The Turkish Competition Authority issues the communiqué on the procedures and principles to be pursued in pre-notifications and authorization applications to be filed with the NCA in order for acquisitions via privatization to become legally valid (Communiqué No. 2013/2)

Turkey, Mergers, Notification (mergers), Privatisation, Reform, All business sectors

Why a New Communiqué?

The fundamental purpose of Communiqué No. 2013/2 is to replace the market share and turnover threshold system established under Communiqué No. 1998/4 by just the turnover threshold system.

Such amendment was made in order to comply with European Union Regulations and harmonize Turkish legislation.

Harmonization. The Communiqué on Mergers and Acquisitions No. 2010/4 [2] (“Communiqué No. 2010/4”), which requires the Permission of the Competition Board, entered into force on 01.01.2011 and complies with European Union regulations by abandoning the market share and turnover threshold system and adopting the turnover threshold system. Such compliance should also be
ensured in the privatization area, thus Communiqué No. 1998/4 based on both turnover and a market share threshold was amended.

Why a Special Communiqué?

While Communiqué No. 2010/4 regulates general mergers and acquisitions subject to notification, Communiqué No. 2013/2 only regulates acquisitions through privatization. The preparation of special regulations for such acquisitions is mainly based on differences between transactions’ scope and extent. Furthermore, the Act on the Protection of Competition No. 4054 (the “Competition Act”) \[3\] enables the issuance of a special Communiqué.

Scope and Extent of the Transaction

Acquisitions regulated under Communiqué No. 2013/2 are related to the transfer of public undertakings, or some of their parts, to a private undertaking. Public undertakings, by comparison to private undertakings, form legal and/or natural monopolies and have some privileges \[4\]. In light of the foregoing, acquisitions through privatization significantly differ from general mergers and acquisitions.

In order to make up the differences, Communiqué No. 2013/2, unlike Communiqué No. 2010/4, foresees different thresholds and a two-stage notification system, as explained in detail below.

Legal Basis. The lawmaker states in the last sentence of Article 7 of the Competition Act that: “The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid.” - and thus expresses that special communiqués regarding special areas such as acquisitions via privatization may be issued \[5\]. Similar to Communiqué No. 2010/4, Communiqué No. 2013/2 also finds its legal roots in this provision.

Evaluation of the New Communiqué

The most important issues covered in Communiqué No. 2013/2 are related to the scope of privatization and the notification procedure.

Scope of the Communiqué

Acquisition of all or part of a company’s interests or other rights and instruments of an undertaking in such a way as to change control over the undertaking or to affect its decision-making bodies, or full or partial acquisition via privatization of units intended for the production of goods and services fall within the scope of Communiqué No. 2013/2.

However, the below-stated situations are excluded from the scope of Communiqué No. 2013/2:

- Transfers to public institutions and organizations, including local governments, and to education institutions with the nature of public entities,

- The acquisition of immovable property that is not intended for the production of goods and
services,

- Sales in foreign capital markets,
- Public offerings,
- Block sales which include delayed public offerings with a duration of no more than 3 years, without prejudice to the provisions of the capital markets legislation,
- Acquisition by employees, sales in stock markets by normal orders as well as by special orders which do not lead to a change in the control of the undertaking,
- Sales to securities investment funds and/or securities investment trusts, and
- The acquisition of shares which does not lead to a change in the control of the undertaking.

Apart from “Transfers to education institutions with the nature of public entities” and “share transfers which do not lead to a change in the control of the undertaking”, which are excluded from the scope of Communiqué No. 2013/2, the scope of Communiqué No. 1998/4 was exactly preserved under Communiqué No. 2013/2.

The evaluation of the above-stated amendments shows that such amendments were not legally “necessary”. In fact:

- Where there is a share transfer to an educational institution with the nature of a public entity, if the transferring company is not a private entity, then it cannot be stated that “privatization” has occurred since privatization means a “any processes which decreases the public sector share in economic activities” [6];

- First paragraph of Article 2 of Communiqué No. 2013/2 states that transactions that cause a change of control over an undertaking will be considered within the scope of this Communiqué. Thus, it was not necessary to repeat that the acquisition of shares that does not lead to a change in the control of the undertaking will not be considered within the scope of the Communiqué.

**Notification Procedure under the Communiqué**

Communiqué No. 2013/2 is based on a turnover threshold system and foresees a two-stage notification system: the pre-notification and final notification.

*The Turnover Threshold System.* As per Communiqué No. 2013/2, privatizations, which are subject to notification, are determined within the turnover threshold system. Within this scope, “in the calculation of the turnover, sales by the undertaking or unit intended for production of goods or services to be privatized to public institutions and organizations including local governments made on the basis of a legislative provision shall not be taken into account” [7].

**Pre-notification.**

In acquisitions through privatizations, where the turnover of the undertaking or unit intended for
production of goods or services to be privatized exceeds 30 million Turkish liras, a pre-notification with the Competition Authority shall be filed and the opinion of the Competition Board shall be received before the public announcement of tender specifications. The opinion of the Competition Board shall be valid for three years, unless otherwise stipulated.

The validity period of the Competition Board’s opinion is an appropriate provision newly integrated by Communiqué No. 2013/2 since such provision:

- Foresees the average changing period of the conditions in the market and therefore prevents the contradiction of the opinion of the Competition Board within the current market structure; and

- Prevents the Competition Authority from incurring a heavy and unnecessary work-load due to re-applications in circumstances where transactions are not concluded immediately.

The Competition Board shall prepare its opinion within forty business days following the entry of the pre-notification into its records. The distribution of the forty business days is as follows:

- The opinion of the relevant professional department of the Competition Board shall be prepared within twenty-four business days.

- In addition to the opinion stated above, the Competition Board shall receive the opinion of the Presidency of Privatization Administration within six business days.

- The Competition Board shall prepare its opinion in the remaining 10 business days.

These periods may be extended by half at most, with a Competition Board decision for the 24 and 10 business day periods, and upon the discretion of the Privatization Administration for the 6 business day period, depending on the characteristics of the undertaking or unit intended for production of goods or services to be privatized, or of the relevant product market.

Form of Pre-notification. Pursuant to Communiqué No. 2013/2, the pre-notification shall comprise the contact information of the unit to be privatized, its area of operations and any available information and documents concerning this area of operations.

Such conditions were not delineated under Communiqué No. 1998/4; thus, pre-notifications were made with the notification form under the Communiqué on Mergers and Acquisitions which Require the Approval of the Competition Board No. 1997/1 [8] (“Communiqué No. 1997/1). This is because Communiqué No. 1998/4 stipulated that the provisions of the Communiqué No. 1997/1 that were not in contradiction shall be applicable for the issues that it did not regulate.

Communiqué No. 2013/2 contains a similar provision. However, contrary to Communiqué No. 1998/4, Communiqué No. 2013/2 also defines the content of the pre-notification. The existence of these provisions cause hesitation around the use of the notification form under Communiqué No. 2010/4.

We think that the notification form under Communiqué No. 2010/4 will continue being used since the explanations stated under Communiqué No. 2013/2 regarding the content of the pre-notification are general and limited. Otherwise, there would be a long period of information sharing between the Competition Authority and the notifying persons, which may cause unnecessary work-loads and loss
of time. Therefore, direct reference to the notification form under Communiqué No. 2010/4 would be more appropriate.

**Final Notification.** In order for acquisitions through privatization requiring pre-notification to the Competition Authority to become legally valid, it is mandatory to get authorization from the Competition Board.

Authorization applications to the Competition Board (final notification) are made by the Presidency of the Privatization Administration after the conclusion of the tender process, but before the decision on the final acquisition transaction. This application shall be prepared in the form of individual files for each bidder to be included in the High Board of Privatization draft decision to be submitted to the High Board of Privatization by the Privatization Administration.

**Conclusion**

The most fundamental change in Communiqué No. 2013/2 is the abandonment of the market share and turnover threshold system and the preservation solely of the turnover threshold system in compliance with Communiqué No. 2010/4. This fundamental change is well directed, both in terms of harmony with the European Union and uniformity in the domestic legislation.

We believe that most of the changes made in Communiqué No. 2013/2 are not legally “necessary”. For instance, “transfers to education institutions with the nature of public entities” are not within the scope of the Communiqué. However, in any case, such transfers do not qualify as privatization.

In addition to this, since the content of the pre-notification is not clearly regulated under Communiqué No. 2013/2, it would be more incisive to refer to the notification form under Communiqué No. 2010/4.


[2] To consult Communiqué No. 2010/4, see the following link: http://www.rekabet.gov.tr/File/?pat... (accessed on: 03.06.2013).


[6] See TEMEL, s. 5.

[8] The Communiqué no 1997/1 has been abolished with the entry into force of Communiqué No. 2010/4.