

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

DEFINITION OF TRANSACTION FOR THE PURPOSE OF MERGER CONTROL REVIEW

-- Turkey --

18 June 2013

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1. In Turkey mergers and acquisitions are regulated according to the Act No 4054 on the Protection of Competition (Competition Act) and of Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of Competition Board (Communiqué 2010/4).

2. Merger control regime aims at regulating the changes in the market structure. However, it may also slow down transaction procedure, resulting in uncertainties and increasing the work load of the competition authorities. Thus, expected benefits from the merger control regime may fall behind of costs associated with it. As a result, the criteria that determine which transactions should be notified plays an important role in reaching an effective merger control regime. In order to bring about an effective merger control regime, notification criteria both securing the notification of concentrations which may result in anti-competitive effects and avoiding uncertainties for undertakings are needed.

1. Acquisition of Shares

3. In order to grasp expected benefits from merger control regime and minimize costs of merger notification process for the undertakings and competition authorities, it is necessary to design a notification system that covers mergers and acquisitions resulting in competitive concerns as much as possible. That is, in determining which transactions will be subject to notification, transactions which are likely to cause changes in conduct of the undertaking in the market should be taken into account. In doing so, “acquisition of control” and “decisive influence” concepts should be employed.

4. According to Article 5 (1) of the Communiqué 2010/4, a concentration is deemed to arise where a change of control in the undertakings concerned occurs on a lasting basis¹. The Communiqué 2010/4 provides in Article 5 (2) that control occurs through instruments which allow exercise of decisive influence over an undertaking².

5. Control can be acquired through rights, contracts or other instruments and in assessing whether a transaction causes acquisition of control may require a comprehensive analysis of the transaction which may not always be based on objective criteria. As a result, employing “acquisition of control” concept in determining whether notification is required, may cause -to some extent- legal uncertainty. On the other hand, using objective criteria like percentage thresholds or value of transaction, may cause notification of too many transactions which are unlikely to raise any competitive concerns.

6. In order to provide legal certainty, control and decisive influence concepts should be clearly defined. Competition authorities’ are expected to guide undertakings about these concepts through their regulations and decisions. Being aware of that fact, Turkish Competition Board is on the verge of publishing Guidelines on Cases Considered as a Merger or an Acquisition and Concept of Control which explains concept of control, person or undertaking acquiring control, means of control, object of control and change of control on lasting basis.

7. Turkish example provides some insights about the role of acquisition of control concept on creating uncertainty in the notification process. In 2010, while 7 % of all transactions notified to the

¹ In *Babil* (30.10.2008; 08-61/998-390), TCA considered leasing of a ready-mixed concrete plant for five years to constitute a merger transaction as five years was evaluated to be a sufficient time period to exercise decisive influence in ready-mixed concrete market.

² In one case (20.02.2013; 13-11/163-85), a joint bidding agreement which did not include any transfer of shares was considered to constitute a merger transaction by TCA as the parties agreed that both parties would have veto rights about joint venture’s annual development plan, adaptation of the budget, decisions concerning the development of products and pricing.

Turkish Competition Authority (TCA) were out of the scope of merger control legislation, the ratio decreased to 6 % in the following year. That is, statistics of 2010 and 2011 indicate that acquisition of control concept does not cause too much uncertainty in determining whether a transaction has to be notified to the TCA.

8. According to the Communiqué 2010/4, acquisition of minority shares that do not confer an outright right to control the undertaking cannot be regarded as an acquisition which has to be notified. On the other hand, acquisitions of minority shareholdings falling short of ensuring a change in control can be examined under Articles 4 and 5 of the Competition Act prohibiting anti-competitive agreements, concerted practices and decisions, and providing exemption conditions for anti-competitive conduct respectively. As a result, not considering acquisition of minority shares' as an acquisition does not lead to a problem in Turkish merger control regime. And thus, TCA does not have any plans to deal with this issue. On the other hand, expanding the definition of a merger transaction to cover minority shareholdings may cause too many notifications which do not raise any competitive concerns and transaction costs for firms and misallocation of competition authority resources without any enforcement benefits.

9. Before the amendment of the Communiqué 2010/4 on February 1, 2013, notification was not required for transactions without any affected market³ except for joint ventures, even if they exceeded the notification thresholds. Affected market test aimed to eliminate notification requirement for transactions which did not raise any competitive concerns. However, affected market test required undertakings to define relevant market(s) and make comprehensive analysis of the transaction in order to decide whether the transaction resulted in an affected market and caused uncertainty in determining whether a transaction had to be notified. For example, some undertakings preferred to notify transactions without any affected market⁴. As "affected market" test did not provide the expected benefits, it was abandoned in 2013. After the amendment, all merger transactions which exceed notification thresholds have to be notified without considering whether they raise competitive concerns or not.

10. Apart from previous discussions, it should be noted that according to the Communiqué 2010/4, establishment of interlocking directorates that do not confer an outright right to control the undertaking is not considered as a merger transaction. Interlocking directorates may be reviewed under rules on anti-competitive agreements.

2. Acquisition of Assets

11. According to Article 5 (1) of Communiqué 2010/4, the acquisition of direct or indirect control over all or part of one or more undertakings is considered as a merger or acquisition. In this regard, the object of control can be some of the assets of undertakings. The acquisition of control over assets is considered under rules of on mergers and acquisitions if the transaction involves assets to which a market turnover can be attributed. The transfer of customer lists and intellectual property rights are also considered as covered transaction if those assets constitute a business with a market turnover.

³ See paragraphs 28 and 29 of the Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions which provides that "*Affected market indicates horizontal and vertical relations between relevant product markets. Within this framework, the fact that there is a relevant product market where the activities of the parties overlap horizontally or vertically fulfills the condition of the existence of an affected market provided that at least one party operates in Turkey ... Horizontal relationship indicates the overlap in the same level where at least two of the parties are commercially active in the same product market while vertical relationship indicates the cases where at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates.*"

⁴ In 2011, TCA received 13 such notifications.

12. For example, in *Mudurnu*⁵, TCA assessed whether acquisition of a trademark constitutes a merger transaction. In its decision, TCA concluded that the trademark formed the basis of marketing activities of the undertaking and played an essential role in sales and acquisition of the trademark constituted a merger transaction. In another case⁶, acquisition of customer list and employees of an undertaking operating in freight forwarder was considered to constitute a merger transaction by TCA.

13. Moreover, in *Migros*⁷, acquisition of rental contract of three retail stores was considered to constitute a merger transaction by TCA as in organized retail market store space is crucial to operate in the market.

3. Joint Ventures

14. Article 5 (3) of Communiqué 2010/4 provides that formation of a joint venture which would permanently fulfill all of the functions of an independent economic entity shall constitute a merger transaction. Therefore, two conditions must be fulfilled in this regard: (a) an acquisition of joint control by two or more undertakings and (b) full-functionality.

15. A joint venture will be fully functional if it performs the functions normally carried out by an undertaking operating on the same market in which the joint venture operates. Also a joint venture must be formed for a long enough duration to bring about a lasting change in the structure of the undertaking concerned, in order to constitute a merger transaction.

16. In one case⁸, two undertakings⁹ operating in manufacture and distribution of vehicle tires agreed to create a joint venture which would also manufacture and distribute vehicle tires. The Competition Board examined whether the joint venture fulfilled the full-functionality criterion. Following the transaction both parent companies would continue to operate in vehicle tires market, the joint venture would supply its goods in Turkey only to original equipment manufacturers, the price of the products produced by the joint venture would be determined by the parent companies according to a formula, products produced by the joint venture would be distributed in Turkey by one of the parent companies. The Competition Board concluded that the joint venture would not be autonomous in operational respect and therefore could not be dealt under rules on mergers and acquisitions. The Competition Board decided that the notified transaction was a cooperation agreement within the scope of Article 4 and Article 5 of the Competition Act.

17. A joint venture which has the aims or effect of restricting competition between the parent companies also constitutes a merger transaction and it can be examined under rules on anti-competitive agreements. Article 13 (3) of the Communiqué 2010/4 provides that formation of a joint venture which constitutes a merger transaction can also be assessed within the framework of the Communiqué 2010/4 if it has the goal or effect of limiting competition among undertakings. Although in some cases¹⁰ TCA examined whether the joint venture would cause restriction of competition between the parent companies, the Board has never decided that a joint venture which defined as a merger transaction infringes Article 4 of the Competition Act.

⁵ 06.05.2009; 09-21/439-10

⁶ 27.09.2012; 12-46/1395-468

⁷ 14.08.2008; 08-50/721-281

⁸ AKO-SRI (06.02.2013; 13-09/119-65)

⁹ Abdulkadir Özcan Otomotiv Lastik San. ve Tic. A.Ş. (AKO) and Sumitomo Rubber Industries, Ltd. (SRI)
¹⁰ Doganlar-Kelebek (28.08.2012; 12-42/1312-428), General Atlantic-Yemek Sepeti (17.10.2012; 12-51/1447-494), Unmaş-Europastray (27.11.2012;12-60/1598-582)

18. Before the Communiqué 2010/4 came into force, joint ventures which would restrict competition between parent companies were reviewed under Article 4 and Article 5 of the Competition Act without strict time limits and joint ventures which were cleared by the Board would also be reviewed under Article 4 and Article 5 of the Competition Act and this caused uncertainty¹¹. Article 13 (3) of the Communiqué 2010/4 provides legal certainty and time limits about assessment procedure of joint ventures which may restrict competition between parent companies.

¹¹ *Akdeniz Çimento* (03.10.2006 06-69/930-267)