

International Antitrust Bulletin

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We are accepting articles now for our next edition of the International Antitrust Bulletin. Articles can cover any topic in the international antitrust area and should be approximately 800-1,200 words. If you have a topic idea, please contact our Editor-in-Chief, Rob Kwinter at robert.kwinter@blakes.com.

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Turkey's New Merger Control Regime

By: *Göknil Emdi** & *S. Mustafa Durakoğlu***, *Çakmak Law Firm*

As of 1 January 2011, Turkey introduced a new merger control regime by Communiqué No. 2010/4 on Mergers and Acquisitions (the “New Communiqué”)¹. The New Communiqué repeals the previous Communiqué No. 1997/1 on Mergers and Acquisitions (the “Former Communiqué”), which has been in force for the control of mergers and acquisitions since 1997.

Most of the provisions of the New Communiqué are similar to the Former Communiqué. This article provides a brief analysis of the significant amendments introduced by the New Communiqué.

1. The Scope and the Legal Reasoning of the New Communiqué

The Former Communiqué was prepared in 1997; however, Law No. 4054 on the Protection of Competition (the “Law”)², which is the main piece of legislation in this area in Turkey, has been amended several times since 1997, and the Turkish economic system has undergone significant changes. For instance, the administrative monetary fines regulated under the Law have been increased significantly, which has increased the importance of the merger notification requirements to undertakings, as non-compliance can now result in to high monetary fines. As a result, these and other significant changes, have led to the promulgation of a new, clearer communiqué to ensure legal certainty.

2. Notification Thresholds

With respect to the notification thresholds for a merger or acquisition, the Former Communiqué had two

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¹ Published in the Official Gazette No. 27722 dated 7 Oct. 2010.

² Published in the Official Gazette No. 22140 dated 7 Dec. 1994.

alternatives, namely market share and turnover. The New Communiqué adopts a turnover based system to ensure legal certainty. Moreover, if there is no affected market in Turkey, then the transaction does not need to be notified, except for joint ventures.

Pursuant to Article 7 of the New Communiqué, a merger or acquisition shall be notified to the Competition Authority (the “Authority”) to get the approval of the Competition Board (the “Board”)³ if either:

- (i) the total turnover of both parties in Turkey exceeds TL 100,000,000 and the individual turnovers of at least two parties separately exceed TL 30,000,000; or
- (ii) the worldwide turnover of one party exceeds TL 500,000,000 and individual turnover of at least one other party in Turkey exceeds TL 5,000,000.⁴

Although the Former Communiqué had explicitly limited the turnover criterion to the turnovers of the parties in the relevant product market, the New Communiqué seems to refer to the total and worldwide turnovers of the parties. Therefore a precise definition of the relevant product market is no longer crucial for notification threshold purposes. In addition, under the New Communiqué, the size of *both* parties’ turnovers matters for a notifiability analysis, whereas, pursuant to the Former Communiqué, the turnover of only one party could be sufficient to meet the notification threshold. This may reduce the number of notifications.

The Board shall revise the thresholds every 2 years following the entry into force of the New Communiqué.

3. Calculation of the Turnover

In order to calculate the turnover of each party, the total turnover of all legal persons and economic units in the entire shareholding structure of the relevant enterprise is to be included. This includes the turnover of the relevant enterprise, its subsidiaries, parent companies

³ The Authority is the main public body that oversees the merger regime whereas the Board is its decision-making committee, which has the final word on mergers.

⁴ 1 Turkish Lira (TL) is approximately 0.50 Euros as of 1 Dec. 2010. 1 Turkish Lira (TL) is approximately 0.60 US dollars as of 1 Dec. 2010.

and other subsidiaries of the parent companies. The underlying rationale is to identify the total economic power of the parties.

It should be noted, however, that, in case of an acquisition, for the purposes of determining the turnover of the transferor, only the turnover of the target company is to be counted. If there is joint control of an economic unit, the relevant turnover shall be divided accordingly. Furthermore, if the same parties are involved in two or more mergers or acquisitions in a 2-year period, these transactions shall be considered as a single transaction in terms of the calculation of the relevant turnovers.

4. Change of Control

Although the Former Communiqué was silent on the timing of the change of control, the New Communiqué clearly sets forth that a transaction is deemed to be realized on the date of occurrence of the change of control.

5. Notification Form and Other Procedural Issues

Notification Form: The notification of a merger or acquisition to the Authority shall be made with the notification form attached to the New Communiqué starting from 1 January 2011.⁵ The new notification form is more detailed than the former and entails more economic analysis. However, it should be noted that for certain transactions identified below, the information stated under Clauses 6 (Information on the affected markets), 7 (Market entry conditions and potential competition) and 8 (Efficiency gains) of the notification form need not be submitted:

- (i) where one of the parties to the transaction will acquire entire control of an undertaking in respect of which it has joint control of; or
- (ii) with respect to Turkey and the relevant geographic markets, where the total market share of the parties to the transaction is less than 20% on a horizontal basis and the market share of one of the parties to the transaction is less than 25% on a vertical basis.

Submission: Another amendment introduced by the New Communiqué is that, rather than submitting the notification form in three hard copies as was previously

required the notification form shall now be submitted in two hard copies together with an electronic copy. In addition, the parties are no longer obliged to submit the executed version of the relevant agreement, since the New Communiqué allows for submission of the “current version of the agreement”. However; the practical implications of this change remain to be seen.

Online Announcement: Following the filing of the notification, the Board will announce the notified transaction, together with information regarding the relevant undertakings and their field of activities on its website (<http://www.rekabet.gov.tr>).

On-the-spot Inspection: Unlike the Former Communiqué, the New Communiqué confers on the Board, where necessary, the authority to conduct on-the-spot inspections at the relevant undertakings’ premises.

6. Final Remarks

With the New Communiqué, Turkey’s merger control regime more closely accords with EU legislation. Especially for large scale transactions, Turkish antitrust lawyers will need to develop and provide more economic analysis in areas such as efficiency gains, affected markets and potential competition to support their positions. Nevertheless, as with all newly adopted rules, it is expected that there will be areas or questions which will need the Board’s further explanation either on a case-by-case basis or by explication through publication of guidelines or both. Guidelines, which are expected be issued soon, may shed more light on as yet unclear matters.

⁵ An English translation of the form and the New Communiqué can be found at <http://www.rekabet.gov.tr/dosyalar/teblig/teblig84.pdf>.