

M&A Essentials

A Practical Guide for Buyer,
Seller, and Advisors



Introduction

This handbook is designed to provide clear and concise insights into **Mergers and Acquisitions** (M&A) processes. It serves as a practical guide for buyers, sellers, and consultants aiming to enhance their expertise in the M&A field. By simplifying key concepts and practical applications encountered throughout the process, the handbook makes these complex topics accessible to all stakeholders.

The handbook covers the various stages of the M&A process in its core chapters, including:

Defining the Number of Shares to Be Transferred

Deciding whether to sell all or part of the shares significantly impacts the sales strategy and shapes offers from potential buyers. If the seller intends to retain a shareholding, additional agreements, such as shareholder agreements, may be required. These agreements define the rights and obligations of the parties and may include mechanisms like call or put options for future share transfers. This handbook focuses on scenarios where all shares are transferred.

Vendor Due Diligence: Identifying Risks in Advance

Vendor due diligence is a proactive approach that allows sellers to identify and mitigate risks before presenting the company to buyers. It involves analysing key areas such as employment contracts, licences, intellectual property, and financial statements. By addressing identified issues early, sellers enhance their negotiation power and reduce potential adverse effects on the sale price.

Information Memorandum:

Introducing the Target Company to Potential Buyers

An **information memorandum** (IM) is a comprehensive document that introduces the target company to potential buyers. It provides details about the company's financial position, operations, market share, and other critical aspects. The **IM** should be prepared with honesty and transparency to attract buyers while avoiding misleading or incomplete information.

Letter of Intent (Term Sheet)

The M&A process often begins with the signing of a non-binding **letter of intent** (LOI). This document outlines the intentions of both parties and includes key elements such as exclusivity, confidentiality, and financial terms. A well-crafted **LOI** helps clarify the parties' positions and typically leads to the due diligence phase.

Buyer's Due Diligence on the Target Company

Due diligence enables buyers to evaluate risks, liabilities, and the overall transaction structure. It may include legal, financial, tax, or even **ESG** (**Environmental, Social, and Governance**) reviews, depending on the nature of the company. The findings from this process help guide the structuring of the transaction and inform risk management strategies.

Negotiating the Share Purchase Agreement (SPA)

Negotiations in M&A should be viewed as an opportunity for mutual understanding and collaboration rather than a battleground. The focus should be on achieving a win-win outcome, fostering productive working relationships, and minimising disputes.

Key Concepts in the SPA

The SPA includes several critical terms, such as:

Conditions Precedent: Operational or legal prerequisites that must be fulfilled before closing.

Representations and Warranties: Guarantees provided by the seller about the condition of the target company.

Material Adverse Change Clause (MAC Clause): A provision that allows the buyer to withdraw from the transaction under certain significant adverse circumstances.

Price Adjustments: Mechanisms such as locked-box and completion accounts to address financial changes between signing and closing.

Non-Compete Obligations: Restrictions preventing the seller from engaging in competing activities after closing.

Seller's Indemnity Obligations and Liability Limitations

Sellers may be liable for breaches of representations and warranties. Indemnity mechanisms cover specific risks, while liability limitations, such as caps or de minimis thresholds, protect sellers from excessive exposure.

Escrow Mechanism: An escrow mechanism provides security by holding part of the purchase price with a neutral third party to cover potential liabilities. Buyers are thus protected, while sellers can recover the escrowed amount if no risks materialise.

Interim Period and Closing Procedures

The interim period—between signing and closing—requires sellers to maintain the target company's status quo while fulfilling any conditions precedent. Closing formalises the transaction through payment transfers, share endorsements, and other procedural steps. Key documents, such as share certificates and board resolutions, are also finalised at this stage.

Each chapter of this handbook offers practical insights into common practices and potential risks, empowering readers to navigate the M&A process with confidence and foresight.

Enjoy your journey into the world of M&A!

Key Terms

Interim Period

The time between the signing date and the closing date, during which specific obligations and conditions must be fulfilled to finalise the transaction.

Information Memorandum (IM)

A document prepared by the seller to introduce the target company to potential buyers. It provides key details about the company's ownership structure, financial status, operations, market share, and assets.

Drag-Along Right

A mechanism that enables majority shareholders to compel minority shareholders to sell their shares to a third-party buyer under the same terms when an offer is made for the majority's shares.

Tag-Along Right

A mechanism that allows minority shareholders to sell their shares under the same terms as the majority shareholder when a third-party buyer makes an offer to the majority.

Exit

The process in which a seller divests all their shares in the target company.

Closing Date

The date when the transaction is legally and practically completed.

Material Adverse Change Clause (MAC Clause)

A provision granting the buyer the right to withdraw from the transaction if a significant adverse change occurs before the closing date.

Share Purchase Agreement (SPA)

A contract between the buyer and seller outlining the terms and conditions of the share purchase, including each party's respective responsibilities.

Shareholders Agreement

A contract between the buyer and seller governing the rights and obligations related to the target company. This agreement is relevant when the seller retains a portion of their shares.

Letter of Intent (LOI) / Term Sheet

A primarily non-binding document that outlines the initial terms and intent of the parties to proceed with negotiations and work towards completing the transaction.

Disclosure Letter

A document in which the seller discloses exceptions to the representations and warranties outlined in the SPA.

Vendor Due Diligence

A proactive due diligence process undertaken by the target company's existing shareholders before an M&A transaction to assess the company's status and address potential risks.

Closing Protocol

A document that records all actions completed during the closing phase, including any waived conditions.

Share Ledger

A company ledger that maintains a record of shareholders, their respective shares, and all transactions involving those shares.

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Preparation Stage

Determining the Quantity and
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Preparation Stage

Determining the Quantity and Percentage of Shares to be Transferred

When a company enters the sales process, the seller(s) must first decide whether to sell all or only a portion of their shares. This decision not only defines the overall sales strategy but also significantly influences the structure of offers from potential buyers.

If the seller intends to retain a stake in the company post-transaction, specific arrangements must be established for both the pre- and post-transfer periods. In such cases, a **Shareholders Agreement** is typically executed between the buyer and seller. This agreement clearly outlines the parties' rights and obligations concerning their shares, including governance, dividend distributions, and veto rights on certain matters.

Additionally, mechanisms for future share transfers may be incorporated into the agreement.

Examples include:

- The buyer may request a **call option** to purchase the remaining shares from the seller after a specified period.
- Conversely, the seller may secure a **put option** to sell their remaining shares to the buyer under predefined terms.

These options provide flexibility and protection for both parties, helping to manage future uncertainties.

In conclusion, clarifying the scope of shares to be sold minimises uncertainties and enables buyers to prepare more accurate and informed offers. Since this handbook focuses on scenarios where sellers exit the company entirely by transferring all their shares, cases where sellers retain ownership in the target company are not addressed.



→ **Sales Strategy:**

Decide whether to sell all or only part of the shares. This decision will shape both the sales strategy and the structure of offers from potential buyers.

→ **Option Mechanisms:**

Buyers or sellers may negotiate call or put options for future share transfers. Such mechanisms add flexibility to the transaction and protect the parties' interests.

Vendor Due Diligence Proactively Identifying Risks

Potential sellers who are shareholders of the target company can adopt a proactive approach by conducting **vendor due diligence** (VDD). This process helps identify and address compliance gaps or risks before presenting the company to potential buyers.

VDD enables sellers to detect issues such as:

- Non-compliance with employment contracts
- Expired or incomplete regulatory or operational permits
- Intellectual property risks
- Errors in financial statements

By addressing these deficiencies beforehand, sellers can be better prepared for questions during buyer due diligence and mitigate potential negative impacts on the transaction value.

Through VDD, sellers can:

- Reduce their liability
- Avoid delays during negotiations
- Gain a stronger position during discussions

In addition to identifying and resolving risks, **VDD** allows sellers to gain a deeper understanding of their company, highlight its strengths, and present a more attractive profile to potential buyers. Engaging professional advisors for this process can significantly enhance risk management and ensure a smoother transaction process.

→ **Be Proactive:**

Conduct vendor due diligence before presenting your company to buyers to identify and address compliance gaps or violations.

→ **Identify Risks Early:**

Resolve potential issues, such as deficiencies in employment contracts, non-compliance with environmental regulations, or errors in financial statements, before they are uncovered by buyers.

→ **Strengthen Negotiating Power:**

Addressing deficiencies in advance prevents buyers from using them to lower the purchase price or demand additional guarantees, thereby bolstering the seller's position in negotiations.

Information Memorandum

Introducing Target Companies to Potential Buyers

An **Information Memorandum (IM)** is a critical document prepared to introduce the target company to potential buyers and generate interest in a possible transaction.

Typically, an IM includes key details about the company's:

- Financials
- Operations
- Market share
- Workforce
- Assets

Before sharing the IM with potential buyers, it is essential to protect the company's confidential information through a signed **Non-Disclosure Agreement (NDA)**.

The IM is created by the target company's advisors to highlight its strengths and attract buyers to proceed with the process. **However, the principle of honesty must always be maintained during its preparation:**

- **Accuracy is Crucial:** The IM must not contain misleading or false information. While not all

details need to be disclosed at this stage, providing inaccurate or incomplete information can lead to disputes and expose the seller to liability.

- **Balanced Approach:** While emphasising the company's strengths, the IM should also truthfully reflect its current state to ensure transparency.

Once the IM is shared, potential buyers typically evaluate whether to proceed further. Those who express interest usually advance to the next phase, culminating in the signing of a **Letter of Intent (LOI)**.



- **Create Appeal:** The primary goal of the IM is to make the target company attractive to potential buyers. Highlight the company's opportunities, market position, and growth potential to motivate buyers to move forward.

Structuring the Sale Process as an “Auction”

In scenarios where multiple potential buyers express interest, the sale process can be structured as a bid procedure. Although no legal regulations define how such a procedure should be conducted, **the following practical steps are typically followed:**

- 1. Sharing of Information Memorandum:** Potential buyers are provided with an information memorandum or a vendor due diligence report prepared by the seller’s advisors.
- 2. Process Timeline and Rules:** The seller’s advisors share a bid process letter that outlines key details, including the timeline for submitting bids, procedural rules, and negotiation guidelines.
- 3. Draft SPA Sharing:** The top two or three bidders with the highest offers are granted access to a virtual data room containing detailed information about the target company. A draft **Share Purchase Agreement** (SPA) is also shared, and bidders are invited to provide comments and revised offers based on this draft.

- 4. Selection:** The seller reviews the submitted offers and, after selecting the best one, either proceeds with signing a **Letter of Intent** (LOI) or moves directly to **SPA** negotiations.



→ **More Than Just Price:** Sellers do not base their decisions solely on the purchase price. They also evaluate bidders’ comments and requests for changes to the **SPA** draft. This dual approach ensures that sellers secure both an advantageous purchase price and favourable contract terms.

Letter of Intent (Term Sheet)

The sale process typically begins with the signing of a **Letter of Intent** (LOI) between the seller and a potential buyer. While **LOIs** are generally non-binding, parties often agree to make certain provisions binding, **such as:**

- Exclusivity
- Confidentiality
- Governing law clauses

Primary Purposes of a LOI:

- **Express Intentions:** Clarify the parties’ intentions regarding the proposed transaction.
- **Define Exclusivity:** Specify an exclusivity period during which the seller agrees not to negotiate with other potential buyers, and the buyer refrains from engaging with other sellers in the same sector.
- **Outline Financial Terms:** Include the purchase price or the method for determining it.

There are no legal requirements for the format of an **LOI**. However, it is advisable to prepare written and signed documents for evidentiary purposes.

After signing the **LOI**, the buyer typically initiates the due diligence process on the target company. During this phase, detailed confidentiality agreements and documents governing virtual data room protocols are often executed. These agreements are essential for protecting the rights of both parties and ensuring that the transaction progresses securely.

Buyer's Due Diligence on the Target Company

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Expanding the Due Diligence Scope:
ESG Considerations

Protection of Personal Data

Data Room

Due Diligence Report



Buyer's Due Diligence on the Target Company

A standard M&A transaction typically begins with the signing of a **Letter of Intent** (LOI) and a **Non-Disclosure Agreement** (NDA). Following this, a **data room** is established based on the buyer's due diligence request list, granting access to the buyer's advisors. Simultaneously, insights gained from the due diligence process inform negotiations for the **Share Purchase Agreement** (SPA).

The primary objectives of the due diligence process for the buyer are to:

- Evaluate the risks and liabilities associated with the target company
- Accurately structure the transaction
- Identify the seller's responsibilities
- Mitigate potential risks

Depending on the target company's industry and operational areas, the buyer typically conducts **legal**, **tax**, and **financial due diligence**. In some industries, **technical due diligence** may also be required.

Scope of Legal Due Diligence

The extent of legal due diligence depends on the industry and activities of the target company. Crafting a due diligence checklist tailored to these factors is critical to ensuring relevant questions are asked. A customised checklist not only saves time but also fosters a professional working environment for all involved parties.



→ **Avoid Standardised Checklists:** Using a generic, unconsidered checklist can burden startup founders with irrelevant inquiries and create the impression that the investor lacks expertise in the company's field. Instead, ensure the checklist is tailored to the target company's specific industry and circumstances.

A comprehensive legal due diligence process requires gathering and reviewing essential documents and information across several key areas:

Corporate:

- Copies of the articles of association
- Extracts from the trade register
- Copies of the share ledger
- Copies of board resolutions and minutes of general assembly meetings

Contracts:

- Copies of contracts with key customers
- Copies of distribution agreements
- Copies of supply agreements

Finance:

- Copies of loan agreements
- Copies of security agreements, such as mortgages or pledges

Immovable Properties:

- Copies of title deeds of the target company
- List of encumbrances on immovable properties
- Copies of lease agreements
- Copies of construction and use permits

Employment:

- Copies of employment agreements
- Information on the total number of employees
- Evidence of payment of social security contributions
- Potential employment-related liabilities

Licences and Regulatory Compliance:

- Copies of licences and permits required for the sector
- Identification of missing licences or permits
- Compliance with personal data protection legislation
- Compliance with sector-specific legislation

Related-Party Transactions:

- Details of commercial transactions between the target company and related parties, such as shareholders and board members

Intellectual Property:

- Copies of records of registered intellectual property rights, such as patents and trademarks
- Copies of licence agreements

Litigation:

- Information on pending or threatened litigation involving the target company

Review of Permits and Legal Compliance

The due diligence process should extend beyond merely reviewing copies of permits and approvals provided in the data room.

A thorough investigation into the following aspects is essential:

Whether the conditions of the permits and approvals have been adhered to

- The validity periods of the permits and approvals
- Whether renewal applications for permits have been appropriately and timely submitted
- Whether any warnings have been issued by relevant authorities that could lead to the revocation of these permits

Internal Corporate Approvals

For internal approvals, the buyer must ensure these approvals are legally valid and not subject to future disputes by addressing the following:

- Whether the approvals were granted by the authorised bodies or individuals of the target company
- Whether the required procedures for obtaining these approvals were properly followed

Expanding the Scope of Due Diligence The ESG Concept

The concept of **Environmental, Social, and Governance** (ESG) has gained global prominence and is now an integral part of the due diligence process. The scope of ESG considerations should be tailored to the sector and operational areas of the target company.

Environmental Factors

For companies operating factories or power plants, the due diligence review may include:

- Verification of necessary permits for operations
- Compliance with environmental regulations
- Investigation of complaints or penalties related to environmental issues
- Existence of corporate policies on environmental protection, pollution reduction, and waste management
- Availability of sustainability reports

Social and Governance Factors

The review may also encompass the following aspects of social and governance practices:

- Compliance of workplace practices with legal regulations (*e.g., working hours, health and safety*)
- Adherence to personal data protection laws and respect for employee privacy
- Relationships with local communities and their impacts
- Promotion of diversity among employees and within the board structure
- Assurance of corporate transparency

Compliance with Personal Data Protection

Due diligence often involves the disclosure of personal data, making compliance with data protection laws imperative. **Startups should implement the following minimum measures:**

- **Limit Data Sharing:** Only disclose data that is strictly necessary for the due diligence process.
- **Inform and Obtain Consent:** Ensure data subjects are aware their data will be disclosed to potential buyers

and advisors. Obtain their consent where required by applicable legislation.

- **Incorporate Data Protection Provisions:** Include specific provisions regarding personal data protection in the non-disclosure agreement between the parties.

Data Room

Once due diligence questions and document requests are shared, sellers and their legal counsel begin preparing a data room. Historically, this involved setting up a physical data room at the company headquarters, where documents were organised into folders for review. Access was restricted to authorised individuals, and the room was locked when not in use.

With technological advancements, **virtual data rooms** (VDRs) have largely replaced physical data rooms. These secure online platforms allow authorised individuals to review documents remotely. In addition to professional **VDR** service providers, startups can use encrypted links to securely share documents.

Due Diligence Report

After completing the due diligence process, the buyer's legal advisors prepare a comprehensive due diligence report. The deliverables expected by the buyer should be clearly defined in advance.

While some buyers prefer detailed reports, others may opt for executive summaries focusing on key factors impacting:

- Value
- Purchase price
- Liability
- Future activities of the target company

Share Purchase Agreement (SPA) Negotiation Phase and Key Concepts in the SPA

Cooperation Over Confrontation

Natural Dynamics of Negotiation:
Tensions and Turning Points

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Share Purchase Agreement (SPA)

Negotiation Phase

Not a Battlefield, but a Search for Common Ground

The negotiation phase of M&A processes should be viewed as a communication and problem-solving journey where parties work to understand each other's expectations and concerns. This phase is not a battlefield but a collaborative effort toward a shared goal. By focusing on mutual benefit rather than defeating the other side, a more productive environment can emerge. Such an approach facilitates the process and lays the foundation for a strong business relationship in the future.

Understanding the reasons behind the other party's demands is essential during negotiations. Often, the concerns raised by the other side can be resolved more easily than anticipated. For example, providing an additional guarantee or an explanatory document may fully address their concerns. These small yet strategic steps can prevent unnecessary delays and avoid potential conflicts between parties.

It is equally important to avoid disputes over issues that do not pose actual risks or are not critical to the transaction. Such disagreements not only waste time but also erode trust between the parties. By focusing on truly significant matters and channelling your energy accordingly, the negotiation process becomes both more efficient and constructive.

The cornerstone of successful negotiation lies in empathy and a solution-oriented approach. Striving to understand the other party's position allows you to articulate your demands more clearly while maintaining mutual respect throughout the process. This ensures not only an agreement for today but also the potential for future collaborations.

Natural Dynamics of Negotiations Tensions and Turning Points

During negotiations, moments of heightened tension or even instances where voices are raised may occur. At times, one party might even choose to leave the table. While such moments can seem challenging, they are part of the natural dynamics of negotiations. Many projects that appeared to reach a deadlock have ultimately resulted in successful agreements.

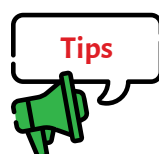
In these situations, it is crucial to remain calm and trust both your advisors and the preparation you have undertaken.

Before entering negotiations:

- Define your red lines and the boundaries that could lead you to walk away.
- These red lines need not be disclosed to the other party immediately but will help you manage your negotiation space more effectively.

This groundwork also enables your advisors to guide you more efficiently.

Remaining calm, thinking strategically, and being willing to reposition yourself when necessary are key elements of successful negotiation. A strong negotiator is not just someone who defends their position but also someone who is open to finding common ground.



→ Don't View Negotiations as a Battlefield:

Aim for a win-win agreement that benefits both parties. This approach simplifies the process and fosters strong future business relationships.



- **Prioritise Empathy:**
Seek to understand the rationale behind the other party's demands. Often, a guarantee or explanatory document can resolve significant issues.
- **Maintain Positive Communication:**
Uphold mutual respect throughout the process. Articulate your demands clearly and demonstrate an understanding of the other party's position.
- **Focus on Critical Matters:**
Avoid disputes over issues that are not genuine risks or critical to the transaction. Such conflicts waste time and harm trust.

Key Concepts in The SPA

Conditions Precedent

When signing the **Share Purchase Agreement (SPA)**, both the seller and the buyer commit to fulfilling the obligations outlined within it. However, signing the **SPA** alone is not always sufficient to finalise the transaction. In many cases, specific conditions precedent must be satisfied by the seller before the closing can occur. **These conditions may relate to:**

- **Operational Requirements:** Completion of missing permits or licences for the company, repayment of debts owed to third parties, etc.
- **Legal Requirements:** Obtaining approval for the transaction from regulatory authorities, such as the Competition Board or other relevant bodies.

Operational Conditions

Certain conditions, referred to as **conditions precedent**, may include **operational matters**—such as obtaining company permits or settling debts—or **legal requirements**, such as securing approval from regulatory authorities.

Some contracts involving the target company may include **change of control clauses**, allowing the counterparty to terminate the agreement unilaterally if there is a change in the target company's ownership structure.

- If these contracts are critical to the company's operations, buyers may require the seller to secure **letters of consent** from relevant counterparties. These letters confirm that the counterparties will not exercise their rights under the change of control clause.
- Where obtaining such letters is stipulated as a condition precedent, the seller must fulfil this requirement during the **interim period** before the transaction is finalised.

Regulatory Approvals

As a general principle, shares in joint stock companies are freely transferable and do not require regulatory approval. **However, certain sectors are exceptions to this rule:**

- **Regulated Sectors:** In industries such as banking, insurance, telecommunications, and energy, the transfer of shares may require approval from the relevant regulatory authority, depending on the percentage of shares being transferred.
- **Competition Board Approval:** Transactions exceeding specific thresholds must obtain clearance from the Competition Board before closing.

Company Approvals

The transfer of registered shares that have not been fully paid is subject to the company's approval. **Approval may be denied under the following circumstances:**

- **Concerns About the Buyer's Financial Standing:** If doubts arise about the buyer's financial stability.
- **Failure to Provide Required Guarantees:** If the buyer cannot provide the security requested by the company.

Additionally, the company's articles of association should be reviewed to identify any restrictions on share transfers. **These restrictions may include:**

- **Lock-Up Periods:** Designed to preserve the shareholding structure, maintain operational continuity, or ensure economic independence.

Typically, approval from the target company's board of directors is required as one of the conditions precedent for share transfers.



→ Foreign Investments and Sectoral Restrictions

Foreign Investors:

Foreign investors can freely and directly invest in Turkey, receiving the same treatment as domestic investors. However, such investments, including share transfers, must be reported to the competent authorities under the Foreign Direct Investment Law.

Sectoral Limitations:

Certain sectors, such as broadcasting and civil aviation, impose restrictions on the percentage of shareholding that foreign investors may own.

Competition Authority Approval

Share transfer transactions may require Competition Authority approval under competition laws.

In such cases:

- Parties must apply for approval during the interim period.
- Closing cannot proceed until approval is granted.

If the transaction results in a change of control and exceeds the thresholds set by legislation, Competition Authority approval is mandatory. This regulatory review aims to prevent anti-competitive outcomes that could harm market dynamics. Failure to obtain approval before closing constitutes a legal violation and may lead to significant financial penalties.



→ **Analyse Thresholds Early:**

Determine whether the transaction exceeds thresholds and whether filing an application is necessary. Submitting the application on time is critical to avoid delays.

→ **Consider Exemptions for Technology Companies:**

For transactions involving technology companies, assess any exemptions that may apply to thresholds.

Representations and Warranties

Representations and warranties form a significant part of the **Share Purchase Agreement** (SPA).

Representations are essentially guarantees provided by sellers regarding the attributes of the target company. Buyers expect the target company to meet specific key criteria, and sellers are required to provide assurances about these qualities.

Typical Representations and Warranties

The representations and warranties in an SPA typically include assurances that:

- The company has obtained all necessary permits and licences to conduct its operations.
- There are no third-party rights over the company's shares.
- The company has no outstanding tax liabilities.
- There are no legal claims or lawsuits filed against the company.
- The company complies with labour law regulations.
- The company is the legal owner of, or has the necessary licences to use, the intellectual property it utilises.
- Both parties have the legal capacity and authority to enter into the agreement.

Liability for Inaccurate Representations

If any of the representations provided under the SPA are found to be inaccurate, the seller may be held

liable. In such cases, the seller could be required to indemnify the buyer for any damages resulting from these inaccuracies.

Link to Due Diligence

Representations and warranties are directly linked to the due diligence process. Risks identified during due diligence play a critical role in shaping the scope of the representations and warranties included in the SPA. By addressing these risks, both parties can ensure a more transparent and well-structured transaction.

Warranty and Indemnity Insurance

In Turkey, the insurance sector is highly regulated, and warranty and indemnity insurance (**W&I insurance**) is not yet widely recognised as a standalone insurance product. However, some companies offer this type of insurance as part of general insurance policies.

Although **W&I insurance** is not prevalent in Turkey, it is gaining popularity in international transactions. Turkish insurance providers often hesitate to offer such coverage due to insufficient legal regulations. Nevertheless, demand for **W&I insurance** in Turkey is expected to grow, and its adoption is anticipated to become more widespread in the coming years.

Material Adverse Change (MAC) Clause

The **Material Adverse Change** (MAC) **Clause** grants the buyer the right to withdraw from the closing—essentially, the right not to purchase the shares—if a material adverse change occurs with the target company before the closing.

Criteria for Material Adverse Change

To enforce this clause, the following criteria must be met:

- 1. Change:** During the interim period, a condition or circumstance must arise that differs from those existing at the time the agreement was signed.
- 2. Adverse Effect:** The change is assessed based on its impact on the target company. Notably, the change

does not need to occur directly within or under the control of the target company. For example, significant fluctuations in exchange rates in the country where the company operates may also qualify as a material adverse change.

- 3. Materiality:** The adverse change must be significant enough to make the transaction undesirable for the buyer. In other words, the circumstances and conditions at the time of signing must have deteriorated to a degree that allows the buyer to walk away from the deal.

Definition of Material Adverse Change

A material adverse change is typically defined in the agreement based on the criteria outlined above.

However, the scope of this definition is often subject to negotiation between the buyer and seller:

Buyer's Perspective:

Buyers generally prefer broad definitions that grant them discretionary power. For instance, the definition may include anticipated adverse effects that have not yet materialised. However, an overly broad definition may lead to disputes between the parties about whether a material adverse change has occurred.

Seller's Perspective:

Sellers aim for a definition based on objective criteria and a narrower scope. Examples include situations such as the revocation of a licence essential for operations or the termination of a key contract, which are more acceptable definitions from the seller's standpoint.

Additionally, the parties may agree to explicitly exclude certain foreseeable risks that the buyer assumes at the time of signing from the **MAC** definition. This strategy helps mitigate potential disputes.

Practical Application

There is no universal or standard **MAC** clause, as each transaction has unique dynamics and sector-specific characteristics.

The key certainty is that if the definition of a material adverse change is unclear, disputes about the applicability of the **MAC** clause are almost inevitable. Furthermore, buyers often use the **MAC** clause not as a means to terminate the deal but as leverage to enhance their bargaining position.



- **No Standard Definition Exists:**
The MAC clause should be tailored to the specific characteristics of each transaction and sector.
- **Clear Definition is Crucial:**
Ambiguity in the definition significantly increases the risk of disputes between the parties.
- **Negotiation Leverage:**
Buyers often use the MAC clause as a tool to enhance their bargaining position rather than to terminate the deal.

Adjustment of the Purchase Price Locked Box and Completion Account

Businesses, like living organisms, are constantly evolving. Therefore, the target company must continue its operations during the period between signing and closing. Changes in the target company's financial condition during this period can affect the final purchase price. To manage such uncertainties, adjustment mechanisms are often incorporated into purchase agreements.

The two most common mechanisms are:

- Locked-box
- Completion account

Locked Box Mechanism

Under the locked box mechanism, the final purchase price is determined based on the target company's financial statements as of a specific date (*the "locked*

box date"). To "**lock the box**," the agreement includes a no-leakage clause, which prevents the seller from undertaking any actions between the locked box date and closing that could diminish the target company's value.

If the seller breaches this provision, they are obligated to either:

- Compensate the buyer for the leaked value
- Agree to a price reduction

Advantages of the Locked Box Mechanism:

- The price is finalised upfront, reducing post-closing calculations and disputes.
- Eliminates the need for extensive financial reviews after closing.

Buyer's Consideration:

- Buyers must exercise diligence to mitigate potential leakages.

Completion Account Mechanism

In the completion account mechanism, the purchase price is adjusted based on the target company's financial condition at the closing date. The final price is calculated by comparing the financial statements prepared as of a specified earlier date (**accounts date financials**) with those prepared as of the closing date (**completion accounts financials**).

Advantages of the Completion Account Mechanism:

- Provides flexibility by aligning the purchase price with the target company's actual financial condition at closing.
- Reduces potential financial discrepancies by reflecting the company's updated value.

Choosing the Right Mechanism

Both mechanisms cater to different transaction needs. The selection of the appropriate mechanism depends on the parties' objectives, the transaction's specifics, and the desired level of certainty versus flexibility in the purchase price.

Non-Compete Clause Seller's Post-Closing Obligations

Non-Compete Clause and Its Scope

In M&A transactions, buyers often incorporate restrictive covenants, such as **non-compete** and confidentiality obligations, into transaction documents. The **non-compete** clause is designed to prevent the seller from engaging, directly or indirectly, in activities that compete with the target company after closing.

To ensure fairness and enforceability, non-compete obligations must be:

- Reasonable in terms of **duration, scope, industry, and geographic limits**.
- Tailored to address the **buyer's need for protection** while considering **the seller's future plans**.

Non-compete clauses should not unnecessarily restrict economic freedom or violate principles of good faith. To achieve their intended purpose, these clauses must remain proportional and justified within the context of the transaction.

Legal Scope and Limitations of Non-Compete Clauses

Non-compete clauses are typically limited to a period of two to three years in practice. **However, their duration and scope should be carefully evaluated to align with the following factors:**

1. Target Company's Industry and Geographic Scope:

A non-compete clause should be limited to the industry and geographic areas in which the target company operates.

For example:

- If the target company operates in a single city, imposing a nationwide restriction may be deemed unnecessary and legally invalid.
- Extending the clause to industries unrelated to the target company's business could render it unenforceable.

2. Principles of Equity and Proportionality:

Non-compete clauses must be limited to what is necessary to protect the transaction. Overly broad restrictions may result in both legal and commercial risks.

Drafting Non-Compete Clauses**To strike a balance between the interests of both parties, non-compete clauses should be:**

- Carefully drafted to reflect the specifics of the transaction
- Aligned with judicial precedents where applicable
- Clearly defined in terms of scope, duration, and geographic boundaries

By maintaining this balance, the non-compete clause safeguards the buyer's investment while respecting the seller's economic freedom. This ensures fairness and minimises potential disputes.

Seller's Indemnification Obligations and Limitations of Liability

Specific Indemnity

Disclosure Letter

Limitation of Liability

Escrow Mechanism:
A Safeguard for the Seller's Obligations



Seller's Indemnification Obligations and Limitations of Liability

General Framework

Under Turkish law, the primary legal remedy for a breach of obligation is specific performance. However, in M&A transactions, pursuing specific performance is often impractical. As a result, parties typically agree on indemnification provisions to address breaches of representations and warranties.

To claim indemnification, the following conditions must be met:

- A breach of a contractual obligation
- A resulting loss
- A causal link between the breach and the loss
- Fault on the part of the obligor

Sellers may be held liable for damages if the representations and warranties they provide in the **Share Purchase Agreement (SPA)** are inaccurate or misleading. They are obligated to indemnify the buyer for losses incurred after closing.

Specific Indemnity

When specific risks are acknowledged by the parties, and the buyer does not wish to assume responsibility for these risks, a specific indemnity provision is often included.

- These provisions require the seller to indemnify the buyer for losses arising from the specified risk without any limitations of liability.

Disclosure Letter

A disclosure letter, typically appended to the SPA, allows sellers to:

- Outline exceptions to the representations and warranties
- Disclose situations for which they do not intend to assume liability

Disclosed matters generally absolve the seller of liability. **However:**

- If a disclosed matter poses a substantial and material risk, the buyer may insist that the seller retains responsibility for it.

Limitation of Liability

Sellers often negotiate liability limitations in the SPA to manage their potential exposure. **Common mechanisms include:**

- 1. Monetary Caps:** Setting an upper monetary limit on the seller's liability.
- 2. De Minimis Thresholds:** Excluding liability for minor claims below a certain value.
- 3. Basket Thresholds:** Requiring claims to exceed a specified aggregate value before indemnification applies.
- 4. Time Limits:** Setting a specific period after closing during which the seller's liability remains in effect.

These mechanisms are widely used to balance risk between the parties and ensure manageable exposure for the seller.

Important Note: In cases of gross negligence, liability limitations agreed upon in the SPA are not enforceable.

Escrow Mechanism

A Safeguard Against The Seller's Liabilities

In M&A transactions, buyers may request an **escrow mechanism** to secure the seller's indemnification obligations against potential material risks associated with the target company during the pre-closing period. This mechanism involves transferring a portion of the purchase price to a neutral third party (**the escrow agent**) rather than paying it directly to the seller on the closing day.

The **escrow mechanism** provides security for potential indemnification liabilities over a defined period. If the identified risks do not materialise, the escrowed funds are released to the seller at the end of the specified period.

Key Elements of the Escrow Mechanism

The escrow agent, typically a professional organisation such as a bank, administers the escrow mechanism for a fee. ***Its operation is governed by a tripartite escrow agreement, which includes the following key elements:***

- **Escrowed Amount:** Specifies the portion of the purchase price to be held in escrow.
- **Release Conditions:** Outlines the circumstances and timeline for releasing the escrowed funds.
- **Risk Management:** Defines which party the escrow agent acts in favour of if specific risks materialise.
- **Rights and Obligations:** Details the responsibilities and entitlements of the parties involved with the escrow agent.

Benefits of the Escrow Mechanism

This mechanism is particularly useful in transactions involving significant and identifiable risks. ***For example, buyers may opt for escrow to mitigate risks related to:***

- Tax liabilities from prior periods
- Regulatory non-compliance
- Uncertainties in the target company's financial statements

If such risks do not materialise, the escrowed funds are released to the seller after the defined period.

Mutual Assurance

The escrow mechanism provides assurance to both parties:

- **For the Buyer:** Secures potential indemnification for unforeseen damages.
- **For the Seller:** Guarantees that the funds will be released upon meeting the agreed conditions.

The Deal is Signed. **But What's Next?**

Interim Period

Restrictions During the Interim Period



The Deal is Signed. But Whats Next?

Interim Period

In transactions involving the acquisition of shares, the date of signing the agreement and the **date of share transfer (closing)** often differ. The **closing date**—the date when the share transfer is legally and effectively completed—marks the finalisation of all processes outlined in the agreement. The period between the signing date and the closing date is referred to as the **interim period**.

When the agreement is signed, the parties mutually commit to fulfilling the obligations stipulated within the contract. However, signing the agreement does not necessarily mean that closing—i.e., **the transfer of shares**—occurs immediately.

Closing may depend on the satisfaction of specific conditions precedent, which may include:

- **Operational Requirements:** For example, the completion of a missing permit or the settlement of outstanding debts owed to third parties.
- **Legal Requirements:** Obtaining approvals from regulatory bodies such as the Competition Authority or other governmental entities.

The interim period provides time for meeting these conditions. To avoid indefinite extensions in cases where conditions remain unmet or are delayed, the parties usually set a **long stop date** in the agreement, which acts as a maximum deadline for completing the conditions precedent.

Interim Period Restrictions

During the **interim period**, existing shareholders are restricted in how freely they can act regarding their shares and the company. The buyer expects the company's condition at closing to be consistent with its condition at signing. To preserve this status quo, current shareholders are expected to manage the company in the ordinary course of business, aligned with past practices.

Shareholders are typically required to adhere to restrictions such as:

- Refraining from incurring debts beyond the ordinary course of business
- Avoiding the termination of key agreements with major customers or suppliers
- Not selling the company's movable or immovable assets or creating encumbrances on them
- Avoiding salary increases for senior executives or hiring new top-level managers
- Refraining from amending the company's articles of association or increasing the company's capital

Long Stop Date

To prevent indefinite delays in the closing, parties can establish a **long stop date**. If the conditions precedent are not fulfilled, or the parties do not waive the unmet conditions by the **long stop date**, the agreement is terminated.

Termination Effects:

- Unless otherwise stated, all obligations under the agreement—including those related to the closing—cease upon termination.
- If the failure to meet conditions precedent is due to the fault of one party, that



→ It is crucial to strike a balance between the buyer's desire to prevent significant changes in the company's status and the seller's need to retain enough freedom to manage the company in the ordinary course of business. Overly restricting the seller's ability to operate the company effectively could prove counterproductive for both parties. Maintaining a fair equilibrium between these interests is essential.



→ If conditions precedent are unmet by the long stop date due to the fault of one party, they may be held liable for compensating the other party for damages caused.

Closing Day: From A to Z

On the **closing day**, the parties typically convene at the office of one of the parties' legal counsel or at the target company's headquarters. The process begins with the verification of the fulfilment of all **conditions precedent**.

Steps for Payment and Share Transfer:

1. Payment:

- The buyer instructs their bank to transfer the purchase price to the seller's account.
- The seller receives a **SWIFT message** as confirmation of the transfer.

2. Completion of Share Transfer:

- Once the payment is credited to the seller's account, the seller endorses and signs the back of the share certificates representing the transferred shares.
- The share certificates are delivered to the buyer.

3. Corporate Procedures:

- If amendments to the target company's articles of association or changes to the board of directors are planned, the relevant **general assembly procedures** are carried out.

After verifying that the **conditions precedent** have been fulfilled, the buyer instructs their bank to transfer the purchase price to the seller's account.

If amendments to the **articles of association** or changes to the **board of directors** of the target company are planned, the required **general assembly procedures** are carried out.

Documents Signed at Closing

The following documents are typically signed and exchanged during the closing process:

- **Share Certificates:** Endorsed share certificates representing the transferred shares.
- **Share Ledger:** Updated share ledger reflecting the transfer and the new shareholders.
- **Board Member Appointment Documents:** Documents signed by newly appointed board members.
- **Resignation Letters:** Resignation letters from outgoing board members.
- **Employment Agreements:** New employment contracts, if necessary, with key executives of the target company.
- **General Assembly Documents:** Documents required for the general assembly meeting of the target company.

Closing Protocol

The closing process concludes when all obligations outlined in the transaction documents are fulfilled, the share transfer is officially completed, and a **Closing Protocol** is signed to formalise the completion of the transaction.

Glossary of Additional M&A Terms

Basket Threshold

A provision that indemnification will only apply if the total claims exceed a specified aggregate amount.

Completion Account Mechanism

A pricing method where the purchase price is adjusted based on the company's financials at the closing date.

Conditions Precedent

Specific requirements or actions that must be completed before the transaction is finalised.

Due Diligence

A comprehensive review of the target company's operations, finances, and legal matters to identify risks before completing the transaction.

Escrow Mechanism

A financial arrangement where a portion of the purchase price is held by a neutral third party until certain conditions are met.

Indemnification Provisions

Clauses in the SPA that require the seller to compensate the buyer for specific losses or risks outlined in the agreement.

Locked Box Mechanism

A pricing method where the purchase price is based on the target company's financials at a specific date, preventing the seller from taking actions that reduce the company's value thereafter.

Long Stop Date

The deadline for fulfilling conditions precedent, after which the agreement may be terminated if those conditions remain unmet.

No-Leakage Clause

A clause ensuring that the seller does not take any action that diminishes the company's value after the financials are locked in the agreement.

Non-Compete Clause

A provision that restricts the seller from starting or engaging in competing businesses for a certain period and within a specified area after the sale.

Regulatory Approvals

Permissions from governmental or sector-specific authorities required to proceed with the transaction.

SWIFT Message

An international payment confirmation sent between banks, used to verify the transfer of funds.

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