

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

Working Party No. 3 on Co-operation and Enforcement

THE TREATMENT OF CREEPING ACQUISITIONS IN MERGER CONTROL

-- Turkey --

15 February 2011

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 February 2011.

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1. This contribution is intended to give brief information on the topic of the *Treatment of Creeping Acquisitions in Merger Control* by citing the relevant provisions in the legislation on merger control in Turkey and the decisions of the Competition Board, the decision making body of the Turkish Competition Authority.

2. First of all, the Competition Board adopted a new communiqué on mergers and acquisitions which entered into force as of 1st of January, 2011. The new communiqué, namely Communiqué No. 2010/4 concerning the Mergers and Acquisitions calling for the Authorization of the Competition Board, replaced the previous Communiqué No. 1997/1 and brought some changes to the merger control rules in Turkey such as elimination of market share threshold.

3. The Communiqué No. 2010/4, unlike the previous one which did not include any provision on the topic of the discussion, provides that in partial acquisitions two or more transactions carried out between the same persons or parties within a period of two years shall be considered as a single transaction for the calculation of turnovers.¹ As is well known, the purpose is to avoid escape of such transactions from merger control rules applicable. No decision has been taken yet on the topic under the Communiqué No. 2010/4.

4. Although the previous Communiqué No. 1997/1 lacked any provision on the topic, there are few decisions taken by the Competition Board which addressed the topic in the past when the Communiqué No. 1997/1 was in force.

5. For instance, in one decision,² the Competition Board has mentioned that several legal transactions which are realized between the same parties within a short period of time and which constitute a whole in themselves are considered as a single transaction. According to the decision whether the transactions constitute a single concentration or not becomes important in deciding whether the notification thresholds are exceeded. Moreover, the decision also provides that the reference legislation applied in the EU treats transactions between the same persons or undertakings realized within a period of two years as a single concentration in calculating turnovers. Based on these considerations, the transactions in question were not considered as a single concentration as the parties to the transactions were different.

6. Similar views were also expressed in another decision³ concerning an acquisition consisting of two separate transactions. In this case, to simplify, the acquirer acquired the shares of Company A in November 2008. Company A later acquired the assets of Company B in December 2008. Companies A and B were controlled by the same family before the transactions. As a result of the transactions the acquirer gained control of the entire business of the family controlling Companies A and B in the relevant market. According to the Competition Board although there were two separate transactions, they were connected with each other and involved acquisition of control of a single business by the same acquirer. Therefore, the Competition Board regarded the two separate transactions which occurred within a short period of time as a single transaction. In reaching this conclusion, the Competition Board has expressly mentioned the reference legislation applied in the EU, the details of which were not cited in the previous decision mentioned above, as *Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)* which provides that “... two or more transactions ... which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.”⁴ Moreover, the

¹ Article 8(5) of the Communiqué No. 2010/4.

² *Mudurnu*, dated 6.5.2009 and numbered 09-21/439-107.

³ *Gül Ambalaj/Gül Matbaacılık/Selçuklu Holding*, dated 25.11.2009 and numbered 09-57/1355-348.

⁴ See Article 5.2 of the Council Regulation No. 139/2004.

decision has also summarised the view expressed in *Commission Consolidated Jurisdictional Notice under Council Regulation No. 139/2004 on the control of concentrations between undertakings* that a single concentration may occur in case control of a single business is acquired by the same acquirer through several legal transactions.