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Turkey: Means to Acquire a Target

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I. Introduction

Although it is the first thing that comes into mind, share acquisition is not the only way to acquire a target. Turkish laws allow acquisitions to be completed through a number of other methods such as asset acquisitions, business acquisitions and merger, depending on preference of the buyer. This article will explain the processes for the acquisition methods concerning joint-stock and limited liability companies covering the requirements for valid acquisitions and matters to consider.

II. Share Acquisition

The most common and straightforward way to acquire a company is acquiring the target company's shares by share transfer.

As a general rule, registered and bearer shares in a joint-stock company can be transferred freely as per Articles 489 and 490 of the Turkish Commercial Code No. 6102 (the "TCC"). However, Article 491 of the TCC stipulates that registered shares, nominal value of which are not fully paid-in, can only be transferred pursuant to company's approval save for the exceptions also included in the said article. It should be also noted that foregoing freedom to transfer registered shares may be restricted if a significant reason is explicitly stipulated in the articles of association of the company, such as by requiring the board of director's prior approval or limiting the buyers to a certain group. The board of directors of a joint-stock company is allowed reject transfer of a registered share on the grounds as set forth under Articles 493 and 495 of the TCC. In terms of Turkish corporate law perspective, transfer of bearer shares cannot be restricted.

If there are share certificates issued by the relevant joint-stock company representing shares being subject to the transfer, these share certificates must be endorsed and delivered to the buyer. Transfer of bearer share certificates must be also notified to the Central Securities Deposit (MKK), even if they are not publicly traded.

In terms of limited liability companies, articles of association may impose a total ban on transfer of shares pursuant to Article 595 of the TCC. Moreover, unless otherwise stipulated in the articles of association, the share transfer must be approved by the general assembly and the directors must apply for registration with the relevant trade registry. The transfer will be void if it is not approved by the general assembly.

Share transfers should also be duly registered with the share ledger of the relevant companies.

III. Asset Acquisition

Surely, buyers and investors may prefer acquiring assets of a company, instead of their shares. This method may be more advantageous for some cases where the target refers to only a specific asset, not the entire company.

As per Article 202 of the Turkish Code of Obligations No. 6098 (“**TCO**”), when liabilities attached are transferred together with the assets, the buyer will be liable against the creditors concerning the assets transferred as of the date the buyer notified the creditors or the date of announcement in the Turkish Trade Registry Gazette. Moreover, for 2 (two) years, the debtor (*i.e.* the transferor) and the buyer will remain jointly liable starting from the foregoing dates or the due date of the debts, whichever is later. The 2 (two) year period will not commence until the notification and announcement obligations are satisfied.

Under the Enforcement and Bankruptcy Law No. 2004 (“**Enforcement and Bankruptcy Law**”), transfers of all or significant parts of assets are considered to be conducted with the purpose to harm creditors through fraudulent transaction, and creditors have the right to file a lawsuit to annul such transfers. In this regard, in case a debtor fraudulently transfers its assets to a third party and the creditors of the debtor cannot collect their receivables due to such fraudulent transaction; the court may rule annulment of the transfer of assets upon request of a creditor. As per Article 280 of the Enforcement and Bankruptcy Law, in order to prevent annulment of asset transfers in case of a dispute, the debtor should announce the contemplated transfer in the Turkish Trade Registry Gazette 3 (three) months prior to the relevant transfer. In practice, although sellers and buyers usually tend to skip the foregoing announcement phase in order to accelerate the contemplated acquisition; however, the announcement has a significant effect since it may lead to annulment of the transaction, as the case may be.

In asset acquisitions, an essential aspect is to determine whether significant part of the assets or a significant asset is being transferred or the assets subject to the transfer constitute a unit. Otherwise, such transfer may not constitute an asset transfer within the meaning of Article 202 of the TCO and Article 280 of the Enforcement and Bankruptcy Law, and will merely be an ordinary sale and purchase transaction which does not require any announcement due to nature and value of the asset. It should be noted that relevant regulations draw only a general

framework on this matter and there is not any explicit definition to make this assessment. Therefore, characteristics of the transaction should be evaluated on case-by-case basis.

In order to make the relevant registrations and announcements, general assembly resolution (on wholesale of significant part of assets in joint-stock companies) or board of directors' resolution is required. In addition, for announcement under Article 202 of the TCO, Turkish Trade Registry Gazette mostly seeks notarized asset transfer agreement. The announcements will include the details of the assets subject to transfer.

IV. Business Acquisition

Business (commercial enterprise) acquisitions are in fact part of asset acquisitions. However, where the transferred assets are (i) sufficient to continue the commercial activities of a business, (ii) considered a business line on its own or (iii) where the seller's capacity to carry out its commercial activities in the relevant business line is significantly reduced after the transfer, the asset transfer should be deemed a business transfer. Whether an asset transfer constitutes a business transfer must be examined on a case by case basis.

As per Article 11/3 of the TCC, transfer of a business must be made in writing as an agreement and such transfer agreement must be registered with the trade registry and announced in Turkish Trade Registry Gazette. As per Article 133 of the Regulation on Trade Registry, registration is a mandatory step for validity the transfer.

Article 202 of the TCO and Article 208 of the Enforcement and Bankruptcy Law as explained under the section (III) above are also applicable to business acquisitions.

It is also important to note that in practice, registration of transfer of business agreements are not very common and the practitioners need a detailed secondary legislation on this matter. General tendency is to treat business acquisitions as asset acquisitions and, realize and conclude the contemplated transactions by following the asset acquisition steps.

V. Merger

As per Article 136 of the TCC, companies may merge by way of (i) acquisition of the other company *i.e.* "merger by acquisition" or (ii) "merger by incorporating a new company" where companies form a new company together. In merger by incorporating a new company, two or more companies' assets are transferred to the new company as per the principle of complete succession and the companies merged will be terminated but will not be liquidated.

Article 137 of the TCC sets forth the permitted mergers. Under the said article, joint-stock companies and limited liability companies cannot be acquired by sole proprietorships.

For a valid merger, an agreement must be concluded. As per Article 145 of the TCC, merger agreement is required to be executed in writing. Article 146 of the TCC lists the mandatory content of the merger agreement. The list provides the minimum and the parties are free to extend the scope of the agreement.

The merger will be concluded upon registration with the relevant trade registry. At the moment of registration, all active assets and liabilities of the acquired company will automatically pass on to the acquiring company. The merger decision will also be announced in the Turkish Trade Registry Gazette.

With regard to protection of shareholders' rights, according to Article 142/1 of the TCC, in cases of merger by acquisition, the acquiring company must increase its share capital to the extent that it is required for maintaining the shareholders' of the acquired company's rights. Moreover, as per Article 140 of the TCC, shareholders of the acquired company have the right to claim from the company the shares and rights covering the value of their existing shares and rights. The shareholders of the acquired company holding non-voting shares shall be given the shares in the equal value with or without voting rights. Furthermore, privileged and dividend shareholders of the acquired company will be given rights in equal value or will be compensated in accordance with Article 140 of the TCC.

As per Article 158 of the TCC, the shareholders of the acquired company will remain liable for the debts incurred prior to the announcement of the merger. Claims for such debts will be subject to a 3 (three) year period of time bar, save for certain exceptions.

During a merger process, the managing bodies of the merging companies are required to prepare a report on merger, either severally or jointly. This report must cover all the matters listed in Article 147 of the TCC. Preparation of this report may be waived from the merger process for small and medium sized enterprises provided that all of their shareholders agree to waive.

If it has been more than 6 (six) months between the date of the balance day and the signing of the merger agreement or there have been material changes in the companies' assets, the merging companies are required to prepare an interim balance sheet in accordance with Article 144 of the TCC.

Merging companies are required to submit merger agreement, merger report, past three years' financial statements and interim balance sheets where required, to their stakeholders' attention, at their headquarters and branches 30 (thirty) days prior to the general assembly meeting regarding merger. Furthermore, companies which are subject to independent audit, are required to publish the said documents on their websites.

The TCC also provides a simplified way for joint-stock and limited liability companies' mergers when the acquiring company holds 100% or 90% of the voting shares of the target company as per Article 155 of the TCC.

VI. Conclusion

During acquisitions, distinguishing the method as per TCC and TCO (*i.e.* whether the acquisition is completed by share transfer, asset transfer, business transfer or merger) especially between an asset transfer/business transfer and merely a sale and purchase transaction is crucial in order to determine and satisfy the applicable requirements which may impact validity of the acquisition. While a share transfer is more straightforward, it will also transfer all the liabilities, debts and obligations of the company together with the shares. On the other hand, by acquiring assets, the acquirer will be able to benefit from the facilities of the company and enhance its business but will not be able to get the rights attached to shares. If it is decided that a merger is required, companies should also bear in mind that a simplified merger is an option. Although each method has separate advantages, features and outcomes, in Turkish M&A market, asset and business acquisitions are very popular in recent years.

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