Turkey

Negotiated M&A Guide

Corporate and M&A Law Committee

Contact

Ferhat Pekin

Pekin & Bayar Law Firm
Istanbul, Turkey

f.pekin@pekin.com.tr

INTRODUCTION

This guide provides a summary of the main topics and issues commonly encountered in transactions involving the acquisition of assets or shares of companies in the Republic of Turkey ("Turkey") and the rights accorded to and limits imposed on the parties by the Turkish legal system, with an intention to provide the reader with the basic concepts and matters which should be taken into consideration during a M&A transaction in Turkey, acting for either side of the transaction.

APPLICABLE LEGAL FRAMEWORK

The fundamental legislation that governs the transfer of shares of companies and transfer of assets are, respectively, the provisions of the Turkish Commercial Code No: 6102, published in the Official Gazette No: 27846 dated February 14, 2011 ("TCC") and Turkish Code of Obligations No: 6098, published in the Official Gazette No: 27836 dated February 4, 2011 ("TCO"). Furthermore, depending on the type, status and activity field of the relevant target and structure of the transaction, additional legislation and regulatory requirements will need to be taken into consideration during a M&A deal. For instance, in case of acquisition of publicly-held companies whose shares are listed on the stock exchange, the provisions of the Turkish Capital Markets Law No: 6362 (the "CML") and the communiqués and regulations issued by the Turkish Capital Markets Board (the "CMB") as well as those of the stock exchange, would bring additional regulatory requirements and have an impact on the timeline and structure. Similarly, for companies operating in different fields, additional regulatory approvals and authorizations may be needed, such as the approval of Banking Regulatory Supervision Authority for M&As involving banks, approval of Energy Market Regulatory Authority for M&As involving energy companies, approval of Undersecretariat of Treasury for M&As involving insurance companies, etc. In an asset-deal, the transfer of assets will be subject to provision of different laws, such as the Industrial Property Law No. 6769 for transfer of trademarks, the Title Deed Law No: 2644 for transfer of real property, the Labor Law No: 4857 for transfer of work place and employees, and the list would go on. Last but not the least, both sides to the transaction in all types of deals will be required to take into consideration the provisions of the Law on the Protection of Competition No: 4054, as mergers or acquisitions exceeding certain thresholds in terms of market share or turnover, will be subject to the approval of the Turkish Competition Board.

Having said that, the provision of the TCC and TCO will be the main pillars upon which the legal framework of a M&A deal will be constituted. The TCO defining and governing the legal nature and characteristics of the deal, legal effect and implication of transfer of ownership, as well as the rights of the parties arising out of such transfer of ownership, while the TCC determining the procedures and form of transfer of ownership of shares or merger of companies, as well as rights of parties following the transfer in case of joint ventures or transfer of less than 100% of the target.

There are two alternative main structures in a M&A transaction: Asset-deal and share-deal (merger of two or more entities under a new entity or absorbing entity is considered under the share-deal for the purposes of this Guide). When it comes to M&A, asset-deals are less frequently encountered in transactions in Turkey compared to share deals, which can be attributed to, among other things, different tax treatments (including the fact that stamp tax will be applicable over a transfer agreement in an asset-deal) and additional obligations for parties involved. An asset-deal can be structured as either the transfer of specific assets of an enterprise, the transfer of the commercial enterprise with all assets and liabilities (a going concern) or partial spin-off of certain assets of the enterprise in a more tax-efficient structure. For the transfer of a commercial enterprise as a whole, the acquirer will be prevented from acquiring just the assets and leaving the liabilities with the company, furthermore, the seller and acquirer will remain jointly liable for the liabilities of the company to the creditors of such company for a period of two years following the acquisition.

Due to the less frequent transfer of the commercial enterprise as a whole or of asset-deals in M&A in Turkey, this Guide will mainly focus on the issues and matters related to share-deals and a specific category of share-deals.

With respect to the qualification of legal nature and characteristics of a share-deal, share purchase contracts have been the subject matter of few publications and decisions in the Turkish doctrine and jurisprudence to a limited extent. Most of the discussions revolve around whether there can be any statutory warranty right accorded to an acquirer concerning the company whose shares are being transferred, in addition to express representations agreed by the parties in a share purchase agreement ("SPA") and existence of any statutory warranties applicable to share transfers in the absence of or in addition to specific provisions in an SPA. For issues related to statutory warranties, indemnifications and rights arising under the sale transaction, practitioners often refer to foreign jurisprudence, and most of the time to the Swiss Code of Obligations, which is very similar to TCO in many respects. There is a discussion in the Turkish doctrine and among legal scholars as to whether the sale of the shares of a company should be considered a commercial sale based on the fact the transfer is related to a commercial enterprise. Under Article 202 of the TCO, movable goods, such as shares, can be subject matter of a sale transaction and will be governed by the provisions of the TCO, on the other hand, in the event that the sale of shares of a company is considered as a commercial sale within the meaning of Article 18 of the TCC, certain provisions of the TCC will also apply to the transaction.

One of the basic tenets of the rules governing joint stock companies is the alienability of the shares of a joint stock company, i.e., unless the articles of association or contractual agreements among the shareholders provide otherwise, the transfer of the fully paid-in shares is, as a matter of principle, not subject to any body of the joint stock company or the consent of other shareholders. Shares which are in registered form are transferred with the endorsement annotation of the transferor on the share certificates and with the delivery of such share certificates to the transferee, while the shares in bearer form are transferred with the delivery of such share certificates to the transferee. In the event that no share certificates are printed for the shares, the transfer of shares is governed by the rules governing assignment of receivables and therefore are capable of being transferred by the transferor pursuant to a declaration of assignment, to the transferee. The assignment declaration should be in writing and therefore a written assignment agreement, such as a share purchase agreement (SPA), is required to the transfer of shares where there are no printed share certificates. The transfer of shares is effective against the company only after the registration of the new transferee in the share ledger of the company. The registration of the transferee bestows upon such transferee the rights arising under shareholding rights vis-à-vis the company. Under the new rules brought by the TCC, the board of directors of a non publicly held joint stock company is entitled to refuse the registration of the transferee on the share ledger only in cases of i) the acquirer of shares which are not fully paid-in, fails to provide relevant collateral requested by the company upon a determination that the financial ability of the acquirer is doubtful; ii) if the acquirer refrains from declaring that the transaction is to the name and account of the acquirer; iii) a material reason enumerated in the articles of association (such as the preservation of composition of current shareholders group or the activity field of the company, or the preservation of economic independency); or iv) the board deciding to acquire the subject matter shares for the account of the company, other shareholders or third parties. Companies are permitted to include a clause in their articles of association stating that the board of directors is entitled to refuse the registration of the share transfer for a material reason as stated above.

As a final point, several mandatory provisions of the TCC, ranging from issues regarding the distribution of dividends, quorum of the Board meetings, access of shareholders to the company records to auditors or general assembly procedures etc., will determine the rights of parties following the transfer in case of joint ventures or transfer of less than 100% of the target, in addition to the provisions of a possible shareholders' agreement ("SHA") to be executed between the parties in a M&A share-deal.

STRUCTURE OF THE TRANSACTION

It is important for the parties involved in a transaction to agree on the structure of the acquisition and the relevant assets included in the scope, before the commencement of any negotiation process. As indicated above, the first distinction will be made as to whether the transaction relates to an asset-deal or a share-deal.

As mentioned above, this Guide will focus on the issues and matters related to share-deals. Under the share-deal category, a second level of distinction can be made as to whether the acquisition involves the transfer of part or all of the share capital of the target or whether the acquisition involves the merger of two or more entities. Similarly, as mentioned above, rather than merger of the entities, this Guide will analyze the acquisition by transfer of shares, which would usually involve the negotiation and execution of a SPA and possibly a shareholders agreement (SHA).

A third level of distinction under the share-deal can be made as to i) whether the acquirer will own the shares of the target following the transfer of shares by the existing shareholders or ii) whether the acquirer will obtain such shares pursuant to a capital injection by the acquirer and the increase of share capital by issuing new shares to the acquirer (under the new rules brought by the TCC, companies are allowed to acquire their own shares subject to a threshold and in such case the acquirer may directly obtain the redeemed shares from the company), or iii) whether the structure will be a combination of both.

It is usual in share-deals in Turkey, especially when the acquirer is a foreign company or entity, to sign a non-binding letter of intent or memorandum of understanding, to outline and pre-agree on the structure of the transaction (transfer of shares of existing shareholders, capital injection or combination). In case of an auction process involving more than one possible acquirer (or bidder as the frequently used term suggests), the structure of the transaction will usually be notified to the interested parties by using an information memorandum or transaction outline.

Signing a letter of intent or memorandum of understanding ("MOU") has the advantages of getting the parties to agree on the fundamental terms and conditions of the transaction, such as the structure, purchase price, number of shares to be sold or issued etc. The execution of a MOU serves the purposes of (i) reaching a mutual agreement on important issues and hence avoiding the negotiation and discussion of the main items at a later stage (transfer documentation stage, as discussed below), (ii) demonstrating the willingness and commitment of each party in the process, and (iii) outlining the steps ahead, the timeline and conditions precedent for each party to complete the transaction. Typically, an interested acquirer or interested buyer will request to conduct a detailed review of the target from the financial, legal and technical perspectives (which is customarily called a "due diligence" process) before the completion of the transaction and most of the time, especially when the interested party is a foreign company or entity, such party would insist on signing a MOU before the party starts incurring costs with respect to due diligence exercises. Similarly, it would also be beneficial for the seller and/or target company to enter into a MOU which will demonstrate the commitment of the interested party but which will also include confidentiality provisions to protect the secrecy of records or trade secrets of the target, before the seller and/or target company discloses sensitive information and allow access for due diligence purposes.

On the other hand, although a MOU may serve the purpose of avoiding the discussion of the fundamental issues at later stages, the negotiation and execution of a MOU itself can be a lengthy process if the parties try to include as many provision as possible in a MOU (even though most of such provision should typically go under the SPA or SHA). For that reason, it is important for each party involved and its legal counsel to understand that an MOU is not meant to replace the provisions of the SPA or SHA and its purpose is to outline major terms of the transaction.

A typical MOU will involve the following terms and conditions:

- Names of the acquirer, seller and target company;

- Structure of the transaction;

- Purchase price or issue price in case of capital injection and basic assumptions regarding the valuation (cash free – debt free etc.);

- Mechanism of payment of the purchase price and escrow mechanism if any;

- Conditions precedent of the acquirer and seller if any, conditions precedent specific to the transaction (such regulatory approvals etc.);

- Process forward and outline of steps (financial, legal, technical due diligence, approvals of the corporate bodies of the entities etc.) and provisions related to access to company records;

- Conduct of target's business for the period between signing of the MOU and signing of the SPA and/or SHA;

- Confidentiality provisions and conditions for public announcements;

- Exclusivity period, if any, granted to the acquirer, by the seller and conditions of such exclusivity and the termination of the MOU;

- Non-compete provisions for the seller;

- Cost and Expenses (determination of the costs to be assumed by each party);

- Binding effect (specification as to the terms and clauses of the MOU which will be binding on the parties, typically the clauses regarding confidentiality, exclusivity, costs and expenses, binding effect and governing law will be binding on the parties);

- Governing law and jurisdiction (determination of the lex loci and situs for the settlement of disputes or arbitration) for the MOU.

- In the event that the transaction involves transfer of part of the share capital of the target or the issuance of new shares to the acquirer, resulting in the existing shareholders holding some shares in the target (which would also require a SHA), the following provisions are usually added to the MOU:

    - Governance of the target in post-Closing period (composition of board of directors and committees, voting rights, veto rights for certain issues and matters, information rights of shareholders, composition and authorities of the senior management etc.);

    - Dividend rights and distribution of dividends and any other privileges with respect to proceeds;

    - Transfer of shares and exit rights of the shareholders (lock-up, right of first refusal, tag-along rights, drag-along rights, IPO rights etc.);

    - Non-compete provisions for the shareholders.

As a final note on the signing and execution of the MOUs, as stated above, although the execution of an MOU is frequently desired by both the acquirers or sellers due to its purpose of showing the intent of the parties involved, except for a number of clauses (please see the binding effect provision mentioned above), an MOU is usually drafted to be a non-binding document. This is due to the fact that an acquirer would prefer not to be bound to purchase the shares before the results of its due diligence exercises. However, in some transactions, depending on the negotiation strategy or power of the parties, one may encounter binding MOUs or MOUs with most of the provisions binding on the parties. It is usually advantageous for the seller to bind the acquirer in its commitment to purchase and for the acquirer to bind the seller in its commitment of exclusivity. One alternative to avoid discussions on the binding effect of a MOU is to insert binding monetary penalty clauses in the MOU for breach of exclusivity, confidentiality or failure to transfer the shares after the satisfaction of all conditions precedent.

STAGES

The legal side of a typical share-deal process, involving one acquirer or interested party (rather than multiple interested parties), will normally include the following stages, in chronological order:

1) Meeting of the parties and negotiation of a MOU (if any);

2) Signing of a MOU (or an confidentiality agreement in the absence of the MOU) and start of the financial, legal and technical due diligence process (technical due diligence may involve environmental, construction / engineering, pharmacovigilance etc., depending on the field of activity of the target);

3) Drafting of the transaction documentation (SPA and, if any, SHA and/or escrow agreement and other security agreements);

4) Negotiation and signing of the transaction documentation;

5) Interim period: obtainment of required regulatory approvals, third party consents and satisfaction of the conditions precedent to Closing;

6) Closing and transfer/issue of shares.

A typical share-deal process, involving an auction or bidding process (multiple acquirers or interest parties), would normally include the following stages in chronological order:

1) Signing of a process letter (or equivalent) by the interested bidders;

2) Access to data rooms for due diligence process (may be shortened or skipped if there is a vendor legal due diligence report already prepared by for the relevant transaction by a law firm;

3) Submissions of binding bids/offers by the interested bidders;

4) Following the short-listing, negotiation and signing of the transaction documentation;

5) Interim period: obtainment of required regulatory approvals, third party consents and satisfaction of the conditions precedent to Closing;

6) Closing and transfer/issue of shares.

TRANSACTION DOCUMENTATION AND ISSUES

This section will analyze the typical issues encountered and discussed during the negotiation and finalization transaction documentation. In a share-deal, the term transaction documentation will normally include the SPA and the SHA, if any. However, depending on the structure of the transaction, it may also encompass other documents such as, an escrow agreement (for the payment of certain portion of the purchase price), a pledge agreement (pledge of shares, as security for the performance of parties under the transaction documentation) or, as the case may be, a guarantee agreement (with respect to payment obligations of the acquirer or indemnification obligations of the seller), etc.

I) SPA

a) Purchase Price Payment and Adjustment Mechanics

As indicated above, the payment of the purchase price, any holdback and adjustment to be made (and the underlying assumptions) are usually mentioned in the MOU. The SPA is expected to provide in detail the amount/currency of the purchase price, payment methods and mechanism, any holdback and adjustment mechanism.

In the event that the purchase price offered by the acquirer is based on a valuation of the target based on a cash free – debt free assumption, it is expected that the purchase price will be subject to adjustment shortly after the closing (i.e. completion of share transfers).

Often in share-deals in Turkey, it is customary for the SPA to include a definition of the accounts date (the accounts that the purchase price mechanism will be subject to) and a mechanism to adjust the purchase price based on the difference between the amounts on the financials as of the accounts date and the closing date. Typically, the acquirer would request an adjustment shortly after the closing, usually the period ranging between 30 days to 3 months after the closing. The negotiation points will revolve around the definition of "net cash" and "net debt" which will form the basis of the adjustment mechanism, and the appointment of the audit firm which will conduct the calculation exercise. Usually, the seller will be inclined to attempt to carve-out a number of items from the definition of net debt (especially the investment or expenses which are known to occur before the closing), while the acquirer will negotiate to limit the items included in the "net cash" definition.

It is also customary to encounter the placement of a portion of the purchase price in an escrow account under an escrow agreement, to be used for the adjustment mechanism purposes (which allows the acquirer to easily set-off against the escrow amount any negative adjustment to be made, rather than going after the sellers for collection).

b) <u>Conditions Precedents</u>

One of the most contested areas in SPAs is usually the list of the conditions precedent for the closing. Such list includes, from the perspective of the acquirer, the issues which are required to be resolved and/or the approvals/licenses/documents required to be obtained before the completion of the transfer of shares. Although a tentative list of the conditions precedents may be included in the MOU, the full list is usually compiled following the finalization of the due diligence process and a time closer to the signing of the SPA.

Needless to state, the sellers' interests lie, almost always, with a shorter list of conditions precedent. For that reason, in a seller-friendly SPA, it is customary to encounter only the required regulatory approvals and authorizations and the required structural changes, as the items in the conditions precedent list. On the other hand, the acquirer will prefer to populate the list with the findings of the due diligence and force the sellers to resolve as many issues as possible or invest in or spend as much as possible, to cause the target to be in the best condition possible before the title to the target or the shares pass to the acquirer.

Often a customary provision found within the list of the conditions precedent is the requirement that "there has been no Material Adverse Change between the signing and closing of the Agreement". The definition of the Material Adverse Change ("MAC") is usually one of subjects of extensive negotiation. The sellers will prefer a MAC closely linked to acts or events having a direct impact on the target, while the acquirer will usually insist on a broader definition of MAC, encompassing changes in the economy, sector or currency exchange rate, which may or may not have a direct impact on the operations of the target. An often encountered compromise in share deals in Turkey is to quantify the amount of the indirect impact on the operations (such as change in the sector or country rates etc.) by inserting a percentage amount or a ratio amount, linked to the value or income of the target.

For obvious reasons, the issue of the conditions precedent is an issue closely linked with the termination of the SPA before the completion of the transfer of shares, granting a right to walk away to the acquirer. For that reason, it is the intention of the sellers to limit the number of items on the list. An issue which is related to the conditions precedent and termination, is the issue of a break-up fee, which is usually sought by the sellers against the termination or not proceeding to completion, for no reason. A break-up fee provision is negotiated depending on the willingness of the parties to complete the transaction and the relative bargaining position of each other. Depending on the findings of due diligence, an acquirer which is very interested in the target may be amenable to agree on a break-up fee based on the non-completion of the closing for reasons other than the breach or non-compliance of the sellers. A typical break-up fee may amount to 5 – 10% of the purchase price.

c) Interim Period and Covenants

Interim period refers to the period between the signing of the SPA and completion of the transfer of shares, where certain activities and decisions of the sellers regarding the target will be restricted. The interests of the acquirer lie with keeping a close control over the target following the signing of the SPA, to prevent any damage to the target or leakage from the resources, while the sellers will usually like to have broad freedom to run the operations taking into consideration the possibility of a failure of closing. Therefore, the items in the interim period list are often subject to great negotiation.

Customarily, the acquirer would request a prior approval of the acquirer before the sellers can initiate any major corporate structuring, capital expenditure, investment or borrowing, as well as any dividend distribution, litigation settlement etc. which may cause certain leakage from the target. It is customary in the SPAs in Turkey to insert certain monetary thresholds or percentages with respect to expenditures, changes in payment terms, settlements, assignments of receivables, investments or changes in the remuneration of employees, borrowings and indebtedness, above which the prior approval of the acquirer would be required. The number or percentage will vary depending on the size of the target and its operations. It will be also important for the acquirer to allow sufficient leeway to the existing owners or managers for them to be able to continue the ordinary course of business. The parties will need to strike a balance between the level of control of the acquirer on the target and continuation of the business, avoiding obliging the acquirer to be involved in every small aspect of the business during such period.

This section of the SPA is also usually the place where the acquirer may require the sellers to avoid entering into certain transactions before the completion of the shares, such as distributing dividends or issuing press releases or require the sellers to execute/allow certain actions, such as providing access to the representatives of the acquirer to the commercial records of the target or informing the acquirer regarding significant issues affecting the target. Depending on the size of the target, its activity field and operations, the referred access to records may, at times, be a point of contention. Certain provisions restricting communication with the employees of the target or a limited access to financial records are sometimes requested and/or negotiated by the sellers.

d) Closing Transactions

The list of the actions and transactions which will be carried out during the completion of the shares is usually not one of the areas subject to extensive negotiation, as the issues of transfer of shares and change to the corporate bodies are governed by the provisions of the TCC. However, the chronological sequence of the actions and the venue of the transaction may sometimes be part of the bargaining.

One of the often encountered bargaining items is the sequence of the payment of the purchase price and the evidence required with respect to the transfer of funds. In case the purchase price is paid to the sellers (as opposed to capital injection in the target) by wire transfer between the bank accounts (which is the case most of the time), the sellers may insist on the deposit and receipt of the purchase price in the accounts of the sellers before the commencement of the share transfer procedures, while the acquirer will have a preference to initiate the transfer of shares before the funds leave the account of the acquirer.

This deadlock is usually resolved by legal counsel of the respective parties holding documents and share certificates in escrow for the duration of the closing.

e) <u>R&Ws and Qualifications and Limitations of R&Ws</u>

Needless to state, the representation and warranties (R&Ws) represent one of the major components of a SPA and the content of the R&Ws of the sellers is often the subject matter of intense debate and bargaining.

The content and form of the R&Ws of the sellers will be shaped by, and will vary depending on, the findings of the due diligence. However, it is customary in the share-deals in Turkey to include a minimum of R&Ws regarding the authority of the sellers, corporate and capital structure of the target, title and legal status of shares, licenses and authorizations of the target, accounts and financial records, litigation, environmental, regulatory and employment related liabilities, assets, real property, insurance, taxation issues and solvency of the target. As discussed above, under the TCO the R&Ws of the sellers will be considered as statements made by the sellers to the effect that the target has certain positive qualities or does not have certain negative qualities and the sellers will be liable in case of absence of such qualities or in case of existence of negative qualities. Furthermore, the TCO provides a statutory protection to the acquirer in the case of a claim by a third party on the ownership of shares, following the completion of the transfer of shares.

One of the usual points of contestation and debate is whether, and for which matters, the sellers will be allowed to disclose exceptions or deviations from the text of the R&Ws and the qualifications to be inserted within the text. Typical qualification statements would include knowledge qualifiers (such as “to the best knowledge of the sellers”) or awareness qualifiers (such as “as far as the sellers are aware”). Typically, an acquirer will not allow any knowledge or awareness qualifier regarding the authority of the sellers, corporate and capital structure of the target, title and legal status of shares, while the sellers will usually want to insert qualifiers in R&Ws related to litigation, environmental, regulatory and employment related liabilities, taxation issues etc.

Another point of debate will be whether the sellers will be exonerated from liability by disclosing certain exceptions to, non-compliances or breaches of the text of a specific R&W or whether there will be certain R&Ws where the acquirer will not allow any disclosure. The content of the R&W provisions is usually negotiated together with the content of the disclosure letter prepared by the sellers, up until the last minute of the signing of the SPA.

With respect to the limitations and survivals of the R&Ws of the sellers, the following items summarize the usual points which are mostly debated/bargained for:

- Any de minimis thresholds (i.e. any threshold of liability up until where the acquirer will not be entitled to bring any claim against the sellers)

- Survival periods for the R&Ws: being the period where the sellers will remain liable for the R&Ws in the SPA and during which the acquirer may bring a claim. This issue is closely linked to the statutory time limitation (statute of limitations) applicable under the Turkish laws. As there are different statutory time limitations applicable for claims of different subject matters, it is usual for the acquirer to request the survival period to be equal to or greater than the statutory time limitation and/or to negotiate different survival periods for different subject matters. The sellers will negotiate to reduce the survival period. Most of the time, the usual survival period in Turkey is five years for taxation related issues (which is the statutory time limitation) and less than five years for other issues (with an exception of competition law related issues).

- General cap/upper threshold on the liability of the sellers: this amount is usually stated as a percentage of the purchase price. Such percentage varies greatly depending on the size of the target, its activity field and operations, as well as the bargaining power of the parties. There is usually a negative correlation between the size and the liability cap, i.e. the bigger the size of the target and transaction, the lower the percentage. Typically, the percentage ranges between 20% and 70% of the purchase price.

- Escrow Arrangements: although this issue is usually dealt with in a different section of the SPA and possibly under a different agreement, it is closely linked to the R&Ws and indemnification issues. Especially when the parties are of different jurisdictions, it is common for the acquirer to request that some portion of the purchase price to be placed into an escrow account as the guarantee of the obligations of the sellers with respect to their R&W and indemnification obligations. Similar to the issue mentioned above, the escrow amount is usually stated as a percentage of the purchase price and varies greatly depending on the size of the target and transaction. Again, there is usually a negative correlation between the size of the target and the escrow amount. Typically, the percentage ranges between 5% and 25% of the purchase price. In most of the deals involving escrow agents in Turkey, the escrow agent is usually chosen among the banks willing to provide such services, rather than law firms or other independent institutions. Although it is usually not a big item of negotiation due to the fact the escrow banks would typically use their own standard forms, the content and text of the escrow agreement can be subject to some discussion and bargaining between the parties and escrow bank.

- Data Room and Disclosures: as mentioned above whether the sellers should be entitled to be exonerated from liabilities by way of disclosing exceptions to, non-compliances or breaches of the text of a specific R&W, will be a point of contestation. Similarly, as a qualification and limitation of liability, the sellers may also request to insert a provision in the SPA to the effect that the sellers provided access to a data room prepared for due diligence purposes and that the documents and information provided by the sellers during the due diligence process should act as specific disclosures against relevant R&Ws. The content and effect of the documents provided in the data room and information in the disclosure letter to be provided by the sellers, will usually remain a point of negotiation until the signing of the SPA.

As a final point on the limitations on R&Ws, any limitation or qualification of R&Ws, restricting or eliminating the liability of the seller in case of wilful misconduct or gross negligence is null and void.

f) <u>Conduct of Sellers in Post-Closing</u>

One of the remaining significant points which is usually the subject of extensive negotiations is the non-compete provision in a SPA. Typically and especially for a share-deal involving the transfer of 100% of the share capital of the target, the acquirer may request certain restrictions on the business activities of the sellers following the post-closing due to the intimate knowledge of the sellers regarding the target and its relevant sectors. Such restrictions are usually drafted in the form of confidentiality and non-compete provisions. The non-compete provisions which are usually subject to negotiation and bargaining are: (i) the definition and scope of the business of the target, products and sector of the target which will have an effect on the activities that the sellers will be entitled to carry out in post-closing period, (ii) the scope of the non-compete provision (i.e. whether the affiliates, subsidiaries and relatives of the sellers will be subject to same limitations and restrictions), and (iii) the duration of the non-compete period.

With respect to the duration of the non-compete period, as a general rule, indefinite non-compete periods are not allowed and any non-compete period exceeding five years will carry the risk of non-compliance with the competition law legislation. Depending on the type and structure of the deal, if the transaction requires an application to the Turkish Competition Board, the Turkish Competition Board may request the parties amend the SPA to lower the non-compete period. Typically, non-compete periods range from 15 months to 3 years in share-deals in Turkey.

g) <u>Governing Law and</u> <u>Dispute Resolution Provisions</u>

Last but not the least, the provisions regarding governing law and dispute resolutions have also become an area of discussion and negotiations. While there has been an increase in the selection of English laws or Swiss laws in share-deal transactions involving a foreign acquirer, the SHAs remain predominantly governed by Turkish laws, due to the mandatory provisions of TCC applicable in corporate governance matters of the target company. Similarly, international arbitration clauses are frequently preferred by foreign acquirers in SPAs based on the assumption that interpretation of intricate representation and warranty clauses requires relatively more focused expertise in these types of M&A transactions. It is important to note that exclusive jurisdiction clauses in an agreement governed by Turkish laws and signed by real persons may be declared invalid, unless such real persons are determined to be merchants.

CONCLUSION

As discussed in the Applicable Legal Framework section above, some of the issues with respect to transfer of assets and/or shares and governance of the companies are governed by the provisions of the TCO and TCC. However, it would be correct to state that such mandatory provisions of law governing a M&A transaction are usually exceptional and scattered. Most of the issues and points which form the basis for contestation, bargaining and negotiation are usually left to the commercial arrangements, understanding and agreement of the parties, which means that Turkish laws essentially provide large space for the parties to negotiate on many significant and structural issues during many stages of a M&A transaction.

This guide attempted to highlight and summarize the topics, matters or points which are commonly observed to be part of the discussions and negotiations of parties to a M&A transaction and is prepared with a view to provide foreign lawyers, who are engaging in negotiated acquisitions in Turkey, with an overview of typical provisions commonly found and to provide less-experienced attorneys with a basic and practical guide. This guide should not be viewed as a substitute for any treatise or academic writing of learned scholars and the practitioners are always advised to refer to qualified attorneys for specific issues governing a particular area or stage of any M&A transaction.

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