

Turkey Welcomes its New Merger Control Regime

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As of January 1, 2011 Turkey welcomed its new Merger Regulation or officially referred to as the Communiqué Concerning The Mergers and Acquisitions Calling for the Authorization of the Competition Board No:2010/4 (Communiqué No. 2010/4). Albeit various shortcomings and flaws were encountered in practice with the old Communiqué – the use of market share threshold versus turnover threshold – that jeopardized legal certainty, mergers and acquisitions that need to be notified to the Turkish Competition Board (the “Board”) under the new regulation will have to comply with extended requirements compared with the previous regulation, Communiqué No. 1997/1. “Short form” notifications under the new regime are available for those transactions that

that of EU’s Merger Regulation^{*}. The ensuing discussion shows the changes that have come about with the new regulation while comparing it EU’s regime.

While the old Communiqué used a system of market share thresholds that resulted in legal uncertainty, Communiqué No. 2010/4 uses a threshold system that is based on turnovers which eases the undertakings to make their assessments. More specifically, transactions have to be notified if: (a) Total turnovers of the transaction parties in Turkey exceed 100 million TL, and turnovers of at least two of the transaction parties in Turkey each exceed 30 million TL, or (b) Global turnover of one of the transaction parties exceed 500 million TL, and at least one of the remaining transaction parties have a turnover in Turkey exceeding five million TL.” It should be emphasized that in the calculation of the turnovers, in case of a transfer of those parts of the transaction parties with or without legal personality, only the turnover of the part transferred will be taken into account with regards to the transferor. In addition to calculation of the turnover, another relevant concept that is new for Turkish law but familiar to EU’s Merger Regulation is the concept of conditional/closely related transactions.^{***}

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meet certain requirements as detailed below, yet for those that fail to meet the requirements, “long form” notifications will have to be performed, which certainly entail more disclosures than its counterpart. It is clear that the development of Turkish economy since 1997 necessitated this change in the law, where in which transactions have become more complex, demanding additional disclosures than before. Nevertheless, it is clear that Turkish competition law is being further harmonized with European Union competition law as the new Turkish regime resembles

* Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation)

** It should be underlined here that the Board has reserved the right to re-establish the thresholds every two years.

*** Communiqué No. 2010/4 Art 8(5) states: “Two or more transactions under paragraph 2 of this Article, carried out between the same persons or parties within a period of two years, shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué.” Similarly, Art 5(2) of EC Regulation No 139/2004 states “two

More importantly, a brand new concept that has completely changed the overall merger control regime is the notion of "affected markets". It entails the relevant product markets that might be affected by the transaction to be notified and includes horizontal relationships where two or more of the parties are commercially active in the same product market and vertical relationship where at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates. The affected market concept also plays a role where the transaction does not affect any markets, the parties do not need to file a notification form with the Board. The lack of necessity to notify here is qualified in terms of joint venture transactions for which notification is not required as long as the thresholds are exceeded.

The Board's authorization of the notified transaction will also cover those limitations which are directly relevant and required for the

parties acquires full control over an undertaking in which it had joint control, or, for any affected market within Turkey, the sum of the market shares of the transaction parties is less than 20% for horizontal relationships, or the market share of one of the transaction parties less than 25% for vertical relationships. For all other instances, the parties still have to notify with a long form, which necessitates disclosures on import conditions, suppliers, customers in the affected markets, market entry conditions as well as a detailed analysis of efficiency gains.

In merger or acquisition transactions, the date of implementation is the date when the control is changed, which once again harmonizes the Turkish regime with that of EU. Likewise, joint notifications are to be made with a single form. As in the EU, a copy of the final or current version of the agreement concerning the notified merger or acquisition can be enclosed with the Notification Form. Hence, this would permit the parties to file before the transaction document is signed, whereas in the old regime executed document was required.

Last but not least, the M&A's existence will no longer be confidential. The Board now publishes the notified transactions on its official website, together with the relevant undertakings and their fields of operation, extracting commercial secrets. As such, competitors or any other interested third parties can submit electronic information on the Board's website that is relevant to the transaction.

Overall, the new system has introduced a brand new form that certainly requires a lot more information, yet is more harmonized with the EU's Merger Regulation. Short form and long form distinctions are welcome as the short form permits parties to save significant time. The new system brings more clarity, especially in terms of threshold calculations. Nevertheless, given the Board will review applications based on this form for the first time, uncertainties hang as far as the Board's interpretations to the new terms (i.e. affected markets) which will only get clearer with time.

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implementation of the transaction, hence ancillary restraints. By this, the Board will no longer devote a separate part of its decisions to ancillary restraints and thus the parties themselves shall assess the ancillary status of the restraints contained in their transactions. Thus, as long as the major transaction is approved, so will its ancillary restraints, such as non-compete and/or non-solicitation clauses. This once again resembles the EU's regime where the ancillary restraints benefit from the Commission's approval of the main concentration.⁸

As far as procedural changes, it could be argued that the new system works in favor of the notifying parties as they can opt for a so-called "short form" where either one of the transaction

or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction."

⁸ EC Regulation No 139/2004 Art 6(1)(b) "A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration."