

Overview of Private Acquisitions in Turkey (2013)

1 Oct 2013

1. What are the main corporate entities commonly involved in private acquisitions?

The main corporate entities commonly involved in private acquisitions are the joint stock company (AS) or a limited company.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on Share Transfer

The Commercial Code 6102 regulates the principles and procedures for share transfers in private companies. Different regulations apply to the different company types.

Joint Stock Companies

Transferring registered shares in a joint stock company is unrestricted unless a restriction exists in law or in the company's articles of association (articles) (*Article 490, Commercial Code*).

The main restriction in law is that if a registered share's price is not paid in full, it can only be transferred with the joint stock company's approval. However inheritance, partial inheritance, provisions of matrimonial property between spouses and compulsory execution are exceptions to this restriction. If one of these exceptions applies, the unpaid registered shares can be transferred to the successors without requiring the company's approval.

A joint stock company can only reject the share transfer if the transferee's ability to pay is doubtful or the transferee has not paid the requested deposit to the joint stock company.

The joint stock company's articles can restrict share transfers by setting out explicit clauses or by stating that the shares can only be transferred with the approval of its board of directors.

Bearer shares can be freely transferred by transferring possession of them.

Limited Companies

Transferring shares in a limited company must be completed in writing and the parties' signatures must be notarized (*Article 595, Commercial Code*). Also, transferring shares in a limited company is subject to:

- Obtaining the approval of the general meeting of shareholders, unless the articles say otherwise.
- Registration with the trade registry offices and announcement in the *Trade Registry Gazette*.

Unlike a joint stock company the general meeting of shareholders has the right to reject the share transfer without stating any reason. Also, a limited company's articles can prohibit share transfers.

Share transfer restrictions in the form of put option and call option clauses can be included in a joint stock company or limited company's articles.

However, regulations regarding pre-emption rights for existing shareholders continue to be debated. Since the Commercial Code is quite new, trade registry offices have continued to accept and register articles that contain right of refusal clauses even though it is understood from the wording of the Commercial Code that such clauses must not be included in a company's articles. It is not clear whether this practice will continue for long. Similarly, the courts' approach remains unforeseeable, due to the limited number of disputes resolved since the Commercial Code was introduced.

Foreign Ownership Restrictions

Unless a restriction applies, direct foreign investment is unrestricted and foreign investors and their investments are treated the same as their local counterparts (*Article 3(a), Direct Foreign Investment Code*). Foreign investors are not required to obtain additional permits. However, certain foreign investments are subject to restrictions to prevent foreign capital majorities in strategic sectors, for example:

- Media service providers (Establishment of Radio and Television and Broadcasting Services Code).
- The electricity market (the Electricity Market Code).
- The civil aviation and sea transport sectors.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

Share Purchases: Advantages/Asset Purchases: Disadvantages

The most important advantage/disadvantage in purchases of shares/assets relates to the transfer of contingent liabilities. In share purchases, the contingent liabilities generally transfer to the buyer, while in asset purchases contingent liabilities generally remain with the seller.

It is easier and quicker to transfer shares through a share sale rather than transferring each asset individually in an asset sale. The target company's contracts with suppliers, distributors, employees and so on are generally unaffected by a share sale.

On the other hand, liability for public debts accrued for the period before a share purchase remain with the seller (for example, tax payments).

In asset sales, if payments of public debts are not made by the seller, an action can be brought to annul certain disposals by the debtor (including asset disposals) (*Code on Collection of Public Receivables 6183*).

Additional provisions apply to financially distressed purchases.

Share Purchases: Disadvantages/Asset Purchases: Advantages

See above, *Share purchases: advantages/asset purchases: disadvantages*.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

Except for privatizations, sales of companies by auction are not common for private acquisitions in Turkey. There are no specific procedures or regulations that apply to auctions, apart from those in the Bankruptcy and Enforcement Code 2004.

Preliminary Agreements

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Letters of Intent

Letters of intent are not regulated under Turkish law. However, there is some discussion about the nature of such documents in Turkey. A letter of intent is commonly classified as a preliminary contract.

Under Turkish contract law an agreement is deemed to be made when the parties make mutual and matching declarations. A letter of intent can be considered as such a declaration if it clearly includes the intention of the parties to enter an agreement and the main provisions of the agreement. A letter of intent usually outlines the willing party's intention to enter an agreement with the opposing party.

For acquisitions, a letter of intent usually includes the percentage of the share capital to be transferred and the consideration agreed for the transfer. Further, the letter of intent can set out the procedure to be followed throughout the acquisition process and afterward. The parties usually determine the provisions of the letter of intent which are intended to be legally binding.

The term letter of intent is commonly used in strategic investment transactions. Terms such as a memorandum of understanding, term sheet, and non-binding offer letter are mostly used in financial investment transactions.

Exclusivity Agreements

Exclusivity agreements are not regulated under Turkish law. However, they are commonly used in acquisitions. Their scope is determined by the parties.

Although there are cases where the parties sign an exclusivity agreement as a separate agreement, it is normally included as a provision in the letter of intent. Exclusivity provisions usually include a longstop date until which negotiations between the parties will continue, and say that until this date, the transferor party must not offer the target shares (or other rights) to third parties.

Non-Disclosure Agreements

Non-disclosure agreements are not regulated under Turkish law. However, they are usually included in the letter of intent.

Non-disclosure provisions usually determine the scope of the negotiations and state that information shared with the opposing party during the negotiations is strictly confidential and must not be disclosed to anyone or any authority without obtaining the other party's written consent.

Asset Sales

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

An asset purchase where all assets are transferred to the purchaser is regulated as the transfer of a commercial enterprise (*Article 11(3), Commercial Code*). Under this provision, a commercial enterprise can be transferred as a whole, without requiring separate transfers of its assets. Unless determined otherwise the transfer of a commercial enterprise will include the transfer of all rights, liabilities and assets to the buyer. However, since Article 11(3) clearly states that the parties can determine otherwise, any asset or liability can be excluded from the purchase.

Further, contingent liabilities in asset sales generally remain with the seller (*see Question 3*).

A sale of all the assets constitutes a sale of a significant portion of a company's assets (*Article 408(2) (f), Commercial Code*). A general meeting resolution approving the sale is required in a joint stock company. There is no such requirement for limited companies.

The seller is liable for two years for all debts relating to the relevant asset or enterprise, together with the buyer (*Article 202, Code of Obligations*). The joint liability starts on the date on which the creditors are notified of the asset transfer (*see Question 7*), or for enterprises, the date on which the asset transfer is announced in the *Trade Registry Gazette* and/or local newspapers. For undue debts, the two year period starts on the maturity date of the undue debts.

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

Creditors must be notified by the transferee if the enterprise is being transferred as a whole, with all its rights and liabilities (*Article 202, Code of Obligations*). However, this notification is not interpreted as obtaining the consent of the creditors, that is, consent does not have to be expressly obtained from the creditors unless there is a contractual obligation to do so.

Share Sales

8. What common conditions precedent are typically included in a share sale agreement?

The most common conditions precedent included in a share sale agreement are regulatory authority approvals, such as from the Competition Authority or Capital Market Board. Other common conditions relate to non-breach of representations and warranties and removing risks and liabilities in the target company.

Seller's Title and Liability

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

The seller's title to shares is a property right. This is a common right and there is no specific wording necessary to exercise it in a share sale. Buyers do not impose a higher standard than is required by law.

10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

Seller

If an agreement is entered into by deceiving the buyer or which results in the seller causing the buyer to be at a material fault there is a possibility for the buyer not to be bound by the agreement. In such cases, Articles 30 to 39 of the Code of Obligations apply. The buyer is bound by the agreement unless the buyer notifies the seller of its intention to not be bound (*Article 39, Code of Obligations*). This notification to the seller must occur within one year of the date when the buyer becomes aware of the fault or deceit. Even if this time limit has expired, the buyer may still claim compensation for being manipulated into executing the agreement.

Advisers

The relationship between the seller and its adviser(s) is usually based on an engagement agreement. In this case, the adviser should act in line with the seller's instructions. If the buyer notifies the seller of its intention to not be bound by the agreement (*see above, Seller*), the seller's adviser(s) may be liable to the seller within the scope of the engagement agreement, if the adviser(s) committed the fault or deceit through non-compliance with the seller's instructions.

Main Documents

11. What are the main documents in acquisition and who generally prepares the first draft?

The main documents in an acquisition are the share purchase agreement and the ancillary agreements and documents relating to it such as share certificates (or, if there are no share certificates, the temporary share certificates representing the target shares). Ancillary documents usually include the parties' representations and warranties, shareholders agreements (if the acquisition is not a take-over), management and consultancy agreements and key employee agreements.

The buyer generally prepares the first draft of the share purchase agreements.

Due to the requirement in an asset sale to prepare separate documents for transferring each asset, the number of documents to be prepared may be more than those required for a share sale. If the transfer of certain assets requires registration before authorities, these registration documents must also be prepared.

Acquisition Agreements

12. What are the main substantive clauses in an acquisition agreement?

An acquisition agreement mainly consists of clauses regarding the material obligations of the parties, particularly the sale and transfer of shares/assets and consideration/payment. This is irrespective of whether the agreement relates to the sale of shares or assets.

Acquisition agreements also include:

- Conditions precedent.
- Representations and warranties regarding the shares, company or enterprise being transferred.
- Claims and indemnities in case of breach of representations, warranties or other provisions of the agreement.
- Closing provisions.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

Under Turkish law, parties to an agreement which includes a foreign element can determine the governing law for the agreement. The parties' freedom of contract is the main principle when determining the applicable law in an acquisition agreement.

However, there are certain cases where Turkish law must be directly applied. These are stipulated in the International Private and Civil Procedure Law 5718. If a foreign (non-Turkish) law is chosen as the applicable law for an acquisition agreement Turkish rules still apply regarding (but not limited to):

- Competition and unfair competition.

- Title to shares/assets and their transfer procedures.
- Notices under the agreement.
- Arbitration.

Warranties and Indemnities

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Warranties and indemnities from the seller are typically included in acquisition agreements. The seller's warranties usually include:

- Title to the shares/assets.
- Shares/assets being free from any collusions and claims.
- Information about the target company's organization and good standing.
- The seller's authority to enter into the necessary transactions.
- Representations regarding the target company's financial standing.
- Representations regarding the existence and accuracy of financial statements.
- Information regarding the company's tangible and intangible assets.
- Tax related matters.

15. What are the main limitations on warranties?

Limitations on Warranties

Basket and de minimis rules commonly apply in terms of limitations on warranties. The most common limitations include:

- Time limits.
- Caps.
- Baskets.
- De minimis (mini-baskets).

Qualifying Warranties by Disclosure

The main principles for qualifying warranties by disclosure are fair disclosure, awareness and materiality.

It is usual practice for the seller's warranties in an acquisition agreement to be restricted to those subjects that are "fairly disclosed". The seller's potential liability for a breach of warranty is reduced to the extent that a matter is fairly disclosed. Disclosure letters are a common way to determine the limits of the seller's liability.

On the other hand, the general rules under the Commercial Code and the Code of Obligations always apply. For example, under these codes the buyer has a commercial status as a merchant and must examine and inspect movables to ensure they are free of defects, even if no warranty is given by the seller through disclosure.

16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

In the event of a breach of warranty, the parties usually agree that the seller granting the warranty will indemnify a party that incurs damage or loss (usually the buyer) for all the loss it incurs.

Parties can agree to other remedies in case of a breach of warranty.

Time limits for Claims Under Warranties

Parties can determine and agree the time limits applicable to claims under warranties. The typical time limit is two years and five years for tax related matters.

Consideration and Acquisition Financing

17. What forms of consideration are commonly offered in a share sale?

Forms of Consideration

The most common form of consideration is cash. Non-cash consideration such as shares in the buyer is rarely seen.

Other types of consideration seen in structured finance transactions include deductions for receivables and share swaps, such as offering shares in the buyer as consideration.

Factors in Choice of Consideration

The choice of consideration usually rests with the seller. A seller in a share sale usually prefers cash consideration.

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

The most common way to raise cash for funding an acquisition by issuing new shares is to increase the company capital and to use the resources arising as a result of the capital increase in new investments.

Though it is not common, the Commercial Code has introduced a new system for capital increase that enables companies to conduct a conditional capital increase to be used to issue new shares to raise cash to fund an acquisition.

In a conditional capital increase the buyer's articles must explicitly regulate the following issues (*Article 465, Commercial Code*):

- Nominal value of the contingent capital increase.
- Number, nominal value and type of shares.
- Share classes that can benefit from the exchange or purchase.
- That the preemption rights of existing shareholders have been disapplied and the amount of the shares that have been freed from these
- preemption rights.
- The rights to be granted to certain shareholder groups.
- Limits regarding the transfer of the newly registered shares.

The nominal value of a capital increase through a conditional transaction cannot exceed half of the company's share capital.

These requirements apply to private companies. For listed companies, the regulations under the Capital Market Law 6362 and the Communiqué regarding Shares VII-128.1 apply.

Consents and Approvals

If the buyer is listed, it must obtain the necessary approvals from the Capital Market Board (*Article 17, Communiqué regarding Shares VII-128.1*). This includes a prospectus for issuing new shares (see *below, Requirements for a prospectus*).

However, the Capital Market Board's approval is not required if the conditional capital increase is to provide the company's employees with shares.

No shareholder consent is required for a share issue to raise cash to finance an acquisition.

Requirements for a Prospectus

If the buyer is listed, its board of directors must issue a resolution for issuing new shares and it must make an application to the Capital Markets Board for approval to issue new shares to raise cash to fund an acquisition. The application should be made at least 45 days before the exercise date of a right to convert, use or purchase the shares.

The right to convert, use or purchase the shares must be exercised within 10 business days of the Capital Markets Board approving the prospectus for issuing the new shares.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

All legal transactions regarding the granting of an advance, loan or security entered into by a company with a third person who wishes to purchase that company's shares are invalid (*Article 380, Commercial Code*).

A company cannot acquire more than 10 percent of its own shares as consideration and can only acquire fully paid shares (*Article 379, Commercial Code*).

Exemptions

The restrictions do not apply where the transaction (*Article 380, Commercial Code*):

- Is a regulated transaction conducted by credit and finance institutions?
- Enables the company's employees and employees of the company's subsidiaries to purchase the company's shares by transactions between the company and the employees to grant an advance, loan or security to them.

However, these exemptions are invalid if they reduce or adversely affect the company's capital reserves as defined under Articles 519 and 520 of the Commercial Code.

Further exceptions are listed in Article 382 of the Commercial Code. A company can acquire its own shares regardless of the restrictions in Article 379 in the following circumstances:

- The capital is increased in accordance with Articles 473 to 475 of the Commercial Code.
- The acquisition stems from the principle of universal succession.
- The acquisition stems from a statutory purchase obligation.
- The acquisition aims to collect the company's receivables provided that all relevant shares are fully paid.
- The company is active in the field of securities and capital markets.

Another exemption in Article 383 is if the company acquires its own shares free of charge the restriction in Article 379 does not apply.

Signing and Closing

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

The main document prepared and signed at a signing meeting is the share purchase agreement and its annexes. Ancillary documents are signed as required by the nature of the business. However, it is common to sign agreements regarding the company's real estate, intellectual property rights and key employees.

Closing

At closing, parties usually sign the documents that finalize the deal. The most common documents signed during closing are:

- Release letters
- Share certificate transfer and delivery documents
- Bank transfer documents
- Resolutions from the board of directors regarding the share transfer
- Registration of the share transfer in the company's share ledger
- Resolutions regarding the appointment of the new board of directors
- Amendments to the articles of association

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

If both parties are Turkish the acquisition agreement and all other related documents must be prepared in Turkish (*Code on Using Turkish Language in Commercial Enterprises 805*). Therefore bilingual agreements and documents are common in Turkish acquisitions.

The Commercial Code and other codes regulate certain form requirements for some documents such as written form. A document on which the company's seal is affixed on behalf of the company must be signed by its authorized person(s). This authority can be granted by a board of directors' resolution or directly by the company's articles, and a notarized signatory circular must be prepared to evidence this authorization. Further, a company can also be represented by a proxy holder. Proxies must be granted by someone authorized to sign the proxy.

Signatures must be affixed in the obligor's handwriting (*Article 15, Code of Obligations*). However, both the Code of Obligations and the Commercial Code state that a duly obtained secure electronic signature has the same legal effect as a handwritten signature. Further, signatures obtained through other means besides handwriting are accepted in some circumstances by customs and where a signatory must sign a large number of commercial documents.

22. What are the formalities for the execution of documents by foreign companies?

There are no specific regulations regarding the execution of documents by foreign companies. A foreign company can execute a document with the signature of the person authorized to represent the company (*see Question 21*). However, this authority to represent the company must be proved by legal documents such as a notarized signatory circular or a document with similar effect.

For a foreign notarized document to be enforceable in Turkey the document must be apostilled by the competent authority in the contracting states of the Hague Convention Abolishing the Requirement for Legalization for Foreign Public Documents 1961. In states that are not signatories to this convention the documents must be certified by the Turkish consulate in the relevant state.

23. Are digital signatures binding and enforceable as evidence of execution?

A secure electronic signature has the same legal effect as a handwritten signature (*Article 5, Electronic Signature Code and Article 15, Code of Obligations*).

However, bills of exchange, bonds, checks and commercial bills similar to bills of exchange cannot be issued using secure electronic signatures (*Article 1526, Commercial Code*). Additionally, legal transactions such as acceptance, surety and endorsement relating to these documents cannot be executed by using secure electronic signatures.

An electronic signature is electronic data attached to other electronic data, or which has a logical connection with some electronic data, and is used for the purpose of identity verification (*Article 3(b), Electronic Signature Code*).

24. What formalities are required to transfer title to shares in a private limited company?

Joint Stock Companies

In a joint stock company it is not compulsory to issue share certificates. If there are no share certificates the shares can be freely transferred. The transfer is made by executing a written share transfer agreement between the transferor and transferee. The transfer must be entered in the company's share ledger.

However, the company can issue share certificates for its shares in the form of registered shares or bearer shares. Bearer shares can be transferred by transferring possession of them (*Article 489, Commercial Code*). Registered shares must be transferred by endorsing the registered share certificates and transferring possession of them to the transferee.

Limited Companies

The transfer of shares in a limited company must be made in written form and the signatures of the parties must be notarised (*Article 595, Commercial Code*). The share transfer must also be approved by the company's general meeting, unless the articles say otherwise.

The share transfer must be registered with the trade registry offices and announced in the *Trade Registry Gazette*.

Tax

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share Sale

Stamp tax must be paid on all agreements that include a price, including share purchase and asset sale agreements. The stamp tax rate for 2013 is 0.948 percent, calculated on the highest amount in the agreement and paid for each copy of the document subject to stamp tax. It is common to sign only one original copy and to issue certified copies for all parties to the transaction.

Asset Sale

See above, *Share sale*.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share Sale

It is common to sign only one original copy of the share or asset agreement and to issue certified copies for all parties to the transaction (*see Question 25*).

Asset Sale

See above, *Share sale*.

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share Sale

Capital gains made on a share sale or asset sale must be included in the taxable profits of a company, and are subject to corporate tax. The applicable corporate tax rate is 20 percent (*Corporate Tax Code 5520*).

Asset Sale

See above, *Share sale*.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share Sale

75 percent of the capital gains from the sale of shares held by a tax resident entity for at least the two year period before the sale are exempt from corporate tax.

A share sale is exempt from tax if the shares are sold in consideration for other shares. Therefore, if the buyer acquires the shares of the seller using its own shares as consideration, the share sale is exempt from tax (*Corporate Tax Code*).

For companies that are not tax resident in Turkey, applicable treaties to prevent double tax should be considered.

Asset Sale

75 percent of the capital gains from the sale of an immovable asset that is held by a tax resident entity for at least the two year period before the sale are exempt from corporate tax.

For companies that are not tax resident in Turkey, applicable treaties to prevent double tax should be considered.

If the asset benefits from investment incentives, some tax exemptions may arise due to the incentives.

29. Are other taxes potentially payable on a share sale and an asset sale?

Share sales are exempt from value added tax (VAT) (*Value Added Tax Code 3065*). If the acquisition is performed by a share swap (*see Question 28, Share sale*), the transaction is also exempt from VAT.

An asset sale is subject to VAT on the sale price of the asset. In general the VAT rate is 18 percent, but the rate can differ (1 percent, 8 percent or 18 percent) in accordance with the nature of the asset.

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Tax consolidation is not allowed in Turkey. Therefore, all entities are liable for their own taxes even if they are in the same group of companies. Accordingly, it is not permitted to surrender losses between group companies.

The Corporate Tax Code states that companies can perform transactions with related parties if the arm's length principle is followed. A company can enter any kind of commercial relationship with a company in the same group, but cannot change the conditions of the relationship in a way which violates the arm's length principle.

Employees

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset Sale

In principle, there is no obligation to obtain employees' consent for a share or asset sale under Turkish employment law. However, an important exception is stipulated in Article 178 of the Commercial Code, which applies by reference to Article 158 of the Commercial Code. Accordingly, employees can object to their employment contracts being transferred to the buyer in a merger. Therefore, obtaining the employees' consent is necessary and recommended in asset sales.

Share Sale

See above, *Asset sale*.

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Business Sale

The Labor Law 4857 outlines the provisions that apply to employment contracts in a business sale. If a business is transferred in whole or part to a new employer the employment contracts that are in force must be transferred to the new employer along with all associated rights and liabilities (*Article 6, Labour Law*).

When employment contracts are transferred to a new employer the employees are entitled to terminate the employment contract on the basis of just cause. Further, an adjustment is usually made to the employment conditions of the seller's employees and the buyer's existing employees. If the employment conditions of the seller's employees become less favorable than before they are entitled to terminate the employment contract on the basis of just cause.

In these circumstances, the employees are entitled to a severance payment. The seller and the buyer are jointly liable for making the severance payment to the employee.

Share Sale

Employment contracts are not affected by a share sale. Employment contracts are made between the employee and the target company employer. A change in the employer's shareholding structure does not affect the employee. In this case, neither the employer nor the employees are entitled to terminate the employment contract due to the change.

If the new employer (buyer) terminates an employment contract the employee has the right to claim notice and severance payments. Additionally, the employee is entitled to file a reemployment lawsuit.

Transfer on a Business Sale

See above, *Business sale*.

Pensions

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition is the transferee obliged to honor existing pension rights or provide equivalent rights?

Private Pension Schemes

The general principle in Turkey is to participate in government pension schemes. However, it is also common for some private companies, especially large companies, to offer private pension schemes to their employees.

Employees usually participate in private pension schemes if they are established and offered by their employer.

Pensions on a Business Transfer

Under the Labor Law, the transferee receives all rights and liabilities of the business' employees. It may not be possible to transfer the private pension scheme offered by the seller as it is. However, rights in connection with private pension schemes are deemed to be among those that must be granted by the new employer.

Therefore, the new employer may decide to offer the transferred employees a private pension scheme with similar conditions to the previous pension scheme or provide them with an equivalent monetary benefit.

Competition/Antitrust Issues

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Triggering Events/Thresholds

Mergers and acquisitions that result in a situation where a company obtains a dominant position with regard to competition law are prohibited. The Competition Board determines the mergers and acquisitions that require its approval (*Article 7, Act on the Protection of Competition 4054*). Competition Board approval is

required for merger or acquisition transactions where either the (*Communique Regarding Mergers and Acquisitions required to be approved by the Competition Board*):

- Total turnover of the parties in Turkey exceeds TRY100 million, and the turnover of at least two of the parties in Turkey each exceeds TRY30 million.
- Turnover in Turkey for the acquired asset or operation, or for at least one of the parties in mergers, exceeds TRY30 million, and at least one of the other parties has a global turnover exceeding TRY500 million.

Notification and Regulatory Authorities

The Competition Board determines the mergers and acquisitions that require its approval. Notification of the merger and acquisition to the Competition Board must be made by either of the parties, by all parties together or by their representatives. The notifying party must inform the other parties that they have notified the Competition Board.

Substantive Test

The substantive test applied by the Competition Board is whether the merger and acquisition creates a dominant position, or strengthens an existing dominant position to cause a significant lessening of competition in a market for goods or services in the whole or part of Turkey.

Environment

35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

Liability arising from environmental issues such as pollution and contamination is jointly determined by Articles 730 and 737 of the Civil Code 4721 and the Environment Code 2872.

The main principle stemming from the Civil Code is that the owner of the immovable asset is liable for any contamination. The Environment Code adopts the "polluter pays" principle.

Since the legal entity being acquired in both an asset and a share sale is seen as the polluter, the legal entity is liable for any contamination. However, it is possible for the buyer to take recourse against the seller in relation to contamination occurring before the acquisition. To do this, the parties should include a right of recourse against the seller for environment-related obligations in the acquisition agreement.

The penalties for land contamination are set out in the Criminal Code 5237, in Articles 181 to 184. Polluting the environment deliberately or by negligent acts, causing noise and carrying out construction without a permit triggers certain penalties, including imprisonment and administrative fines.

Criminal liability rests with the party who is responsible for committing the relevant environmental crime.

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