Conditions Precedent that Fall Mandatory under Turkish Law in a Share Deal

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A condition precedent, for the purposes of this article, shall be defined as a condition, only upon whose fulfillment closing of a transaction will be made by the parties. In a share deal, the parties may agree upon certain matters to be designated as conditions precedent for the closing, these may arise from the laws, agreement between the parties, specifics of the transaction and/or activities of the target. In this article, we will only touch upon certain conditions precedent which may become mandatory under Turkish laws.

The Approval of the General Assembly

Among the cases where the affirmative votes of a certain majority of shareholders are sought (the percentage of which would change in accordance with the type of action to be taken) and which cannot be assigned to any other organ of a company, are cases where articles of association are to be amended, board members to be appointed and removed, termination of the company, for example. Our focus in this paragraph is on a certain type of a general assembly approval, which is triggered under Article 408(2)(f) of the Turkish Commercial Code. The relevant article stipulates that the general assembly shall decide on the sale of a significant amount of company assets. While especially what constitutes a "significant amount" and other aspects of the drafting of the said article stir debate in legal writing, it becomes relevant in share deals regarding sale of a parent company's shares in a subsidiary. In such case, it would become mandatory that the parent company's general assembly resolves upon sale of its shares in a subsidiary.

i. Ministry Consent for Changes in the Articles of Association

As stated above, while the percentage of affirmative votes of a general assembly may differ (in accordance with the type of change to be realized), companies, in principle, would be able to amend their articles of association through a general assembly resolution on the matter, without requiring consent from the Ministry of Customs and Trade ("Ministry"). That said, the communiqué regarding determination of joint-stock companies whose amendment of articles of association is subject to ministry consent, published on the Official Gazette numbered 28468 and dated November 15, 2012, lists certain companies, whose amendment of articles of association is subject to consent. Accordingly, banks, companies engaged in financial leasing, factoring, wealth management, insurance, independent auditing and companies that are subject to capital markets laws are among those whose amendment of articles of association would trigger the need to obtain Ministry's consent. Accordingly, if the target is subject to the abovementioned communiqué, the buyer would expect the seller to obtain the relevant consent, resulting in the seller causing the target to apply for such consent and such matter to be stipulated as a condition precedent for the closing within the transaction document.

ii. Regulatory Approvals

Depending on the sector the target is active in and whether it is publicly-traded or not, almost all independent administrative bodies (a definition which would cover the Capital Markets Board

("CMB"), the Banking Regulatory and Supervision Authority ("BRSA"), Energy Markets Regulatory Authority ("EMRA") and the Tobacco and Alcohol Market Regulatory Authority ("TAPDK") do seek that a share deal is brought before them for clearance before closing, thus rendering their consent a condition precedent for the closing.

The CMB seeks that its consent is obtained in deals regarding transfer of shares of intermediary institutions [Article 44(3) of the Capital Markets Law numbered 6362], investment funds (under certain conditions) [Article 14(1) of the Communique on the Principles regarding Investment Funds; Article 50(2) of the Capital Markets Law numbered 6362] and stock exchanges [Article 65(7) of the Capital Markets Law numbered 6362].

As for BRSA, the Banking Law numbered 5411 ("Banking Law") stipulates that share transfers with the minimum magnitude of 10% shall be subject to BRSA's approval (Article 18 of the Banking Law).

EMRA also stipulates a 10% threshold, with a decreased 5% for publicly-traded companies that are also subject to EMRA's rules and regulations [Article 8(1)(b) of the Law numbered 4628 on the Organization and Duties of EMRA]. Lastly, TAPDK also seeks that its consent is sought with respect to share transfers to third parties by companies that have production permit for alcohol or alcoholic beverages (Article 20 of Regulation on Principles and Procedures as to Technical Specifications, Establishment, Operation and Auditing of Production Plants of Alcohol and Alcoholic Beverages).

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