

# Taboglu & Demirhan

## 10-Dailies

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### SIGNIFICANT AMENDMENTS INTRODUCED BY THE NEW COMMUNIQUE ON M&A

**W**ith effect from 1 January 2011, a new Communiqué No. 2010/4 on Mergers and Acquisitions (the “**New Communiqué**”) which was published by the Turkish Competition Board (the “**Board**”) in the Official Gazette on 7 October 2010 has replaced the previous Communiqué No. 1997/1 (the “**Old Communiqué**”), which was in force since 1997. With the New Communiqué, among others, definition of merger and acquisitions, thresholds and ancillary restrictions have been amended significantly.

It shall be emphasized that as part of the harmonization process with the European Union, the Law No. 4054 on

the Protection of Competition has been amended several times and those amendments made the issuance of a New Communiqué to replace the Old Communiqué necessary.

This article aims to spotlight the significant amendments introduced by the New Communiqué and to provide information on the new arrangements regarding the Notification Form Concerning the Mergers and Acquisitions (the “**Form**”).



### SIGNIFICANT AMENDMENTS

#### i) Definitions Section

**T**he Old Communiqué did not contain a separate “Definitions” provision; however, Article 4 of the New Communiqué defines a number of terms including “relevant undertaking” (merging persons or economic units in merger transactions; acquiring or acquired persons or economic units in acquisition transactions) and “transaction party” (undertaking party to the merger or acquisition).

#### ii) Cases Considered and Not Considered As a Merger or an Acquisition Transaction

One of the most important topics regulated by the New Communiqué is the evaluation of transaction whether or not to be considered as a merger or an acquisition. Transactions not to be considered as a merger and an acquisition are, *inter alia*, acquisition of control by a public institution or organization by operation of law and due to divestment, dissolution, insolvency, suspension of payment, bankruptcy, privatization or a similar reason.

Article 6 of the Communiqué also states that intra group transactions and other transactions which do not lead to a change in control should not be considered within the scope of the New Communiqué and do not require the authorization of the Board.

#### iii) Thresholds and Turnover Calculation

##### a) Notification Thresholds

Another significant amendment introduced by the New Communiqué is the new notification thresholds. The Old Communiqué envisaged a dual threshold system involving market shares or turnover for determination of mergers and acquisitions subject to approval. However, in the New Communiqué the notification of the thresholds are based on total turnovers in Turkey and global

turnovers whereas the market share threshold system is eliminated. As per Article 7 of the New Communiqué, a merger or an acquisition shall be notified to the Competition Authority for the approval of the Board if either the total turnovers of the transaction parties in Turkey exceed TL 100 million and turnovers of at least two of the transaction parties in Turkey each exceeds TL 30 million or the global turnover of one of the transaction parties exceed TL 500 million, and at least one of the remaining transaction parties have a turnover in Turkey exceeding TL 5 million.

***A competitive world offers two possibilities. You can lose. Or, if you want to win, you can change.”***

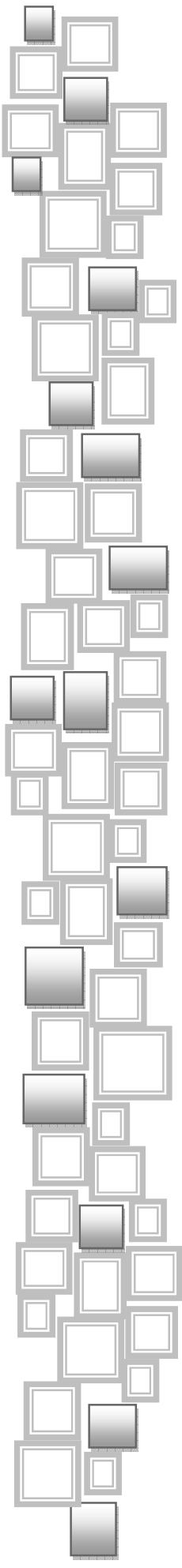
***Henry Ford***

affected market as a result of a merger or an acquisition transaction, the approval of the Board will not be required even though the above mentioned thresholds are exceeded. The Board may revise the abovementioned thresholds every year.

##### b) Turnover Calculation

To calculate the turnovers of the parties, the total turnover of all legal entities and economic units, such as; subsidiaries, parent companies and the subsidiaries of the parent companies need to be included in the calculation.

As it is mentioned above, under the “Definitions” section of the New Communiqué, the term “Relevant Undertaking” is defined as the merging entity or economic units in merger transactions; the acquiring entity or economic units or the entity or economic units subject to transfer in acquisition transactions. The definition of the



“Relevant Undertaking” differs in acquisitions depending on the structure of the control. The term “Transaction Party” is defined as “the enterprise which is party to a merger or acquisition transaction”.

In accordance with these definitions, the “Relevant Undertakings” shall be interpreted as the persons or economic units who are directly parties to merger or acquisition transactions whereas the “Transaction Parties” are economic integrities which include the relative undertakings. Therefore, at the time of determining whether the authorization of the Competition Authority is required for a merger or an acquisition, first the relative undertakings shall be designated. The turnover thresholds of the transaction parties are calculated in the light of Article 8 of the New Communiqué. During such calculation, the total turnover of such economic integrity where the relative undertakings are involved (namely other persons or economic units which are related with the relative undertakings) are considered.

The final point to be underlined is if two or more transactions are carried out by the same parties within a period of 2 years, these transactions shall be considered as a single transaction for the calculation of turnovers.

#### iv) Ancillary Restrictions

The New Communiqué has regulated a provision stating; approvals granted by the Board concerning the merger and acquisition shall also cover those restrictions which are directly relevant and required for the implementation of the transaction. The principle is that parties should determine whether the ancillary restrictions introduced by the merger or acquisition exceed this framework.

Hence, the general procedure for the assessment of the ancillary restrictions in all mergers and acquisitions has been abandoned. Therefore, the transaction parties are obliged to assess the restrictions whether they are ancillary restrictions or not. Accordingly, it has been accepted that, even though the Board has not made an assessment regarding the restrictions, the Board’s decision will cover the ancillary restrictions as well. However, upon the request of the transaction parties, the Board will evaluate the new restrictions in its decision regarding concentration, if it has not been evaluated in the previous decision of the Board.

Additionally, parties that will make the assessment shall take into account that the ancillary restrictions are directly related to the concentration transaction and necessary for the application of the transaction and for the complete provision of the activities expected from the concentration. Also, criteria of “direct relation” and “necessity” have to be evaluated objectively.

As provided under the Guidelines which has been published by the Board, the ancillary restrictions will be applicable only if they are considered as “directly related”. For determining the direct connection, one shall take into consideration the following criteria; (i) the ancillary restriction shall be within the same scope as the transaction; (ii) the ancillary restriction shall be applied at the same time period with the transaction; (iii) the ancillary restriction shall be closely related with the main transaction in terms of economy; and (iv) the ancillary restriction shall have been envisaged for providing convenience during the transmission to the newly adopted structure.

Non-compete obligation of the seller in a merger transaction provided that it is admissible in terms of time, scope, geographical area and person; non-solicitation, non-disclosure and imposing related obligations on the seller are deemed as acceptable ancillary restrictions in the Guidelines. Therefore, it has been advised that undertakings shall choose the best alternative in terms of ancillary restrictions to preserve the competition.

As to the Guidelines, non-compete obligation not exceeding 3-year period is reasonable. However, if there is an outlasting customer dependency and more time is required in respect to the qualification of the transferred know-how, the non-compete obligation more than 3-year period may be acceptable as an ancillary restriction.

#### v) Notification Form

There have been some significant changes in the Form of the New Communiqué. Compared to the Old Communiqué, the content of the New Communiqué has become more comprehensive. The following matters have been included in the informative section of the Form:

- The Board does not require filling out the information in Articles 6, 7, 8 of the New Communiqué in case a) one of the transaction parties shall acquire full control of an enterprise which has already been controlled jointly; and b) the transaction parties’ total market shares are less than 20% for horizontal relationships and one of the transaction parties’ total market shares is less than 25% percent for vertical relationships in relation to the affected markets. This arrangement provides convenience to the enterprises. However, in some cases the Board may request to fill out the Form completely out.
- The Board has obliged the parties to submit the agreement which is subject to the transaction with the notification form. With the new arrangements, unlike the Old Communiqué, the Board does not oblige the parties to submit the executed copies of the agreements. The agreements shall not have to be the original copies signed by the parties of the agreement. The Board has also taken into account the possibility of the agreement in question executed in foreign language. In such case, the notifying party is obliged to provide the translation of the agreement and indicate that the Turkish version shall be the essential one. It has been emphasized that, every page shall be approved by an authorized person of the entity or its representative in case the texts are not translated by a sworn translator.
- Finally, it has been added that in case the requested information or documents cannot be provided, the parties must state their reasons for not having certain information or documents and provide soundest estimated data concerning the information in question and disclose the sources for these estimated data and clarify where those information may be gathered.

#### Final Remarks

As from 1 January 2011, the merger and acquisition system is more closely harmonized with the European Union legislation. Hopefully, the system in the New Communiqué will provide sufficient legal certainty as it is aimed.