

Substantive and procedural issues in asset purchases under Turkish law



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Transactions for the transfer of assets of commercial enterprises, and commercial enterprises *in toto*, have always been somewhat controversial under Turkish law. A threshold issue is whether, under applicable law, the divested asset(s) comprise the seller's total enterprise. In this respect, it is important to start with the definition of an asset transfer under Turkish law. Asset transfer is defined as the transfer of ownership of an asset, group of assets, or business from one natural or legal person to another natural or legal person. However, the transfer of a substantial asset of a commercial entity or merchant is considered a transfer of a commercial enterprise. When an asset is going to be purchased in Turkey, an assessment must be made to determine whether it is an independent asset, or constitutes a commercial enterprise.

Article 11 of the Turkish Commercial Code (TCC), no 6102, defines a commercial enterprise as one in which 'the activities aiming to generate income exceeding the limit foreseen for the tradesmen are carried out continuously and independently.'

The Turkish Code of Obligations (TCO), no 6098, considers assets comprising substantially all of a seller's business to be equivalent to its whole commercial enterprise. However, 'substantially all' is a term that lacks a clear statutory definition. Accordingly, for elucidation attorneys must refer to the substantial body of well-developed case law on the matter. Decisions of the Supreme Court of Turkey apply the following tripartite test to determine whether divested assets comprise substantially all of a seller's assets:

- i) whether the assets can be treated as a stand-alone business;
- ii) whether the assets are sufficient to continue the relevant business enterprise;
- iii) whether seller's capacity to engage in the enterprise is materially diminished by the divestiture.

Under Turkish law, a sale of assets satisfying each of the above criteria is considered a sale of substantially all of a seller's assets, and is, deemed a commercial enterprise transfer. Therefore, a sale of assets failing to satisfy one or more of the above criteria will be deemed a transfer of individual assets representing less than the seller's total commercial enterprise.

Subject of transfer

Article 11 of the TCC regulates the assets of a commercial enterprise that are subject to transfer. According to Article 11 of the TCC, a commercial enterprise is considered as a whole and may be the subject of transactions such as pledges and transfers *in toto*. In the context of a commercial enterprise transfer, as a rule, the constituent assets are transferred with all attendant rights and obligations.

It is controversial whether liabilities can be excluded from the scope of a transfer of a commercial enterprise. Prevailing judicial opinion, considered doctrinal on the subject, holds that where a business enterprise is transferred, attendant liabilities cannot be separated from transferred assets and must be transferred along with them.

The correct understanding of prevailing law is that in cases where there is no special provision in the transfer agreement to the contrary, it is accepted that all assets constantly allocated to the enterprise are within the scope of the transfer. On the other hand, the transfer does not necessarily have to recite all of the material assets because, as mentioned above, the transfer of assets essential to a specific commercial enterprise are considered a transfer of the whole commercial enterprise.

However, if some assets are excluded from transfer, and those excluded assets prevent the buyer from continuing the enterprise after completion of the sale, such transfer is transfer of assets of the commercial enterprise only, and not a transfer of the commercial enterprise *in toto*.

The employees of the commercial enterprise are considered subjects of the transfer. According to Article 6 of Turkish Employment Law no 4857, 'When, due to a legal transaction, the

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establishment or one of its sections is transferred to another person, employment contracts existing in the establishment or in the section transferred on the date of the transfer shall pass on to the transferee with all the rights and obligations involved.' Employee approval is not considered. This provision is mandatory and cannot be decided otherwise.

Form of the transfer agreement

Fundamentally, a contract for the transfer of assets is not subject to any formative requirements under Turkish law. Nevertheless, the transfer of certain rights related to transferred assets is subject to special conditions. However, Article 11 of the TCC states that a transfer agreement, and any other agreement whose subject is an entire enterprise, shall be written and the writing registered with and published in the trade registry. Thus, concluding a single contract for transfer of an enterprise is deemed sufficient, and separate transactions are not needed to effect the transfer.

The content of an asset purchase agreement is regulated by Article 133 of the Trade Registry Regulation (TRR), pursuant to which a purchase agreement must be reduced to writing, though, as mentioned above, in the case of a business enterprise it need not, under applicable law, stipulate individually each transferred asset. Nevertheless, to avoid ambiguity in the event of subsequent litigation, it is best practice to recite with specificity in the purchase agreement the included assets.

Article 7 of the Communiqué published by the Competition Board on *Mergers and Acquisitions Which Require the Authorization of the Competition Board No 2010/4*, provides that where the business operations of the parties to an asset purchase satisfy the following criteria, such purchase is subject to approval by the Competition Board: a) the total combined annual domestic revenue of the contract parties exceeds 100,000,000 TL, and the total annual domestic revenue of two or more of the parties

considered individually exceeds 30,000,000 TL, or b) the global revenue of at least one of the contract parties exceeds 500,000,000 TL, and at least one of the other party's total domestic revenue exceeds 5,000,000 TL.

Legal consequences of asset transfer

In accordance with TCC, all assets of an enterprise pass to the transferee upon registration and announcement of the transfer in the trade registry. On the other hand, the transfer of debts of the transferred commercial enterprise is specifically governed by the TCO. Pursuant to Article 202 of the TCO, liabilities attached to assets comprising a seller's commercial enterprise, whether known or unknown at the time of contract, are transferred to the purchaser regardless of creditor consent. For a period of two years following official publication of the sale, purchaser and seller are jointly liable therefor. For outstanding debt this period starts from the date of notification or announcement; and for prospective debt from the relevant due date.

Interestingly, under TCO Article 202, in cases where a major asset specific to a particular commercial enterprise is purchased, the buyer, regardless of intent, is liable for debts attaching to that asset, even if in contravention of the terms of the purchase agreement. Since the purchaser's liability for operational debt is based on a provision of law, the purchaser is also liable for unknown debts.

At this point, it should also be stated that there are some protective and weighty provisions regarding protection of creditors under Turkish law. Under Article 280 of the Enforcement and Bankruptcy Law (EBL), no 2004, debt incurred while insolvent and in bad faith is subject to cancellation if such insolvency and bad faith was or should reasonably have been known by the creditor. It is presumed under the EBL that the purchaser of an insolvent business enterprise, or substantial assets thereof, was aware of the debtor's insolvency and of any bad faith

transactions it entered into while insolvent. This presumption can be overcome with proof of: individual creditor notification, or public notice made at least three months prior to the closing date of the transaction, or by posting conspicuous notices in the place of business, and publishing notice in the Trade Registry Gazette or, if it is not possible, accomplishing such other notice sufficient to ensure that all creditors are aware of the transfer in advance of closing. Accordingly, associated liabilities are imputed to the purchaser.

In this regard, it should be noted that if liabilities are excluded from transfer the abovementioned notification requirements should still be adhered to in case the transaction is cancelled. In order to limit potential litigation over cancellation, it is extremely important that a financial expert determine the state of the debtor's finances, and identify all outstanding, prospective, and conditional liabilities, all creditors, and the existence and filing status of security interests, if any, in the subject assets.

Conclusion

Although there is no sharp distinction between the transfer of a commercial enterprise and the transfer of individual assets, they are evaluated differently under Turkish law. As a result of an evaluation made within the framework discussed above, if a transfer is deemed not merely a transfer of individual assets, but of a commercial enterprise in toto, appropriate steps must be taken to ensure the validity of the transaction. Furthermore, it is important and advisable to conduct due diligence, draft a legally valid agreement which includes representations and warranties of the counterparties, and to timely accomplish required notifications and announcements. ■

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