

The Concept of Affected Market under the New Merger Communiqué and its Recent Interpretations by the Turkish Competition Board

Ayşe GÜNER

It has been one year since the enactment of the new Turkish merger control regulation—Communiqué No 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (“Communiqué”). The Communiqué was adopted pursuant to the Turkish Act No: 4054 (“Act”) on the Protection of Competition which prohibits M&A transactions that are

regulation certainly is far from ideal. For one, the threshold system now catches global transactions that arguably have no impact on the Turkish market. For the purposes of this article, the notion of “affected market” – a term that has significant bearing on the notifiability of an M&A transaction, and its implications are discussed.

The first requirement in analyzing the notifiability under the Communiqué is that the parties’ turnovers must exceed the thresholds provided.^[1] Assuming that the transaction parties’^[2] turnovers in the year preceding the transaction exceed the turnover thresholds provided under Article 7 of the Communiqué, they nevertheless may not need to seek authorization for their concentration if this pertinent element – affected market – is in fact missing. In other words, the affected market concept works almost like a filtering effect that restricts the Competition Authority’s say over many transactions (unless the transaction is a joint venture formation)^[3]. This is indeed very beneficial in

any clients express frustration over the concept for this very reason as arguably there will be no effects of the transaction on the local market. However, it appears for the time being that the intention of those members at the Board is simply to broaden their powers and scrutinize a significant amount of transactions. Hence, to be on the side of caution, parties should nevertheless notify their transactions until the case law of the Board in this area further develops to side with one view or the other.

capable of resulting in the significant lessening of competition in a market for goods or services within part or whole of the country, from the point of creation or strengthening of a dominant position. Prior to this relatively New Communiqué, the previous merger control regulation contained numerous short-comings and flaws – i.e. the use of market share threshold – that jeopardized legal certainty. Although in principle the New Communiqué has aligned the notifiability requirements with that of the European Union regime, in application the

[1] Article 7 provides: In a merger or acquisition transaction as specified under Article 5 of this Communiqué, authorization of the Board shall be required for the relevant transaction to carry legal validity in case (a) Total turnovers of the transaction parties in Turkey exceed one hundred million TL, and turnovers of at least two of the transaction parties in Turkey each exceed thirty million TL, or (b) Global turnover of one of the transaction parties exceed five hundred million TL, and at least one of the remaining transaction parties have a turnover in Turkey exceeding five million TL.

[2] Defined in Article 4 as “the undertaking party to the merger or acquisition”.

[3] If the transaction parties’ turnover exceed the threshold provided and if the transaction is one of formation of a joint venture, the parties must seek the Board’s authorization without the necessity to analyze whether there is an affected market arising out of the transaction.

that the turnover thresholds^[4] under the Communiqué are significantly low for global players, which deems many transactions notifiable and had there been no affected market analysis, the workload of the Board's case handlers would have doubled as well as the duration of a clearance decision.

So what is this affected market then? The Communiqué defines the affected market as "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)."^[5]

Until the publication of the Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions (the "Guidelines") nearly seven months after the enactment of the Communiqué, the notion of affected market, albeit being defined in the Notification Form^[6] attached to the Communiqué, could be manipulated in the submissions made before the Board. Put simply, until the Guidelines, the term's implications could have been restricted to those horizontal and vertical relations within the Turkish market. What that meant was that Transaction Part A conducted one line of business globally but not in Turkey and Transaction Party B conducted that same business in Turkey, we could have argued that the transaction did not give rise to an affected market simply due to the fact that there was no overlap in Turkey. In practice though, even until the publication of the Guidelines, the advice to clients was to simply notify their transaction if in doubt just for an abundance of caution. Since the publication of the Guidelines, however, it is in fact clear that a global overlap among the parties is all that is required to deem the transaction notifiable. The Guidelines now expressly spell out that "*Affected market indicates horizontal and vertical relations between relevant product markets. Within this framework, the fact that there is a relevant product market where the activities of the parties overlap horizontally or vertically fulfills the condition of the existence of an affected market provided that at least one party operates in Turkey.*" Moreover, if none of the parties carry out sales into Turkey, the requirement is not fulfilled, and there would be no notification as there would be no affected market.

[4] Refer to footnote 2.

[5] Section 5 of the Notification Form Concerning Mergers And Acquisitions

[6] Refer to footnote 1

Yet, there is still some leeway that can be found under the literal reading of the Guidelines. The Guideline provides that the "*assessment of an affected market will be made in terms of markets that are likely to be affected by the transaction. Accordingly, all activities of undertakings will be assessed in mergers within this framework. In acquisitions, assessment is made considering only the area of activity of the company to be acquired.*"^[7] This means that in mergers, for instance, if Transaction Party A carries out a business activity in a country outside of Turkey, as long as Transaction Party B carries out that same activity or an activity in the downstream or upstream markets in Turkey, the transaction would be notifiable. On the other hand, in acquisitions, it is arguable that the same line of logic dictates the analysis. One could argue that in acquisitions, the starting point is the Target's activities in Turkey. To give an example, let's assume that the Acquirer manufactures several types of medical devices but only sells some of those into Turkey (i.e. Device A and Device B), and let's further assume that the Target likewise manufactures and sells medical devices but that Target does not manufacture nor sell Device A and Device B into Turkey, but only sells Device C into Turkey and the Acquirer does not manufacture nor sell Device C anywhere in the world. Hence, it is arguable in such a scenario that there is no affected market on the basis of an assessment that considers only the area of activity of the Target.

It is at this point that one should point out the internal debate among the members of the Board where one side considers the above language cited that analyzes acquisitions in line with the Target's activities in Turkey, and another side construes the language more broadly. Under the latter interpretation, the aforementioned transaction would be subject to notification where in which both the Target and the Acquirer manufacture and sell Device A and Device B globally, but despite the fact that the Target does not sell Device A and Device B into Turkey, some members of the Board view that there is an affected market. Many clients express frustration over the concept for this very reason as arguably there will be no effects of the transaction on the local market. However, it appears for the time being that the intention of those members at the Board is simply to broaden their powers and scrutinize a significant amount of transactions. Hence, to be on the side of caution, parties should nevertheless notify their transactions until the case law of the Board in this area further develops to side with one view or the other.

[7] Para. 29 of the Guidelines