TURKEY

Kaan Demir

Partner, Kayum & Demir Attorney Partnership

+90 212 2911 002
kaan.demir@kayumdemir.av.tr
kayumdemir.av.tr
irglobal.com/advisor/kaan-demir

Kaan Demir specialises in mergers and acquisitions, corporate governance and litigation. He actively advises foreign and local investors, assisting them in their transactions.

Kaan has experience in advising clients on cross-border and local transactions, joint ventures, private equity investments and strategic investments on a wide range of sectors including but not limited to with media, e-commerce, retail, manufacturing and energy.

His experience covers all aspects of the transactions, starting from the due diligence phase to structuring, contract drafting, and negotiating the terms of the transaction documents. He also renders day-to-day advice on all types of corporate law-related matters. He has been involved in several significant merger and acquisition projects in Turkey in the above-listed sectors.

He also acts as a litigator, representing clients in complex commercial disputes and provides assistance to his clients in all fields of dispute resolution.

Kayum & Demir Attorney Partnership is a full-service law firm located in Istanbul. The firm provides high quality legal services to its clients and is committed to helping them achieve their business targets, while overcoming legal challenges by finding innovative solutions.

The partners are highly motivated to offer legal services with sophisticated advice and practical solutions that reflect a deep understanding of legal issues and business objectives.

The firm has experience in the fields of mergers and acquisitions, strategic investments, corporate and corporate governance, energy, e-commerce, data protection, real estate, competition and litigation.

Executing Shareholder Agreements in Turkey

Shareholder Agreements are used for regulating the rights and obligations of the shareholders and for the determination of corporate issues and matters that are not regulated under the Articles of Association of a company.

Turkish Commercial Code (TCC) does not explicitly regulate Shareholder Agreements, but parties may enter into an agreement within the framework of freedom of contract, as long as its provisions do not conflict with the articles of the company or the provisions of TCC.

As a consequence, Shareholder Agreements only create a binding contractual relationship between its parties and do not impose obligations or grant any rights to any third parties or future shareholders, unless they become parties to the Agreement.

A Shareholder Agreement will usually govern the following matters: shareholding structure of the company and share groups, scope of business of the company, corporate governance matters including composition of the board, election of the chairman, meeting and decision quorums at shareholders and board level, reserved matters, veto rights, determination of budget annual business plans, financing, capital increases, distribution of dividends, share transfer restrictions and share options, deadlock and exit provisions, information rights, non-compete/non-solicitation provisions and representations and warranties.

One of the most controversial issue in this area is the enforceability of share options. Call/put options as well as tag/drag options and right of first refusal (Options), are valid and binding under Turkish law and create a contractual obligation for the obligor vis-à-vis the beneficiary of the option.

There are two crucial issues with the enforceability of such options. Firstly, they will not, as a general rule, be enforceable against third parties acquiring the shares subject to an option, unless it can be proved that the third party acquired the shares with the intention of harming the beneficiary. Secondly, the courts may tend to award monetary damages and be reluctant to impose a remedy of specific performance to require the transfer of shares.

Below are the widely used solutions to improve the enforceability of options:

(i) Inserting the Option provisions in the Articles:

Articles are registered with the trade registry and are public. Inserting the terms of the options in the Articles will put third parties on notice as a warning. However, if the beneficiary wished to issue proceedings against the third party it would have to prove the third party intended to cause harm in acquiring the shares.

(ii) Inserting a provision into Articles which state that Board cannot register the transfer of shares to a third party:

Pursuant to TCC, a board may refuse to approve the transfer of registered shares for justifiable reasons. We believe options may be incorporated in the Articles as a justifiable reason for the board to approve or refuse a transfer of shares. Accordingly, if a third party acquires the shares in violation of option provisions, the board would not be permitted to register the acquirer as a shareholder of the company and the holder of the shares may not benefit from its rights as a shareholder.

(iii) Inserting transfer restriction on share certificate:

Inserting a statement on registered share certificates that the shares are subject to transfer restrictions would put third parties on notice. A third party may validly acquire the shares despite such notice, since the contractual share restriction may not be asserted against a third party even if they are aware of the existence of such restriction.

(iv) Penalty provisions:

Penalty clauses are valid and binding, unless payment of such penalty causes the obligor to go bankrupt. Accordingly, a high penalty could be imposed for a sale to a third party in breach of the options.

(v) Escrow arrangements:

Parties may enter into escrow arrangements, and share certificates of the company may be deposited with an escrow with blank endorsement. Escrow can release the option shares with the written instruction of the beneficiary of the option.

(vi) Establishing holding companies outside Turkey:

Shareholders may establish a company in a jurisdiction where there is greater legal certainty on the enforcement of options and shareholding arrangements would operate at this holding company level and this holding company can hold the shares of the Turkish company.

Within this context, it is crucial to negotiate and discuss all the terms of the Shareholder Agreement and make sure that its provisions are enforceable before making an investment for both strategic and financial buyers.