior consent).

In share transfers and business or commercial enterprise transfers, the transferred employees' approval is not required by law for the transfer. However, it is advisable to enter into a tri-partite protocol between the transferee, transferor, and the transferred employees to prevent any potential future claims from employees (see *Question 8 and Question 31*).

In an asset or business acquisition, the buyer must notify creditors or announce it in the Trade Registry Gazette or a national newspaper (Article 202, Code of Obligations No. 6098). The buyer must adopt a resolution of the general assembly for the announcement (which requires a simple majority) and announce it in the Trade Registry Gazette.

The seller is jointly and severally liable with the buyer for debts in relation to the transferred assets or business for two years from the notification/announcement date.

If the transfer of particular assets is subject to special conditions or forms (for example, a transfer of real estate, vehicles, or IP rights) (see *Question 9*), these must be satisfied for the relevant transfers to be valid.

Shareholder approval is required for an asset transfer, as the sale of a substantial part of the company's assets requires authorisation by the general assembly (Article 408, Commercial Code). The general assembly decision authorising the transfer requires a simple majority of the shareholders.

Tax Considerations

Depending on the details of the transaction, share sales can be more beneficial from a tax perspective. In particular, there are certain exemptions from tax on capital gains from a share sale if the conditions are met (see *Question 25 to Question 29*).

Share sale agreements are exempt from stamp tax. Asset sale agreements are subject to a stamp tax on the highest amount indicated in the agreement.

Land and building transfers are subject to title deed charges.

Merger, demerger, and share exchange transactions are tax-free under Turkish tax legislation, provided that certain conditions are fulfilled.

Auctions

4. Are sales of companies by auction common? What is the typical procedure and what regulations (if any) apply?

Sales of companies by auction are not common and there are no specific Turkish laws or regulations relating to private auctions.

Under the Enforcement and Bankruptcy Law. 2004, attached (secured) company shares can be sold through a public auction on the creditors' request. If no one buys the attached shares or 50% of the estimated value of the shares is not achieved at the first public auction, the execution office must set up a second public auction with the same conditions. If the stated conditions are not met at the second public auction, this will result in foreclosure of the request of sale. Further details are set out under the Enforcement and Bankruptcy Law.

For an international overview of the auction sale process for a share or asset sale, see *Practice Note, Auction Sales: Overview (International)*.

Foreign Ownership Restrictions

5. Are there any restrictions on acquisitions by foreign buyers?

Turkey's open foreign investment policy ensures equitable treatment for both local and foreign investors. Turkey actively engages in signing bilateral and multilateral agreements, creating a favourable environment for economic collaboration by outlining standards of treatment for investors and their investments.

The main foreign investment legislation in Turkey is the Foreign Direct Investment Law, which was recently amended. In principle, there are no foreign ownership restrictions and foreign investors, regardless of their identity or citizenship, can invest in Turkey without any approval or permission. Regardless of their ownership structure or the percentage of foreign investor engagement, legal entities established with foreign capital are treated as domestic companies under Turkish Law.

Foreign investors are only required to notify the General Directorate for Incentives Implementation and Foreign Capital under the Ministry of Industry and Technology of the investment type, capital investment amount, and shareholding structure (Foreign Direct Investment Law). They must also inform the Ministry each year about their investment activities relating to any capital increases or share transfers and any payments relating to them. These notifications are done through an electronic platform, the Electronic Incentive Application and Foreign Investment System (E-TUYS).

However, foreign investments in some industries such as civil aviation, insurance, banking, radio and TV broadcasting, financial advisory, and mining are subject to certain restrictions. Restrictions mainly involve establishing a local investment vehicle in Turkey that is controlled by Turkish nationals. For example, the:

- *Banking Regulation and Supervision Agency (BRSA)* regulates the banking industry. Establishing a new bank or financial institution in Turkey, opening a branch of a foreign bank, or appointing its management are subject to BRSA approval.
- *Energy Market Regulation Authority (EMRA)* regulates companies in the energy industry. EMRA grants the necessary licences relating to energy activity. Asset transfer and share transfers which result in shareholding ratios exceeding certain thresholds indicated in the relevant legislation require EMRA approval.

- *Ministry of Finance and Treasury* regulates insurance companies. Share transfers which result in shareholding ratios exceeding certain thresholds indicated in the relevant legislation require the Ministry's approval.

Other laws apply to the control of foreign investments (including transactions) such as the Competition Law, Civil Aviation Law, Mining Law, Law on the Protection of the Value of Turkish Currency, and the Land Registry Law (see *Question 16*).

Preliminary Agreements

6. What preliminary agreements are commonly made between the buyer and the seller before negotiating or executing the primary acquisition documents?

Letters of Intent

A letter of intent (LoI) (otherwise referred to as a term sheet or memorandum of understanding) is not specifically regulated by Turkish legislation. An LoI outlines in writing the contract that the parties plan to formalise, with a non-binding statement of intention, and provides the basis for a full draft agreement.

LoIs can be used at any time. Negotiations do not have to be finished before a Lol is drawn up. There is no required layout or structure, and a LoI can be as formal or informal as the parties decide.

Typically, a LoI includes:

- The names and addresses of the parties.
- Background to why the parties are negotiating.
- Details of the proposed agreement.
- Obligations of the parties.
- Target date for completion and note of who will draft the LoI into a full agreement.
- Pre-conditions.

To be binding, the parties must show their intention to be bound. An LoI offered by a party is not generally legally binding and is not a substitute for a legal contract unless it is accepted by the other party.

In practice, to emphasise its non-binding nature, an LoI usually includes the phrase "Subject to contract and without prejudice."

"Subject to contract" indicates that none of the content in the LOI is contractually binding unless it is placed in another agreement, while "Without prejudice" indicates that the content is not necessarily the parties' final on the matter.

In any case, most LOIs in practice have binding effect clauses in which the parties specify which parts of the LOS are binding and which parts are not.

Exclusivity Agreements

Separate exclusivity agreements are not common in Turkey. Instead, parties tend to include exclusivity provisions in the LoI/term sheet/memorandum of understanding, which usually restrict a party from negotiating or soliciting offers from other parties.

There is no requirement in Turkish law for the enforceability of exclusivity agreements. For evidential purposes, in practice, exclusivity agreements are usually entered into in writing.

An exclusivity agreement imposes some obligations arising from good faith on the parties. If a party negotiates with a third person in breach of its exclusivity obligation, that party must compensate any damage incurred by the other party. It is common to set out a penalty for infringement of the exclusivity agreement.

Non-Disclosure Agreements

Turkish law does not explicitly regulate non-disclosure agreements. They can be defined as contracts entered into by two or more parties, in which some or all of them agree that certain information passing from one party to the other will remain confidential.

There is no requirement in Turkish law for the enforceability of non-disclosure agreements. For evidential purposes, in practice, parties tend to enter into written non-disclosure agreements.

If the confidential information is revealed or disclosed to another individual or entity, the injured party can claim breach of contract and seek injunctive relief and monetary damages. Along with compensation for losses, it is common to set out a penalty for infringement of confidentiality.

See also *Preliminary Agreements (Private Company Acquisitions) Toolkit (International)*.

Due Diligence

7. How is due diligence typically carried out and what main areas does it usually cover?

The due diligence stage is one the most important stages in an M&A transaction and its primary purpose is to obtain as much reliable information as possible about the target company and to confirm the seller's claims.

M&A transactions involve several types of due diligence, such as financial, tax, operational, environmental, and legal.

In legal due diligence, the potential buyer's legal adviser usually sends a checklist to the seller, which lists the documents and information requested from the seller. The seller sets up a virtual data room and uploads the documents and information there.

The potential buyer's legal adviser asks questions about those documents and information, if any, and prepares a written due diligence report (usually a red flag report covering the most important and risky findings, and the legal adviser's recommendations) after examining all the documents and information provided by the seller.

The potential buyer examines the due diligence report. If the potential buyer decides to proceed with the transaction, the SPA is prepared (usually by the buyer's legal advisers) in light of the due diligence findings.

A legal due diligence typically includes examination and review of the following topics:

- Organisation, structure, and corporate records.
- Directors and officers, and affiliate transactions.
- Key contracts.
- Inter-company accounts and agreements.
- Regulatory and data privacy.
- Litigation and contingent liability.
- Insurance.
- Intellectual property.
- Environmental.
- Labour and employment.
- Real estate.

For a toolkit of global resources providing practical guidance on due diligence issues in corporate M&A transactions and joint ventures, see *Due Diligence in M&A Transactions and Joint Ventures Toolkit (International)*.

Consents and Approvals

8. What are the main consents and approvals typically required for an acquisition?

Corporate Approvals

JSCs. Under the Commercial Code, there are no statutory restrictions on a transfer of shares in JSCs. However, the articles of association (articles) may impose such restrictions, for example limiting the transferability of the company's registered shares and requiring shareholder and/or board approval for the transfer.

In practice, a board decision approving the share transfer is usually obtained for evidential purposes.

The board can refuse to register a transfer of registered shares in the JSC's share ledger if the conditions in Articles 493(1), 493(3), or 493(4) of the Commercial Code are met (for example, regarding the JSC's shareholding structure, scope of activity, or economic independence).

LLCs. In an LLC, the board of managers' approval (or, if there is only one manager and no board, the manager's approval) is not required for share transfers. A written share transfer agreement must be signed before a Turkish notary public and the general assembly must approve the share transfer (see below, *Shareholder Approval*).

Shareholder Approval

In JSCs and LLCs, the authors' commonly see share transfer restrictions (for example, lock-up periods, call option, drag-along and tag-along rights) where foreign investors only acquire some of the shares, to prevent the remaining Turkish shareholders from freely transferring their shares to third parties.

In an LLC, a share transfer must be approved by a resolution of the shareholders' general assembly, which must be approved by shareholders holding more than 50% of the share capital, unless a higher majority is required by the articles.

The articles can also prohibit share transfers. A right to refuse or a prohibition of share transfers can also be agreed by the shareholders in the shareholders' agreement, which binds all the shareholders.

Shareholder approval is required for an asset transfer, as the sale of a substantial part of the company's assets requires authorisation by the general assembly under the Commercial Code (see *Question 3*, *Complexity of the Transaction*).

Contractual Consents

Creditors' consent is not required but an asset sale must be announced in the Trade Registry Gazette or notified to creditors (see *Question 3*).

However, if the transferred agreements require approval of the counterparties to be assigned, such approval must be obtained before proceeding with the asset transfer.

Most agreements have provisions on transfer and assignment. It is common for parties to agree neither can assign the agreement or any receivables arising from it without the other party's express written consent, except for assignments to the parties' affiliates.

However, the Code of Obligations states that a transfer of an agreement should be done either:

- Through a tri-partite protocol among the transferee, transferor, and the counterparty who will remain a party to the agreement.
- By obtaining the prior approval of the counterparty who will remain a party to the agreement, or that party should consent to the transfer afterwards.

Also, under the Code of Obligations, the agreement should be in a form which can be transferred. Therefore, it is advisable to obtain the counterparties' approval before the assignment of each agreement, even if the transferred agreement does not require this.

Regulatory Approval

In general, mergers and acquisitions are subject to the Commercial Code and related Turkish legislation. Some sectors are subject to specific rules, especially in banking, energy, insurance, telecoms, and similar sectors. Permission may be required from authorities such as the Banking Regulation and Supervision Agency, the Energy Market Regulatory Authority, the Competition Authority (see *Question 33*), the Capital Markets Board or the General Directorate of Civil Aviation.

Main Documents

9. What are the main documents in an acquisition and who generally prepares the first draft?

In Turkish market practice, the buyer generally prepares the first drafts in an acquisition transaction.

The transaction documents such as SPAs and shareholders' agreements are generally modelled on US and UK precedents, especially in deals involving non-Turkish parties, while arbitration is usually the preferred dispute resolution method.

Share sales are the most common structure and the main document is the SPA. A SPA aims to protect the interest of all parties to a transaction, and usually includes the following types of clauses:

- Warranties.
- Representations.
- Indemnity.
- Limitation of liability.
- Penal clause.
- Earn-out. deferred payment and holdout mechanisms and escrow arrangements.

Where the buyer does not buy all the shares in a company, a shareholders' agreement is usually signed along with the SPA to regulate the relationship among the shareholders.

Sometimes, instead of executing a separate shareholders' agreement, the SPA may include provisions usually covered by a shareholders' agreement.

Given the requirement to register and announce the articles of companies (see *Question 3*), the shareholders' agreement allows the shareholders to obtain flexibility and confidentiality that they otherwise cannot obtain under the articles.

Among the most critical provisions of a shareholders' agreement are those related to the governance of the company. A shareholders' agreement regulates how the board of directors will be elected, the rights of each shareholder in the election of such, and the functioning of the board of directors and the general assembly. However, the shareholders' agreement is only binding between its parties and it does not create any rights or obligations for third parties or the company (as the company is a third party in terms of the legal consequences of the shareholders' agreement).

In addition, employment agreements, consultancy agreements, disclosure letters, and consent letters (if the agreements signed by the target company require counterparty's consent to a change of control) are common in share transfers.

If the target is an LLC, a summarised version of the SPA is usually prepared, to be notarised, registered, and announced in the Trade Registry Gazette.

In an asset sale, an asset sale agreement is prepared. Closing an asset sale transaction is usually more complex since the assets must be transferred individually. Separate procedural steps and additional transfer agreements may be needed based on the asset being transferred. For example:

- A transfer agreement for vehicles must be signed before a notary public.
- A transfer agreement for immovable property must be signed before the competent title deed registry.
- A trade mark transfer agreement must be signed before a notary public, and the agreement must be registered with the *Turkish Patent and Trademark Office*.

See also *Share Acquisition Documents Toolkit (International)*.

Acquisition Agreements

10. What are the main substantive clauses in an acquisition agreement?

The main clauses in an SPA are:

- Parties.
- Introduction.
- Definitions.
- Interpretation.
- Conditions precedent.
- Sale of the shares.
- Sale price, consideration, and payments.
- Representations, warranties and indemnities of the seller and the buyer.
- Closing clauses.
- Indemnification clauses for breach of representations.

- Limitation of liability.
- Confidentiality and non-solicitation/non-compete undertakings by the seller, if applicable.
- Standard contractual clauses relating to non-assignment, waiver, costs, notices, and so on.
- Choice of law and dispute resolution/arbitration.
- Exhibits, schedules, and disclosures.

Provisions in an asset purchase agreement are similar. In addition, the following may be included:

- Provisions in relation to third party consents.
- Identification of the assets and provisions for their transfer.

Warranties and Indemnities

11. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Warranties and indemnities (W&I) are typically included in an SPA and an asset transfer agreement.

Warranties are aimed at assuring the buyer that the seller provides accurate and complete information.

W&I offer the buyer and seller a way to allocate the risk and generally provide that if the seller breaches any of the representations and warranties (R&W), the buyer has a right to seek indemnification.

Indemnifications enable the buyer to be able to seek remedies for any losses brought on by a breach of the R&W.

W&I in a SPA typically relate to:

- The seller being the full legal and beneficial owner of the shares/assets.
- Particulars of the company (for example, the share capital and group structure).
- Assets or property, such as unencumbered title, condition, and the company's current business.
- The seller's authority to enter into the transactions.
- Tax, accounts, and financial records.
- Litigation.

- Intellectual property and IT systems.
- Employees.
- Agreements, including suppliers and customers.
- Compliance with applicable laws, data privacy legislation, and insolvency.

In an asset sale agreement, more detailed warranties relating to the assets being transferred may be included in the agreement.

12. What are the main limitations on warranties?

Limitations on Warranties

R&W clauses usually include a materiality threshold establishing the nature and extent necessary for a breach to trigger a remedy. In practice:

- The parties can agree a monetary cap on liability, depending on the negotiations between them. The monetary cap is usually expressed as a percentage of the purchase price and generally determined as the aggregate amount of the sale price payable by the buyer.
- A time limit may be set on warranties after which the seller is no longer responsible for any breaches. See also *Question 13*, *Time Limits for Claims Under Warranties*.

There are usually no de minimis levels before claims can be made.

Qualifying Warranties by Disclosure

Disclosure letters usually set out exclusions for certain types of information or events, where the parties limit their liabilities in relation to disclosures included/attached to an acquisition agreement. The agreement may state that if a certain matter is disclosed to the buyer and the buyer is aware of such disclosure during the transfer of shares or assets, it will not be able to claim a remedy in relation to the warranties to the extent of that disclosure..

13. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

The parties usually agree that the seller will indemnify/compensate the buyer for damage or loss the buyer incurs due to the seller breaching the warranties.

Time Limits for Claims Under Warranties

Tax warranties are generally limited by the statute of limitations, which is five years.

Claims under other warranties are usually limited to one to two years. Depending on the findings of the due diligence, longer periods can be determined.

Signing and Closing

Conditions Precedent

14. What common conditions precedent are typically included in a private acquisition agreement?

Conditions precedent set out the specific requirements that must be satisfied for the completion of the transaction such as, regulatory approvals, shareholder/board approvals, third party consents and so on.

Conditions precedent in a SPA commonly include:

- No material adverse change or material adverse deterioration in the position or prospects of the company.
- The warranties are true and accurate and not misleading at closing.
- Clearance from the Competition Authority or other regulatory and governmental consents, if necessary.
- A document evidencing that necessary consents have been obtained or necessary notifications made between signing and closing (for example, in relation to target contracts that have change of control clauses).
- Performance of actions between signing and closing (for example, obtaining a certificate to open and operate business premises, renewal of expired agreements, and provision or discharge of guarantees).
- A disclosure letter with matters that are exceptions to the warranties, if any.

Main Steps at Signing and Closing

15. What are the main steps at signing and closing in a private share sale and asset sale? What main documents are commonly produced and executed?

Signing

The primary document executed on signing is the SPA or asset purchase agreement and its annexes (including the closing documents in agreed form), agreeing the terms and conditions of the transaction. The buyer and the seller usually sign an SPA or asset agreement, setting out the terms of the deal and the rights and obligations accompanying the ownership transfer.

Signing itself does not necessarily result in the actual transfer of ownership, as there might be certain conditions to be met. Closing conditions are agreed in the SPA and must be met before the ownership rights are transferred from the seller to the buyer.

A material adverse change clause may be included to provide for a delay between exchange and closing, entitling the buyer to rescind the agreement in the event of significant adverse effects on business operations (for example, a drop in sales or the loss of a key customer).

The seller may insist on a downpayment at signing. In that case, if the buyer refuses to complete the transaction (that is, fails to pay the sale price), the seller is entitled to rescind the agreement and retain the downpayment as a penalty.

Closing

Closing refers to the completion of a transaction and the transfer of ownership. It is the date from which the buyer has actual control over the assets or the business. Once a deal is signed, the parties must undertake all actions required to consummate the deal.

Conditions precedent are defined by both parties before signing (see *Question 14*) and may rely on country-specific regulations. In many cases, obtaining antitrust clearance is the most relevant condition. Other non-legally required conditions are at the parties' discretion and largely depend on their negotiation power.

Further, the parties agree on a closing date, in the sale contract or shortly after signing when the date of meeting all conditions is foreseeable. The purchase price only becomes due when all requirements are satisfied.

In a share transfer, the following are usually executed on closing:

- Letter stating that the R&W are true, accurate, complete, and not misleading, on or as of the closing date.
- Disclosure letter, if necessary.
- Letters from the tax authorities and the social security authorities stating that the company has no outstanding debt to these authorities.
- If the parties are represented by other persons, powers of attorney (POA).
- Resignation letters of current board members and acceptance letters and specimen signatures for new board members.
- General assembly meeting minute regarding resignations and appointments of board members or the target's managers and amendment of the articles, if necessary.

- Any written waivers or consents obtained from third parties or government authorities, if required.
- Company resolution to approve and register the share transfer in the share ledger, in the buyer's name.
- Registration of the shares in the company's share ledger in the buyer's name.
- Transfer endorsements on the share certificates and delivery of them.

In an asset sale, separate procedural steps and additional transfer agreements may be needed, based on the asset being transferred (see *Question 9*).

For an overview of the mechanics of signing and closing and key provisions of opinion letters in cross-border acquisitions, see *Signing, Closing, and Opinions Toolkit (International)*.

Execution of Documents

16. How are documents executed by companies in your jurisdiction? Are there specific formalities to execute certain types of documents?

A SPA to transfer LLC shares must be signed before a Turkish notary public, registered by the competent Trade Registry, and announced in the Trade Registry Gazette (see *Question 17*).

There are no additional legal formalities for the signature of share or asset purchase agreements by foreign companies.

The parties' signatories usually grant a PoA to their legal counsel to sign the agreement on behalf of the relevant party and to handle the closing transactions. If a PoA is issued in Turkey, the person granting the PoA should attend a notary public to issue the document. If a PoA is issued abroad, it should be notarised and apostilled in the country where the person signing the PoA is located.

Certain documents and transactions may require different procedures. For example, to buy real estate in Turkey, the seller and buyer must obtain prior approval for the sale from the local Land Registry Office where the real estate is registered. This procedure applies to both foreign and Turkish buyers/sellers.

When applying for approval, the seller and buyer must supply various documents and pay certain fees. The buyer and the seller (or their proxies) must also attend the relevant Land Registry Office to complete the sale. If either party authorises a proxy to act on their behalf in the sale, the proxy must be issued by a notary public in the form required by law.

Transferring Title to Shares

17. What formalities are required to transfer title to shares in a private company?

JSCs

In a JSC, a share transfer is usually made through an SPA between the seller and buyer and by recording the transfer in the company's share ledger.

If the shares are issued as registered share certificates, the certificates must be endorsed in the buyer's name and delivered to the buyer.

If the shares are issued as bearer share certificates, title passes with possession of the certificates and registration of the transfer with the Central Registry Agency.

A transfer of shares in a JSC does not require notarisation or registration with the relevant Trade Registry. However, if as a result of a share transfer the JSC becomes a sole shareholder company, registration is required with the relevant Trade Registry.

Although not required by law, buyers also tend to request a resolution from the target's board of directors approving the share transfer.

LLCs

In an LLC, a share transfer requires both:

- An SPA, which must be signed before a notary public.
- A general assembly resolution approving the share transfer. Affirmative votes of shareholders holding more than 50% of the share capital are required to pass the resolution, unless a higher majority is required by the articles.

The shareholders' resolution approving the share transfer must be registered with the competent Trade Registry, along with the other relevant share transfer documents (for example, a copy of the SPA) and announced in the Trade Registry Gazette.

The transfer must also be registered in the LLC's share ledger.

The effective date of the transfer is the approval of the transfer by the shareholders.

There is no transfer tax on share transfer agreements in JSCs and LLCs.

Seller's Title and Liability

18. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

In a SPA, the seller generally warrants that it will sell the full legal and beneficial ownership of the shares free from encumbrances, and with all the rights attaching to the shares (including rights to unpaid or undeclared dividends and distributions).

The seller also usually undertakes to waive (and procure waiver by any other person of) all pre-emption rights over the shares.

19. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements, or similar matters?

Seller

Sellers are generally liable for pre-contractual misrepresentation, misleading statements, or similar matters if the agreement is made by deceiving the buyer and/or committing a tortious act.

Advisers

Advisers cannot normally be liable under the share transfer agreement, but they can be liable to the buyer due to a tortious act or material fault.

Governing Law and Arbitration

20. Can a share purchase agreement provide for a foreign governing law? Is an arbitration provision usually included in private M&A documents?

Choice of Law

In principle, Turkish law allows agreements with a foreign element (for example, a foreign party) to include a choice of foreign law. There is no general requirement for the acquisition of shares or assets in a company or a business to be governed by Turkish law. Parties can agree that a law of a foreign jurisdiction will govern an acquisition deal or part of it and for disputes relating to an acquisition to be resolved through arbitration.

The authors have recently seen an growing preference for Turkish law in SPAs where the target company is in Turkey. However, this gives rise to concerns about the validity of exit provisions such as drag-along and tag-along clauses, and the speed and perceived lack of relevant experience of Turkish courts. Therefore, even if the governing law is chosen as Turkish law, parties tend to choose arbitration as the dispute resolution method instead of local courts.

While the parties are free to choose a foreign law and agree on arbitration, certain Turkish law provisions always bind the parties and the target company, for example, formalities for share transfers, statutory minority rights, and corporate governance.

- Under the International Private and Civil Procedure Law 5718, directly applicable rules of Turkish law will always apply in relation to:
- Public order and public interest.
- The social, political, or economic structure of Turkey, for example competition law, IP law and employment law.

Arbitration

Choosing arbitration as the dispute resolution method is common in private M&A documents, due to concerns about the validity of exit-provisions and the speed and experience of Turkish courts (*see above*, *Choice of Law*).

The parties can include an arbitration clause in the main contract or sign a separate arbitration agreement.

The main arbitration institution in Turkey can be considered the *Istanbul Arbitration Centre (ISTAC)*, an independent and impartial institution providing efficient dispute resolution services for both international and domestic parties. The ISTAC Arbitration and Mediation Rules, prepared by ISTAC with regard to modern institutional rules, entered into force in 2015.

Foreign judgments (including arbitral awards) in civil law matters are enforceable in Turkey as long as they are final under the laws of the foreign country.

When examining an enforcement request, Turkish courts can only determine whether the arbitral award and/or arbitral proceedings meets the enforcement conditions stipulated under the Turkish Law 5718, which is the main arbitration legislation in Turkey, or the *New York Convention on the Recognition and Enforcement of Arbitral Awards 1958* (New York Convention). This limited examination of the courts is also known as prohibition of the *revision au fond*.

Turkey is a party to the New York Convention.

The following substantive requirements must be fulfilled for an arbitration agreement/provision to be valid:

- The parties must have the legal capacity to conclude arbitration agreements.
- The arbitration agreement must be valid under Turkish law (for example, no fundamental error, deception, or coercion).
- The subject matter must be arbitrable.
- Disputes referred to arbitration must arise out of a specific dispute or relationship.

In terms of formal requirements, an arbitration agreement must be in writing. An arbitration agreement is deemed to exist where:

- The agreement to arbitrate is recorded with a document signed by the parties, a letter, fax, telegram, or other means of telecommunication exchanged between the parties, or electronic means.
- The existence of an arbitration agreement has been claimed in a filed court petition, and the counterparty has not objected.
- A document containing an arbitration agreement is referred to, so it is an inseparable part of the main agreement.

For further information, see *Country Q&A, Arbitration Procedures and Practice in Turkey: Overview*.

Consideration and Acquisition Financing

Forms of Consideration

21. What forms of consideration are commonly offered in a share sale?

Forms of Consideration

In a share sale, the most common type of consideration is cash. Non-cash consideration (for example, other securities and loan notes) can also be used.

Factors in Choice of Consideration

Factors such as liquidity, retaining a continuing interest in the target business or assets, and tax are factors in the choice of consideration.

Buyers can pay the price in full on closing or pay in instalments on the realisation of certain milestones or financial goals.

Buyers usually prefer paying in instalments and may use earn-out mechanisms when it is important to keep the seller(s) in the company after closing, to ensure a smooth transaction and the company's continuous growth.

See also *Consideration and Acquisition Finance Toolkit (International)*.

Price Adjustments and Deferred Consideration

22. How is the price typically assessed and agreed? Is the price commonly adjusted?

Price adjustment mechanisms are commonly used in M&A deals to determine the price and payment conditions. EBITDA multiple valuation is the most commonly used method, although other techniques such as discounted cashflow, comparable company analysis, and precedent transaction analysis are sometimes used.

Both closing accounts and locked-boxed structures are used, although many smaller deals do not include such mechanisms. While many fund investors prefer to use locked boxes, closing accounts are generally more common in the wider market.

For an overview of certain key features of earn-outs, locked box pricing mechanisms, and purchase price retention arrangements to be considered in a cross-border private company acquisition, see *Earn-Out, Locked Box, and Retention Toolkit (International)*.

23. Do buyers typically pay the price in full on closing, or is deferred consideration common?

In M&A transactions, earn-out mechanisms are common, particularly if the buyer is a private equity fund. Holdback provisions are also preferred, especially in industrial companies where delivery of pipeline revenues and project profitability may be important in the investment decision and valuation.

Deposits are not very common. However, escrow arrangements are commonly used as security for claims relating to R&W.

Financial Assistance

24. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

All transactions relating to granting an advance, loan, or security entered into by a company with a third person wishing to purchase that company's shares are invalid (Article 380, Commercial Code).

Further, a company cannot acquire or give assistance to a potential buyer for transactions that would result in the company acquiring more than 10% of its shares.

Exemptions

The above restrictions do not apply if the transaction either:

- Is a regulated transaction conducted by credit or finance institutions.
- Enables the employees of the company or its subsidiaries to purchase the company's shares, through the company granting an advance, loan, or security to the employees.

However, these exemptions are not available if they reduce or adversely affect the company's capital reserves, as defined under Articles 519 and 520 of the Commercial Code.

Additionally, a company can acquire its own shares regardless of the restrictions in Article 379 and 380 of the Commercial Code where:

- The capital is decreased in accordance with Articles 473 to 475 of the Commercial Code.
- The acquisition is realised due to the principle of universal succession.
- The acquisition is realised due to a statutory purchase obligation.
- The acquisition aims to collect the company's receivables through compulsory enforcement, provided that all the relevant shares are fully paid.
- The company is active in the field of securities and capital markets.
- The company acquires its own shares free of charge.

(Article 382, Commercial Code.)

Tax

Transfer Tax

25. What transfer taxes are payable on a share sale and an asset sale?

Share Sale

There are certain tax implications such as corporate income tax, value added tax (VAT) and stamp duty and some tax exemptions in an M&A transaction taking place in Turkey.

Share sales are exempt from stamp tax under the Stamp Tax Law 488.

Capital gains derived from the sale of company shares held by companies resident in Turkey are subject to corporate income tax.

If the Turkish-resident company has held the shares (JSC or LLC) for more than two years, 75% of the capital gain is exempt from tax and the remaining 25% is subject to corporate income tax in the presence of the following conditions:

- The sale price must be collected before the end of the second calendar year following the year the transaction is completed.
- The part of the capital gain benefitting from the tax exemption must be kept in a special fund account for five years following the year the transaction is completed. Such amounts cannot be transferred to another account, distributed or withdrawn from the company other than being added to the company capital.

(Corporate Tax Law 5520.)

If the seller's Turkish resident company held the shares for less than two years, the capital gains derived from the sale of share will be subject to corporate income tax.

If the seller company is not resident in Turkey, it is not possible to benefit from the corporate tax income. However a non-resident company will benefit from the provisions of the international double taxation avoidance agreements in most cases, and therefore the capital gain might not be taxed in Turkey depending on the particular treaty.

Asset Sale

Under Stamp Tax Law, stamp tax must be paid on asset sale agreements that include a monetary amount.

Land and building transfers are subject to title deed charges.

A capital gain on a sale of assets is subject to corporate income tax. 75% of the capital gains from the sale of any real estate assets that have been held for at least two years may be exempt from corporate income tax subject to certain conditions:

- The part of the capital gain benefiting from the tax exemption must be kept in a special fund account for five years following the year in which the transaction is completed.
- The sale price must be collected before the end of the second calendar year following the year in which the transaction is completed.

(Corporate Tax Law 5520.)

A sale of immovable assets (for example, a factory building and land) can be exempt from VAT, if the transferred assets are held for more than two years.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate transfer tax liability?

Share Sale

Share sales are exempt from stamp tax.

Asset Sale

There are no stamp tax exemptions in an asset transfer.

Corporate Taxes

27. What corporate taxes are payable on a share sale and an asset sale?

Share Sale

Turkish-resident company seller. If the Turkish-resident company (JSC or LLC) has held the shares for more than two years, 75% of the capital gain is exempt from tax and the remaining 25% is subject to corporate income tax (Corporate Tax Law 5520).

For a seller to benefit from this exemption:

- The sale price must be collected before the end of the second year in which the sale transaction is completed.
- The exempt amount cannot be distributed for five years from the sale date.

If the holding period is less than two years, the capital gain is subject to corporate income tax.

Seller is an individual. In a JSC, if the seller has held share certificates issued by the JSC for more than two years, there is no tax on the capital gain. Otherwise, the capital gain is subject to tax as per the tariff in the Income Tax Code.

In an LLC, the capital gain is subject to tax as per the tariff in the Income Tax Code (an LLC does not issue share certificates).

Seller company not resident in Turkey. If the buyer is also not resident in Turkey, there is no tax in Turkey. Taxation is in the country where the seller is resident. If there is a double tax treaty between Turkey and the country where the seller is resident, the treaty applies.

Asset Sale

A capital gain on a sale of assets is subject to corporate income tax.

According to the Corporate Tax Law 5520, 75% of the gains from the sale of any real estate assets that have been held for at least two years may be exempt from corporate income tax subject to certain conditions.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate corporate tax liability?

Share Sale

See *Question 27*.

Merger, demerger, and share exchange transactions are tax-free under Turkish tax legislation, provided that the conditions in the legislation are met.

Asset Sale

See *Question 27*.

Other Taxes

29. Are other taxes potentially payable on a share sale and an asset sale?

VAT on a Share Sale

Under the Value Added Tax Law 3065, a sale of shares (except to individuals) in Turkey is subject to VAT.

A full VAT exemption applies if the shares have been held for more than two years at the time of the sale (JSCs and LLCs) or share certificates have been issued before the share sale (JSCs only).

There is also an opinion that if the transfer is between two non-residents and does not take place in Turkey, the transfer should not be subject to VAT in Turkey (even though there is no specific exemption).

If payable, VAT is paid by the buyer to the seller, and is input VAT for the buyer and carried forward until it is offset against output VAT. The seller pays the VAT to the tax authority with its monthly VAT return.

VAT on an Asset Sale

Asset transfers are mainly subject to VAT (including goodwill).

The previous VAT exemption for a sale of immovable assets (for example, a factory building and land) that have been held for more than two years was revoked by an amendment effective from 15 July 2023. However, a VAT exemption will continue to apply on transfers by sales of assets that have been held since before that date.

For an overview of key tax issues relating to the structure and tax costs after closing of a cross-border acquisition, see *Tax (Private Company Acquisitions) Toolkit (International)*.

Employees

Information and Consultation

30. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset Sale

Parties are not obliged to inform or consult employees or their representatives or obtain employee consent to an asset sale. However, in a spin-off transaction, employees transferred to the buyer can object to the transfer (Article 178, Commercial Code). In this case, the employment agreement with the employees objecting to the spin-off will terminate at the end of the period determined under the Labour Law. 4857.

Share Sale

Employment contracts are made between the employees and the target company employer. A share sale does not change the employer and employment contracts remain in force.

See also *Employees (Private Company Acquisitions) Toolkit (International)*.

Transfer in a Business Sale and Other Protections

31. Are employees automatically transferred to the buyer in a business sale? What other protection do employees have against dismissal in the context of a share sale or asset sale?

Transfer on a Business Sale

In a transfer of a commercial enterprise (see *Question 3*) or one of its divisions, the employment contracts automatically transfer to the transferee employer, with all rights and obligations of the transferring employees (Article 6, Labour Law 4857). The transferor and transferee are jointly and severally liable to the employees for all rights and claims of the employees as of the date of the transfer. This liability of the transferor is limited to two years from the date of the transfer.

When employment contracts are transferred to a new employer, the transferor employer and the transferee employer cannot terminate the employment contracts of the transferring employees, that is, the transfer is not a just cause for termination of the employment contracts. In the event of such termination, the employees can claim notice and severance payments.

Other Protections

A share sale does not change the employer and employment contracts remain in force. The employer and the employees cannot terminate the employment contract due to the share sale. Any unfair dismissals are subject to general protection under the Labour Law, for example, termination must be for just cause and is subject to notice and severance payments.

For an overview of key employment law issues to consider in any acquisition between two parties in a cross-border context, *see Employees (Private Company Acquisitions) Toolkit (International)*.

Pensions

32. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private Pension Schemes

Most employees participate in government pension schemes, although most global companies operating in Turkey also offer private pension schemes to their employees.

Employees under the age of 45 are automatically enrolled in a private pension plan, with a pension agreement between the employer and a pension company under the Private Pension Savings and Investment System Act.

The employee's contribution to the plan is 3% of their average earnings, in addition to social security premiums, and the employer must pay this amount into the plan on the day following payment of the employee's salary (at the latest). An employee can request a higher percentage contribution to the plan from their employer.

Pensions on a Business Transfer

In a business transfer (see *Question 31*), private pension agreements automatically transfer to the transferee, with all rights and liabilities together with the employment agreements.

Competition/Anti-Trust Issues

33. Do private acquisitions have to be notified to a competition law regulator in certain circumstances?

Notification and Regulatory Authorities

If a transaction exceeds the thresholds, notification must be made to the Turkish *Competition Authority* (TCA) for review and clearance of the transaction. The transaction is not valid until the TCA gives a clearance decision.

Obtaining this authorisation is generally regulated as a closing condition in the SPA. Regardless of this, an M&A transaction without TCA clearance will be in any case invalid. Additionally, administrative fines may also be imposed.

The TCA Board's authorisation must be obtained if the:

- Total turnovers of the parties in Turkey exceed TRY750 million, and turnovers of at least two of the parties in Turkey each exceed TRY250 million.
- Turnover of the asset or activity subject to an acquisition or of at least one of the parties to a merger in Turkey exceeds TRY250 million and the global turnover of at least of the other transaction parties exceed TRY3 billion.

(Article 7, TCA Communiqué Concerning the Mergers and Acquisitions Requiring Authorization from the Competition Board numbered 2010/4 (Clearance Communiqué).)

A new supervision model was introduced for M&A transactions involving technology businesses by recent amendments to the Clearance Communiqué by Communiqué No. 2022/2. Technology enterprises are defined as "enterprises or related assets operating in the fields of digital platforms, software and game software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies."

(Article 7(2), Communiqué No. 2022/2.)

With this new model, an additional notification obligation has been introduced in respect of M&A transactions involving technology enterprises. In such transactions, a notification must be made to the TCA for review regardless of the above thresholds for general transactions and the merger or acquisition will not be legally valid without authorisation.

A notification form must be filed to the TCA containing detailed commercial and sectoral information. The notification can be made by one of the parties, all the parties together or by their authorised representatives.

In practice, obtaining authorisation from the TCA takes about six to eight weeks.

Substantive Test

The Competition Authority assesses whether there is a dominant position, that is, whether the transaction causes a significant lessening of competition in a market for goods or services in Turkey.

Environment

34. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

Under the Environmental Law 2872, the owner of immovable property is liable for any contamination on it.

Liability and risk therefore pass to the buyer in an asset sale (and indirectly through ownership of the target in a share sale) unless a specific compensation clause is included in the transfer agreement.

Under environment law, a polluter must clean up the contamination and/or pay costs incurred by the state for such clean-up.

Additionally, an entity's representatives who caused the contamination are directly liable for fines imposed on the entity, in accordance with the rules on directors' and officers' liability in the Commercial Code.

Environmental, social, and governance due diligence is becoming increasingly common, in line with the increasing interest of international finance institutions and development finance institutions in the Turkish M&A market.

ESG matters are a growing part of M&A negotiations and due diligence processes and examining companies' compliance with relevant policies and provisions in purchase agreements are considered increasingly important. While there is currently no specific ESG legislation in Turkey, regulatory authorities tend to follow global ESG trends globally.

For more information, see *Country Q&A, Environmental Law and Practice in Turkey: Overview.*

Contributor Profiles

Görkem Bilgin, Partner

Gün + Partners
T +90 212 354 0012
F +90 212 274 2095
E *gorkem.bilgin@gun.av.tr*
W *www.gun.av.tr*

Professional qualifications. Turkey, Lawyer

Areas of practice. Corporate and M&A; life sciences; energy and natural resources; construction and real estate; insurance and reinsurance

Non-professional qualifications. Faculty of Law, Marmara University, Istanbul LLB, 2008

Languages. English, Turkish

Ugur Erkirli, Associate

Gün + Partners
T +90 212 354 0053
F +90 212 274 2095
E *ugur.erkirli@gun.av.tr*
W *www.gun.av.tr*

Professional qualifications. Turkey, Lawyer

Areas of practice. Corporate and M&A; data protection and privacy; dispute resolution; competition; IT and telecoms;.

Non-professional qualifications. Faculty of Law, Koç University 2015.

Languages. English, Turkish.

END OF DOCUMENT

Related Content

Topics

Cross-border - Acquisitions
Asset Acquisitions
Share Acquisitions - Private
Acquisitions - Auctions

Practice note: overview

Auction Sales: Overview (International) • Law stated as at 31-Jan-2021
Share purchases: overview • Maintained
Asset Acquisitions: Overview • Maintained

Standard documents

Confidentiality Agreement (UK Style, Share Acquisitions) (Jurisdiction Neutral) • Maintained
Letter of Intent (UK Style, Share Acquisitions) (Jurisdiction Neutral) • Law stated as at 19-Dec-2023
Share Purchase Agreement (UK Style) (Jurisdiction Neutral) • Maintained

Checklists

Due Diligence: Checklist (International) • Maintained
Acquisition: Checklist (International) • Maintained

Country Q&A

Commercial Real Estate in Turkey: Overview • Law stated as at 01-Jan-2024
Lending and Taking Security in Turkey: Overview • Law stated as at 01-May-2022
Public Mergers and Acquisitions in Turkey: Overview • Law stated as at 01-Oct-2021

Toolkit

Employees (Private Company Acquisitions) Toolkit (International) • Law stated as at 01-Mar-2024
Signing, Closing, and Opinions Toolkit (International) • Law stated as at 01-Nov-2022
Tax (Private Company Acquisitions) Toolkit (International) • Law stated as at 01-Jan-2024