

TURKISH M&A PRACTICAL GUIDE SERIES



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1. IS A DOUBLE TAXATION TREATY IN PLACE BETWEEN THE BUYER'S JURISDICTION AND TURKEY?

It is highly recommended to check whether a double taxation treaty is in place between the buyer's jurisdiction and Turkey. If a treaty exists, its provisions, especially the ones in relation to capital gain tax are of high importance. Although at that point the short-term goal would be to complete the acquisition, it would be prudent to think ahead and check the tax implications in the event of an exit, restructuring or a shareholder financing. The terms of the double taxation treaty would be a key factor for any decision making in terms of the entity that will be acquiring the target company's shares. If the double taxation treaty is not favourable between the buyer's jurisdiction and Turkey, the buyer may prefer to acquire shares through a special purpose vehicle ("SPV") located in a different jurisdiction.

2. IS A BILATERAL INVESTMENT TREATY IN PLACE BETWEEN THE BUYER'S JURISDICTION AND TURKEY?

Along with the double taxation treaty, it is recommended to check whether a bilateral investment treaty ("BIT") is in place between buyer's jurisdiction and Turkey to protect direct investments and set the groundwork for any possible investment disputes. If exists, the BIT will also act as a major factor in determining the jurisdiction of the entity acquiring target company's shares and use of any SPVs for this purpose.

3. DOES THE TARGET COMPANY OPERATE IN A REGULATED INDUSTRY?

This is important in order to determine the specific regulator that you will deal with and its requirements for the companies operating in the industry. This will directly affect the transaction as the specific legislation may require regulatory approvals or notifications to be filed with the regulator before or after the completion of the transaction. These requirements may affect the timing of the closing. It will also be useful to determine whether the target company has been operating in compliance with the requirements set by the regulator and to assess the risks involved with any previous non-compliance.

4. DOES THE TRANSACTION REQUIRE ANY CLEARANCE FROM THE COMPETITION AUTHORITY?

Transactions that trigger change of control in the target company is subject to the Turkish Competition Authority's merger control if the turnover thresholds are exceeded. If (i) the local turnover of the parties to the transaction in total exceed TRY 100m and at least two of the parties' local turnover individually exceed TRY 30m, OR (ii) if the local turnover of the acquired business exceeds TRY 30m and one of the parties' worldwide turnover exceed TRY 500m, the transaction triggering a change of control would require a clearance from the Turkish Competition Authority. It is important to understand whether the transaction requires a Competition Authority clearance in order to plan and start on the Competition Authority filing, as early as possible.

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5. WHAT PRECAUTIONS ARE TAKEN TO ENSURE COMPLIANCE WITH THE DATA PRIVACY REQUIREMENTS?

The transaction will likely involve a flow of personal data from one party to the other and especially from the target company to the potential buyer(s). The target company and/or the seller may refrain from sharing information to protect itself from any incompliance with the data privacy requirements and the buyer will ask to be provided with information during the due diligence process. A fragile balance between a proper due diligence process and the data privacy requirements has to be agreed between the parties to the transaction. The anonymization of any personal information disclosed to the other party can be a valid solution in most cases to ensure such balance. The personal information that cannot be anonymized should be limited to the extent possible and proper restrictions have to be implemented to ensure limited access to the extent possible. The execution of non-disclosure agreements and confidentiality undertakings by the parties and their advisors and proper documentation of these, as well as restriction of access on a need-to-know basis are highly recommended.

Given that the Turkish Personal Data Protection Authority is highly sensitive in relation to cross-border transfer of any personal data, the selection of the virtual data room service provider and where its servers are located are also highly important. The parties to the transaction may request undertakings from the data room service provider to ensure compliance.

6. IS THE PERSON NEGOTIATING AND SIGNING DOCUMENTS ON BEHALF OF THE COUNTER PARTY AUTHORIZED?

The party signing documents on behalf of a corporate entity must be formally authorized to represent and bind such entity. The binding power of a signatory must be documented through up-to-date corporate documents of such entity. Turkish companies have notarized signature circulars which document their authorized signatories. In significant transactions such as M&As and financings, the signature circulars are accompanied with board resolutions and/or power of attorneys which designate the authorized signatories for the specific transaction. A transaction party is under the obligation to review counter party's authorization documents in order to avoid any invalidity claims in the future.

7. WHAT IS THE GOVERNING LAW AND DISPUTE RESOLUTION FORUM?

Turkish law allows parties to choose a foreign law as the governing law to the transaction and foreign courts or arbitration as a dispute resolution forum, provided that there is a foreign element in the transaction. "Foreign element" is interpreted broadly to include one of the parties to be resident abroad, the agreement to be performed abroad, one of the parties to have a foreign shareholding or the transaction to be funded by a foreign party. However, Turkish law overrides the selected foreign law if the application of the foreign law is against Turkish public order or the foreign law is against Turkish public policy rules.

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8. IS A NON-TURKISH ENTITY PARTY TO THE TRANSACTION?

Turkish law requires a document between all Turkish parties to be signed in Turkish for the document to be valid. An English translation can also accompany the Turkish version but the Turkish version will prevail. If one of the parties is a foreign entity, the document can be signed in a different language.

9. WHAT IS THE TARGET COMPANY TYPE?

Two company types are broadly used in Turkish practice: (i) joint stock company and (ii) limited liability company. Both companies provide shareholders with protection in terms of liability from company debts - at least from non-public debts. While limited liability companies are relatively easier to establish and manage, they provide certain disadvantages in terms of liability, closing mechanics - and most important of all - tax when shares are sold.

If you have a limited liability company as a target company, it would be highly recommended to change the form of a limited liability company to a joint stock company before the closing to avoid the disadvantages above.

10. WILL THE ACQUISITION BE FINANCED THROUGH THE TARGET COMPANY?

Turkish Commercial Code prohibits target companies from providing financial assistance (loans, advances or pledges etc.) for the acquisition of its own shares. Therefore, the target company's assets cannot be utilized for financing the acquisition, although its shares can be pledged.

Case specific structures are designed in Turkish practice to implement leveraged buy-outs.

Please contact us at info@consulturk.com.tr for further information.

This guide has been prepared for general information purposes. It is not meant to serve as legal advice in any manner. It is only a brief outlook of the topic. It is not and does not aim to be comprehensive. It only provides information on certain significant points of the topic and should not be used without a specific legal advice for the relevant case.

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