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NEW MERGERS AND ACQUISITIONS COMMUNIQUÉ

This article provides brief information regarding Communiqué No. 2010/4 on Mergers and Acquisitions¹ (the “New Communiqué”), which will become effective on 1 January 2011.

The New Communiqué repealed the previous Communiqué No. 1997/1 on Mergers and Acquisitions (the “Former Communiqué”) which has been effective since 1997. Most of the provisions of the New Communiqué are similar to the Former Communiqué. For convenience, this article will first provide an overview of the reasoning behind the New Communiqué and then will analyze the important substantial and procedural changes of the New Communiqué.

1. The Scope and the Reasoning of the New Communiqué

The Former Communiqué was prepared in 1997. However, since 1997 Law No. 4054 on the Protection of Competition² (the “Law”) has been amended several times and the Turkish economic system has been faced with significant changes. For instance, the administrative monetary fines regulated under the Law have increased significantly. With it, the importance of the acknowledgement of the notification requirement of the mergers and acquisitions in order to avoid high monetary fines has also increased. As a result, these significant changes have led to the necessity of the preparation of a new communiqué which is more clear, concise, and beneficial.

2. Substantial Issues

The Notification Thresholds: With respect to the threshold for a merger or acquisition to qualify for notification, the Former Communiqué had two alternatives, namely market share and turnover-based systems. The New Communiqué adopts a turnover-based system to ensure legal certainty. Pursuant to Article 7 notification of the New Communiqué, a merger or acquisition shall be given to the Competition Board (the “Board”) for its approval 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 global 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.

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

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

Moreover, if there are no markets in Turkey affected by the merger or acquisition, then the Board does not need to be notified, except for notifications related to joint ventures. The Board shall revise the thresholds every two years following the effective date of the New Communiqué.

Calculation of the Turnover: In order to calculate the turnover of each party, the total turnover of all legal persons and economic units of the entire shareholding structure of the relevant enterprise shall be calculated. This includes the turnover of the relevant enterprise, its subsidiaries, parent companies and other subsidiaries of the parent companies.

It should be noted that in the case of an acquisition, the turnover of the target company shall be calculated only on the transferor part of the transaction. If there is joint control on an economic unit, the relevant turnover shall be divided accordingly. Furthermore, if the same parties are involved in two or more mergers or acquisitions within 2 years, the transactions shall be considered as single transactions in terms of the calculation of the relevant turnovers.

Change of Control: Another important modification is that pursuant to the New Communiqué, a transaction is deemed to be realized on the date of the occurrence of the change in control. Under the Former Communiqué, the closure of a transaction was regarded as the realization of the transaction.

3. Procedural Issues

Notification Form: The notification of a merger or acquisition to the Board shall be made using the notification form attached to the New Communiqué beginning 1 January 2011.

However, it should be noted that for certain transactions identified below, the information stated under Clauses 6 (Information regarding the affected markets), 7 (Conditions for entry into the market and potential competition) and 8 (Efficiency that is brought by the transaction) in the notification form may not be submitted while filing a notification:

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

Submission: Another amendment brought with the New Communiqué is that, rather than submitting the notification form in three copies as it was the case pursuant to the Former Communiqué, the notification form shall be submitted in two copies together with an electronic copy. In addition, the parties are no longer obliged to submit the executed version of the merger or acquisition agreement since the New Communiqué allows for the “current version of the agreement” as well. However, the implementation of these changes by the Board in practice remains 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 field of activities in its website.

On-the-spot Inspection: Unlike the Former Communiqué, the New Communiqué entitles the Board, where necessary, to permit on-the-spot inspections of the relevant undertakings' premises.

4. Final Remarks

With the New Communiqué, Turkish merger control rules move closer to the relevant EU legislation. Nevertheless, as in all newly adopted rules, it is expected that there will be areas or questions which will need to be addressed by the Board with further explanation on a case-by-case basis, by issuing a guideline or both. ⊕