TURKEY: SHARE TRANSFER RESTRICTION OPTIONS

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I. Introduction

Transfer of shares to a third party may cause harm to the existing shareholders and create undesired consequences for them. For example, share transfer may result in the entry of an undesired third party into the entity as a shareholder. Therefore, shareholders may require strict measures to be taken for protecting the corporate structure of the entity, preventing the entry of undesired third party to the entity, preventing deadlock when reaching a decision, preventing the sale of company's shares to its competitors, protecting the rights of the minority shareholders, etc.

As per the general principle, shareholders are free to transfer their shares to third parties without any restriction. However, freedom of transferring shares can be restricted either by the provision of the Turkish Commercial Code No. 6102 ("TCC") or the articles of association of the companies. According to Article 490 of the TCC, the shareholders holding registered shares can transfer their shares without being subject to any restriction unless otherwise is regulated under either the TCC or the articles of association. In addition to the share transfer restrictions determined under the TCC or the articles of association of companies, the shareholders may execute an agreement to govern the relations among shareholders and decide on some additional restrictions (for example; options) to obtain more protection because it is not always possible to reflect all rights and obligations of the shareholders to the articles of association because of the regulatory bodies. In this article, we aim to explain the general concept of options under Turkish law.

II. Options

While regulating the relationship among the shareholders, the shareholders usually prefer to have option rights for future (for example; call options) in order to restrict transferring the shares easily to third party. As per the Turkish corporate law perspective, options are legally enforceable and valid in line with the law of contracts. However, it is important to mention that they are not regulated under the TCC. Option rights can be legally enforceable if it is agreed by the parties in a contractual relationship. Accordingly, options rights are usually regulated under shareholders' agreement, option agreement or share purchase agreement. In case of a breach, the provisions of the Turkish Code of Obligations No. 6098 will be applicable to resolve the dispute.

a. The Right of First Refusal

The shareholders holding the right of first refusal are entitled to purchase any shares if any one of the shareholders desires to sell her/his shares. In accordance with the right of first refusal, the shareholder who wishes to transfer her/his shares to a third party is obliged to notify the other existing shareholders first and offer them purchase of the shares. In practice, the right is granted on the condition that the selling shareholder must set a price for the shares subject to the acquisition after negotiating with a third party and must offer the shares to the existing shareholder holding such rights on the same terms including the price. Accordingly, the right holder shareholders will be able to acquire the shares on the same terms with the third party.

b. Pre-Emptive Purchase Right

The main difference between the right of first refusal and pre-emptive purchase right is that there must be an agreement between the selling shareholder and the third party regarding the sale of the shares in the pre-emptive purchase right. The shareholder holding such right will be able to purchase the shares of the shareholder who planned to sell her/his shares to third party by a unilateral declaration.

c. Call Option

Provided that the call option is granted to the shareholders through shareholders' agreement, the shareholders holding the call option are entitled to purchase the shares of the selling shareholder in whole or in part at a price pre-determined by the parties. By exercising the call option, the beneficiary shareholder will be able to exit from the company after a certain period of time or upon the occurrence of a certain event. Also, such option can be used as a contractual penalty in case of breach of the contract. Parties may decide on the exact price of the shares subject to the acquisition beforehand or they may agree on a method to calculate the price of shares. Once the parties determine to have call option right, the beneficiary will be entitled to use this option by unilateral declaration and the other parties will be obliged to sell their shares in whole or in part at a price that is already determined or can be calculated by a pre-determined formula.

d. Put Option

The put option grants the shareholder the right to sell his/her shares in whole or in part at a pre-determined price. Parties may decide on the exact price of the shares subject to the acquisition beforehand or they may agree on the calculation method for the price. Once the parties determine to have a put option right, the beneficiary will be entitled to use this option by unilateral declaration and the other party will be obliged to make an agreement that is the subject of the put option right.

e. Tag Along Option

As per the tag along option, the shareholder is obliged to sell her/his shares under the same conditions, given that another shareholder decides to sell his/her shares. Shareholder intending to sell her/his shares to a third party offers to the other shareholders the opportunity to be a part in the sale. Main aim of this option is to protect minority shareholders and allowing them to benefit from the sale. In case that a third party wishes to acquire the shares of the shareholders to whom such option is addressed to, the tag along option grants the other shareholder who hold this right with the option to sell under the same condition. The purchasing party purchases the same amount of shares, although not from the same shareholder, but from all of the shareholders exercising their rights to participate in the transfer.

f. Drag Along Option

In case of drag along option, the shareholder has the right to force other existing shareholders to jointly sell their shares under the same terms and conditions including the price to the third party intending to purchase the shares when her/his own shares are being sold to the third party. Shareholders who are address of the drag along options will be obliged to sell along with the right owner upon his/her request.

III. Conclusion

Even though shareholders are free to transfer their shares to third parties as per the general principle under Turkish Law, such transaction may also result in negative consequences for the remaining shareholders. Therefore, in addition to the share transfer restriction regulated under the TCC and the articles of association, shareholders would like to have additional protection while regulating the shareholding relationship among them. While regulating such relationship, they prefer to use tools such as call and put options, tag along and drag along options, the right of first refusal and pre-emptive purchase right. These options and rights are considered valid and binding with regard to the law of contracts.

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