

## Share Transfers in Capital Companies: Issues to Re-consider

Most purchasers' main objective in a company acquisition is taking over the absolute control of the target company with minimum liability. In share purchase deals, which are the most resorted to means of acquisition, the ownership of the target company's shares are transferred from the seller to the purchaser. The latter means that the purchaser steps into the shoes of the seller and the operation of the legal entity continues in an uninterrupted manner. Unless specifically agreed to through a "representations and warranties clause" to be inserted into the share purchase agreement, subsequent to the share transfer, the seller has no continuing interest in or obligation with respect to the assets, liabilities or operations of the legal entity in question<sup>1</sup>.

The epicenter of a share purchase deal consists of the due performance of share transfer. In case the shares are not duly transferred, the transfer may not be binding on (and enforceable against) the entity in question and/or third parties. Therefore, share transfer must be performed in a precise and orchestrated manner.

In Turkey, legal entities that are most commonly involved in share purchase deals are joint stock companies (*anonim şirket*) (**JSCs**) and limited liability partnerships (*limited şirket*) (**LLPs**). Below you may find the main issues that should be taken into account in a share purchase deal involving those entities.

### 1. Share Transfers in JSCs

In JSCs, shares may be registered (*nama yazılı*) or in bearer (*hamiline*) form; they may or may not be represented by temporary share certificates (*ilmuhaber*) or share certificates (*hisse senedi*). Consequently, their transfer's validity conditions may differ from one type of share to another.

- **Transfer of naked shares**

If the shares of a JSC are not represented by (temporary) share certificates, they are referred to as "naked shares" (*ciplak pay*). Pursuant to the Turkish Commercial Code (the **Code**) and well-established Turkish Court of Appeals' precedents, transfer of naked shares is not subject to any formal requirement. Accordingly, unless otherwise provided in the articles of association (**AoA**) of the respective JSC, naked shares are duly transferred provided that (i) a written share purchase agreement -which does not necessarily have to be executed before notary public - is executed between the parties, (ii) the transfer is notified to the JSC either by the seller or the purchaser, and (iii) the transfer is duly registered with the share ledger of the JSC.

- **Transfer of shares represented by (temporary) share certificates**

According to the Code, a JSC's shares represented by (temporary) share certificates may be either registered or in bearer form.

*Transfer of registered shares.* Unless otherwise provided in the AoA of the respective JSC, the transfer of registered shares occurs provided that (i) the (temporary) share certificates are endorsed; (ii) their possession is transferred from the seller to the purchaser; (iii) the transfer is notified to the JSC either by the seller or the purchaser, and (iv) the transfer is duly registered with the share ledger of the JSC.

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<sup>1</sup> There may be specific legislation stipulating otherwise. For instance, the shareholder of a limited liability company in Turkey continues to be liable for the company's public debts which have occurred within his term of partnership even after he leaves the company as a shareholder.

*Transfer of shares in bearer form.* Unless otherwise provided in the AoA of the respective JSC, transfer of possession of the share certificates from the seller to the purchaser with the intention of transferring the ownership of the shares represented by the same suffices for a due share transfer.

- **Registration of the transfer with the share ledger of the JSC**

As stated above, registration of the transfer of naked and/or registered shares into the share ledger of the JSC is a validity condition for the transfer.

The Board of Directors (*yonetim kurulu*) of the relevant JSC is responsible for keeping the share ledger of the JSC up-to-date. Therefore, once the transfer of shares is notified to the respective JSC, the Board of Directors registers such transfer in the share ledger, typically *via* a resolution. Otherwise, the purchaser would not be considered as a shareholder of such JSC. The Board of Directors of a JSC may refuse the registration of the transfer based only on the grounds set forth under the Code or the AoA of the respective JSC. One should bear in mind that it is possible to include in the AoA of a JSC that the Board of Directors may refuse to register the transfer of shares without any reason. Therefore, the AoA should be thoroughly reviewed before any JSC share transfer to prevent any unpleasant situation.

- **Restrictions with respect to capital contributions in kind**

Please note that pursuant to the Code, shares issued in exchange of capital contributions in kind cannot be transferred for a two-year period starting from the date of (i) the registration of the JSC with the respective Trade Registry or (ii) the relevant capital increase.

- **Exemptions granted to the transfer of (temporary) share certificates**

The Income Tax Law and the Law on Value Added Tax provide for certain tax exemptions for taxable incomes generated through transfer of (temporary) share certificates. One of the decisive conditions for the seller to benefit from such exemptions is having held the (temporary) share certificates for more than two years. Nonetheless, transfer of naked shares is not within the scope of the said exemptions.

## 2. Share Transfers in LLPs

Initially, please be informed that although it is possible for LLPs to issue partnership bonds (*ortaklik senedi*), such bonds are basic evidence tools, they are not negotiable, and thus their transfer does not result in the transfer of the partnership stake they represent.

In order to realize a share transfer in an LLP, the parties have to comply with a rigid procedure. Therefore, unless otherwise provided in the AoA of the respective LLP, the below steps shall be completed:

- *Notarized share purchase agreement.* The purchaser and the seller shall execute a written share purchase agreement before a notary public.
- *Notification of the share transfer to the LLP.* Either the purchaser or the seller has to inform the LLP on the share transfer.
- *Approval of the share transfer by the LLP.* Once the LLP is notified of the transfer, the Board of Partners (*ortaklar kurulu*) should approve such transfer with the affirmative votes of 3/4 of the partners representing at least 3/4 of the share capital of the LLP. Please note that even though there is a notarized share purchase agreement, if the Board of Partners does not approve such agreement, it does not have any legal effect.
- *Registration of the transfer with the share ledger of the LLP.* Once the Board of Partners approves the transfer, it should make a resolution on its registration with the share ledger of the LLP.
- *Registration and announcement.* Finally, the share transfer has to be registered with the respective Trade Registry and announced in the Trade Registry Gazette to inform third parties.

- *Restrictions with respect to capital contributions in kind.* Pursuant to the Code, shares issued in exchange of capital contributions in kind cannot be transferred for a three-year period starting from the date of (i) the registration of the LLP with the respective Trade Registry or (ii) the relevant capital increase.
- *No tax exemption.* Since LLPs cannot issue share certificates, tax exemptions granted to the transfer of (temporary) share certificates in JSCs referred to above are not applicable for them.