

大成 DENTONS

# Manufacturing in Turkey



# Foreword

Dear Readers,

The Dentons Europe offices cover a legendary territory for manufacturing and industrial projects, including Spain and France to the west, Russia, Kazakhstan and Uzbekistan to the east, Germany, Poland, Hungary and other Central European countries in the middle and from Italy to Turkey to the south. This territory offers a vast population with strong purchasing power and excellent infrastructure, combined with vast workforce resources and industrial expertise.

Dentons Europe has been at the forefront of the first industrial projects going east after the fall of the Berlin wall, actively advising on greenfield and brownfield projects as well as on acquisitions and joint ventures when Central European countries—Romania, Czech Republic, Slovakia and Poland—joined the European Union. We are now actively witnessing Asian investors' interest for manufacturing in Europe.

The legal environment in the countries we cover has greatly evolved. It is a strong advantage to have been present in some of the emerging economies of Eastern Europe, Caucasus and Central Asia for the past 20 to 30 years, as the legacy legal systems in these countries can still be felt, in particular with regard to land acquisition and environmental norms. Today many jurisdictions, including in Western Europe, offer state aid and tax incentives to attract the best manufacturing projects.

We are well placed to help you choose your entry doors to the European Union and to Eurasia.

We hope the Manufacturing Guide you have selected will be of interest. It aims to give you a general overview of key checkpoints for this jurisdiction. Do not hesitate to contact me or the authors of this guide for any further information.



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# Credentials in Turkey

- **Koenig & Bauer:** Advising on the acquisition of 80% shares in a new company to be established by transferring the folder gluer business of Duran Makina Sanayi ve Ticaret A.Ş., a Turkish industrial company.
- **Bridgepoint Advisers Limited:** Advising on its acquisition of Peyman Kuruyemiş San. ve Tic. A.Ş., a Turkish dried fruit, nuts and seeds producer, from its founders and Esas Holding.
- **Schott:** Advising the glass manufacturer in all their Turkish legal matters.
- **Henkel:** Advising on their acquisition of Eczacıbaşı Schwarzkopf Kuafor Urunleri Pazarlama from Eczacıbaşı Holding.
- **Mitsui & Co Europe Plc:** Advising on its investment into Sarten Ambalaj, a prominent Turkish packaging company, which has subsidiaries in Russia and Bulgaria.
- **Plastiques du Val de Loire S.A.:** Advising on the acquisition of OTOSIMA Plastik Sanayi ve Ticaret A.Ş. via its German subsidiary, BAP GmbH.
- **Lesaffre SA:** Advising on its acquisition of Dosu Maya, a Turkish bread yeast manufacturer, from Yıldız Holding by Lesaffre's Turkish subsidiary, Ozmaya Sanayi A.Ş.
- **Cargill:** Advising on its acquisition of the vegetable oils, fats and refined oils business of Turyag Gıda Sanayi ve Ticaret A.S.
- **CentraGroup Fareva SAS:** Advising on the acquisition of all shares in Coster Aerosol, a Turkish home care and cosmetic products company in a deal valued at US\$37.5 million.
- **Laboratoires Expanscience:** Advising the French health product manufacturer on the acquisition of certain shares of Dharma İlaç and its main dealership in Turkey.
- **Koç Holding:** Advising on the acquisition of Kaletron Yazılım Teknolojileri Sanayi ve Ticaret A.Ş., one of the leader manufacturers of military simulation products and services in Turkey and Middle East.
- **Muka Metal A.Ş.:** Advising on the sale of its shares to Stryker Corporation, one of the world's leading medical technology companies.
- **Özata Kimyevi Maddeler Gıda Ve Ambalaj Sanayi ve Ticaret A.Ş.:** Advising Özata on a number of synchronized (and almost simultaneous) transactions, including: (i) the acquisition by Özata Kimyevi Maddeler of Sealed Air's 50 percent stake in their Turkish joint venture Teknik Plastik Sealed Air Ambalaj Sanayii ve Ticaret A.S., (ii) the sale of a 51 percent stake in the same company to Greiner Packaging International GmbH, and (iii) the sale of a 51 percent stake in IML Ambalaj Sanayi Ticaret A.S., to Greiner Packaging International GmbH, (iv) the formation of two joint ventures between Özata and the Greiner Packaging International GmbH for the governance of Teknik Plastik Sealed Air Ambalaj Sanayii ve Ticaret A.S. and IML Ambalaj Sanayi Ticaret A.S., and (v) the financial restructuring of Teknik Plastik Sealed Air Ambalaj Sanayi ve Ticaret A.S. consisting of a capital increase and a reorganization of its existing bank debts, supported by guarantees to be provided jointly by Özata and Greiner Packaging International GmbH, leading to a release of the guarantees provided by Sealed Air.
- **Mondelez International Holdings LLC:** Advising on the sale of its 100 percent shares in Kraft Gıda to Doğu Çay, a leading Turkish industrial company active in tea, sugar and canned goods production and distribution.

# Contents

## **09 ... Turkey and the European Union**

### **11 ... Preparing to manufacture: greenfield and brownfield projects**

- A. Corporate vehicles
- B. Real Estate, Construction and Insurance
- C. Administrative law – dealing with authorities  
– including anti-bribery laws
- D. Employment
- E. Tax and State aids
- F. Protecting your intellectual property and complying with data  
privacy obligations

### **21... Operating**

- A. Connecting to utilities
- B. Health and Safety
- C. Trade unions
- D. Industrial risk & Insurance
- E. Commercial and Insolvency related risks related to suppliers
- F. Defending your intellectual property
- G. Regulation compliance
- H. Competition law investigations
- I. Tax investigations
- J. Compliance monitoring – anti-bribery, anti-money laundering  
and whistle blowing rules in Turkey

**29...**

**Acquiring and selling a plant  
(buy side & sell side key check points)**

- A. Share deals & Asset deals
- B. Real estate acquisition
- C. Acquiring a mortgaged plant
- D. Employment & trade unions
- E. Specifics for distressed assets
- F. Merger control
- G. Tax risks
- H. Intellectual Property & Technology acquisition

**33 ...**

**Closing down – Moving away manufacturing from Turkey**

**35 ...**

**Contacts**



# Turkey and the European Union



Shortly after the establishment of the European Economic Community (EEC), Turkey made its first application to join in July 1959. Upon Turkey's application, the EEC proposed the signature of an association agreement until such time when Turkey will be ready to fulfil the responsibilities of full membership. This agreement was signed in Ankara on September 12, 1963.

In the Ankara Agreement, three phases, namely, preparation, transition and final periods were envisaged for Turkey's integration to the EEC. The preparation period ended in 1973 upon entry into force of the Additional Protocol, and the transition period started. The transition period, which proceeded slowly due to economic hardship in the 1970s and a military coup in 1980, was finally completed with Turkey's accession to the Customs Union in 1996.

During the Summit held in Helsinki on December 10-11, 1999, Turkey's candidacy for full membership was officially recognized. Therefore, a new chapter was opened in the long-established Turkey-EU relations. The Brussels Summit of December 15, 2004 became a watershed as Turkey's fulfilment of the Copenhagen criteria was declared, and a launch of accession negotiations on October 3, 2005 was proposed. Accession negotiations started on the mentioned date, and the work for alignment with the EU *acquis* is ongoing.



# **Preparing to manufacture:** greenfield and brownfield projects



## A. Corporate Vehicles

The most common company forms in Turkey are joint stock companies (*anonim şirket*) and limited liability companies (*limited şirket*):

### Joint stock companies (*anonim şirket*)

- Governing body: Board of directors
- Liability of directors: Fault based liability for financial losses suffered due to mismanagement. Board members may be held liable for unpaid public debts of the company or criminal acts committed by the company, among others.
- Liability of shareholders: Limited to the share capital (e.g. taxes, social security payables) for which they are liable pro rata to their shareholdings
- Capital gains taxation: Not if shares were held for at least two years

### Limited liability companies (*limited şirket*)

- Governance: One or several managers, who can also form a board. At least one of the shareholders must also be a manager fully authorized to represent the company.
- Liability of managers: Fault based liability for financial losses suffered due to mismanagement. Managers may be held liable for unpaid public debts of the company or criminal acts committed by the company, among others.
- Liability of shareholders: Limited to the share capital, except for public debts
- Capital gains taxation: Fully taxable

## B. Real Estate, Construction and Insurance

Factory land and any building on it may be purchased or leased.

If an investor is to secure ownership title over a factory building without acquiring title to the underlying land plot, it is also possible to establish an easement right. This is usually the case for factory developments over land owned by the state treasury and allows for the investor to provide security over the factory building while excluding the state treasury's ownership interest in the underlying land.

An easement right separates the ownership over the land from the one on the building on it; thereby providing the ownership over the building to its beneficiary for a certain period of time. It must be provided for at least 30 years in order to be treated separately as a standalone real estate. Otherwise, no mortgages or rights in rem may be established over the easement right.

### On real estate and construction permits in general:

There are a wide variety of construction agreement forms and precedents available in Turkey. The level of detail and sophistication of an agreement used in a deal depends on the transaction size and the profile of the transacting parties and ranges from short and simple contracts to FIDIC standard forms. Our team is accustomed to drafting tailor-made contracts appropriate for transactions of any volume and contractors of any background. In the past, our sector specialists advised on, amongst others, industrial factory building contracts and private procurements including competitive tender processes.



As for construction permits, these are obtained upon submission of numerous highly technical documents obtained from various departments of the administration. Our team is well-equipped for navigating the bureaucratic landscape and delivering quick and effective results.

### Insurance

Construction insurance agreements provide insurance coverage for losses and damages on goods or property that may occur during construction work phase.

The insurance covers the value of the construction material and work (plus possible taxes, duties and charges, transport and labour costs) and machines, equipment and tools used as well as, sometimes, temporary construction sheds and outbuildings.

The coverage of the policy terms starts on the date when the construction materials are brought to the construction area and ends on the date when the construction is delivered to the employer.

One key commercial point to verify is whether the construction elements are described in the insurance agreement according to the specifics provided in the construction agreement, plan or projects.

It should also be checked if the maintenance period which generally starts after the completion of the construction or provisional acceptance is also included in the insurance coverage.



### **C. Administrative law – dealing with authorities – including anti-bribery laws**

No authorization is required for manufacturing products in general. However, permission is needed for producing certain types of products, such as chemicals, drugs. The sale of industrial products is subject to a separate regime involving type approvals, homologation, customer protection rules and other related aspects.

In Turkey, specific anti-corruption laws exist only in so far as they impose transparency and behavioral rules on persons holding public office, but also board members of foundations. Some secondary legislation exists for the medical sector. Otherwise, the general rules driven by criminal law and corporate governance must be observed. It should be noted that legal entities may be held responsible for actions of their officials and employees.

When supplying public clients, manufacturing companies will normally have to enter into public procurement processes, driven by a special legislation that contains extensive rules aiming at preserving a competitive and fair tender process.

### **D. Employment**

#### **Basic obligations as an employer in the manufacturing sector:**

The common type of employment agreement is the indefinite term employment agreement. Additionally, a definite term employment agreement may be signed, or employees may be moved temporarily between group companies if specific conditions exist. Moreover, under specific conditions, employees may be kept at private employment agencies.

Part-time employment is also allowed. If an employee in a workplace works not more than two-thirds of the working hours of a full-time employee in the same or a similar position at that workplace, he or she will be deemed in a part-time employment-relationship.

The employer must notify any new hiring to the Social Security Institution not later than one day before the commencement of work. And any leaving employee must be notified to the same institution within 10 days therefrom.

A statutory minimum wage exists and is determined at the beginning of each calendar year by a special commission under the Ministry of Labour and Social Security. For 2018, it was fixed as TL 2,029.50 (approximately €360) gross.

Income tax is collected by the employer, through a withholding. The income tax rate varies between 15 – 35 percent.

Statutory social security premiums have to be paid by the end of the month following any month of work, by withholding the employees' share and adding to that the employer's share. In addition, the State makes a contribution to these social security premiums.

In addition, employers must enrol most of their employees in private individual pension plans run by individual private pension companies. The financial burden of the contributions to the private pension scheme is not with the employer, since it is supposed to deduct these from the employee's salary.

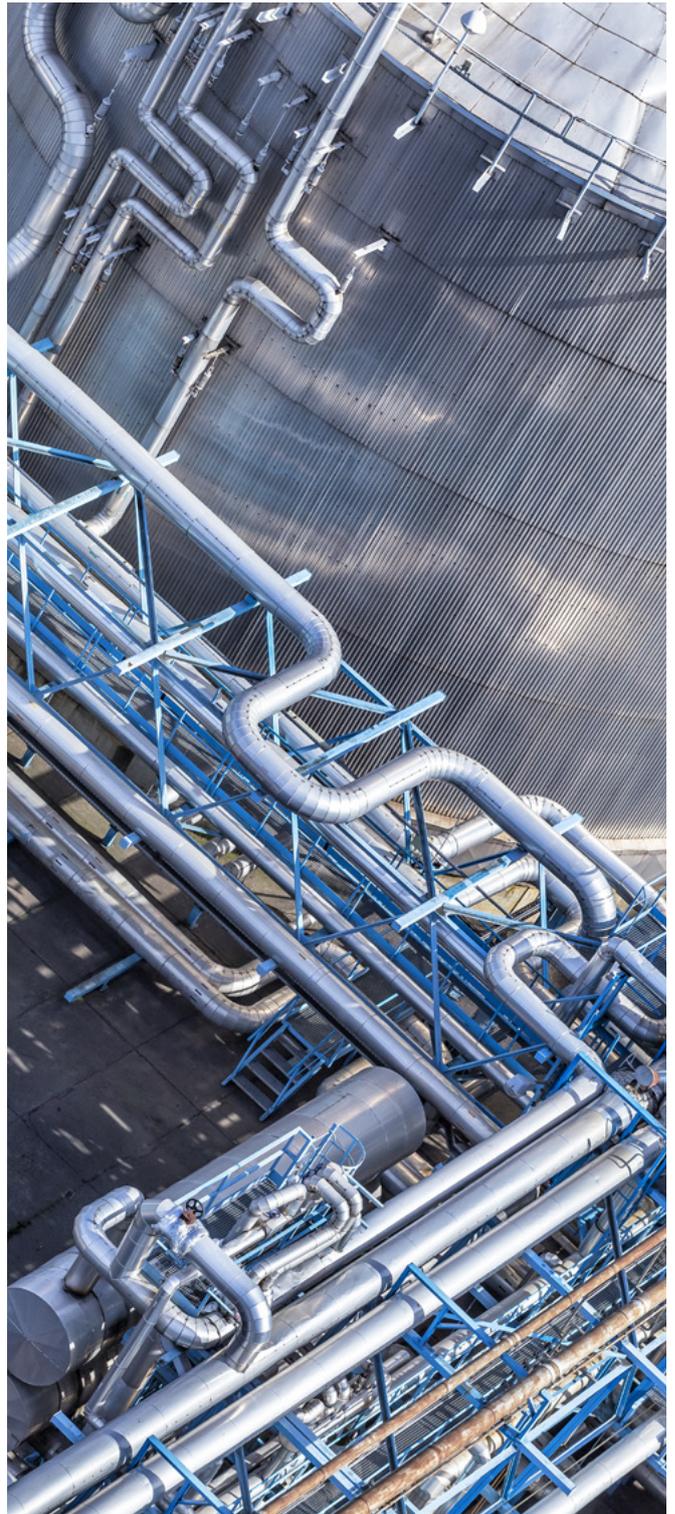
Unless agreed in an individual employment agreement or a collective bargaining agreement, the employer does not have a statutory obligation to provide an employee with side benefits, such as meal tickets, travel allowances, company car, private health or private life insurance or bonus payments. Having said that, these are very common in Turkish labor practice.

In case of an employee's termination by the employer, the latter must, depending on the reason and period of employment, effect a notice payment, severance payment and unused annual leave days' payment.

In cases where an employment agreement is terminated after at least one year of employment:

- By the employer for reasons other than any conduct against morality and good faith or any other similar acts of misconduct of employee;
- By the employee (a) based on just causes, (b) for having to render compulsory military service in case of male employees, (c) after achieving the entitlement to retirement, (d) within one year of marriage in case of a female employee; or
- Because of the death of the employee,

the employer must pay to the employee (or the heirs, as applicable) a severance payment.



## E. Tax and State aids

Corporate Income Tax (CIT)	20 percent (22 percent for the years 2018, 2019 and 2020)
Value Added Tax (VAT)	1 percent, 8 percent and 18 percent depending on the product or service
Personal Income Tax	Progressive rate (top rate 35 percent)
Tax delay interest	1.4 percent per month
Tax depreciation on real estate	25-50 years
Stamp duty on share capital contributions	N/A
Stamp duty on share transfer	N/A
Withholding tax on dividends (subject to reductions/exemptions under international tax treaties and domestic regulations)	15 percent
Withholding tax on interests to be paid to foreign entities	10 percent (0 percent if the lender is a financial institution)
Withholding tax on royalties (subject to reductions/exemptions under international tax treaties and domestic regulations)	20 percent

## Main rules

- **Corporate income tax:** The rate for corporate income tax is scheduled to increase to 22 percent (up from 20 percent) for the tax periods 2018, 2019 and 2020.
- **Capital gains tax:** In Turkey, corporate capital gains are treated as regular income and subject to normal corporate taxation. Capital losses can be offset against regular business income. 75 percent of profits derived from disposals of shares, in joint stock companies owned for at least two years is exempt from corporate income tax if the profit is placed in a reserve account and not distributed for five years. For profits derived from the disposal over real estate, there is a 50 percent exemption (75 percent before December 5, 2017), subject to the same conditions.
- **Tax consolidation regime:** No tax consolidation regime exists in Turkey; in other words, losses of one group company cannot be offset against the taxable profit of another.
- **Value added tax:** Value added tax is neutral for companies having commercial activities. Those companies collect the tax on their own sales and deduct the tax they have paid on purchase of goods and services. The net VAT payable is the difference between collected VAT and deductible VAT. VAT Credits can be reimbursed under certain conditions. Exports are VAT-exempt. Turkish value-added tax has three rates: 18 percent (standard rate); one percent (among others, residential houses (up to net 150 m<sup>2</sup>) and eight percent (medical products and devices, etc.).
- **Customs regime:** Goods imported into Turkey may be subject to various charges: customs taxes and levies (customs tariffs and the so-called mass housing fund levy); and internal taxes (excise duties also known as the Special Consumption Tax, the VAT, and the stamp duty). As a result of its participation in the customs union with the EC, since 1996 Turkey has based its tariff on all industrial products and the industrial components of processed agricultural products (imported from third countries), on the EC common external tariff. Aside from the EC, Turkey provides tariff preferences to EFTA member states under various bilateral trade agreements.
- **Carrying forward tax losses:** Operating losses can be carried forward for five years.

## Exemptions and beneficial tax regime

Local and foreign investors have equal access to the support instruments to be provided within the framework of various investment incentives schemes and exemptions, most notably:

- **Free trade zones:**
  - Income derived from the sale of goods manufactured in the free trade zones is exempted from corporate income tax.
  - Documents and transactions regarding the operations in free trade zones are exempted from stamp tax and charges.
  - The delivery of goods and performance of services in free trade zones are excluded from VAT.
  - Also non-tax incentives and a real estate tax exemption are available.



- **Technology development zones:**

- Profits derived from some R&D activities in Technology Development Zones are exempt from corporate income tax until December 31, 2023.
- The salaries of R&D and support personnel carrying out R&D and software development activities in Technology Development Zones are exempt from income tax until December 31, 2023.
- 50 percent of the employer portion of social security premiums for R&D and support personnel (maximum of 10 percent of number of full-time R&D personnel) will be funded by the Ministry of Finance.
- Software and specified services arising from development activities in Technology Development Zones are exempt from VAT until December 31, 2023.

Law No. 3305 provides for a variety of incentives under a Center of Attraction program. To benefit, manufacturing companies must invest at least TL 2 million and employ at least 30 employees. Call centers must employ 200 employees, and data centers must extend more than 5,000 square metres of white area. Tax benefits under the center of attraction program include social security contribution support to employers, an income tax exemption for employees, customs duty and VAT exemptions, as well as tax reductions.

- **Incentives and support for companies in Turkey conducting R&D activities include:** Companies that have certain R&D expenses, which also employ at least 15 full-time equivalent R&D personnel and have R&D center status, can deduct 100 percent of their R&D and innovation expenditures from taxable profits.

Companies with separate R&D centers employing more than 500 qualifying R&D personnel can deduct from their taxable profits the same aforementioned 100 percent of incurred R&D expenditures, as well as half of any increase in R&D expenditures compared to the previous year's expenditures.

There is a general R&D deduction of 100 percent for expenditure on eligible innovation and R&D expenditures made on R&D and innovation projects approved by the Ministry of Finance.

There is also an additional deduction for up to 50 percent of the increase in the R&D and innovation or design expenditures incurred separately in a respective year at R&D or design centers (compared to the previous year).

The Ministry of Finance will pay half of an employer's contribution of social security premiums for each R&D and support personnel under certain conditions.

- **Elimination of double taxation:** Turkey has concluded numerous bilateral tax treaties to eliminate double taxation situations.

## Things to watch out for

**Transfer pricing:** Where the prices of transactions with related parties are not determined in accordance with the “arm’s length” principle, the distribution of profits arising from these will be considered disguised profit distributions.

Three traditional transfer pricing methods listed in the OECD Transfer Pricing Guidelines are also accepted by Turkish tax authorities and clearly defined as the transfer pricing methods to be used. Those methods are:

- The comparable uncontrolled price method
- The resale price method
- The cost-plus method

Taxpayers are also allowed to adopt a different transfer pricing method if it is not possible to apply one of the above because of their particular circumstances. Taxpayers have the option to conclude a bilateral agreement with the Turkish Ministry of Finance to determine the transfer pricing method applicable for a maximum of three years, assuming the conditions effective at the time of determination of that particular transfer pricing method remain stable.

**Thin capitalization rules:** Borrowings from shareholders or from persons related to the shareholders that exceed three times the shareholders’ equity of the borrower at any time within the relevant year will be considered thin capital. This ratio is double for loans received from related banks or financial institutions (excluding institutions which provide financing only to related parties). In other words, in order to be considered thin capital, borrowings from related party banks or financial institutions must exceed six times the shareholders’ equity. Loans from different related parties will be aggregated for purposes of the calculation.

Where thin capitalization exists, interest and foreign exchange losses calculated on such thin capital are re-classified and taxed as dividends distributed by the borrower and as dividends received by the lender and, hence, as repatriated profit for non-resident lenders.

## F. Protecting your intellectual property and complying with data privacy obligations

### Intellectual Property

The intellectual/industrial properties listed under the Industrial Property Law are as follows: trademarks, industrial designs, patents, utility models and protected indications of origin/protected geographical indication/traditional specialties guaranteed. Although their registration is not required in order to own them, they must be registered with Turkish Patent and Trademark Office (TPTO) to benefit from the special protections granted by the law to registered rights. In this respect, the protection period set forth for registered trademarks and utility models is 10 years, whereas the protection period set forth for registered industrial designs and patents is five and 20 years respectively. Registrations for trademarks and industrial designs can be renewed for the same registration terms.

Pursuant to the Copyright Law, a “work” is defined as any intellectual or artistic work, which is deemed a scientific and literary or musical work, or work of fine arts or cinematographic work, bearing the characteristic of its author. Designs appearing on products fall within this scope. Intellectual and artistic works defined under the Copyright Law benefit from an *ipso facto* protection starting from the creation of the work. A registration with or notification to an authority is not required for its protection. Nevertheless, the Copyright Law enables optional recording-registration of intellectual and artistic works before the General Directorate of Copyright. This does

not provide an absolute protection for such works or prevent third party claims but provides evidence for copyright ownership, in case of a third party claim.

Trade secrets are not subject to any registration process but are protected pursuant to the Turkish Commercial Code numbered 6102.

Trademarks and company names can also be registered as domain names. Domain names with “tr” extensions must be registered via [www.nic.tr](http://www.nic.tr), which is a local organization operated by the Middle Eastern Technical University. Domain names used by companies must be registered, and the relevant payments for the continuation of their registrations must be completed for their availability.

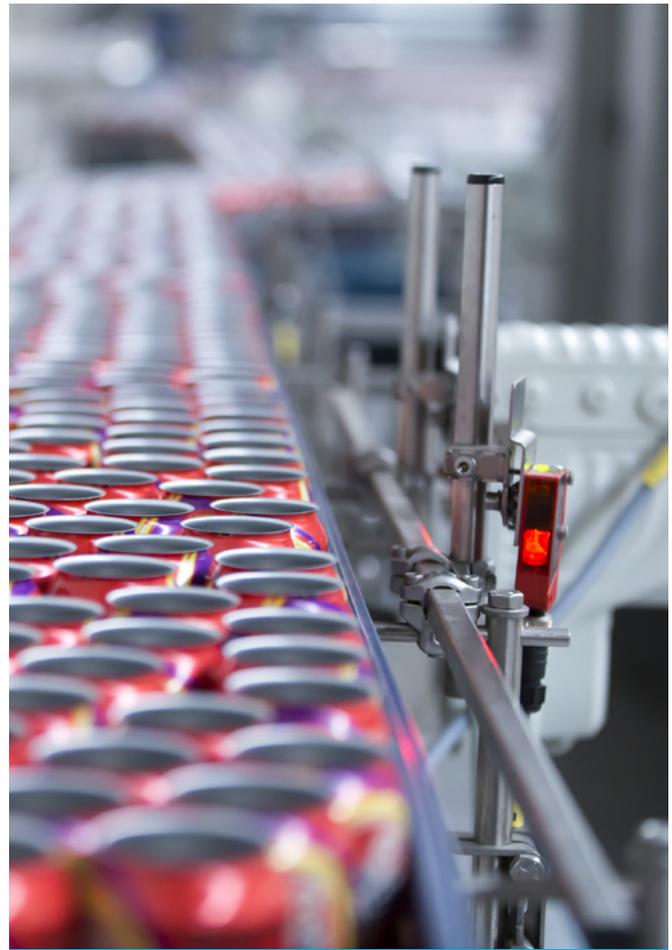
There are certain rules regulating company names which prevent imitation of existing company names to a certain extent. Company names may be in a foreign language, but must include at least one of the company’s fields of activity and the type of company in the Turkish language.

### **Data privacy**

The Turkish Data Protection Law and relevant communiques were enacted very recently, and no established practice has formed yet. However, in a nutshell, the following can be said:

Personal data cannot be processed without the explicit consent of the so-called “data subject”, except (broadly speaking) if any of the following:

- i. It is expressly allowed under or necessary to comply with law
- ii. It is necessary to protect the life or physical integrity of the data subject or another person
- iii. It is directly related with and necessary to establish and perform a contract, to which the data subject is a party



- iv. It is required to establish, use or protect a right
- v. It is needed to protect the legitimate interests of the data controller and does not harm any fundamental right or freedoms of the data subject
- vi. Data was disclosed to the public by the data subject.

The transfer of personal data abroad from Turkey is not permitted without the explicit consent of the data subject. However, personal data may be transferred without obtaining such consent if (cumulatively) the said data could be processed as per one of the exceptions listed in the first paragraph above, and:

- i. Either the country to which data shall be transferred is deemed by the Turkish Personal Data Protection Board to be one of the countries providing sufficient protection, or
- ii. The data controllers obtain permission from the Turkish Personal Data Protection Board.

Turkish Personal Data Protection Board is supposed to publish a list of foreign countries providing sufficient protection, but it has not done so yet.

# Operating





### **A. Connecting to utilities**

There should be no difficulty for the company to connect to water and energy utilities. In Turkey, utility contracts are generally made under private law.

Companies which consume electricity over a certain threshold qualify as eligible consumers and are allowed to purchase electricity from any supplier of their choosing. This frees these companies up to negotiating their own terms for their energy needs. Those who do not qualify as eligible suppliers on the other hand are required to purchase electricity from the authorized utility company in the region.

Plants may install their own renewable energy or cogeneration facilities and sell any unused energy output.

Water, on the other hand, is generally provided by the administration. Some plants produce their own water by obtaining permits from the administration for digging wells etc.

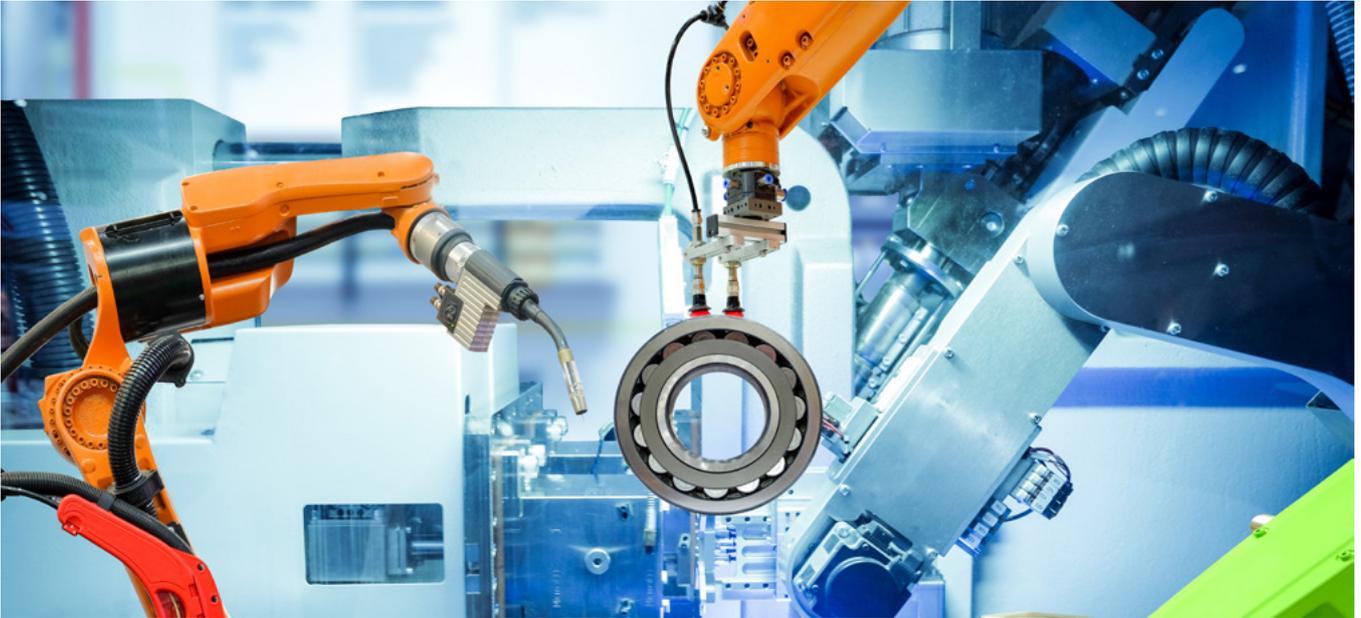
### **B. Health and Safety**

#### **Basic obligations as an employer in the manufacturing sector:**

Employers are obliged to make available all equipment and take all necessary measures required to ensure occupational health and safety at the workplace, while employees are also obliged to comply with these measures.

An employer may fulfil health and safety related obligations by itself or outsource the required services to one of the service providers authorized by the Ministry of Labour and Social Security to act as Common Health and Safety Unit.

The main obligations of an employer are as follows: (i) making risk assessments at the work place, (ii) taking the measures to avoid any occupational accidents or diseases, including the providing of employees with risk training and adopting an internal regulation on occupational health and safety, (iii) inspecting whether employees comply with health and safety rules, and (iv) providing employees with appropriate safety equipment and/or taking actions to improve health and safety conditions at the workplace, (v) preparing emergency plans, (vi) assigning own or external workplace safety experts, on-site physicians and health officers, and forming a health and safety committee in workplaces with at least 50 employees, (vii) establishing health and safety units, (viii) keeping health and safety records, (ix) keeping records of occupational diseases and accidents and notifying them to the Social Security Institution, and (x) providing employees with regular medical check-ups with respect to particular occupational risks.



### C. Trade unions

A trade union is entitled to enter into a collective bargaining agreement, if one percent of the employees working in the line of work of the trade union are union members. The trade union is also entitled to enter into collective bargaining agreements if more than half of the employees working at a work place are members of the trade union. In case of an enterprise consisting of more than one workplace, a trade union is entitled to enter into a collective bargaining agreement, if 40 percent of the employees working at the enterprise (i.e. 40 percent of the total number of employees in all work places of the company at the enterprise level) are members of the trade union.

Turkish law does not provide for any work councils but only for union workplace representatives as further explained below.

Members of the trade union who work at the work places of the company that is a party to a collective bargaining agreement do benefit from it. In addition, employees who are not members of the trade union can benefit from the collective bargaining agreement if they were employed at the time it was signed and pay a so-called collaboration fee to the trade union.

Trade unions are entitled to negotiate the terms of collective bargaining agreements and enter into them. They are entitled to act on behalf of the employees and represent them. They can take collective actions, in order to enforce the terms of a collective bargaining agreement, file actions and represent the employees or their successors during the proceedings for protecting their rights arising from the employment relationship, legislation and/or custom.

The trade union authorized to execute a collective bargaining agreement appoints its representatives from among its members employed at the workplace and notifies their names to the employer. The number of representatives depends on the number of persons employed at the workplace/company.

The trade union workplace representatives are to (i) hear the employees' complaints and wishes, (ii) ensure the cooperation between the employer and the employees and labour peace and cohesion, (iii) protect the employees' rights and interests, and (iv) assist with the implementation of the working conditions stipulated under the labor laws and collective bargaining agreements.

## D. Industrial risk & insurance

There are two main phases in dealing with an industrial incident:

### Crisis management

The purpose of this phase is to deal with the general immediate consequences of the industrial incident, which may have two types of consequences for the company (policyholder):

- Losses of the Company
  - The company must notify its insurers of the occurrence of the risk as soon as it becomes aware of such event (without any delay).
  - Upon occurrence of the risk, the company (policyholder) must, either according to the terms of the insurance agreement or upon the insurer's request, provide the insurer with any information and documentation required for determining the extent of the risk and indemnity amount expected from the policyholder. In addition, and further to the information and documents received by the insurer, the company must allow the insurer to make a site visit and take appropriate measures as might be expected.
  - In the event that a risk occurs or occurrence of the risk becomes highly probable, the company must take necessary measures to prevent the loss or its increase, mitigate the loss, and to protect the insurer's rights of recourse against third persons.



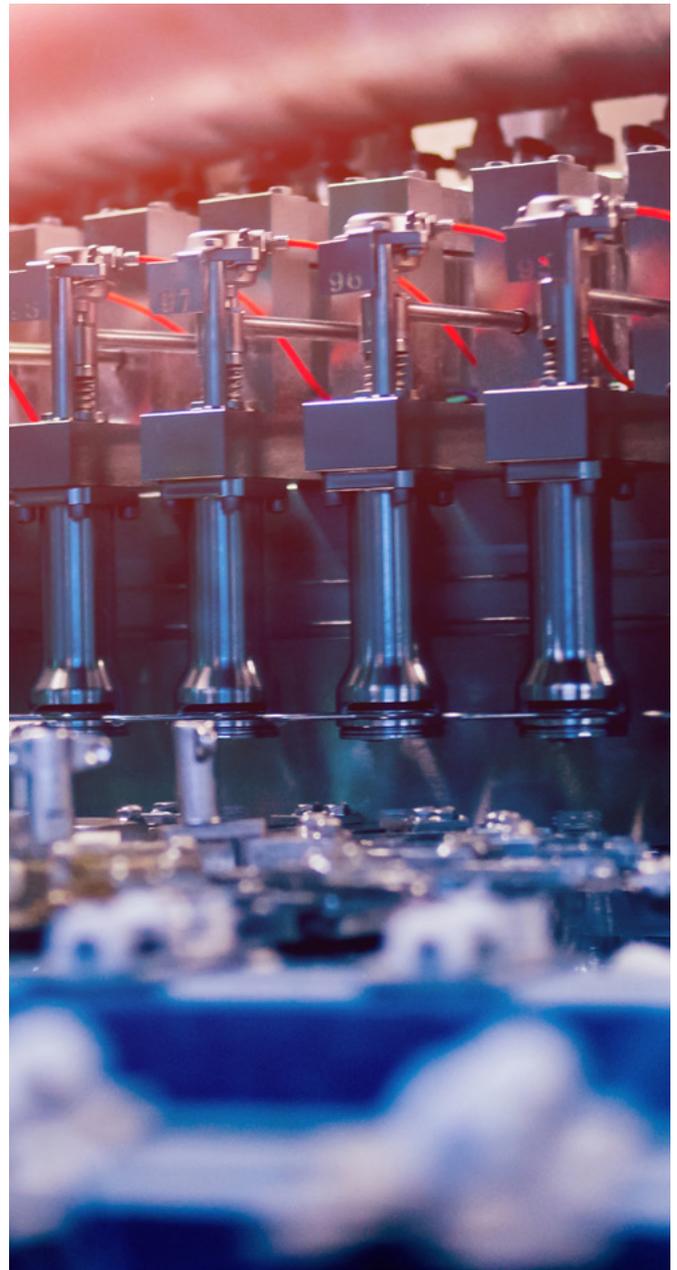
- Losses of third parties
  - The company must notify the insurer within ten days of any event that may give rise to its liability towards third parties.
  - Also, the company must notify the insurer of any claim made against it immediately.
- Recourse preparation

This phase aims at preparing future legal actions of the company and its insurers against potential liable contractors or third parties, in order to shift on them the financial consequences of any industrial events.

- **For the company:**

The company may, based on contractual liability or tort liability, and to the extent that they have not been compensated by their insurers, seek compensation for its losses caused by the industrial event.

In some cases, the prospects of success of a lawsuit may not be clear at the beginning. Then the company can initiate a determination lawsuit and ask for the appointment of expert(s) by a civil court of law to assess the causes of the industrial incident and its financial consequences. The company or its lawyers may then accompany the expert panel and point out any material issues which may have a bearing on a future dispute. That said, when initiated, this lawsuit is notified to the potential counterparty, for a follow-up indemnity claim, which will also receive a copy of the decision. Thus if the outcome of the expert report is negative, this will not remain hidden from the counterparty.



- **Right of subrogation of the insurers:**  
Upon paying the insurance indemnity, the insurer will by operation of law be subrogated to the rights and claims of the insured. If the insured has the right to sue third parties liable for the loss occurred, this right passes on to the insurer up to the amount it has paid. If legal action or enforcement proceedings had already been initiated against such parties, the insurer may continue these proceedings as per the rule of subrogation without the court's or the defendant's consent provided that it proves the payment made to the insured.

## **E. Commercial and Insolvency related risks related to suppliers**

Under Turkish law, there are certain provisions protecting small-scaled suppliers against bigger enterprises. Such provisions provide *inter alia*: (i) a restriction regarding the maximum amount of payment term that can be imposed on a supplier, (ii) bigger enterprises automatically defaulting without the supplier having to serve a default notice, and (iii) bigger enterprises being required to pay interest provided by law with higher rates than the standard commercial interest rate to suppliers.

A number of commonly used collateral types are for protection from commercial and insolvency related risks of suppliers. Bank guarantee letters are the best for protection, but especially small-scaled enterprises may sometimes have difficulties obtaining them, and even if they can, they are usually too costly. Other than that; mortgages, movable pledges, share pledges, bonds, cheques, personal sureties and third party guarantees are the most common examples of provided securities. Cheques are a good means of security as they lead to blacklisting by the banks if they bounce. Mortgages take too much time to perfect, and it is not possible to enforce any agreed private sale mechanisms for movable and/or share pledges. It is also possible to make sales with a retention of title, but these are not valid unless registered with a notary public.

## **F. Defending your intellectual property**

The Industrial Property Law and the Law on Intellectual and Artistic Works regulate the actions which are considered as trademark infringements (e.g. counterfeit, unauthorized use in marketing a product, including use as keywords), design rights infringements (e.g. sale of items copying relevant aspects of the design), patents/utility models infringements (e.g. sale of items copying/using relevant aspects of the patent/utility models), protected indications of origin/protected geographical indication/traditional specialities guaranteed infringements (e.g. counterfeit) and artistic works (including violations of the author's economic and/or moral rights).

In case of an intellectual property infringement, the intellectual property owner may request, *inter alia*, cease and desist of such infringement, compensation of damages, as well as a preliminary injunction.

## **G. Regulation compliance**

Although Turkey is not a member state, Turkey has been in a customs union with the EU since 1995, with the exception of certain goods. The free trade agreements signed by the EU do not extend to Turkey, so the EU's free trade agreements partners can export to Turkey tariff-free, while maintaining tariffs on Turkish goods, unless they also conclude a separate free trade agreement with Turkey. The EU and Turkey are in negotiations for amending the customs union agreement to add Turkey to the present and future free trade agreements.

Turkey has mostly harmonized product regulation at the European level, notably with regard to industrial standards, as Turkey is one of the largest trade partners of the European Union. The majority of goods are subject to harmonized sector specific EU regulation and for some products, the products with the CE marking can move freely in Turkey. For some products, legislation is not harmonized at the EU level and is national.

Turkish Ministry of Commerce General Directorate of Market Surveillance and Inspection is the governmental authority, who is in charge of coordinating nine domestic market surveillance authorities. Each of these is responsible for a limited range of products, which falls into its fields of expertise and has extensive investigation powers and can take various measures including the withdrawal and recall of products in their market surveillance activities. It is therefore important to put into place strict internal procedures for the manufacture of products in compliance with all applicable regulations and to have all the relevant contracts and audits in place with the third parties involved in the manufacturing and sale process (sub-contractors, distributors etc.).

## **H. Competition law investigations**

The Turkish Competition Authority has very extensive investigating powers when they investigate potential anticompetitive practices. They can conduct dawn raids during which they can search the premises, copy or seize documents, computers, telephones and interview employees. It is therefore important for undertakings to be well prepared so that their employees behave appropriately during a dawn raid and that the procedures are already in place to handle the entire process of dawn raid. In order to prevent any anticompetitive practices, an antitrust compliance program should be put in place which will consist of training the management and the commercial teams on prohibited behaviors and providing them with assistance for any competition law questions that they may have.

## **I. Tax investigations**

Period: The tax authorities in Turkey do not have a regular audit cycle for every taxpayer. Tax audits are usually performed based on selection through risk assessment software, where they can conduct either sector-specific or issue-specific audits. Tax returns filed by companies remain open to tax inspection until the end of the five-year statute of limitations according to the provisions of Turkish Tax Procedural Law.

The audit usually takes place on site. The tax authorities may request all the accounting records or documents likely to justify the declared results to be delivered to the tax office.

The tax audit will start with the sending of a letter to the head office of the company specifying the period to be checked and inviting the company representatives to a meeting together with required documents.

The company may be assisted by a counsel throughout the audit.

## **J. Compliance monitoring – anti-bribery, anti-money laundering and whistle blowing rules in Turkey**

Anti-bribery: Turkish anti-bribery legislation obliges public officials to disclose their assets and earnings and refrain from accepting any gifts or other benefits from companies that exceed a certain threshold (ten times their monthly net salary). In addition, any gift and/or benefit provided to public officials by companies may fall under crimes of extortion or bribery pursuant to criminal law, if such benefits were provided for having the public official do or refrain from doing something for the benefit of the company's business.

Anti-money laundering: Turkish anti-money laundering legislation requires certain companies to perform KYC checks, provide continuous information to authorities and suspend and inform the authorities

of suspicious activity. Companies obliged to do so are described in the relevant law and include, among others, banks, financial institutions, insurance companies, sports clubs, notaries and accountants. Manufacturing companies are not listed among the "obligated" companies and do not need to perform KYC checks and perform business partner due diligences.

Whistleblowing: Whistleblowing is not regulated under Turkish law, and therefore whistle blowers are not protected under any specific legislation. In extreme cases where there is a crime involved and the employee's life is threatened, the employee might be protected pursuant to witness protection legislation, as a witness.



# Acquiring and selling a plant

(buy side & sell side  
key check points)



## **A. Share deals & Asset deals**

The following paragraphs generally highlight some notable differences between a share deal and an asset deal from a corporate law standpoint.

- Share deal main pros & cons
  - No cherry picking possible: all the assets and liabilities are transferred.
  - Extensive due diligence, particularly for the purpose of the negotiation of the indemnity provisions inserted in the SPA.
  - Indemnity provisions may cover various liabilities, such as environmental risks.
  - Company assets may not be used to secure the acquisition debt.
  - Share deals may require consent of public authorities, but this is rare in the case of manufacturing companies. Change of control provisions may exist in the contracts of the company.
- Asset deal main pros & cons
  - Cherry picking is possible, but involves risks: There is no automatic transfer of all the assets and liabilities pertaining to the transferred plant. The parties may agree to exclude specific assets and liabilities (with the exception of the employment contracts where applicable). However, any cherry picking acquisition should be on arms' length basis with fair market value prices and not contrary to the interests of creditors, otherwise the transaction parties may be sued, and in particular, creditors of the transferor may claim that a business was transferred and connected liabilities have followed by operation of law.
  - Transfer of contracts pertaining to the plant (if any) transferred requires the approval of the relevant counterparties (unless the contract provides for the contrary) – thorough due diligence required on this specific point.
  - The assets may serve to secure the acquisition debt.
  - Almost none of public licenses can be transferred to third parties.

## **B. Real estate acquisition**

All records relating to real properties are kept under the records of the land registries. Such records include:

- The details of the owners (shared, joint ownership, acquisition date, acquisition reason etc.)
- Lease agreements if they are annotated
- All rights in rem relating to such property (all servitudes, easement rights, usufruct rights etc.)
- Mortgages
- All official notes and restrictions regarding such property (such as use for only a certain purpose, transfer restrictions etc.)
- The legal proceedings regarding such property if they are annotated.

Most of the transactions involving rights on real estate must be made before land registry. The land registry fee for acquisition of the real estates is 4 percent (to be paid equally by the seller and the buyer as 2 percent each) over the declared value of the real estate, which can in any case not be less than registered value of the real estate. Please note that this rate is temporarily applied as 3 percent for the acquisition of residences and workplaces until October 31, 2018.

## **C. Acquiring a mortgaged plant**

If there is a mortgage on a property to be transferred, the ideal way would be for the seller to pay off the debt secured by the mortgage before such transfer and have the buyer acquire the property free of any encumbrance. However, usually the sellers need the funds generated by the sale to pay off the debts for releasing the mortgage over the property.

There is no legal structure under Turkish law enabling secure and simultaneous payment of the property purchase price and release of mortgage.

In practice, the bank usually provides a letter indicating an account number and confirming that it will start the process for releasing the mortgage as soon as the money is deposited with such account.

The property is transferred to the purchaser with the mortgage, which is released in due course when the land registry processes the bank's instruction to release the mortgage after payment is made. It takes approximately one week after payment for the mortgage to be released.

## **D. Employment & trade unions**

In the event of an assets sale constituting the transfer of a workplace or a part thereof, by preserving the economic unity, the employees working at the relevant workplace or part thereof are automatically transferred by operation of law with all the rights and obligations to the purchaser. With respect to the rights of the transferred employees which depend on seniority, the date of commencement of the employment with the transferor would be taken into consideration; and the former employer and the acquirer are jointly and severally liable for any claims of the employees which fell due prior to the transfer and payable at the time of transfer, such as unpaid salaries, overtime work payments. Transferor remains liable for such claims for two years starting from the date of transfer of the workplace.

As opposed to an asset deal, in the event of share deal, the above does not apply since the employer remains the same legal entity.

There is no legal requirement to obtain the employees' consent for or notify them prior to an assets sale or share sale. However, in the case of a workplace transfer occurring on the basis of a merger or full or partial division, the employment agreements pass to the transferee with all rights and liabilities unless an employee raises an objection, in which case that employee's agreement is deemed to have been terminated by the company at the end of the legal notice period.

In the event of a transfer of a workplace or a part thereof, neither the transferor nor the transferee of a workplace is entitled to terminate the employment agreements due to the transfer of workplace. Similarly, an employee also does not have the right to terminate

the employment agreement for just reasons, owing to transfer of workplace.

It is legally not required to conduct any consultation process with the trade unions before an asset or share deal.

### **E. Specifics for distressed assets**

Upon insolvency of an owner of the manufacturing plant, the owner may either file for a rearrangement of debts with the creditors or declare bankruptcy. If approved by the court, the rearrangement of debts restricts creditors' receivables and/or amends their payment term. It does not have any specific effect on the plant.

In case of the bankruptcy of its owner, the manufacturing plant is included in the bankrupt company's assets which are liquidated by the bankruptcy office in accordance with the creditors' wishes. Accordingly, stocks, machinery and equipment in the plant may be liquidated separately or the plant may be disposed of as a whole to a third party purchaser, depending on the creditors' wishes.

### **F. Merger control**

Briefly, for a transaction to be considered as a notifiable transaction as per Turkish competition law, the transaction must meet a two-staged criteria. Accordingly,

- i. The transaction must give rise to a permanent control change; and
- ii. The turnover thresholds defined by the legislation must be exceeded.

The turnover evaluation varies based on the nature of the control change (i.e. whether or not the transaction results in transfer of sole control, formation of joint control etc.) therefore needs to be evaluated on a case by case basis and by taking into account the type of the transaction.



### **G. Tax risks**

#### **Key risks**

- **Purchase or sale of assets** may qualify as a transfer of a business and be therefore governed by specific legal provisions protecting employees and creditors.

**Statute of limitation attached to tax liabilities:** The limitation period for a tax assessment is five years commencing on the first day of the year after the related tax debt is incurred.

### **H. Intellectual Property & Technology acquisition**

In case of registered intellectual property, their protection terms and renewal periods should be confirmed beforehand to verify their accuracy and validity. Also, intellectual properties registered before TPTO must be duly transferred to the new owner before TPTO and similarly, the domain names should be transferred to the new entity.

As for unregistered intellectual property, the new owner must verify and confirm whether such intellectual property is being transferred with all of its elements and data through a technical study. The return, deletion or destruction of such elements and/or data by the transferring company should also be ensured.

# Closing down

– moving away  
manufacturing  
from Turkey





- The company running the operations will need to be liquidated through a voluntary winding up procedure. In order to ensure a smooth liquidation and to minimize the timeframe, all outstanding debts should be paid, claims and lawsuits settled and contracts terminated.
- Closing down a business constitutes legally valid termination grounds for employment contracts. If the dismissed employees file a reinstatement lawsuit against the company, it would be rejected provided that the employer can prove that the company is actually being closed down.
- Apart from their legal entitlements (i.e. notice payment, severance payment and unused annual leave days' payment) at the time of termination of employment, an employer is not legally required to make any additional payment to employees.

Dismissal of employees is likely to be qualified as "a collective redundancy", in which case certain notice requirements must be followed.

# Contacts



# Contacts

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