

The Turkish Competition Authority releases new guidelines for mergers and acquisitions

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Turkish Competition Authority, 27 June 2011, Guidelines for Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions

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The Guidelines for Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions (the "Guidelines") which was published in the official website of the Competition Authority on June 27, 2011, was prepared with a view to facilitate the enforcement of the *Communiqué* No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (the "*Communiqué* No. 2010/4").

Legal Grounds in the Preparation of the Guidelines

Article 7 entitled "Mergers and Acquisitions" of the Act No. 4054 on the Protection of Competition (the "Competition Act") prohibits operations of merger or acquisition which would create a dominant position or strengthen a dominant position and result in significant lessening of competition in a market for certain goods or services within the whole or a part of the country. The same article states that the Competition Board (the "Board") shall declare, *via Communiqué* the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained in order for them to become legally valid.

The Board, in compliance with this article, first issued the *Communiqué* No. 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (the "*Communiqué* No. 1997/1"), which foresaw the market share threshold system; and subsequently, the *Communiqué* No. 2010/4 which provides the turnover threshold system to replace the market share threshold system.

The *Communiqué* No. 2010/4, in addition to the turnover threshold system, also defines the notion of "ancillary restraints" which was not found in the *Communiqué* No. 1997/1. The New *Communiqué* clarifies also the notion of "undertakings concerned", a very important notion for mergers. The notion of "ancillary restraints" is regulated under Paragraph 5 of Article 13 of the *Communiqué* No. 2010/4. As per this Article, authorization granted by the Board concerning the relevant merger and acquisition shall also cover those restraints which are directly related and necessary for the implementation of the operation. The notion of "undertaking concerned" is defined under Article 4 of *Communiqué* No. 2010/4. In accordance with this Article, "undertaking concerned" means the merging persons, direct participants or economic units in merger operations and acquiring or acquired persons or

economic units in acquisition operations.

The above-stated notions, which are newly included in the *CommuniquÃ©* No. 2010/4, should be explained through a guideline as in European Union Law in order for the *CommuniquÃ©* No. 2010/4 to be correctly understood and implemented. Within this framework, the Guidelines was prepared and the above-stated notions were defined and exemplified. The said notions are as follows:

Undertaking Concerned

The Guidelines defined the undertaking concerned separately for mergers and acquisitions. Indeed, in operations of acquisition, the undertakings concerned are individually each of the merging persons or economic units.

As for operations of merger, the undertakings concerned are all the undertakings in both the acquiring and the acquired party. Furthermore, the definition of an undertaking concerned might be different depending on the structure of control in acquisitions. The said situations are as follows:

Acquisition of Full Control. In such case, the undertakings concerned are the acquiring undertaking and the undertaking to be acquired. If the undertakings are within a group, the undertakings concerned are the acquiring firm and the undertaking to be acquired.

Partial Acquisition. In such case, the undertakings concerned are the acquiring undertaking and the part to be acquired in the transferring firm.

Transition from Joint Control to Full Control. In the change of joint control to full control the undertakings concerned are the acquiring shareholder and the joint venture company.

Acquisition of Joint Control. In such case, the undertakings concerned may differ depending on the situations listed below:

In case a new joint venture is established, each of the shareholders who will have a say in the joint control is regarded as an undertaking concerned. The newly established joint venture is not regarded as an undertaking concerned, as it does not yet have any turnover; In case one or more undertakings acquire another company so as to establish joint control, each of the undertakings to have joint control after the operation and the acquired company are regarded as undertakings concerned; Acquisition of a company in order to share its assets within a short period of time is regarded as an acquisition of full control individually over the related parts of the acquired company by each of the acquirers; and not as the acquisition of joint control over the company as a whole. In such case, the undertakings concerned are the acquiring companies and different parts that are acquired in each operation.

Change of the Shareholders Controlling the Joint Venture. In such case, the undertakings concerned are all the previous and new shareholders who will have joint control due to the structural change in the control and the joint venture itself.

Acquisition of Control by the Joint Venture. In such case, the undertakings concerned may differ depending on different hypothesis: Where a joint venture acquires the control of another company, the joint venture *per se* and each of the parent and each of the parent companies may be considered as an undertaking concerned; In case the acquisition is realized by a full-function joint venture, the undertakings concerned are the joint venture and the company acquired; In case the joint venture is used as an instrument in an acquisition by the parent companies, the parent companies are considered as the undertakings concerned, and not the joint venture.

Break-up of Joint Venture. In such case, the undertakings concerned may differ depending mainly to two situations:

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When the parent companies break up the joint venture, split the assets and gain full control over the assets they obtain, the undertakings concerned for each operation are the acquiring parent and the asset acquired; When two or more companies exchange economic units, each transfer of control is independently considered as an acquisition of full control. In this situation, the undertakings concerned are the acquiring companies and the economic units acquired.

Acquisition of Control by Real Persons. In such case, the undertakings concerned are the acquiring real person and the economic unit acquired.

Turnover

Pursuant to Article 7 entitled “Mergers or Acquisitions Subject to Authorization” of the *Communiqué* No. 2010/4, in case (i) total turnovers of the parties to the relevant operation in Turkey exceed TRY one hundred million, and turnovers of at least two of the parties of the operation in Turkey individually exceed TRY thirty million; or (ii) global turnover of one of the parties of the operation exceeds TRY five hundred million, and at least one of the remaining parties of the operation has a turnover in Turkey exceeding TRY five million, the authorization of the Board is required.

In calculating whether the turnovers stated above are exceeded or not, the turnovers of the undertaking concerned as well as all relevant persons and economic units - that are connected to it - are taken into account. According to Article 8 of the *Communiqué* No. 2010/4 entitled “Calculation of turnover threshold”, the total turnover of the below stated undertakings, persons and economic units are considered:

- a. *Undertaking concerned;*
- b. *Persons or economic units in which the undertaking concerned; 1- holds more than half of the capital or commercial assets, or 2- holds the power to exercise more than half of the voting rights, or 3- holds the power to appoint more than half of the members of the board of supervisors, board of directors or the bodies authorized to represent the undertaking, or 4- holds the power to manage operations;*
- c. *Persons or economic units which hold the rights and powers listed in (b) over the undertaking concerned;*
- d. *Persons or economic units over which those listed in (c) hold the rights and powers listed in (b);*
- e. *Persons or economic units over which those listed in (a) & (c) jointly hold the rights and powers listed in (b).*

In addition, in an operation of acquisition, only the turnover of the transferred part is taken into account with respect to the transferring party.

Concerning joint ventures, double counting should be avoided when the turnovers of the parties of the operation are calculated. Therefore, when the joint venture is regarded as an undertaking concerned beside the parent company, the turnover of the parent company will be calculated without the turnover of the joint venture to be acquired and the turnover of the joint venture will be calculated without the turnover of the parent company.

Article 7 of the *Communiqué* No. 2010/4 also foresees a possibility of exemption from the notification obligation. As per the said provision, even though the thresholds listed above are exceeded, the authorization of the Board shall not be required for operations without any affected market.

The definition of the “affected market” is given under Article 5 of the Notification Form Concerning Mergers and

Acquisitions. In accordance with this article, the relevant product markets that might be affected by the transaction to be notified and where, Two or more of the parties are commercially active in the same product market (horizontal relationship); 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) constitute the affected markets. Therefore, “affected market” shall be understood as “relevant product market”.

Therefore, the fact that there is a relevant product market where the activities of the parties overlap horizontally or vertically is sufficient to fulfill the condition of the existence of an affected market provided that at least one party operates in Turkey. Moreover, if none of the parties operates in Turkey with respect to the relevant product markets where the activities of the parties overlap horizontally and vertically, it can be said that there is not an affected market.

All markets that are likely to be affected by the transaction shall be taken into consideration in the assessment of an affected market. Accordingly, all activities of undertakings will be taken into consideration. In acquisitions, however, assessment shall be made considering only the area of activity of the company to be acquired.

Ancillary Restraints

Ancillary restraints are those which are directly related to the concentration and which are necessary for the implementation of the transaction and in order to fully achieve the efficiencies expected from the concentration.

For the restraints to be directly related, it is not sufficient for them to be implemented within the same scope or time period with the concentration operation; in addition, they have to be closely related economically to the main operation and they have to be envisaged for a smooth transition to the new structure to be formed following the concentration.

The criterion of necessity, on the other hand, may be fulfilled in case the relevant restraint is obligatory for the implementation of the concentration or in case of a significant increase in uncertainty and costs of the main transaction in the absence of the restraint. In determining whether a restraint is necessary, the duration and scope of the restraint shall be taken into consideration, in addition to its nature. On the other hand, the restraint with the least restriction on competition must be preferred among alternative restraints that serve to attain the same goal.

Conclusion

The Guidelines, in order to well-determine whether or not an operation of merger or acquisition is submitted to the authorization of the Board, gives detailed information on the calculation of the turnover threshold and the definition of the concerned undertakings.

Nevertheless, if there is not any operation of merger or acquisition falling within the scope of the *CommuniquÃ©* No. 2010/4, there is no need to determine if the turnover thresholds are exceeded. As a matter of fact, in such case, the operation is not submitted to authorization.

Therefore, it would have been more appropriate if first the notions of “mergers and acquisitions” and “permanent change in control” stated in Article 5 of the *CommuniquÃ©* No. 2010/4 were analyzed by the Guidelines.

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