

Still strong

Cüneyt Yüksel and Selen Sümer of YükselKarkınKüçük Law Firm outline M&A transactions in Turkey

In 2008, the Turkish market witnessed various M&A transactions. The global economic crisis emerged at the end of 2008 and has had a negative effect over the M&A transactions. The number of deals decreased and there were unclosed deals. But the fact that notable and significant deals were successful during the first three quarters of 2008 can not be neglected. The decline in the value and number of deals is a direct consequence of the global economic crisis. This demonstrates that the effect of the global economic crisis is not related to the internal dynamics of the Turkish economy.

In 2008, M&A transactions focused on the services industry, financial services and energy sectors. The energy sector was also an especially active sector. The acquisition of Akpet Group by Lukoil Group, Izgaz by GDF Suez, Baskent Elektrik Dağıtım by EnerjiSA-Sabancı Holding-Verbund, Sakarya Elektrik Dağıtım by AkCez Consortium, Meram Elektrik Dağıtım by Alsim Alarko, and Aras Elektrik Dağıtım by Kiler Holding were the most notable transactions in 2008. With the exception of the acquisition of Akpet Group by Lukoil, the vivacity in the energy sector is due to the privatisation of distribution companies in the electricity and natural gas market.

Healthcare is another sector in which M&A transactions were mostly effectuated. The most noteworthy transactions that took place in the healthcare sector during 2008 were the acquisitions of Acibadem Sağlık Hizmetleri by Abraaj Capital, Safak Hastaneleri by Hygeia and International Hospital by Acibadem Sağlık.

In the insurance sector, attractive M&A transactions have also taken place such as the acquisitions of Oyak Emeklilik by ING Group and Güven Sigorta by Groupama.

In 2008, the deal with the highest value was the acquisition of Migros Türk by BC Partners-DeA Capital-Turkven. The value of the Migros Türk shares acquired by BC Partners-DeA Capital-Turkven was approximately \$3.1 billion. The second most attractive transaction was the acquisition of Tekel by British American Tobacco following its privatisation.

The economical and political stability of Turkey over the last four years is also a sign of the fact that the M&A transactions will continue in Turkish market.

It seems that M&A transactions will continue to take place in 2009 in spite of the

global economic crisis. But due to a shortage of cash and difficulty in securing loans from the banks, the number and value of the deals is expected to decrease. However, this will not be a large obstacle in the Turkish M&A market. In some of the deals that closed in the last quarter of 2008, Turkish shareholders selling their shares agreed to receive the payment of the purchase price in installments to enable investors to benefit from long term financing. This trend will continue in 2009.

Tendencies

Compared to previous years, there are much more Turkish shareholders willing to sell their shares. However, due to the effects of the global economic crisis during 2008, they do not have high expectations in relation to the value of their shares. Those shareholders willing to sell their shares have rational expectations and they are much more open to negotiations whereas in previous years they preferred to enter into negotiations under much more stringent conditions and with high expectations.

In the M&A transactions of 2008, two types of acquisitions have been observed: (i) the acquisition of 100% of the target shares, and (ii) the acquisition of some part of the target shares. In the latter, the purchaser and the seller execute a shareholders' agreement which governs the relation between the seller and the purchaser and/or the target company in relation to shares in the target company.

Selling parties are not ready to compromise during the negotiations especially when a shareholders' agreement is to be executed in order to regulate the relations between parties in relation to the shareholder rights. One point which is subject to discussion is the decision quorums during the negotiations in respect of the shareholders' agreement.

Turkish sellers tend to prefer selling to funds if they are willing to sell all of their shares. But, if they continue to be a

shareholder in the target company they prefer to sell their shares to strategic investors.

In recent M&A transactions, it has been noted that documents required for the due diligence study of purchasers are provided through virtual data rooms. It is also noteworthy that the share purchase agreements or the shareholders' agreements drafted by the seller's legal advisors are usually submitted to the virtual data room for the purchaser's consideration. These share purchase agreements or shareholders' agreements usually contain flexible provisions that are subject to negotiation.

Another recent trend that has emerged is that acquisitions are usually effected via auctions and the relevant stages of acquisitions are strictly governed by a schedule announced by the sellers at the beginning of the bidding process.

Governing legislation

There is no specific legislation governing M&A transactions in Turkey, however, a complex combination of the Turkish Commercial Code, Code of Obligations, tax, labour and competition legislation is applied. Specific legislation, for example natural gas legislation, should also be considered during relevant M&A transactions. The legislation to be considered will be dependant on the field of activity of the target company. Specific legislation is usually applicable if the target company operates in a regulated market such as the energy market. If the target company is subject to a specific legislation, such legislation should be carefully examined as change of control provisions may be stipulated in such legislation. Also, the approval of regulatory authorities, such as approval of Energy Market Regulatory Authority, may be necessary prior to the transfer of the shares.

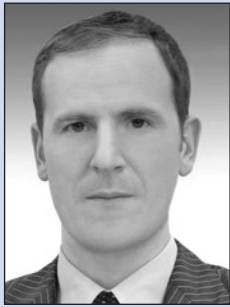
In some of the regulated markets, there are some market thresholds that can not be exceeded. Namely, if a purchaser, who is already a shareholder in a company operating in a regulated market would like to acquire shares of another company operating in the same market, such shareholder should be careful not to exceed the market share thresholds stipulated in the relevant legislation. Such thresholds are generally set forth in the energy market legislation.

Articles of association

Articles of association govern a company's activities and the rights and obligations of its

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Author biographies



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Cüneyt Yüksel is a partner in YükselKarkınKüçük Law Firm. Yüksel's practice focuses on mergers and acquisitions, privatisations, energy, project finance, banking and finance, and intellectual property. He has considerable practice in arbitration and has represented multinational clients in major international arbitration cases.

Yüksel also worked at a major international US law firm concerning a substantial cross-border litigation case and was a lecturer at the International Law Department in Istanbul University

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Yüksel gained his LLM degree at the University of Leicester, England in European/International Trade Law in 1996. He graduated from Istanbul University School of Law in 1994. He is a member of Istanbul Bar Association and speaks fluent English.



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shareholders to the company. The Turkish Commercial Code lists compulsory subjects to be included in the articles of association.

Purchasers usually intend to amend the articles of association following the acquisition of the shares, this often occurs if all the shares in the target company are transferred or the purchasers like to insert clauses in the share purchase agreements as a condition precedent to reflect the provisions of the shareholders' agreement in the articles of association of the target company in case a part of the target shares are acquired.

However, insertion of all of the provisions of the shareholders' agreement into the articles of association, especially the provisions governing the relations between the shareholders, may not be possible.

As articles of association are public, registration with the relevant trade registry and announcement to the third parties in the trade registry gazette need to be implemented. Trade registries are usually unwilling to register the provision of the articles of association into which provisions of shareholders' agreement are inserted. However, the attitude of the trade registries is slightly softening in this regard.

Mac clauses

Stipulation of material adverse change (Mac) clauses has recently gained much more importance as the global economic crisis may have unpredicted effects on deals. Accordingly, Mac clauses provide a right to terminate the agreement if one of the parties, generally the purchaser, is subject to change introduced by adverse business or economic developments

which occur between signing and closing. Therefore, well-drafted Mac clauses provide exit strategies from deals. Under Turkish law, insertion of Mac clauses into share purchase agreements is much more important as there is no specific legal provision governing this issue. However, there is a doctrinal basis serving to the application of Mac clauses. In addition to the lack of legislation regarding Mac clauses, there are almost no examples of invoking M&A Mac clauses in Turkish litigation. Therefore, the Turkish court's interpretation of a Mac clause is unpredictable.

The practice of M&A

The pre-negotiation, due diligence, negotiation and closing stages of M&A transactions usually take between 3 and 12 months.

Pre-negotiation and due diligence

M&A transactions are usually initiated by the execution of a letter of intent or a memorandum of understanding. Although some obligations may arise from these, the parties are not obliged to conclude an agreement. In the letter of intent or memorandum of understanding, confidentiality, duration, governing law and jurisdiction clauses are set out in addition to the intentions of the parties with regard to the contemplated transaction.

In order to be acquainted with the financial and legal status of the target company, the purchasers usually instruct their legal and financial advisers to conduct a due diligence examination. As a result of the examination, the purchasers can be aware of the legal and

financial risks of the target. Depending on the field of activity of the target, an operational or technical due diligence examination may also be conducted.

The scope of the legal due diligence may be limited or extended depending on the activities of the target company. The legal due diligence usually covers the examination of corporate structure, licences and permits, material agreements, loan and facility agreements, properties, employees and lawsuits.

In recent M&A transactions, it is more frequent that purchasers would like their legal advisors to prepare red flag due diligence reports as they are concerned with the efficiency and cost of reporting. Purchasers prefer to this as issues which may have a major impact on the deal or the target can be easily highlighted. This makes reports much more useful, time saving and cost efficient.

Negotiations

The parties are entitled to freely determine the provisions of the share purchase agreement provided that the compulsory provisions of Turkish law are respected.

Furthermore, the performance of the obligations stipulated in the share purchase agreement may be subject to condition precedents. Namely, upon the realisation of the condition precedents, the obligation of the parties under the agreement will be effective. In practice, usually receipt of approval from the Competition Board or other regulatory authorities is stipulated as a condition precedent.

The findings stated in the due diligence reports have a significant role in the conclusion of the share purchase agreements and determination of the conditions precedent and representation and warranties of the parties.

The parties may also agree on a contractual penalty which is the payment of a certain amount of money if a seller breaches its representations and warranties or if it fails to full or partially fulfill its obligations.

Closing

In the share purchase agreements, a specific date is determined for shares to be transferred upon the fulfillment of the condition precedents. In some cases, a drop date after which the purchasers will not be entitled to acquire the shares is also determined in the share purchase agreements.

Expectations

Despite the global economic crisis, M&A transactions in the Turkish market continue at slightly decreasing speed in the Turkish market. Turkey has a large and growing domestic market, a skilled and cost effective labour force, strong local companies and access to other expanding markets in addition to its political stability and liberal legal framework for foreign direct investments.