

# Mergers and Acquisitions in Turkey

Mergers and Acquisitions (“M&A”) is defined as the combining of two or more companies or buying-selling or dividing of two or more companies as a part of corporate finance in order to grow rapidly in business field of activity.

There are many opportunities in Turkey for international investors in particular. In the last decade, Turkey has implemented several reforms in order to improve conditions for foreign investors. As of 2014, Turkey attracted foreign direct investment over 12,5 billion dollars and the number of companies with foreign capital operating in Turkey exceeded 40.000. Despite the global crisis, total foreign direct investment in Turkey has been increasing year for year.

Turkey has recently become a business center for all the investors around the world, accordingly the amount that M&A activities takes place in Turkey has been increased rapidly.

Based on the results of independent reports, 215 M&A transactions have been reported to the Competition Board as of 2014, both parties of 76 transactions were foreign investors. Regarding M&A transactions, foreign investors show interest mostly to financial services, leasing, energy sectors in Turkey. USA, Germany, Holland and Luxembourg have been the first four countries which have realized M&A transactions in Turkey in the year of 2014. As mentioned above, the total transaction value has been increasing year for year and this value amounts to approximately 483 billion TL as of 2014.

Despite the negative economic developments all around the world, thanks to new incentives and legal amendments, we do not think that interests of foreign investors and private equity funds will neither cease nor decrease, accordingly merger and acquisitions activities will be increasingly taken place.

## M&A Activities under Legal Perspective

M&As are slightly different from each other. An acquisition is, in very simple words, the purchase of one company by another company. Most likely, it takes place as an acquisition of a smaller company by a larger company. On the other hand, a merger occurs more like combining of two or more companies to become just a single separate unit of business.

For an M&A transaction to be sound, legal, operational and financial due diligences should be conducted. Pursuant to such due diligences, condition precedents should be specified and accordingly share sale agreements and shareholders agreements should be fulfilled and performed in order for an M&A transaction to be materialized.

The rules that M&A are regulated under differs from country to country. As to how M&A activities are realized in Turkey are specified under Turkish respective codes. Turkish Commercial Code (“TCC”) is one of the Turkish laws that M&A activities are regulated. Turkish tax laws, the Law on the Protection of the Competition and Capital Market legislations are other regulations that M&A activities are applied.

## M&A under Turkish Commercial Law

According to the TCC; Mergers are defined as the establishment of a new commercial company through uniting of two or more commercial companies with each other or joining of one or more commercial companies to another commercial company.

Thus, this definition means that there are structural elements for the merger;

There should be at least two commercial companies before the merger. At least one commercial company will be transferred to another commercial company with its rights and obligations. Dissolving a company or companies' partners will become the partners of the new established or transferee company. As a result of the transfer, at least one company in case of an establishment of a new company and at least two companies in case of an acquisition will be dissolved. As a whole, all the businesses and assets of the dissolving company/ies with its/their all the rights and obligations will also be transferred to the transferee or to the new company established. At least two commercial companies will become solely one commercial company.

Pursuant to the TCC, Companies can be merged in two ways:

- Acquisition of a company by another company, technically called "merger by acquisition" or
- Union of two companies under a new company, technically called "merger by formation of a new company".

The company accepting the merger is called "transferee" and the company that is joined is called "assignee". Merger occurs when the shares of the transferee are acquired by the shareholders of assignee on the basis of an exchange ratio in return for the wealth of assignee. The new TCC has removed the condition of similar company types in mergers. Accordingly, capital companies may merge with capital companies and cooperatives and other types of companies may merge under the conditions regulated by the TCC.

According to the TCC, the resolution on the merger must be submitted to the authorized organs of the companies such pursuant to what the law requires, the TCC also demands certain majority of the votes in

order for such resolutions to be approved. All assets and liabilities of the assignee are automatically transferred to the transferee upon the registration in Trade Registry.

According to the new TCC, the simplified merger may be applied provided that certain conditions are present such as holding of transferee's voting stocks by the assignee or holding of all voting stocks of merging capital companies by a company or a person. In the event that these conditions are fulfilled, some obligations such as drafting of a merger report and providing the audit right to related institutions or persons stated in the TCC will not be applied. Moreover, such companies are not obliged to submit the merger agreement to the general assembly.

## M&A Activities under Turkish Capital Market Legislation

Under the Capital Markets Communiqué on the Principles Regarding Merger Proceedings, Series: II, No.: 23.2, ("Communiqué") the principles to be observed in merger proceedings through acquisition of a corporation or through the establishment of a new corporation, in case at least one of the parties is a publicly held corporation are set forth.

It is required that the financial statements of the merging corporations, which will constitute the basis of the merger proceedings, are to be drawn up in accordance with Capital Markets Board regulations regarding accounting standards, and to be subjected to special independent audits within the framework of Capital Markets Board standards regarding independent audits. In case financial statements to constitute the basis of merger have been subjected to independent audits as per Capital Markets Board regulations, the special

independent audits shall not be required.

Based on the financial statements' date, an expert institution's report shall be prepared in order to determine the companies' assets value.

Certain transactions and documents regarding the M&A transactions that have been stated in the Communiqué shall be disclosed on the Board's or companies' website or on the public disclosure platform depending on the company type.

Apart from abovementioned subjects, the Communiqué regulates conditions within the scope of merger agreement and report, changes in financial status, protection of shareholders, simplified mergers and further specific cases regarding M&A.

# M&A Activities under Turkish Competition Legislation

According to Turkish Law, certain M&A activities are subject to the approval of the Competition Board. Within this frame, a Communiqué regarding the M&A activities which are subject to the approval of the Competition Board has been enacted in 2010 and this Communiqué is currently in force with certain amendments in 2012 and 2015.

Article 7 of the Competition Law governs M&A activities, and authorizes the Competition Board to regulate through communiques which M&A activities should be notified in order to gain legal validity. Merger Communiqué is the primary legal instrument in assessing merger matters in Turkey. The Merger Communiqué sets forth the types of mergers and acquisitions which are subject to the Competition Board's review and approval. Therefore, M&A activities resulting in a change of control may be subject to the approval of the Competition Board.

The Communiqué sets new and only turnover based thresholds as follows;

if the total turnover of the parties to a concentration in Turkey exceeds TL 100 million and the respective turnovers of at least two of the parties individually exceed TL 30 million; or the worldwide turnover of one of the parties exceeds TL 500 million and the Turkish turnover of at least one of the other parties exceeds TL 30 million, the merger transaction may be subject to the Competition Board's approval.

## M&A Activities under Tax Regulations

M&A activities' tax regulation has been implemented through the Law on the Corporate Tax and other laws on various taxes. Principally, mergers are subject to corporate tax since a revenue arising from such transactions come to the fore. The Law on the Corporate Tax has not regulated mergers and liquidation separately. Under this Law, it is stated that mergers are categorized in two groups as mergers with and without tax.

Mergers are considered as transfers under this Law, provided that the head office of both parties is located in Turkey and the company assets are transferred completely. The profit arising from such mergers are not subject to corporate tax.

Moreover, the expenditures arising from mergers and transfers may be reduced from revenue.

It should also be noted that the agreements on the merger, transfer and demergers are held exempt from the stamp tax according to Stamp Tax Code.

<http://www.ketencilaw.com/mergers-and-acquisitions-in-turkey.html>