

# Private acquisitions in Turkey: market analysis overview

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Q&A guide to private acquisitions market practice in Turkey.

The Q&A gives a high level overview of key issues including current major trends, private M&A activity, structuring and documentation in transactions, governing law and arbitration, and reform and future market trends.

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**Resource Type**

Country Q&A

**Jurisdiction**

Turkey

## Market overview

### 1. What are the current major trends in the private M&A market?

In recent years, Turkey has enacted several laws designed to improve its investment environment. In 2012, the Turkish Commercial Code (TCC) and the Turkish Code of Obligations entered into force to replace their previous versions and create a transparent and sustainable commercial environment.

In 2016, Turkey enacted the Law Amending Certain Laws for Improvement of the Investment Environment numbered 6728 (Amendment Law) to make important amendments to various laws, including the TCC, certain tax laws, and enforcement and bankruptcy laws. The aim of these amendments is to reduce investment costs and create an investor-friendly environment, and therefore support both local and international investors.

Another important factor to improve the investment environment and increase the number of M&A transactions in Turkey is the adoption of a non-discrimination and equal treatment policy. Accordingly, foreign nationals who conduct business in Turkey have the same rights and liabilities as locals, although there are exceptions in specific sectors (such as energy, media, telecoms, and so on).

According to the 2019 Report on the Review of Mergers and Acquisitions (M&A Report) published by the Turkish Competition Authority (TCA) on 6 January 2020:

- The total value of deals reported to the TCA between 2013 and 2019 increased year on year (except for 2015).
- The total value of transactions with a Turkish target company was TRY42.9 billion in 2019, compared to TRY21.4 billion in 2013.
- The share of foreign investors in the total transaction volume is quite high. While foreign investors constituted 76.6% of the total number of investors in 2013, their share was 84.1% in 2019.

In this context, although global economic uncertainties, political issues in neighbouring countries and the depreciation of the Turkish Lira in 2018 have had certain negative effects on Turkish markets, Turkey remains an important country for investors and has a high investment potential.

In Turkey, investments are usually small and growth-oriented. Small M&A transactions are generally not debt-financed, but bigger transactions may use debt financing (usually bank financing). Private equity sales are also seen in the Turkish M&A market, but their number remains low.

## 2. What has been the level of private M&A activity in the previous year?

According to the M&A Report, 208 M&A transactions were implemented in 2019 after clearance from the TCA. Note that this figure does not represent all M&A transactions that took place in Turkey in 2019, as only transactions that meet certain turnover thresholds are reported to the TCA. However, the numbers given in the M&A Report still provide an insight into the size and volume of M&A transactions in Turkey. Among the 208 reported transactions, one transaction was a privatisation and three transactions were outside the scope of the TCA's review as they did not create a change of control.

According to the M&A Report:

- Target companies were Turkish companies in 91 transactions. The total transaction value of these was TRY42.863 billion.
- The remaining 113 transactions only involved foreign companies. The total transaction value of these was TRY2.838 trillion.
- All parties were Turkish in 38 of the reported transactions. The total value of these transactions was TRY6.246 billion. All parties were foreign in 115 transactions.
- 46 transactions involved foreign investments in Turkish companies, with a total value of TRY36.177 billion.
- In 51 transactions, at least one of the parties was Turkish and one of the parties was a foreign investor, representing a total value of TRY19.745 billion.

Japanese investors were present in seven transactions. French investors were involved in five transactions, while investors from Germany, The Netherlands and the UK were involved in four transactions each.

In 2019, most transactions involving a Turkish target company were in the field of production, transmission and distribution of electrical energy. In terms of deal size, the highest transaction value was reported in the field of monetary intermediaries. According to the classification in terms of fields of activity:

- The highest transaction value was in financial services activities (excluding insurance and pensions), amounting to TRY16.5 billion.
- The manufacture of chemicals and chemical products had a transaction value of TRY10.4 billion.
- The production and distribution of electricity, gas, steam and ventilation systems had a transaction value of TRY2.93 billion; the distribution of natural gas and production of electrical energy were the prominent sectors within this scope of activity.

## Deal structures

### 3. What are the current trends in the structuring of private M&A transactions?

In Turkey, the most common way to structure a private M&A transaction is a share sale. Asset sales may also be used, depending on the nature of the investment and needs of the parties.

A share sale only requires the execution of a share purchase agreement. In an asset sale, in addition to signing an asset sale agreement, separate transfer agreements may be needed depending on the asset being transferred. For example:

- To sell a company's vehicles, a transfer agreement must be signed before a notary public.
- To sell a company's immovable property, a transfer agreement must be signed before the competent title deed registry.
- For a trade mark transfer, a transfer agreement must be signed before a notary public, and the agreement must be registered with the Turkish Patent Institute.

Share sales are usually preferred, as they can be more advantageous in terms of tax and require fewer procedural steps compared to asset sales.

Cash deals are usually preferred in Turkey. However, non-cash consideration (such as shares and loan stock) may also be used depending on the nature of the transaction and negotiation of the parties.

Buyers may pay the price in full on closing or pay in instalments on the realisation of certain milestones or financial goals. Buyers usually prefer paying in instalments and using earn-out mechanisms when it is important to keep the seller(s) in the company after closing, to ensure a smooth transaction and the company's continuous growth.

Price adjustment mechanisms (such as working capital adjustments or EBIDTA (earnings before interest, taxes, depreciation and amortisation)) are commonly used in M&A deals to determine the price and payment conditions.

#### 4. What are the current trends in the terms and documentation of private M&A transactions?

Share sales are the most common structure in private M&A deals (see [Question 3](#)). The main document in a share sale is the share purchase agreement. The most common clauses in a share purchase agreement are as follows:

- Parties.
- Introduction.
- Definitions.
- Interpretation.
- Conditions precedent.
- Sale of the shares.
- Sale price, consideration and payment.
- Closing/completion.
- Representations, warranties and indemnities of the seller and the buyer.
- Indemnification clauses for breach of representations.
- Limitation of liability.
- Confidentiality and non-solicitation/non-compete undertakings by the seller, if applicable.
- Standard contractual clauses relating to non-assignment, waiver, costs, notices and so on.
- Choice of law and dispute resolution/arbitration.
- Exhibits, schedules and disclosures.

Representations and warranties and limitation of liability clauses are among the most important clauses for investors.

Representations and warranties usually relate to:

- The seller being the full legal and beneficial owner of the shares/assets.
- Particulars of the company (for example, share capital and group structure).
- Assets or property, such as unencumbered title, and the company's current business.
- The seller's authority to enter into the transaction.
- Tax, accounts and financial records.
- Litigation.

- Intellectual property and IT systems.
- Employees.
- Agreements, including suppliers and customers.
- Compliance with applicable laws and insolvency.

The parties typically agree a monetary cap on liability, which is generally determined as the aggregate amount of the sale price payable by the buyer.

A share purchase agreement for shares in a limited liability company must be notarised by a notary public and registered with the trade registry. When the target is a limited liability company, a shorter and less detailed version of the share purchase agreement is also usually prepared and signed.

When only a portion of the shares are acquired, the parties usually also sign a shareholders' agreement. In certain cases, the parties combine the share purchase agreement and shareholders' agreement in one document.

Asset sale agreements usually include similar provisions. However, due to additional transfer requirements (see [Question 3](#)), the following provisions may also be included:

- Provisions relating to third party consents.
- Identification of the assets and provisions regarding their transfer.

#### 5. What are the current trends in how private M&A transactions are conducted?

Negotiated sales are more common, as there is usually only one potential buyer in a standard M&A transaction. However, an auction sale may be preferred depending on the nature of the transaction and the number of potential buyers.

Private auctions are not specifically regulated by Turkish law. Public auctions are governed by the Enforcement and Bankruptcy Law numbered 2004. Shares that are attached to debts of the company's shareholders to third parties or to the company itself can be sold through a public auction on the creditors' request. If no one buys the attached shares or 50% of the estimated value of the shares is not achieved at the first public auction, the execution office must set up a second public auction with the same conditions. If the stated conditions are not met at the second public auction, this will result in foreclosure of the request of sale. Further details are regulated by the Enforcement and Bankruptcy Law.

In negotiated sales, the parties usually commence negotiations after signing a letter of intent or a memorandum of understanding. Following this, the potential buyer usually initiates the due diligence process.

The parties to a private M&A transaction usually conduct due diligence on legal, financial and tax matters. The buyer usually conducts the due diligence process. Legal due diligence is conducted by the buyer's legal consultants, while financial and tax due diligence is conducted by financial and tax advisers.

Both physical due diligence and virtual due diligence are used. Virtual due diligence has become more popular in recent years due to its various advantages, such as cost savings and easy access to virtual data rooms.

The form of the due diligence report depends on the buyer's needs. Depending on the size and scope of activity of the target company, the buyer may require a "red flag" due diligence report, which only highlights important risks and deal breakers, or a full description report that gives a full picture of the company.

After completion of the due diligence and depending on its outcome, the buyer decides on whether to continue with the deal. If the buyer does decide to continue, the parties negotiate their rights and obligations under the sale contract based on the results of the due diligence report.

## Cross-border litigation and arbitration

**6. Is it common market practice for a share purchase agreement to provide for a foreign governing law and/or jurisdiction? If so, in what circumstances does this occur and which governing law and/or jurisdiction are common choices?**

It is quite common for a share purchase agreement to provide for a foreign governing law and/or jurisdiction, particularly when one of the parties is foreign (especially the buyer).

Under the International Private and Civil Procedure Law numbered 5718, agreements containing foreign elements (such as a foreign party) can be governed by a foreign law. However, directly applicable rules of Turkish law will still apply in relation to:

- Public order and public interest.
- The social, political or economic structure of Turkey, for example, competition law, intellectual property law or employment law.

Even if a foreign law can govern a share purchase agreement, the parties must still comply with the TCC and other relevant legislation concerning the transfer of shares.

In practice, the parties usually tend to choose the laws of England and Wales as the governing law of their share purchase agreements, as it is preferred by investors in international investment and corporate transactions. The laws of continental civil law jurisdictions (such as German law or Swiss law) may also be chosen, depending on the nationality of the investors.

**7. Is it market practice for an arbitration provision to be included in private M&A documents? Are arbitration clauses enforceable in your jurisdiction? Do local courts respect the choice of jurisdiction in an arbitration clause?**

It is quite common to include an arbitration provision in private M&A documents in Turkey, especially if one of the parties is foreign. This is because Turkish courts may not always be efficient or expedient in resolving disputes arising from complex deals.

The parties usually refer disputes to international arbitration centres, such as the International Court of Arbitration of the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA), especially in cross-border transactions. However, the Istanbul Arbitration Centre (ISTAC) has also been used in recent years.

Foreign judgments and arbitral awards regarding civil law matters are enforceable if they are final under the laws of the foreign country (*Article 50, International Private and Civil Procedure Law numbered 5718*). When examining an enforcement request, the Turkish courts can only determine whether the arbitral award and/or arbitral proceedings meet the enforcement conditions under Turkish law or the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Defendants cannot raise merits-based defences.

Terms giving jurisdiction to the courts in an arbitration clause are not valid. However, the courts can have jurisdiction in relation to interim injunctions. The parties to arbitration can request interim injunctions from local courts during or before the arbitration proceedings.

## Recent developments and proposals for reform

**8. Have there been any significant recent or proposed legal developments affecting the market that could impact on transactions?**

## Taxation

The Amendment Law, which was enacted in 2016, has introduced important changes concerning stamp tax. In Turkey, stamp tax is calculated as a proportion of the highest monetary amount written in certain documents.

Stamp tax usually represents a big hurdle in transactions involving high amounts. Until 2016, stamp tax could also create problems for share transfers. Under the Amendment Law, documents used in transfers of shares in joint stock companies, limited liability companies and partnerships limited by shares are now exempt from stamp tax. This has been a great relief for the M&A sector.

Another important, although negative, development concerns the application of income tax to share sales. Under Turkish law, sales of shares are in principle subject to income tax. However, income derived from the sale of share certificates of a joint stock company is not subject to income tax if the seller has owned the share certificates for at least two years before the sale. Limited liability companies cannot issue share certificates, and therefore a sale of shares in a limited liability company is not exempt from income tax. To avoid this, sellers used to convert the target company into a joint stock company and issue share certificates before the share transfer. This practice was based on various tax rulings of the Ministry of Finance. According to these rulings, participation in the capital of the target as a limited liability company was taken into account for calculating the two-year ownership period, even if the share certificates were issued after conversion of the company. However, the Ministry of Finance changed its view in a ruling issued in 2018. According to this new ruling, the date on which the share certificates are issued is now used as the acquisition date for calculation of the two-year period. This development has caused a big shock in the market.

### **Formalities for certain share transfers**

The TCC, which entered into force in 2012, introduced an obligation to notify and register share transfers with the relevant trade registry in companies that are part of group companies, when the ratio of the transferred shares exceeds certain thresholds. This requirement applies to transfers of shares in all types of companies. Since there is otherwise no notification and registration requirement for transfers of shares in joint stock companies, the parties must comply with this additional obligation if the joint stock company is part of a group of companies and the thresholds are met.

### **Currency restrictions**

Presidential Decree numbered 85 (Decree No. 85) was enacted in September 2018 to increase the value of the Turkish Lira against foreign currencies. Decree No. 85 provides that Turkish residents (that is, natural persons residing in Turkey and legal entities registered in Turkey) cannot agree a contract price and any other payment obligations in a foreign currency, or index them to a foreign currency, in the following transactions (unless otherwise specified by the Ministry of Treasury and Finance):

- Agreements for the purchase and sale of movable and immovable properties.
- Leases of all types of immovable and movable properties, including vehicle and financial leasing.
- Employment contracts.
- Services agreements.
- Contracts of work.

Soon after the enactment of Decree No. 85, a number of trade associations raised various objections, arguing that the restrictions would have a material impact on trade and that there were uncertainties as to the scope of the restrictions. To overcome these uncertainties, the Ministry of Treasury and Finance issued amendments to the existing communiqué No. 2008-32/34 on Decree No. 32 and listed exemptions from restrictions to the use of foreign currency (Amendment Decree).

Under the Amendment Decree, the following agreements must be in Turkish Lira when executed between Turkish residents (or converted into Turkish Lira if executed before the entry into force of the Amendment Decree):

- Sale and purchase agreements (including sales of immovable property and vehicles in an asset sale).
- Rental agreements.
- Leasing agreements.
- Employment agreements.
- Agreements for services.

- Agreements for the performance of tasks (including construction agreements).
- Insurance agreements.

## 9. What will be the main factors affecting the market next year, and how do you expect the market to develop?

Although local and global economic uncertainties have affected the number and volume of M&A deals in recent years, the Turkish M&A market showed an optimistic picture in 2019. 2020 was expected to be a promising year for M&A transactions. However, this has been greatly affected by the outbreak of the 2019 novel coronavirus disease (COVID-19).

The biggest priority for companies around the world is now to protect their employees and business, and get through this difficult time without incurring too much loss. COVID-19 is expected to have an important effect on global markets from various perspectives, and M&A markets will also be negatively affected. It is currently difficult to predict the extent of these negative effects, but it is highly likely that many M&A deals both in Turkey and around the world will be halted or delayed in 2020.

As part of its 2023 goals to become one of the top ten economies in the world by 2023, Turkey will certainly continue its efforts to support local and foreign investment and growth in the M&A market, by speeding up investment processes and boosting the economy.

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#### Publications

- *Private mergers and acquisitions in Turkey: overview, Practical Law, Co-Author, 2020.*
- *Corporate Governance 2019 in Turkey, GTDT, Co-Author, 2019.*
- *Enhancing the Justice System, The Oath, Co-Author, 2018.*
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#### **Publications**

- *COVID-19 and Personal Data Protection, Gün + Partners, Co-Author, 2020.*
- *Data Protection & Privacy 2019 in Turkey, GTDT, Author, 2018.*
- *TMT Law and Practice 2018 in Turkey, Chambers and Partners, Author, 2018.*
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- *Investing in Turkey, The Oath-Features, Co-Author, 2017.*