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I. INTRODUCTION

Turkish merger control regime has undergone a fundamental reform with the entrance of the new “Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board² (“Communiqué No. 2010/4” or the “New Communiqué”)” in to force on January 1, 2011. This communiqué replaced its predecessor (“Communiqué No. 1997/1”³ or the “Former Communiqué”) that had been applied without any significant change since November 1997. Then, “Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions⁴” and “Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions⁵” also became effective in 2011.

Communiqué No. 2010/4 made important contributions to Turkish merger regime by changing notification thresholds and forms, changing assessment of joint ventures and ancillary restraints, providing a legal basis for consideration of efficiency gains, and accepting commitments as remedies in merger analysis.⁶ This short paper aims to explain the main changes in notification thresholds and their first results.

II. MERGER CONTROL REGIME IN TURKEY

As one of the main pillars of Turkish competition law, merger control has an enforcement history of about fifteen years. Although Turkish Competition Law (“TCL”) entered into force in December 1994, this act practically became applicable to mergers in Turkey with the establishment of Turkish Competition Authority (“TCA”) and issuing of secondary legislation by November 1997. Since then, Article 7 of the TCL has not been changed but there have been several changes in secondary legislation. However, all of these changes, except the last one, did not constitute a significant reform in Turkish merger control regime.

The main legislative text regulating merger control regime in Turkey is the TCL. Article 7 of this act states that:

Merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by

¹ Competition Experts at the Turkish Competition Authority. The views expressed in this paper are personal and do not represent the views of the TCA.

² <http://www.rekabet.gov.tr/dosyalar/teblig/teblig88.pdf>.

³ <http://www.rekabet.gov.tr/dosyalar/teblig/teblig67.doc>.

⁴ <http://www.rekabet.gov.tr/dosyalar/kilavuz/kilavuz14.pdf>.

⁵ <http://www.rekabet.gov.tr/dosyalar/kilavuz/kilavuz16.pdf>.

⁶ For further information see Akkaya&Erdoğan, “Recent Amendments in the Turkish Merger Regime: A Unique Notification System Based on ‘Affected Markets,’” MEDITERRANEAN COMPETITION BULL., No. 3-extra, (June 2011). http://ec.europa.eu/competition/publications/mediterranean/mcb_3_2.pdf.

any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited.

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.

As is seen from the wording of the first paragraph, the TCL prohibits concentrations that are capable of resulting in significant lessening of competition by creation or strengthening of a dominant position. However, there is a lack of clarity, at least in the case-law, whether the “dominance test” as adopted in Article 7 of the TCL also covers “collective dominance” or it only prohibits significant lessening of competition by “single dominance.”

In its *Ladik Çimento*⁷ decision, the TCA prohibited an acquisition on grounds of a collective dominance being created after the transaction. However, on appeal, the Council of State overruled the TCA’s decision and ruled that Article 7 of the TCL does not prohibit lessening of competition through collective dominance.⁸ The Court’s narrow interpretation of the Act in this case has been widely criticized by competition specialists in Turkey; however, a new case on this subject has not yet been taken by the TCA or the court to test the new position of the parties. Therefore there still exists an uncertainty about the scope of the Article 7.

The second paragraph of Article 7 sets forth a mandatory notification system for certain merger and acquisition (“M & A”) transactions and empowers the TCA with defining those transactions that should be notified to the TCA for authorization so that they gain legal validity. In complement with this mandatory notification system, Article 16 of the TCL further prescribes imposition of administrative fine to those M & As that are subject to authorization and are realized without the authorization of the TCA.

A. Former Merger Communiqué

In accordance with Article 7, the TCA issued the first merger communiqué (Communiqué No. 1997/1⁹) in 1997.¹⁰ According to the Article 2 of the Communiqué No. 1997/1, a concentration¹¹ may emerge in three main forms:

- A. Merger of two or more independent undertakings (mergers);
- B. Control or acquisition, by any undertaking or person, of the assets of another undertaking, or the whole or a part of its partnership shares, or the means granting it the power to have a right in the management (acquisitions); and

⁷ Decision of the TCA dated December 20, 2005 and numbered 06-86/1191-343.

⁸ Decision of the Council of State, dated March 1, 2006 and numbered 2005/10038.

⁹ Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board.

¹⁰ In 1998, the TCA also issued another communiqué concerning acquisitions via privatization (*Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid Communiqué No. 1998/4*) and this communiqué has been applied in parallel with the Communiqués No. 1997/1 and 2010/4.

¹¹ The TCL and the merger communiqués use the term of “mergers or acquisitions” instead of the term “concentration.”

- C. Joint ventures which emerge as an autonomous economic entity possessing labor and assets to achieve their goals, and which do not have the aims or effect of restricting competition between the parties, or between the parties and the joint venture (joint ventures).

As regards the concentrations those are subject to prior notification, Communiqué No. 1997/1 established a dual threshold system consisting of “market shares threshold” and a “turnovers threshold.” In this system, a concentration was subject to authorization of the TCA if:

- A. Total market share of the undertakings that carry out the merger or acquisition exceeds 25 percent of the market in the relevant product market within the whole or a part of the territory, or
- B. Their total turnover exceeds twenty-five million Turkish Liras.

B. New Merger Communiqué

After about thirteen years of enforcement experience, Communiqué No. 1997/1 has been replaced with the Communiqué No. 2010/4. This New Communiqué was published in the *Official Gazette* dated October 7, 2010 and entered into force on January 1, 2011. Right after, the TCA issued two guidelines, namely *Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions* and *Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions*.

Communiqué No. 2010/4 has introduced essential changes to the Turkish merger control regime. One of the main features of the New Communiqué is that it made a significant change in notification thresholds. The so-called “market share threshold” was annulled and replaced by a notification system based mainly on turnover thresholds. According to the new threshold system, M & As are subject to authorization where:

- A. The overall turnovers of the parties to the transaction in Turkey exceed 100 million TL and the turnovers of at least two of the parties to the transaction in Turkey exceed 30 million TL, or
- B. The worldwide turnover of one of the parties to the transaction exceeds 500 million TL and the turnover of at least one of the other transaction parties in Turkey exceeds 5 million TL.

However, Communiqué No. 2010/4 has added a further criterion to turnover thresholds. This states that, except in cases of joint ventures, authorization of the Board shall not be required for transactions without any “affected market,” even if the thresholds listed above are exceeded. Therefore, even if a transaction (except joint ventures) meets the turnover thresholds of the Communiqué, it will not be subject to notification if there is not an affected market.

Affected market is a new concept introduced by the Communiqué No. 2010/4 and defined as the relevant product markets that might be affected by the transaction and where, (a) two or more of the parties are commercially active in the same product market (*horizontal relationship*) or (b) 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*).

III. MOTIVATION BEHIND THE NEW THRESHOLD SYSTEM AND ITS FIRST RESULTS

The TCA had two main goals in replacing the “market shares threshold” with the “turnovers threshold.” The first is increasing legal certainty for undertakings and competition law practitioners. As mentioned above, the Old Communiqué’s threshold system was putting undertakings under a task of defining relevant markets and their market shares in those markets. In most cases, this task was really challenging for undertakings, because market definition in competition policy requires some technical analysis, which most of the firms fall short of. Besides, it was also challenging for undertakings to predict their market shares, because even if they knew their sales volumes, they might not have enough information about the size of the market. Therefore, by abolishing the market shares threshold, the TCA aimed to simplify the notification system and thus increase legal certainty.

The second motivation behind this policy change was ensuring effectiveness of the merger control regime. Between the years 1999 and 2010, during which the Old Communiqué was implemented, about half of the total decisions were related to M & As. This figure reveals that assessment of concentrations constituted an important part of the TCA’s total workload. As regards the effectiveness of this system, Table-1 shows classification of concentration decisions between 1999 and 2010.

Year	Authorized	Authorized on Condition	Not Authorized	Out of Scope and Not Subject to Authorization	Total
1999	23	1	0	44	68
2000	49	2	2	47	100
2001	39	2	0	45	6
2002	65	0	0	38	103
2003	77	2	0	27	106
2004	86	3	0	33	122
2005	130	6	1	33	170
2006	110	25	0	51	186
2007	171	17	0	44	232
2008	178	22	0	55	255
2009	110	4	1	31	146
2010	178	9	0	89	276
Total	1216	93	4	537	1850

Source: www.rekabet.gov.tr

As seen above, only 97 (about 5 percent) of a total of 1,850 notified transactions had been subject to detailed investigation and resulted with authorization on condition or prohibition decisions between the years 1999-2010. In other words, 95 percent of the notified cases were either out of scope or non-problematic cases.

This means that an important part of the resources of the TCA has been allocated to the assessment of non-problematic mergers. This was partly due to the uncertainty described above and partly due to the fact that the turnover thresholds have not been updated since 1998 and fell behind the development of Turkish economy. Therefore, it was expected the New Communiqué

would minimize the notification of non-problematic transactions to the TCA and thus increase effectiveness of the Turkish merger control regime.

The New Communiqué has been implemented for about seventeen months. Despite the fact that it is still early to assess the net effects of the New Communiqué in general, we tried to examine its preliminary effects in terms of notification numbers. Below, Table-2 shows classification of concentration decisions in 2011 when the New Communiqué was implemented.

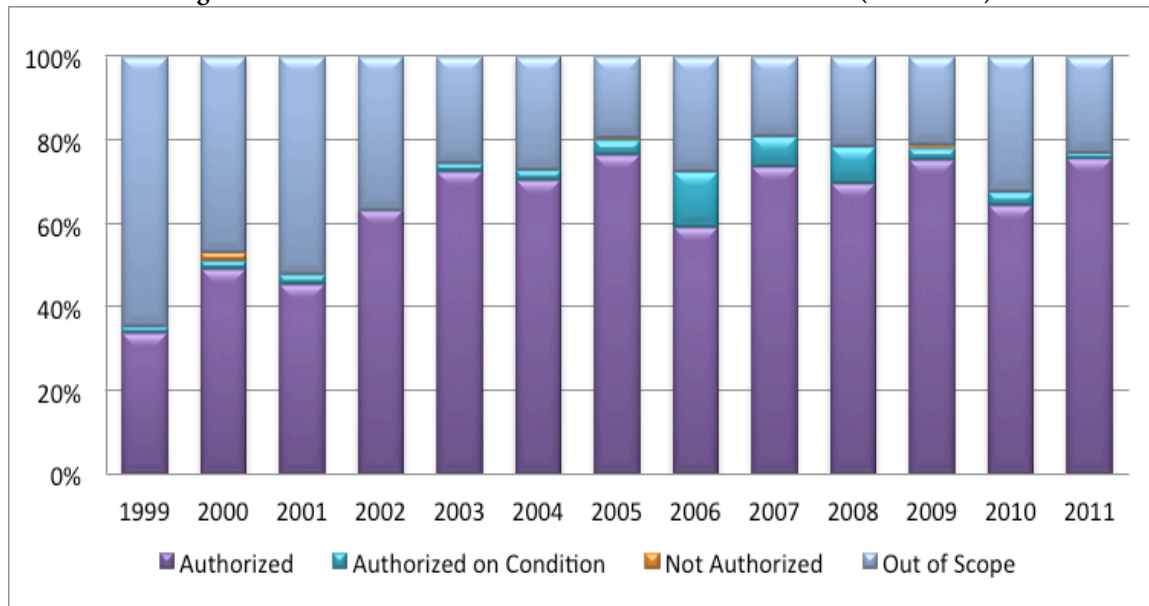
Year	Authorized	Authorized on Condition	Not Authorized	Out of Scope and Not Subject to Authorization	Total
2011	191	4	0	58	253

Source: www.rekabet.gov.tr

As seen from the figures in Table-2, when compared with the 2010 figures, in 2011 the number of total notifications to the TCA has slightly decreased; however, it has not decreased as much as expected. On the other hand nearly 23 percent of the total notifications is out of scope and 75 percent of total notifications¹² were authorized with no condition under the Communiqué No. 2010/4.

Figure-1 shows the distribution of the TCA's concentration decisions:

Figure-1: Distribution of the TCA's Concentration Decisions (1999-2011)



Further, it could be seen from the Figure 1 that, although the total number of cases notified to the TCA has slightly decreased in 2011 compared to 2010, the ratio of non-problematic cases (authorized and out of scope cases) remained nearly the same. These brief statistics show that Communiqué No. 2010/4 has not yielded expected benefits.

¹² Out of scope and unconditional authorization decisions totally came to 98 percent in 2011.

We believe that the reasons of this failure are threefold. First, the second part of the turnover thresholds set forth in the Communiqué No. 2010/4 has relatively low global and domestic turnover levels that weaken the filtering power of the notification threshold. Second, although the market shares threshold system was abolished on grounds of increasing legal certainty, the newly created “affected market” term replaced it and maintained the uncertainty on the part of undertakings. In order to secure themselves, undertakings opted for notifying to the TCA. Third, exclusion of joint ventures from the affected market exception has prevented proper functioning of this exception.

IV. CONCLUSION

To sum up, although the Communiqué No. 2010/4 brings important changes in the Turkish merger regime and it can be called a “reform,” the early results show that it is far from achieving the expected targets. Therefore, notification criteria need to be reviewed in order to achieve the aims of the reform. In fact, Article 7 of the Communiqué requires the review of the thresholds every two years after the Communiqué comes into force and the TCA has already started to review that process.