The Turkish Competition Authority announces draft mergers and acquisitions system

Turkey, Mergers, Remedies (mergers), Notification (mergers), Change of control, All business sectors

Turkish Competition Authority, 7 May 2010, Draft Mergers and Acquisitions System


A Draft Communiqué (the "Draft Communiqué") was prepared with a view to replace the Communiqué n° 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board [1] (the "Communiqué n° 1997/1" or the "Communiqué") which had been prepared on the basis of the Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 257/90 p. 13) and dated December 1989 (the "Regulation n° 4064/89"). The Draft has been submitted to the public opinion by being published in the official website of the Competition Authority ("CA") on 15 February 2010 and reviewed by the relevant commission of the CA [2]. The last draft has been communicated to the competition law practitioners during the meeting of Competition Association held in Istanbul on 7 May 2010 by the participation of the Vice-President of the CA and competition experts' member of the said commission.

Context

During the process of harmonization with the European Union, the works on the harmonization of the Turkish Law with the Acquis of the European Union continue intensively. Within this scope, it was also intended to integrate in Turkish competition law, the novelties brought by the Council Regulation (EC) n° 139/2004 [3], of 20 January 2004, on the control of concentrations between undertakings (ECMR), OJEU L 24, 29 January 2004, p. 1-22 ECMR and dated 20 January 2004 (the "Regulation n° 139/2004" or the "Regulation") abrogating the Regulation n° 4064/89 which was in force since 1 April 2004.

In addition, the Competition Authority’s experience exceeding twelve years and the criticism of the Communiqué in the doctrine has also been taken into account.

System brought by the Draft Communiqué

Change of Control

[1] www.concurrences.com
In line with the Regulation n° 139/2004, the Draft stipulates that a change of control (directly or indirectly) through (i) purchase of shares or asset, (ii) an agreement or (iii) by all other means of a person(s) controlling at least one of the undertakings will be deemed as a merger. However the Competition Board ("CB"), in its decisions, has established the practice to recognise the change of control as a merger. Therefore, the new rule reflects the CB's practice.

Although the notion of "control" is stated in the Article 5 of the Draft, no any reference is made to "continuous control". However, in order to be in compliance with the Regulation n° 139/2004, the notion of "continuous control" has to be included within the framework of the Draft.

Threshold System

The Article 7 of the Draft Communiqué entitled "Mergers and Acquisitions Subject to Authorization" brings, in compliance with the Regulation n° 139/2004, a system different from that based on the total and separate turnover of the undertakings parties to the merger or the acquisition [3].

According to this provision, where, as a result of a merger or an acquisition, total turnover of the undertakings that carry out the merger or acquisition exceeds TRY 100.000.000 (app. EURO 50.000.000) and individual turnover of both exceeds TRY 20.000.000 (app. EURO 10.000.000) within Turkish market, it is compulsory for them to take the authorization of the CB. The second difference of the Draft Communiqué is that the total turnover and individual turnovers of the parties that should be taken into consideration is the total turnover of each undertaking in Turkish market without any relevant market(s) determination. As stated in the Article 8 entitled "Calculation of the Turnover", the Turkish turnover is composed of the turnover resulting from the commercial activities within the boundaries of the Turkish Republic and the turnover resulting from the exports.

Notification

The Article 10 of the Draft entitled "Notification of Mergers and Acquisitions" provides the possibility to notify an agreement, which is not yet finalized. This new regime differs substantially from the current system which states clearly the "final agreement" shall be submitted to the notification (Notification Form Article 7.1). The new approach will give to the undertakings, the possibility to make notifications with draft agreements, gentlemen agreements and also letter of intents. By this way, the Draft simplifies the transactions of Competition Authority and grants to the parties the possibility to know whether or not the articles of the relevant contract are contrary to the Act before that they enter into a binding obligation.

Short Form

The Draft Communiqué, in parallel to the European system, envisages a possibility to notify the concentration by a simplified form.Where, as a result of a merger or an acquisition, total market share of the parties is less than 20% for horizontal relations and less than 25% for vertical relations or where one the undertaking having joint control will gain the sole control or where there is not any affected market with this transaction, the notification can be made by a simplified form.

Announcement of Mergers and Acquisitions

The Article 12 of the Draft Communiqué which provides that the Competition Authority will announce in its official website the merger or acquisition including also the parties to the operation that it took in evaluation establishes judicial certainty by bringing transparency for the public opinion. A similar practice is also applied by the European Commissions for many years. We believe that such practice will also increase the transparency in the Turkish market.
Commitments

The Article 14 of the Draft Communiqué includes a new regime on the commitments. For a long time, the CB has authorized the operation of concentrations normally not acceptable under competition rules, subject to certain conditions that it has imposed on the parties. More recently, its practice has changed to the granting of merger clearances within the framework of commitments proposed by the parties despite the absence of any special provision in the competition legislation addressing this practice. Although the CB gives place to both structural and behavioral commitments within its decisions, it principally opts for structural remedies as in European Competition Law [4].

The draft provision states that the parties may propose commitment during preliminary examination or during investigation.

The Draft only contents itself to make a simple reference to commitments. In accordance with Article 14 of the Draft, in case the parties submit commitments, the notification is deemed to be made at the notification date of the commitments to the Board. Nevertheless, as also provided in the Regulation n° 139/2004, the parties have to include details as the signification of commitments, their purposes, etc.

In order to fill the gap in the legislation, the commitments and conditional authorization have been included in the Draft Law Amending the Act on the Protection of Competition. However, this provision only provides a general outline without providing details. Thus, it is recommended that a communiqué including all the steps from the submission till the implementation of the commitments is issued in order to fill in the missing information.

Conclusion

As it can be observed, the Draft which has been prepared with a view to replace the Communiqué n° 1997/1 brought various novelties. However, the Draft does especially not modify the most criticized dominant position test. As a matter of fact, practices currently applied will continue to be applied.

In fact, as in the Regulation n° 139/2004, the criteria of "significantly impeding effective competition" test shall be accepted in order to determine the prohibited mergers and acquisitions.

[1] The Communiqué 1997/1 has been published in the Official Gazette dated 12.08.1997 and numbered 23078. To consult the Communiqué see the following link: http://www.rekabet.gov.tr/dosyalar/... [2] The public has submitted its opinion on the Draft until 5 March 2010. [3] The current article 4 of the Communiqué entitled "Mergers or Acquisitions Subject to Authorization" provides for two steps thresholds system: The first being the total market shares of the undertakings (exceeding %25 of the relevant market) and the second being the total turnover of the undertakings (exceeding 25 million TL which is approximately Euro 12.5 millions). [4] For further information please see the article Ercüment Erdem, A Review of Merger Commitments, Concurrences, N 2-2010, pp. 49-61.

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