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Steven L Wilner

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GETTING THE DEAL THROUGH

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Contributing editor
Steven L Wilner
Cleary Gottlieb Steen & Hamilton LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Turkey

Serhan Koçaklı, Alp Erçetin and Gökçe İldiri
Kolcuoğlu Demirkan Koçaklı Attorneys at Law

1 What is the typical structure of a real-estate-related business combination?

Under Turkish law, there are two common structures for real-estate-related business combinations: asset deals and share deals. In an asset deal, the purchaser directly acquires the ownership of real property, whereas in a share deal, the purchaser acquires the shares of a company owning the target real property. In this regard, a share deal is only possible if the owner of the target real property is a legal entity.

The parties mainly structure the transaction depending on the parties' needs and expectations and the transaction costs. As a share deal requires more comprehensive due diligence, the parties generally choose to proceed with an asset deal if they intend to close the transaction as soon as possible. However, an asset deal may be costly depending on the real property's value (considering the land registry fees as explained under question 11). In such event, the parties choose to proceed with a share deal. On the other hand, despite its high costs, the parties may still prefer an asset deal, if the legal entity owning the target real property entails certain financial risks (due to its legal background or previous transactions). Spin-off of the target real property into a newly established company and acquisition of this new company's shares is also considered by the parties.

Depending on the real property's value and the budget allocated to the transaction, the parties may develop alternative structures. If the target real property's value is high and investors do not have sufficient funds for an asset or share deal, they may prefer to hold the real property through a long-term lease or an easement right (such as the right of construction, which entitles the beneficiary to carry out construction on a land and benefit from the real property without acquiring the ownership of the real property). In such event, instead of paying high acquisition costs, the investor benefits from the target real property by paying a monthly or annual fee.

Apart from the above, there are two other vehicles that may be used for real-estate-related business combinations: (i) real estate investment companies (REICs) and (ii) real estate investment funds (REIFs). REICs and REIFs are advantageous in certain aspects (eg, tax benefits). However, establishment of a REIC or REIF is more complicated when compared to common special purpose vehicles (such as joint stock corporations (JSCs) and limited liability partnerships (LLPs)) and there are very strict establishment requirements (eg, higher capital, quotation requirement, experience requirements for board members). See questions 32 and 33 for detailed information on REIFs and REICs.

2 Describe the process by which real-estate-related business combinations are typically initiated, negotiated and completed.

As in all commercial transactions, the first and probably the foremost important issue in the real estate transaction is the price. Price is typically determined by comparable market values, generally based on the seller's expectation and sometimes based on an appraisal report prepared by professionals.

If the investor decides to purchase the target real property, the parties generally execute a term sheet, letter of intent or an agreement having a similar nature in written form to express the potential purchaser's interest in doing the transaction. Such agreement is generally non-binding and merely outlines the main terms of the transaction and the parties' conditions for the consummation of the transaction (eg, satisfactory completion of the due diligence, obtaining regulatory and internal approvals).

Subsequently, the purchaser conducts due diligence exercises on the target (eg, legal, financial, accounting, business, tax) through its advisers. The due diligence allows the purchaser to understand the strengths, challenges and opportunities of the target's business, and it helps the purchaser to rationalise the acquisition decision and to establish the purchase price to be paid. If the outcome of the due diligence exercise is satisfactory for the investor, the parties start negotiating binding transaction agreements.

In the event of a share deal, the parties enter into binding agreements such as share purchase agreement (SPA), joint venture agreement or share subscription agreement. Under these agreements, the parties may decide to close the transaction, once certain conditions precedent (CPs) are fulfilled. In this case, there will be an interim period where the sellers will remain as the owner of the target, but be under the obligation to close the transaction when CPs (eg, obtaining approvals, financing of the transaction) are met or waived.

In the event of an asset deal, the investors either close the transaction by directly purchasing the real property through a title deed transfer before the relevant land registry, if the due diligence is fully satisfactory, or the parties enter into a promise to sell agreement, if there are CPs (eg, clean title, zoning plan amendments) that need to be fulfilled until the transfer of title or the purchaser wishes to create contractual exclusivity over the target real property until the transfer of title.

3 What are some of the primary laws and regulations governing or implicated in real-estate-related business combinations? Are commercial, residential or agricultural real estate assets subject to specific regulation that would be material in a typical transaction?

The Turkish Commercial Code (TCC), the Turkish Code of Obligations (TCO), the Title Deed Law and the Zoning Law may be deemed as the main laws to be implicated in real-estate-related business combinations, both for share and asset deals.

Depending on the encumbrances registered on the real property and the location of the real property, there may be additional laws and regulations applicable to the transaction. For instance, if the target real property is located within an organised industrial zone and accordingly bears the 'organised industrial zone encumbrance', the parties should take the additional requirements set out under the Implementation Regulation on Organized Industrial Zones into consideration. Similarly, if the target real property is located in an agricultural area, legislation pertaining to agricultural lands will be applicable to the transaction.

The Foreign Direct Investment Law, the Regulation on Implementation of Foreign Direct Investment Law, the Regulation on Acquisition of Real Property and Limited Rights in Rem of the Companies and its Subsidiaries within the scope of article 36 of the Title Deed Law No. 2644, the Regulation on the Military Forbidden Zones and Security Zones and the Regulation on Administration of Treasury Real Estate are the most common supplementary legislation applicable to cross-border transactions.

4 Are there any specific regulations relating to cross-border combinations or foreign investors or acquirers that are material to real-estate-related business combinations and related structures?

Foreign investors may acquire shares in public (without prejudice to the mandatory tender offer requirement explained in question 8) or non-public companies without any restrictions. Such acquisition of shares must be notified to the Foreign Investments General Directorate within one month of the acquisition.

On the other hand, the Title Deed Law stipulates certain conditions for the acquisition of real property by foreign individuals and legal entities. Foreign individuals may acquire real property in Turkey by going through an approval procedure (very similar to the approval procedure for foreign capital companies as explained below) and certain areal and territorial restrictions.

The Title Deed Law prohibits foreign companies incorporated and resident abroad, to directly purchase real property in Turkey. There are only three exceptions to this general prohibition. Accordingly, foreign companies carrying out their businesses within the scope of the Petroleum Law, the Tourism Incentive Law and the Industrial Zones Law may acquire real property in Turkey.

Considering the prohibition on the foreign companies, foreign investors generally establish a new subsidiary (a special purpose vehicle company (SPV)) in Turkey or acquire the shares of an existing company. Following the establishment or share acquisition, the relevant SPV will be deemed as a foreign capital company (FCC). FCCs may acquire real property in Turkey by going through an approval procedure before the relevant governorship.

In order to purchase real property, the FCCs are required to apply to the governorship where the target real property is located. The governorship, by corresponding with the military and police departments, checks whether the target real property is located within a military or special security zone, thereby endangering national security or not. Upon positive assessment of the governmental authorities, the governorship informs the applicant company and the relevant land registry office that the requested purchase may be completed.

The same principles will apply if a foreign investor directly or indirectly acquires 50 per cent or more shares of a Turkish company owning a real property (ie, share deal). In such event, the relevant company must notify the Ministry of the Economy, which will trigger the approval procedure explained above. If the relevant FCC owns real property located in military or special security zones and the governmental authorities decide that the new shareholder's acquisition endangers national security, the company may be forced to dispose of the real property.

5 What territory's law typically governs the definitive agreements in the context of real-estate-related business combinations? Which courts typically have subject-matter jurisdiction over a real-estate-related business combination?

Under the International Private and Procedure Law, agreements pertaining to the ownership and usage rights of the real properties must be subject to the governing law of the country where such real property is located. In this regard, agreements pertaining to the transfer of ownership of real properties located in Turkey must be subject to Turkish law. Moreover, under the Civil Procedure Law, civil courts where the real property is located will have jurisdiction in a prospective dispute.

The general rule explained above will not be directly applicable to SPAs (or other transaction documents such as share subscription agreement, joint venture agreement, etc) executed for share deals, as the subject of the relevant agreement is the transfer of shares (or establishment of a joint venture, as the case may be), but not the transfer of the real property. Under such agreements, the parties may choose the applicable law at their own discretion.

6 What information must be publicly disclosed in a public-company real-estate-related business combination?

JSCs having more than 500 shareholders or that offer their shares to the public and whose shares are traded at the stock exchange; capital market institutions (eg, intermediary institutions, investment companies including REICs); and organisations and operations of stock and derivatives exchanges and other organised markets are subject to the Capital Markets Law (CML) and must comply with the requirements under the CML.

Under article 15 of the CML, information, events and developments that may affect the value and price of capital market instruments or the investment decision of the investors must be disclosed to the public by issuers or related parties on the public disclosure platform (PDP).

In addition, under the Communiqué on Principles of Real Estate Investment Companies, REICs (explained in question 32) have additional disclosure obligations (eg, appraisal reports, financial reports, asset purchase agreements, promise to sell agreements, information regarding real property sale and acquisition below or above the amounts listed under appraisal reports).

7 Give an overview of the material duties, if any, of the directors and officers of a company towards company stakeholders in connection with a real-estate-related business combination. Do controlling shareholders have any similar duties?

A JSC is managed and represented by the board, while an LLP is managed by its managers. Accordingly, the primary duties of the board members are the company's representation and management. Along with the duties and powers of company's representation and management, under Turkish law, members of the board have the following obligations: not to enter into transactions with the company and not to become indebted to the company; non-compete obligation; duty of care; confidentiality obligation; inviting shareholders to hold a general meeting.

As JSCs are managed and represented by the board, the board members play an active role in the investment decisions (including real-estate-related investments). Board members are liable to the company, the shareholders and creditors of the company for losses that occur due to a breach of their obligations and duties (eg, duty of care, entering into transactions below market value) arising from law or the articles. If the board delegates its powers and duties to a specific person or persons, it will not be liable for the fault of the person who receives the powers and duties, provided that the board acted with care while choosing that person. The TCC further states that the board cannot be liable for breach of law or the articles or fraudulent acts that are beyond its control, and release from such liability cannot be prevented based on the board's duty of care.

With regards to the seller legal entity, under article 408 of the TCC, the general assembly of shareholders' approval is required for the wholesale of a significant part of the company's assets. In order to realise such transaction, the board of directors must adopt a resolution to convene the general assembly of shareholders.

On a final note, if the buyer is a Turkish legal entity (incorporated as an LLP or JSC), the board members' (in JSCs) and managers' (in LLPs) liabilities will be governed by Turkish law.

8 What rights do shareholders have in a public-company real-estate-related business combinations? How do acquirers address and structure around the risks associated with shareholder dissent in the context of real-estate-related business combinations?

If an individual or a legal entity or individuals or legal entities acting in concert take over the control of the management (ie, acquisition directly or indirectly of more than 50 per cent of the voting rights or regardless of such percentage, holding privileged shares to elect or nominate more than half of the board members) of a public company, such individuals or legal entities are obliged to make a mandatory tender offer to purchase the remaining shareholders' shares. Accordingly, the remaining shareholders will have the right to sell their shares to individuals or legal entities taking over the control of the management.

There are different calculation methods under the Communiqué on Tender Offers for determining the mandatory tender offer price depending on whether or not the company is listed, there is an indirect change of control in the company, or the company has more than one class of shares. For instance, in a listed company, the price cannot be less than the arithmetic average of the daily weighted average stock exchange prices quoted within the six months prior to the disclosure date of the SPA and, the highest amount paid by the offeror for the same group shares of the company within six months prior to the mandatory tender offer.

Under the CML, subject to certain exemptions, the shareholders of a public company have an exit right in the event of a significant transaction such as merger, de-merger or transfer of the whole or a significant part of the company's assets. To exercise the exit right, the relevant shareholders must record their dissenting votes to the minutes of the general assembly meeting relating the significant transaction.

The price to be paid to an exiting shareholder will be determined depending on whether or not the company is listed in the stock exchange. In a listed company, the price will be the arithmetical average of the corrected weighted average prices quoted in the stock exchange for 30 days prior to the disclosure date of the planned significant transaction. In a non-listed company, the price to be paid to an exiting shareholder will be determined by a valuation report.

If, in a public company, a shareholder or a group of shareholders acting in concert acquires 97 per cent of the voting rights of a public company (this threshold will apply until 31 December 2017) as a result of a tender offer or any other event, this shareholder or group of shareholders will be entitled to squeeze out the remaining shareholders, subject to the Capital Market Board's (CMB) approval. After 31 December 2017, this threshold will increase to 98 per cent.

Moreover, in public companies, minority shareholders (shareholders holding 5 per cent of the shares) also have certain rights such as right of board representation, calling a general assembly meeting and including an item on the agenda or appointment or replacement of independent auditor.

9 Which kinds of termination fees are permissible, and what is their magnitude?

In real-estate-related business combinations, the parties can freely determine the termination fees. In a share deal, the parties generally execute an SPA and in such agreement, the parties negotiate possible damages arising from the breach of the agreement. In the event of a breach, the non-breaching party becomes entitled to request compensation for the damages determined under the SPA. In share deals, the parties generally determine a lump-sum penalty in the event of a contractual breach, the validity and enforceability of which are subject to certain conditions stipulated under the TCO.

Similar to share deals, in asset deals, the parties determine a penalty for a contractual breach, as the main goal under an asset deal is to create a contractual exclusivity over the target land until the transfer of title. In this regard, if the seller does not transfer the target real property to the potential buyer despite the existence of the promise to sell agreement, the seller is generally obligated to pay a considerable penalty. Moreover, the potential buyer will also have the right to request transfer of the title from competent courts in such event, whereas this is not possible in a share deal (if the SPA is not executed before a notary public).

In share deals, in order to protect against unsolicited acquisition, the parties generally insert exclusivity provisions to transaction agreements, the breach of which is bound to a significant penalty amount. In asset deals, in order to create exclusivity over the target property, the investors request execution of a promise to sell agreement and insert penalty provisions in the event of exclusivity breach. Moreover, the investors also request annotation of the promise to sell agreement with the relevant land registry, which allows the investors to assert their rights under the promise to sell agreement to the new owner of the real property (even if the seller sells the target real property to a third party without the permission of the investor).

10 How much advance notice must a public target give its shareholders in connection with approving a real-estate-related business combination, and what factors inform this analysis? How is shareholder approval typically sought in this context?

Under Turkish law, transferring the whole or a significant part of a public company's assets, and acquiring or leasing a significant amount of real properties from related parties are defined as significant transactions. The general assembly of shareholders' approval is required to carry out a significant transaction. Therefore, the board of directors must adopt a resolution to convene the general assembly of shareholders with an announcement published on the company's website, in the PDP at least three weeks prior to the date of the meeting (excluding the announcement and meeting days), which must include the agenda of the meeting.

11 What are some of the typical tax issues involved in real-estate-related business combinations and to what extent do these typically drive structuring considerations? Are there certain considerations that stem from the tax status of a target?

In an asset deal, sale of real property owned by individuals is subject to income tax. Capital gains arising from sale of a real property by individuals are subject to income tax at the marginal rate of 15 to 35 per cent depending on the income gained from the sale transaction. However, real property owned and held by individuals for more than five years is exempt from the income tax.

Sale of real property owned by legal entities is subject to corporate tax corresponding to 20 per cent of the income gained from the sale transaction. However, under article 5 of the Corporate Tax Law, 75 per cent of the income is exempt from income tax if the relevant legal entity owned and held the real property for more than two years, provided that the amount of income exempted from corporate tax is transferred into a special fund account of the company and kept there for five years following the year in which the transaction took place. Companies engaged in trading of real property cannot benefit from the corporate tax exemption and their sale of real property is subject to corporate tax even if they hold a real property for more than two years.

Sale of real properties owned by legal entities is subject to VAT corresponding to 18 per cent of the purchase price. Sale of real property is exempt from VAT if the relevant legal entity owned and held the real property for more than two years. Companies engaged in trading of real property cannot benefit from the VAT exemption. Sale of real property owned by individuals is exempt from VAT.

In a share deal, transfer of shares will be subject to (i) corporate tax corresponding to 20 per cent capital gains derived from the transaction, if the seller is a legal entity, or (ii) income tax corresponding to 15 to 35 per cent depending on the income gained from the transaction, if the seller is an individual. Capital gains derived from the transfer of shares in a Turkish company are (i) 75 per cent exempt from corporate tax, and (ii) 100 per cent exempt from income tax (if the seller is an individual and the company has issued share certificates representing such shares), if the relevant shares have been held for at least two years prior to their transfer. Further tax benefits or exemptions may be applicable due to double taxation treaties.

In addition, in order to carry out the real-estate-related business combination, the parties may enter into written agreements, as explained above. Under the Stamp Tax Law, agreements executed in Turkey are subject to stamp tax. The stamp tax rate is 0.948 per cent of the value of the agreement, customarily determined by reference to the highest monetary figure in the agreement. The ceiling amount is 1,865,946.80 Turkish lira for the year 2017. As per a recent legislation change in 2017, SPAs and promise to sell agreements pertaining to commercial real estate and residences have been exempted from stamp tax.

Moreover, if the transaction is an asset deal, as the transfer of the target real property must be carried out through the official sale transaction before the land registry, this will lead to land registry fees. Under the Charges Law, the buyer and the seller are separately obligated to pay 2 per cent of the official purchase price (ie, 4 per cent in total) as land registry fees. In addition, as per a recent legislation change, this amount was temporarily reduced to 1.5 per cent for residences and workplaces until 30 September 2017.

12 What measures are normally taken to mitigate typical tax risks in a real-estate-related business combination? How important are tax issues in evaluating structuring alternatives in the context of a real-estate-related business combination?

In order to mitigate tax implications in asset deals and share deals, the parties insert provisions to the transaction agreements, avoiding the buyer's liability pertaining to tax debts of the seller before the date of the transaction. In an asset deal, if the buyer decides to directly purchase the real property without executing a promise to sell agreement, the buyer generally requests that the seller pays the outstanding real estate tax of the real property, if any.

Considering the high tax amounts explained in question 11, the tax implications are very important to structure the transaction. In order to find the most tax-efficient structure, investors engage professional tax consultants. These consultants determine possible tax implications of the transaction and develop the most suitable business model for carrying out the transaction. For instance, if the target real property is owned by a legal entity, investors prefer a share deal in order to avoid 18 per cent VAT and the land registry charges explained in question 11.

13 What form of acquisition vehicle is typically used in connection with a real-estate-related business combination, and does the form vary depending on structuring alternatives or structure of the target company?

The types of capital companies most commonly used by foreign investors are JSCs and LLPs. A JSC is defined as a company whose capital is fixed and divided into shares. An LLP has some characteristics of a personal company. The fields of activity, operations, and other corporate matters of both types of companies are governed by their articles of association (articles), within the parameters set out under the TCC. In terms of tax liabilities, JSCs and LLPs have similar structures and there are no significant differences between these two company types.

In addition, as mentioned in question 12, depending on the size of the contemplated transaction and the tax implications, investors may consider establishing a REIC for real-estate-related business combinations (despite its long and cumbersome incorporation procedure and complex shareholding structure), as all income of REICs, including capital gains, portfolio management income, interest and dividend income are exempt from corporate tax and REICs may distribute dividends without withholding tax.

14 What issues typically face boards of real-estate-related public companies considering a take-private transaction? Do these considerations vary according to the structure of the target?

Under Turkish law, the only real-estate-related public company type is a publicly held REIC (as explained in question 32). The Communiqué on Principles Regarding Real Estate Investment Companies regulates transfer of shares in publicly held REICs. As there are no specific regulations regarding take-private transactions under Turkish law, the rules applicable for all buyers are also applicable for private equities.

Under the applicable legislation, exiting from publicly held REIC status (ie, going private) requires amendment of the articles of association at a general assembly meeting. The company must then apply to the CMB for its consent. The CMB will give consent to the amendments only if outsiders have made a tender offer to take over all shares of the shareholders who have not attended the relevant general assembly meeting or cast affirmative votes for the amendments at the relevant general assembly meeting. The REIC's board of directors must prepare a report containing at least the justifications for exit, the company's field of activity and projections after the exit and an analysis of the effects of exit on the company, and this report must be published in the PDP on or no later than the date of the CMB application. The report is important as it is one of the items that the CMB will take into consideration while giving a decision on whether or not to approve the amendments. If the report is not clear or does not contain sufficient satisfactory information, the CMB may reject the amendments.

15 How long do going-private transactions typically take in the context of a public real-estate-related business combination? What are the major milestones in this process? What factors could expedite or extend the process?

The completion period of going-private transactions varies depending on the integrity of the information and documents submitted to the CMB, the company's swiftness in taking the required action and the CMB experts' workload. A going-private transaction of a publicly held REIC takes approximately three months.

A general assembly meeting must be held to discuss and resolve the amendment of the articles of association. Following the general assembly meeting, the company must apply to the CMB for its consent on exit from publicly held REIC status.

If there are shareholders who have not attended the general assembly meeting or have not cast affirmative votes to amendments, the company must also carry out a tender offer for a third party to acquire the shares of those shareholders and submit an information note to the CMB in this regard. The actual tender offer process starts within a maximum of six business days following the date of approval of the information form by the CMB and no later than two months following the date the obligation to make a tender offer arises (ie, date of the general assembly meeting). The period of actual tender offer cannot be less than 10 business days or more than 20 business days.

After concluding the tender offer, a general assembly meeting must be held to finalise the going-private transaction. A copy of the Turkish Trade Registry Gazette in which the minutes of the general assembly meeting are announced must be sent to the CMB within six business days of the announcement date.

If the amendments to articles of association resulting in exit from publicly held REIC status are not finalised at a general assembly meeting within three months following the date of receipt by the REIC of the CMB's consent relating to exit from publicly held REIC status, then the CMB's consent becomes null and void.

16 Are non-binding preliminary agreements before the execution of a definitive agreement typical in real-estate-related business combinations, and does this depend on the ownership structure of the target? Can such non-binding agreements be judicially enforced?

As explained in question 2, in both share deals and asset deals, it is common to execute a non-binding term sheet, letter of intent or a similar agreement to express the potential purchaser's interest in doing the transaction, regardless of the ownership structure of the target. These non-binding agreements cannot be judicially enforced (ie, the parties are not entitled to request performance of the obligations under the agreement from the counterparty). However, under Turkish law, if parties enter into negotiations for concluding an agreement, they are obligated to act diligently and prudently (culpa in contrahendo). If one of the parties breaches these obligations and the non-breaching party incurs damages accordingly, the non-breaching party may raise compensation claims, even if there is no binding agreement between the parties.

17 Describe some of the provisions contained in a purchase agreement that are specific to real-estate-related business combinations? Describe any standard provisions that are contained in such agreements.

Transaction agreements pertaining to real-estate-related business combinations contain specific representations and warranties. The following representations and warranties are common for each deal:

- the seller is the undisputed and sole owner of the target real property;
- there is no environmental pollution and no penalty or warning regarding the target real property;
- the target real property (or the shares in the target legal entity, if a share deal) will be free from encumbrances on the transaction date;
- the zoning status of the target real property is suitable for the buyer's intended use and in line with the zoning status certificate obtained from the relevant municipality;
- the seller will not sell the target real property to third parties throughout the term of the transaction agreement; and
- there are no outstanding tax debts regarding the target real property.

Depending on the outcome of the due diligence, there may be additional deal-specific representations and warranties. For instance, if the target real property is located in an organised industrial zone, the parties insert a representation to the transaction agreement stating that there are no outstanding liabilities or debts including but not limited to accrued management fees and infrastructure contribution charges to the organised industrial zone management.

18 Are there any limitations on a buyer's ability to gradually acquire an interest in a public target in the context of a real-estate-related business combination? Are these limitations typically built into organisational documents or inherent in applicable state or regulatory related regimes?

Except for the mandatory tender offer requirement explained in question 8, there are no limitations on a buyer's ability to gradually acquire an interest in a public target in the context of a real-estate-related business combination.

19 Describe some of the key issues that typically arise between a seller and a buyer when negotiating the purchase agreement, with an emphasis on building in certainty of closing? How are these issues typically resolved?

When negotiating the transaction agreement for an asset deal (ie, the promise to sell agreement), the buyer's main intention is to prevent investment of other potential third-party purchasers and create contractual exclusivity over the target land until the transfer of title. In this regard, the buyers generally request an exclusivity provision and annotation of the promise to sell agreement with the relevant land registry. However, the sellers are reluctant to include penalty provisions under the promise to sell agreement. Accordingly, exclusivity provisions under promise to sell agreements are always a hot topic in the negotiations.

Naturally, buyers always wish to obtain the title of the target property free from any encumbrances and make clean title a condition to the closing. However, sometimes there are encumbrances on real properties used for commercial purposes, as the owner uses the real property as a collateral in its business transactions. In this regard, if the encumbrance is of significant importance, buyers generally request deregistration of the relevant encumbrance and make deregistration as a CP to closing. In this respect, in every transaction, the parties negotiate the CPs to be inserted into the transaction agreements.

On another note, zoning-plan-related issues are almost always discussed in negotiations. If the zoning plan must be amended to ensure that the buyer is able to use the real property for its business activities, the buyer may request that zoning plan amendments should be a CP to closing under the transaction agreement. Moreover, if the buyer is an FCC, the buyer generally requests that the governorship's permission for purchasing the real property should be a CP under the promise to sell agreement.

20 Who typically bears responsibility for environmental remediation following the closing of a real-estate-related business combination? What contractual provisions regarding environmental liability do parties usually agree?

In both share and asset deals, the seller generally bears the responsibility for environmental remediation before the closing of a real-estate-related business combination. If the outcome of environmental due diligence works is not satisfactory for the buyer, the buyer may request insertion of certain specific indemnity or compensation provisions under the transaction agreements. Moreover, the buyer also requests the seller to participate and raise necessary objections in prospective lawsuits to be filed against the buyer in connection with environmental matters. Such claims by buyers are generally taken into consideration by sellers. However, the sellers tend to cap their liability arising from environmental remediation works, whereas the buyers insist on unlimited liability.

21 What other liability issues are typically major points of negotiation in the context of a real-estate-related business combination?

In share deals, if the seller has multiple shareholders, buyers generally request that the sellers should be jointly liable for the obligations arising from the transaction agreements, in order to avoid filing separate lawsuits against each of the sellers. In return, the sellers request that only they should be liable. Moreover, the sellers generally request that there should be a cap for their liabilities under the transaction agreements, whereas the buyers request unlimited liability.

Under the TCO, limitation of liability provisions under transaction agreements stating that the debtor is not liable for its gross negligence will be invalid. Accordingly, the parties always negotiate the scope of limitation of liability provision in accordance with the mandatory rule set out under the TCO with utmost care.

In asset deals, the sellers generally request that they should not be liable to pay the costs arising from the transaction agreements and the sale transaction. In contrast, the buyers request that the seller should be liable to bear their part of the transaction costs, especially the land registry fees.

22 In the context of a real-estate-related business combination, what are the typical representations and covenants made by a seller regarding existing and new leases?

Investors generally wish to acquire a target property in a vacant condition. In this regard, the parties insert provisions to transaction agreements stating that the relevant real property is in a vacant condition and the seller did not execute any lease agreements in connection with the target property. Under Turkish law, upon acquiring the title of the target property, the buyer automatically becomes a party to the existing lease agreements executed by the seller. In this regard, if the lease agreement executed with the lessee is commercially feasible (eg, the lease amount determined under the agreement is higher than the average value), investors may also decide to purchase the target real property occupied by a lessee, in order to generate income from the lease agreement. Moreover, the buyer may also request a covenant from the seller stipulating that the lessee will evict the real property within a certain time period, failing which the seller will be obligated to pay a certain penalty or compensation to the buyer (subject to our explanations in question 25). Under Turkish law, it is not common to request representations regarding new leases. However, depending on the commercial understanding of the parties, the parties are entitled to insert covenants regarding new leases to transaction agreements.

23 Describe the legal due diligence required in the context of a real-estate-related business combination. What specialists are typically involved and at what point in the transaction are the various teams typically brought in?

The due diligence works carried out in the context of a real-estate-related business combination differ from share deals and asset deals. In an asset deal, the due diligence has three main components: checking the land registry records, checking the zoning plans and checking the cadastral records. It is also recommended to visit the target real property or the site in order to determine the existing status of the real property.

The land registry records contain and indicate a real property's landowner, classification, encumbrances, mortgages, rights in rem, annotations regarding lease agreements and court decisions, such as preliminary injunction, etc, if any. In this regard, checking the land registry records is vital to determine the representations and warranties and conditions precedent for the transaction agreements and structuring the transaction. Under the applicable legislation, attorneys at law are entitled to review the land registry records of real property by visiting the relevant land registry, even if they do not have a power of attorney. In this regard, it is common that legal teams of investors carry out the land registry records check.

Zoning plans indicate the construction conditions for a real property and examination of these plans is especially important for construction projects. Zoning plans also indicate the intended use of the land, which is important for investors to understand whether the real property can be used for commercial, industrial, residential purposes. In this regard, before concluding the transaction, the investor should have the zoning plans examined to determine whether the target real property is in line with its intended use, the buildings on the target real property are in line with the applicable legislation, and it is possible to carry out any further construction on the target real property.

Inspection of zoning plans and checking the condition of the buildings constructed on the target real property requires technical knowledge. Therefore, investors generally engage professional construction firms to understand whether the buildings on the target real property were constructed in accordance with the zoning legislation and coincide with the construction licence or occupancy permit.

A real property's cadastral records indicate the exact location, borders and dimensions of the real property. If a building is constructed on the land, control of the cadastral record gives the opportunity to verify whether the building has been constructed in accordance with a construction licence obtained pursuant to the relevant zoning plans.

In a share deal, in addition to the due diligence works listed above, the investors should carry out more comprehensive due diligence on the target legal entity (eg, legal, financial, accounting, business, tax), through its advisers. During the due diligence exercise, the buyer's advisors review whether there are any encumbrances over the shares in the target legal entity, there are any share transfer restrictions, or the target entity obtained all governmental permits and approvals in order for the target entity conducts its business, etc. In addition, the buyer's financial and legal advisers review material agreements to which the target entity is a party and guarantees provided by the company to third parties, to determine the financial risks of the transaction. If the target legal entity conducts production activities, an environmental due diligence exercise may also be conducted.

24 How are title, lien, bankruptcy, litigation and tax searches typically conducted? On what levels are these searches typically run? What protection from bad title is available to buyers, and does this depend on the nature of the underlying asset?

As explained in question 23, the land registry records indicate the encumbrances established on real properties. In this regard, during the land registry records check carried out before the relevant land registry, the investors' legal counsels will be able to determine whether there are any mortgages, liens or attachments established on the real property. As per litigation search, in share deals, the buyers generally request information or documentation regarding their lawsuits from the seller. This information or documentation is either uploaded to virtual data room or delivered to the potential buyer. In asset deals, the litigation search is generally conducted by visiting the competent courthouse during the site visit. Tax searches are conducted by investors' tax advisers.

If there are significant encumbrances on the target real property that may jeopardise the transaction (eg, mortgage, expropriation annotation, promise to sell agreement in favour of a third party) the buyers request deregistration of the encumbrances until the title deed transfer. In order to ensure that the encumbrances are deregistered, the investors generally insert a provision to the promise to sell agreements and make deregistration of the encumbrances as a CP to the closing (ie, the official title deed transfer before the land registry). If the encumbrances established on the target real property are not vital for the closing, investors may decide to purchase the real property as is and request insertion of a specific indemnity provision to cover possible damages arising from the encumbrance.

25 What are some of the primary lease issues and other agreements that the legal teams customarily review in the context of a real-estate-related business combination, and does the scope vary with the structure of the transaction?

In a real-estate-related business combination, if the seller has executed a lease agreement in connection with the real property, as there are strict regulations under the TCO jeopardising their validity, the legal teams generally review the following provisions of the lease agreement within the scope of the due diligence works: term, the validity of penalty provisions, the rental fee and rental fee-increase-related provisions. For instance, under the TCO, lease agreements executed for a specific term, the lessor is not entitled to terminate the lease upon expiration, based only on the fact that the term of the lease has expired. Without prejudice to other termination rights granted to the lessor, at the end of 10 years of extension, the lessor may terminate the lease without any cause by notifying the lessee with three months' notice prior to the start of each following rental year. In this regard, if the buyer acquires the real property together with a lease and it believes that the lease agreement will expire at the end of the term, the buyer should realise that it will only be able to evict the lessee after the 10th extension year and structure the transaction accordingly.

Moreover, in order to carry out business activities in facilities located onshore, sellers execute usage right or easement right agreements with the Treasury (as the shores are under the possession or control of the Treasury). In this regard, if the buyer intends to carry out a real-estate-related business combination for a real property located in the shore, the legal teams of buyer must review the usage or easement right agreements executed with the Treasury, as these agreements generally include change of control provisions. This will enable the buyer to request necessary remedies under the transaction agreements.

26 What are the typical remedies for breach of a contract in the context of a real-estate-related business combination, and do they vary with the ownership of target or the structure of the transaction?

Please refer to our explanations in question 9.

27 How does a buyer typically finance real-estate-related business combinations?

The corporate structure and the size of the transaction, the type of the target (ie, asset or share) and the investors' financial status are the main factors determining the acquisition financing method. The most traditional method in Turkey, for the investors having financial power, is to finance the acquisition deal by using the investors' own funds. However, due to market fluctuations, cash needs or high acquisition prices and costs, investors acquiring assets or shares usually act conservatively and prefer to use acquisition financing from the banks and financial institutions (ie, lenders).

The acquisition financing structure is determined based on the relevant investor's needs and in accordance with applicable regulations. Lenders usually finance asset deals through debt financing in the form of a secured debt. Senior term loans are the principal elements of a debt financing structure. Amount, term, repayment mechanism of the loan and the collateral package to be provided by the investors are determined under the relevant loan agreement to be executed between the lender and the borrower.

As for the share deals, among other financing structures, leveraged buyout (LBO) is the most common and preferred method to acquire shares in the target legal entity through an SPV incorporated by the investor. In this structure, the SPV (the investor) acquires controlling shares in the target company for a purchase price that is financed by the senior term loan provided by the lenders.

In order to secure the relevant SPV's obligations under the relevant loan agreement, the entire or a significant part of the target company's assets are used as collateral for the loans, along with the assets of the investor. However, in 2012, the TCC introduced the financial assistance prohibition, which prohibits transactions concerning the grant of advance, loans or security by the target company for acquiring the target company's shares by a third party.

28 What are the typical obligations of the seller in the financing?

Sellers are not usually party to financing agreements (eg, loan agreements, security agreements) executed by and between the lender and the investors. In share deals, the investors request that the target company also becomes a party to the financing agreements. However, the lenders usually request the insertion of certain representations and warranties or CPs regarding the target company's or the target asset or shares' legal status into financing agreements.

29 What repayment guarantees do lenders typically require in the context of a real-estate-related business combination? For what purposes are reserves usually required?

Collaterals established to secure the investor's repayment obligations and other liabilities arising from the financing agreements differ for each transaction. Even if investors have financial power to realise the transaction, investors generally prefer to finance the lower percentage of their investment by their own savings and the remaining parts by using loans, due to the high value of real property investments. In practice, investors execute loan agreements with a term of 10–12 years, in order to finance their investments. The maximum amount of a loan is to be determined both by borrower and lender.

Banks and other financing institutions determine the amount of the loan, in line with the Earnings Before Interest, Taxes, Depreciation and Amortisation (EBITDA) values of the borrower. Moreover, the parties are free to determine interest rates in line with current market rates that are to be accrued for three, six or 12 months under loan agreements. Financing institutions often require technical, financial due diligence reports and appraisal reports for the real property from loan applicants, which may vary according to the nature of a contemplated project, in order to negotiate the loan amount to be borrowed by loan applicants. In order to secure the receivables, lenders may require securities such as: mortgage; account pledge; commercial enterprise pledge; share pledge; and assignment of receivables.

In practice, the most preferred security is to establish a mortgage on the target real property. An official mortgage deed must be executed by the parties before the relevant land registry office, and the mortgage deed must be registered with the land registry. A lender is not permitted to automatically gain title over the mortgaged real property upon the debtor's default. Upon default, the lender must follow special foreclosure proceedings, to be carried out by the competent execution office, and enforce its monetary claims by foreclosure of the mortgages on the relevant real properties.

In a share deal, it is possible to establish a pledge on the deposits in a bank account in Turkey, as a security vehicle. Depending on the amount of the loan and the investor's credibility, banks may lend money to such investor, relying on their right to establish a pledge on the investor's account under their general loan agreement with the investor.

The commercial enterprise pledge (CEP) is a type of pledge that allows banks and financial institutions to create a pledge on all moveable property and certain intangible rights of a pledger, without receiving the possession of the collateral. In a CEP, the pledger may continue to use the collateral in its business operations.

Under Turkish law, it is possible to establish a pledge on the shares of capital companies. In this regard, investors may also consider establishing a share pledge over the shares of their legal entity established in Turkey, in favour of a bank, to provide financing for the contemplated investment.

Receivables of entities or individuals may be assigned to third parties for project financing. For instance, investors may assign their rental incomes, arising from agreements to be executed for a shopping centre development project, to a bank for financing the shopping centre construction project.

With the assignment of receivables, all rights relating to such receivables, such as filing lawsuits for collection of overdue payments, claiming default interest for late payments, are assigned to the financing institution. Accordingly, the relevant institution will have the right to collect the investors' receivables directly from third parties.

The above-mentioned security methods alone are not always sufficient for banks to provide financing to investments. In this regard, the banks may request investors to provide collateral packages in order to increase the bankability of their contemplated investments. Investors generally establish share pledges over the legal entities' shares and assign their receivables arising from agreements to be executed within the scope of their prospective investments, in order to increase the bankability of the investment.

30 What covenants do lenders usually insist on in the context of a real-estate-related business combination? Does this vary with the overall financing of the transaction?

Covenants, representations and warranties to be included in the financing documents depend on the type and size of the transaction, as well as the financing structure. These representations and warranties are specific for each deal. However, the lenders usually request to include certain standard representations, warranties and covenants regarding encumbrances, distribution of dividends, financial status of the company, taxation, compliance with the applicable legislation, governmental licences, finance documents and additional borrowings from third parties.

31 What equity financing provisions are common in a going-private real-estate-related transaction? Does it depend on the structure of the buyer?

The security methods explained under Question 29, except mortgages, are also commonly used for going-private transactions.

32 Are there particular legal considerations that shape the formation and activities of REITs?

REITs (REICs under Turkish law) are capital market institutions established for the purposes of operating and managing portfolios composed of real estates, real estate projects, real-estate-based rights infrastructural investments and services, capital market instruments or other assets and rights to be determined by the CMB.

A REIC may be established directly as a real estate investment company, or a joint-stock company may be converted into a REIC by amending the articles of association in accordance with the provisions of the CML. The articles of association of a REIC must be in accordance with the CML. The founding partners, board members and the general manager must meet the conditions required in the applicable legislation.

The initial share capital of a REIC must be at least 30 million Turkish lira (which is 100 million Turkish lira for REICs exclusively managing portfolios composed of infrastructural investments and services). Shares representing a certain proportion of share capital must be issued in return for cash and fully paid-in or included in the unconsolidated audited financial statements of the REIC for the last accounting period.

At least 75 per cent of the total assets of an REIC established for activities and operations in a specific field of activity or for investing in a particular project or real estate or in a particular infrastructural investment and service, must be composed of investments made thereunder.

An REIC must apply to the CMB to conduct a public offering (or if it manages exclusively portfolios composed of infrastructural investments and services; to conduct a public offering or sell shares to qualified investors by private placement) for the shares representing 25 per cent of the initial share capital or issued capital, within three months following its establishment or transformation into an REIC.

33 Are there particular legal considerations that shape the formation and activities of real-estate-focused private equity funds? Does this vary depending on the target assets or investors?

REIFs are funds that enable financing of real property investments by using investment funds and provide investors the opportunity to benefit incomes generated from these investments. REIFs may be established solely by portfolio management companies and the real estate portfolio management companies holding an operating licence issued by the CMB. Under the applicable legislation, only the qualified investors may benefit from the REIFs. Compared to similar structures, REIFs provide some advantages to investors in terms of additional revenues and the investor's ability to cash out the fund units.

KOLCUOĞLU DEMİRKAN KOÇAKLI

HUKUK BÜROSU • ATTORNEYS AT LAW

Serhan Koçaklı	**skocakli@kolcuoglu.av.tr**
Alp Erçetin	**aercetin@kolcuoglu.av.tr**
Gökçe İldiri	**gildiri@kolcuoglu.av.tr**

Sağlam Fikir Sokak	Tel: +90 212 355 99 00
Kelebek Çıkmazı No.5 34394 Esentepe	Fax: +90 212 355 99 99
Istanbul	www.kolcuoglu.av.tr
Turkey	

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