Turkey: Transfer Of A Business Line: An Asset Transfer, A Transfer Of Commercial Enterprise Or A Spin-Off?

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There are various reasons why a company may decided to transfer one or more of its business lines, such reasons being, not deriving sufficient profit, needing to facilitate the management and specialization of different business lines, or simply because during an acquisition the transferee may not wish to acquire all business lines of the transferor, instead preferring to exclude one or more of the transferor's business lines from the scope of the acquisition.

One of the essential criteria is to define the legal nature of such transfer. Occasionally the transfer of a business line may be qualified as an asset transfer, a transfer of a commercial enterprise or as a spin-off depending on the specific features of the transaction and the assets to be transferred. Each legal mechanism has different legal consequences and requires different procedures to comply with. Even the Trade Registry officers often have difficulty to qualify the related transaction correctly and need to understand the rationale behind the transaction as well as the details of the matter in each case. Therefore, it is vital to understand the characteristics of the transaction and choose the correct mechanism in order to set a better timeline of the transaction.

This article aims to define the legal mechanisms of asset transfer, commercial enterprise transfer and spin-off, as well as explains how they are regulated and differentiated under Turkish law.

Asset and Business Transfer under Turkish Law

Transfer of assets and business is regulated under Articles 202 and 203 of the Turkish Code of Obligations[1] ("**TCO**") as a part of "Assignment of Liabilities".

The relevant articles do not require any special form for the valid execution of the asset or business transfer agreement. However, if the transfer of the particular assets is subject to special conditions or forms (e.g. transfer of a real property), such conditions and/or forms must be satisfied for the relevant transfers to be valid.

Under Article 202 of the TCO the transferee who acquires the assets or businesses is required to notify such transfer to the creditors of the transferor or announce such transfer in a newspaper distributed across Turkey. The transferee shall be liable against all of the creditors for the debts of the assets and businesses transferred, starting from the date of the notification or the announcement. Moreover, the transferor together with the transferee will remain liable for such debts for a period of two years starting from the notification or announcement date for due debts and starting from the maturity date for undue debts.

The transfer of assets or businesses does not affect the shareholding structure of the transferor or transferee. In other words, such transfer will not trigger the change of control clause in the agreements; however, the transferee must review these arguments carefully and check whether the "transfer of agreement" clause requires prior consent of the counter party.

Transfer of Commercial Enterprise under Turkish Law

This mechanism is regulated under the Turkish Commercial Code[2] ("**TCC**"). Article 11 of the TCC defines the commercial enterprise as an enterprise aiming to reach an income exceeding the level of craftsman and the activities of which are run in a constant and independent way. The independence and consistency aspects play a significant role as to qualifying a business as a commercial enterprise and determining the application of the provisions of TCC rather than TCO.

Unlike the TCO, the TCC provides that, a transfer agreement shall be subject to certain requirements, such as; a validity requirement, the requirement for such agreement to be in a written form, to be registered with the Trade Registry and announced in the Trade Registry Gazette.

The announcement of the transfer agreement in the Trade Registry Gazette serves the same purpose with the announcement made as per the TCO, with the liabilities of the transferee and transferor against the creditors of the debts of the assets included in the transferred commercial enterprise starting as of the date of the announcement in the Trade Registry Gazette and the transferor remaining liable for a period of two years as of the date thereof for due debts and for a period of two years as of the maturity date for undue debts. Although a person who transfers its commercial enterprise ceases to exist as a tradesman following an applicable execution of the transfer agreement, they shall remain liable for such debts for a specific period of time.

Another significant distinction of the TCC is that all assets of the commercial enterprise (including the real property) are transferred to the transferee as a whole with the signing and registering the transfer agreement, hence it is not necessary to perform the legal transactions which are commonly required for transfer of each particular asset under the general provisions of law. This novelty of the TCC has brought an element of practicality to commercial life.

It is always possible to exclude some of the assets of the commercial enterprise from the scope of the transfer agreement, provided that the assets transferred are sufficient to continue activities as a commercial enterprise.

In situation where assets transferred cannot be qualified as a commercial enterprise after exclusion of certain assets, such transfer shall not be deemed as transfer under the TCC, and shall only be qualified as a transfer subject to the TCO. Given that it will not be considered in the scope of a commercial enterprise andonly the provisions of the TCO shall be applied for such a transfer.

Other matters requiring a consideration while transferring a commercial enterprise is where it may be necessary to notify the transfer of the commercial enterprise to the Competition Authority as per the Law on the Protection of the Competition[3] and to obtain a clearance decision in order for the transfer to be valid.

Spin-off under Turkish Law

Companies may prefer to divide one of their business lines and transfer it to other companies by way of spin-off. In practice the term spin off is used in partial division of a company[4].

The main aspect that distinguishes 'partial division' from the abovementioned types of transfer is that, only companies or cooperatives may be subject to division.

In a partial division, the assets of the company are divided into one or more parts and transferred to existing or to be newly established companies. After the partial division, shareholders of the partially divided company acquire the rights and shares of the transferee company or the partially divided company acquires the shares and rights of the transferee in return for the transferred assets.

Where transferor or its shareholders acquire shareholding rights in the transferee it may be a determining factor while choosing the legal mechanism for transfer of a business line.

In comparison to the asset transfer and transfer of a commercial enterprise, the process of completion during partial or complete division of a company is long and complicated.

The administrative and management bodies of all companies to be involved in the division are required to prepare a division agreement, a division plan and a division report. Such agreements and plans must be in written form and approved by the general assembly of the companies.

The division agreement, division plan, division report and other documents stipulated in the TCC such as financial tables and balance sheets shall be prepared for examination of the shareholders of the companies to be involved in the division two months prior to general assembly decisions.

The companies involved in the division make three announcements in the Turkish Trade Registry Gazette, those being, to call their creditors to notify their receivables and claim for guarantee for their receivables.

The division is deemed as completed when it is registered before the Trade Registry. The partially divided companies continue to exist with the assets that are not transferred.

The employment agreements made with the employees and all rights and liabilities arising thereof pass to the transferee unless the employees object.[5]

Conclusion

The process of transferring a business line may be more complex than it seems. Different legal mechanisms may be applied for such a transfer and these mechanisms may encompass different results in terms of labour law, competition law, tender law and etc. Hence it is important to define legal mechanism to be applied correctly during an acquisition or a merger process or else it may prolong the entire process and affect the closing date for the parties subject to transaction.

Footnotes

1 Numbered 6098, dated 04.02.2011.

2 Numbered 6102, dated 14.02.2011.

3 Numbered 4054, dated 13.12.1994.

4 Under the TCC, there are two types of division: partial division or complete division.

5 Article 178 of the TCC.