

**AMENDMENTS BROUGHT IN TURKISH MERGER CONTROL  
REGIME  
BY COMMUNIQUE NO. 2010/4**

**I. INTRODUCTION**

Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of Competition Board (“Communiqué No. 1997/1”), which regulated the grounds for notifying the Competition Board for legal validity of mergers and acquisitions, based on Article 7 of Law No. 4054 on the Protection of Competition (“Law No. 4054) has been replaced by the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of Competition Board (“Communiqué No. 2010/4”), which has come into force on 01.01.2011.

Communiqué No. 2010/4 has brought certain changes including those relating to notification to the Competition Board of mergers and acquisitions which will be of interest to both lawyers and companies. These changes will be examined in more detail below.

This article aims at identifying the differences between the two Communiqués, which are considered important in practice, as well as changes introduced by the new Communiqué and existing and possible consequences thereof.

**II. NOTIFICATION OBLIGATION  
UNDER TURKISH COMPETITION  
LAW**

Article 7 of Law No. 4054 stipulates that *“Merger of two or more companies, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by any company or person, of another company, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited.”*

Furthermore, as per Article 10 of Law No. 4054, mergers and acquisitions that fall within the scope of Article 7 mentioned above require notification to and approval of the Competition Board. In this manner, the relevant mergers and acquisitions become subjected to an *ex ante* control. The Competition Board, following the preliminary examination after the notification, will decide on whether to grant an approval for the said transaction or to commence the final examination. In cases where the Competition Board decides to commence the final examination, it may either decide to grant or refuse to grant an approval or it may

grant a conditional approval for the relevant transaction.

Article 11 of Law No. 4054 regulates cases where a merger or acquisition that required notification has not been notified to the Competition Board. In such a case, the Competition Board may start an *ex officio* examination and following the examination:

- a) If the Competition Board decides that the relevant merger or acquisition falls under the scope of Article 7, it will grant approval; however, it will impose a monetary fine on the company responsible for notifying the Competition Board.
- b) If the Competition Board decides that the relevant transaction falls within Article 7, then along with the monetary fine for failure to notify, it may also decide to end the relevant merger or acquisition, to remove all actual circumstances occurred unlawfully, to return all acquired shares or assets to the previous owners (if possible) the conditions and periods of which to be determined by the Competition Board, if this is not possible to transfer, assign these shares or assets to third parties, to prohibit the acquiring company to participate in the management of the acquired company within the period required for the assignment of the same to third persons or previous owners and to take other measures as it deems necessary.

Failure to notify the Competition Board of a merger or acquisition that falls under Article 7 affects the relevant transaction's legal validity. Therefore, although under Article 2 of

Law No. 4054 the Competition Board's scope of authority is limited to Republic of Turkey, in transactions that do not concern Turkey only, the outcome of the notification to the Turkish Competition Board should be awaited before the global closing can occur.

### **III. DISTINCTIONS OF AND CHANGES BROUGHT BY COMMUNIQUE NO 2010/4**

#### **1. Transactions That Create a "Permanent Change in Control" Are Subject to Notification**

Article 5 of Communiqué No. 2010/4 sets out the transactions that are deemed as mergers or acquisitions. The most significant difference between this article and Article 2 of Communiqué No. 1997/1, which provides for the same issues, is that the new communiqué introduces the concept of "permanent change in control". Therefore, under the new communiqué, amongst transactions mentioned in Article 5, only those transactions that create a "permanent change in control" are deemed as a merger or acquisition that needs to be notified to the Competition Board.

This new concept aims at preventing the obligation to notify the Competition Board for transactions made for a temporary period. For instance; a case where the shares of a company are "temporarily held by" another company before being transferred to the ultimate acquiring company, does not in itself create a permanent change in control, and thus will not require notification to the Competition Board.

On the other hand, it is clear from its decisions that the Competition Board adopts different interpretations with respect to the concept of “permanent change in control”. In fact, in some of its decisions, it has held that contracts executed for a temporary period with respect to the transfer of turnover generating assets of companies might deem to create a permanent change in control. Therefore, in cases where the thresholds set out in Communiqué No. 2010/3 have been exceeded and where there is an agreement concerning the transfer of a turnover generating asset, including but not limited to leases, it would be more prudent to notify the relevant transactions to the Competition Board.

## 2. Short Form Notification Option

As a difference from Communiqué No. 1997/1, in the notification form attached to Communiqué No. 2010/4, it has been made possible to skip filling out certain sections of the notification form in transactions which will not create any problems under competition law. Accordingly; information requested in Articles 6 (information concerning affected markets), 7 (market entry conditions and potential competition) and 8 (efficiency gains) of the notification form is not required.

a) In case one of the transaction parties shall acquire full control over a company in which it had joint control, or,

b) For any affected market within Turkey and in terms of geographical markets; in case the sum of the market shares of the transaction parties are less than twenty per cent for

horizontal relationships, and the market share of one of the transaction parties is less than twenty five per cent for vertical relationships, in relation to the affected markets in question.

## 3. Determination of Ancillary Restraints Resting on the Parties

Ancillary restraints are defined as restrictions that are directly related to concentration transactions and required for the realization of the transaction and for the complete creation of the efficiencies expected from the relevant concentration<sup>1</sup>. For instance; non-competition obligation imposed on the buyer for a certain period, no poaching obligation and non-disclosure obligation are considered as ancillary restraints that are required for the realization of the relevant transaction and the creation of the expected efficiencies.

Communiqué No. 1997/1 did not include any specific provision with respect to ancillary restraints. Therefore, whether these restrictions are subject to notification is dependent upon whether the related transaction is subject to notification<sup>2</sup>.

Article 13 of Communiqué No. 2010/4 provides a different application compared to Communiqué No. 1997/1. According to this article, the parties to the transaction will analyze whether the Competition Board’s approval with respect to a merger or acquisition

<sup>1</sup> Competition Authority’s Guidelines on Relevant Companies, Turnover and Ancillary Restrictions in Mergers and Acquisitions, paragraph (45).

<sup>2</sup> Galatasaray University Law Faculty Journal, In memory of Prof. Dr. Kemal Oğuzman, 1/2002, “Ancillary Restrictions in Mergers and Acquisitions in Competition Law Aspects”, Ercüment Erdem.

includes also the restrictions directly related to and required for the relevant transaction and whether the relevant restrictions exceed the scope of the approval. In this respect, in cases where the Competition Board has not made any analysis with respect to ancillary restraints in its decisions on concentration transactions, the respective approval decision will be deemed to include the ancillary restraints as well<sup>3</sup>.

#### **4. Lifting of the Obligation to Notify If There Are No Affected Markets**

According to Article 7/2 of Communiqué No. 2010/4, except in cases of joint ventures, Competition Board's approval shall not be required for transactions not involving any affected market, even if the thresholds listed in the first paragraph of the mentioned Article are exceeded.

"Affected markets" is defined in the notification form attached to the relevant communiqué as a product (or service) market where the parties' operations vertically or horizontally overlap<sup>4</sup>. In this respect, except for joint ventures, if there is an overlap between the product (or service) markets where the parties to the

transaction operate; in other words, provided that one of the parties have operations in Turkey, if the parties operate in the same market or if there is a supply or distribution relationship between their operations, the relevant transaction will require notification to the Competition Board due to the existence of "affected market(s)".

#### **5. Market Share Threshold Removed, Turnover Based Threshold Amended**

Article 4 of Communiqué No. 1997/1 stipulated that if, resulting from a merger or acquisition, total market share of the companies that carry out the merger or acquisition exceeds 25 % of the market in the relevant product market within the whole or a part of the territory, or even though it does not exceed this rate, their total turnover exceeds TL twenty-five trillion, such companies were obliged to obtain approval from the Competition Board.

Communiqué No. 2010/4 removed the market share thresholds and provided for notification based only on turnover. Accordingly, mergers or acquisitions that require notification are as follows:

(a) Total turnovers of the transaction parties in Turkey exceed one hundred million Turkish Liras, and turnovers of at least two of the transaction parties in Turkey individually exceed thirty million Turkish Liras, or

(b) Global turnover of one of the transaction parties exceeds five hundred million Turkish Liras, and at least one of the remaining transaction

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<sup>3</sup> Competition Authority's Guidelines on Relevant Companies, Turnover and Ancillary Restrictions in Mergers and Acquisitions, paragraphs (42) and (43).

<sup>4</sup> "Relevant product markets that might be affected by the transaction to be notified and where, a) two or more of the parties are commercially active in the same product market (horizontal relationship), b) at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates in (vertical relationship), constitute the affected markets." Notification form attached to Communiqué No. 2010/4, Section 5, Affected Markets.

parties has a turnover in Turkey exceeding five million Turkish Liras.

The term “turnover” mentioned in this article is defined in Article 8/6 of the same Communiqué as “*in accordance with the uniform accounting plan, shall consist of the net sales generated as of the end of the financial year preceding the date of the notification, or, if this can not be calculated, of those generated as of the end of the financial year closest to the date of notification*”.

Within the framework of the mentioned changes made under the new communiqué, it will no longer be required to include a definition for the relevant product market in order to determine if the relevant transaction requires to be notified to the Competition Board. In fact, market share threshold, which required product market definition, has been removed, and turnover based threshold takes into account the parties’ turnovers generated in Turkey and those generated globally, rather than turnovers generated in the relevant product market<sup>5</sup>.

#### **6. Closing Date Determined As Date of Change in Control**

Article 10 of Communiqué No. 2010/4 stipulates that in mergers and acquisitions, the closing date is the date on which the control has been changed.

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<sup>5</sup> International Law Office, “New merger control regime introduced”, Gönenç Gürkaynak, 14.10.2011, <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=cf4a68ec-4ac3-484d-9281-860728fbf699#tran>

#### **7. Notified Transactions Being Published On Competition Authority’s Website**

As per Article 12 of Communiqué No. 2010/4, Competition Board announces the mergers and acquisitions notified to it, along with the names of the related companies and their business areas. Therefore, any notified transaction ceases to be confidential.

#### **8. No Obligation To Annex the Final Agreement to the Notification Form**

Communiqué No. 1997/1 required that a copy of the final version of the agreement regarding the relevant merger or acquisition or a decision taken in this respect be annexed to the notification form. However, Communiqué No. 2010/4 finds it sufficient that a copy of the relevant agreement’s final or current version be annexed to the notification form.

This significant change provides great relief to the parties in practice since it allows them to notify the Competition Board before executing the agreement on the transaction that might require notification.

#### **IV. CONCLUSION**

The Communiqué No. 2010/4 has abolished the market share threshold and apart from the transactions concerning creation of joint ventures, it sets forth a concept where a mandatory filing is not required if there is no affected market between the parties to the transaction. While, at first glance, it might be expected that such new features of the merger control regime should decrease the number of the filings to be made before the Turkish Competition Authority, such

anticipation has already been proven wrong in practice due to certain factors.

First of all, the newly introduced turnover thresholds under the Communiqué No. 2010/4 necessitated notification of certain international transactions before the Turkish Competition Authority, which will not affect the markets in Turkey in a significant manner. Indeed, it is quite common that the conglomerates –that have investment portfolios and are active in wide variety of sectors- could very easily exceed the 500 million Turkish Liras threshold and the other company's local turnover remains above 5 million Turkish Liras. That is to say, the decrease in the number of the filings by way of abolishing the market share threshold has been regained due to the revised turnover thresholds.

The number of the notifications announced by the Turkish Competition Authority for the period between January 2011 and August 2011<sup>6</sup> upholds the conclusion set out above. 167 filings have been made before the Turkish Competition Authority within the relevant period. 67 (41 %) notifications out of this total number of filings were foreign to foreign transactions, which were subject to approval of the Turkish Competition Board either due to the relevant companies having activity in Turkey or based on the transaction having an effect on the goods and services market in Turkey. Majority of the transactions which have been decided upon consists of 70 transactions (%43) between local and foreign parties; whereas the remaining 26

decisions (16 %) concerned transactions between local companies.

Furthermore, in the same announcement, the Turkish Competition Authority indicated that there was a general increase in the number of transactions in 2011 when compared to 2009 and 2010. The number of the decisions rendered until August 2011 was also higher than the decisions rendered in the entire 2009.

As indicated in the Turkish Competition Authority's announcement, it can be concluded that the reasons behind the increase in the number of the decision rendered concerning merger control were (i) the uncertainties in the application of Communiqué No. 2010/4 and (ii) the turnover threshold which requires worldwide turnover of the parties to exceed 500 million Turkish Liras and their local turnover to be at least 5 million Turkish Liras.

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<sup>6</sup> See the Turkish Competition Authority's announcement on "Announcement on the Mergers-Acquisitions between January 2011 and August 2011"

<http://www.rekabet.gov.tr/dosyalar/images/file/Basin/B%C4%B0RLE%C5%9EME-DEVVALMA-WEB-1.pdf>

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