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Serial Acquisitions and Industry Roll-ups – Note by Türkiye

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More documents related to this discussion can be found at www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

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Türkiye

1. Introduction

1. The main objective of The Act no 4054 on the Protection of Competition (Act No. 4054), which the Turkish Competition Authority (TCA) is empowered to enforce, is to prohibit cartels and other restrictions on competition, to prevent the abuse of dominant position by a firm that has a dominant position in a particular market and to prevent the creation of new monopolies by monitoring certain mergers and acquisitions.

2. Therefore, the objective of the TCA is to facilitate and protect competition in the markets. In order to achieve this goal, the TCA mainly; penalises companies that distort or prevent competition in the market, through examination and investigation procedures that are subject to detailed regulation, and prevents the creation of monopolies in the market by examining mergers, acquisitions and joint ventures that exceed certain thresholds specified in the relevant secondary legislation.

3. In this context, the examination and authorization of mergers and acquisitions is one of the main duties of the Turkish Competition Board (the Board).

2. The Current Legal Framework on Acquisitions

4. The process of evaluation acquisitions by the TCA and obtaining the approval of the Board for the transaction in question is crucial to prevent significant lessening of competition in a market for goods or services in all or part of the country, in particular in the form of the creation or strengthening of a dominant position.

5. The Board evaluates acquisitions notified to it primarily in accordance with Act No. 4054 and the Communiqué on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4).

6. In this regard, Article 7 of Act No. 4054 which regulates the control of mergers and acquisitions includes the following provisions:

> *"It is illegal and prohibited for one or more undertakings to merge, or for an undertaking or a person to acquire – except by inheritance – assets, or all or part of the partnership shares, or instruments conferring executive rights over another undertaking, where these would result in a significant lessening of effective competition within a market for goods or services in the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position.*
>
> *The Board shall, by means of notices to be issued by it, specify the types of mergers and acquisitions which must be notified to the Board and for which authorisation must be obtained in order for them to be legally valid."*

7. Furthermore, under Article 7 of Communique No. 2010/4,

> *"in case in a merger or an acquisition:*
>
> *The total turnovers of the transaction parties in Türkiye must exceed seven hundred and fifty million Turkish Liras (TL), and the turnovers of at least two of the transaction parties in Türkiye must individually exceed two hundred and fifty million TL, or*

The asset or activity subject to acquisition in acquisition transactions, and at least one of the parties of the transaction in merger transactions have a turnover in Türkiye exceeding two hundred and fifty million TL and the other party of the transactions has a global turnover exceeding three billion TL

authorization of the Board shall be required for the relevant transaction to carry legal validity."

8. Consequently, an acquisition below these turnover thresholds does not require the approval of the Board.

9. However, other scenaraios may also arise where competition in the relevant market may be adversely affected as a result of the serial acquisitions that fall below the above-mentioned thresholds by the same undertaking in the same market, in other words, acquisitions that do not require authorization of the Board.

10. In order to prevent serial acquisitions that may have anti-competitive outcomes, Article 8 of Communiqué No. 2010/4 provides that two or more transactions between the same persons or parties or by the same undertaking on the same relevant product market within a period of three-years shall be considered as a single transaction in terms of turnover calculation.

11. In this contribution, the history of the legal framework in Türkiye regarding turnover thresholds on acquisitions will be presented by including the debates throught the years.

3. The History of Legal Framework for Turnover Thresholds on Acquisitions

12. In order to determine the mergers and acquisitions subject to notification and authorisation, the Board firstly issued the Communiqué No. 1997/1 on Mergers and Acquisitions Requiring Authorisation from the Competition Board (Communiqué No. 1997/1).

13. Article 2 of the Communiqué No. 1997/1 listed the situations considered as merger or acquisition. Article 4 of the Communiqué No. 1997/1 stipulated which of these transactions require the authorisation of the Board in order to be legally valid. Accordingly, in order for the transaction to be legally valid, it was obligatory to notify and obtain authorisation from the Board *"in the event that the total market share of the undertakings carrying out the merger or acquisition in the relevant product market in the whole or part of the country exceeds 25% of the market, or even if it does not exceed this ratio, if their total turnover exceeds ten trillion TL"*. The turnover threshold stated as ten trillion TL in Article 4 of the Communiqué No. 1997/1 was increased to twenty-five trillion TL in 1998 and remained unchanged until 2011. However, there was no provision in the Communiqué No. 1997/1 on serial acquisitions.

14. At this point, it would be useful to mention the main problems that arose during the enforcement of Communiqué No. 1997/1 until 2011 with respect to the thresholds set out in Article 4.

- The existence of a market share threshold created uncertainty as to the notification obligations of undertakings.
- The thresholds only measured whether certain thresholds were met as a result of the transaction. Notification obligations were also applicable to transactions which, while fulfilling the required thresholds, did not lead to a significant increase market

share or financial strength and, accordingly did not significantly lessen competition in the relevant market.

- The turnover threshold was last updated in 1998. Almost all those interested in the legal regulations and practices of the merger control system in Türkiye argued that the twenty-five trillion TL turnover threshold should be revised. In addition, the turnover threshold, which in recent years has been assessed mainly on the basis of the turnover in the relevant product market in recent years, was no longer fit for the purpose.
- Communiqué No 1997/1 was not sufficiently clear as to how turnover was to be calculated in different transaction cases, which undertakings' turnover was to be taken into account and whether turnover was to be limited to the turnover generated in the relevant market.

15. In order to address the above mentioned issues, a study to review the Communiqué No. 1997/1 was initiated in 2007, taking into account the experiences gained during the 10-years enforcement of the Communiqué No. 1997/1, the developments in the Turkish economy and the changes introduced by the European Union (EU) in merger control legislation.

16. Within the scope of this study, a "Discussion Text on the Revision of Communiqué No. 1997/1" was prepared, and this text was submitted to public opinion. In this process, workshops and various meetings were also organised. As a result of these efforts, Communiqué No. 2010/4 abrogating Communiqué No. 1997/1 was approved by the Board and entered into force as of 01.01.2011.

17. The most important change introduced by Communiqué No. 2010/4 concerned the concentration transactions subject to authorisation. In this respect, Communiqué No. 2010/4, replaced the system of market share thresholds system with a system of turnover thresholds based on Türkiye and worldwide turnover of the parties to the transaction.

18. In the first version of Communiqué No. 2010/4, Article 7 titled "Mergers or acquisitions subject to authorisation" was as follows:

"(1) In a merger or acquisition transaction specified in Article 5 of this Communiqué;

a) The total turnover of the parties to the transaction in Türkiye exceeds one hundred million TL and the turnover of at least two of the parties to the transaction in Türkiye exceeds thirty million TL individually or

b) The global turnover of one of the parties to the transaction exceeds five hundred million TL and the Turkish turnover of at least one of the other parties to the transaction exceeds five million TL,

exceed the thresholds, authorisation of the Board is obligatory for the transaction to be legally valid.

(2) Except for joint ventures, even if the thresholds set forth in the first paragraph of this Article are exceeded, no authorisation from the Board is required for transactions where there is no affected market.

(3) The thresholds in the first paragraph of this article shall be re-determined by the Board every two years following the entry into force of this Communiqué."

19. With this article, it was obligatory to obtain authorisation from the Board for transactions where the turnover of the parties to the transaction in Türkiye and the worldwide exceeded the specified thresholds; however, transactions where the affected

market did not exist, except for joint ventures, were exempted from this obligation even if the turnover thresholds were exceeded. The revised Communiqué also introduced a requirement for the Board to update the turnover thresholds every two years.

20. In addition to all of these developments, Article 7 of Communiqué No. 2010/4 has been revised over time. In 2013, the turnover thresholds in subparagraph (b) of the first paragraph of the relevant article were amended, the second paragraph of the same article was repealed and the third paragraph was amended as the second paragraph. In other words, the Board updated the turnover thresholds according to the third paragraph of the same article and ended the exemption that transactions without an affected market were not be subject to the Board's approval even if the turnover thresholds were exceeded.

21. In 2017, provision of "(3) The thresholds in the first paragraph of this article shall be re-determined by the Board every two years following the entry into force of this Communiqué." was abolished and the relevant article was revised as follows:

> *"(1) In a merger or acquisition transaction specified in Article 5 of this Communiqué;*
>
> *a) The total turnover of the parties to the transaction in Türkiye exceeds one hundred million TL and the turnover of at least two of the parties to the transaction in Türkiye exceeds TL thirty million individually or*
>
> *b) In acquisition transactions, the turnover of the asset or activity subject to the transfer, and in merger transactions, the turnover of at least one of the transaction parties in Türkiye is more than thirty million TL and the global turnover of at least one of the other transaction parties is more than five hundred million TL*
>
> *exceed the thresholds, authorisation of the Board is obligatory for the transaction to be legally valid."*

22. Finally, with the amendment made in 2022, Article 7 of Communiqué No. 2010/4 has reached the current situation mentioned above.

23. In the next section, the legislative changes regarding serial acquisitions over the years are explained.

4. The History of Legal Framework on Serial Acquisitions

24. The re-regulation of the turnover thresholds that determine whether an acquisition is subject to the Board's authorisation or not, provides both a reduction in the Board's workload and a reduction in transaction costs for acquisitions that do not lead to a distortion of effective competition in the markets for goods or services.

25. However, there may be serial acquisitions that when considered individually, do not exceed the relevant turnover thresholds, but when assessed cumulatively, may restrict effective competition in the market. In order to ensure that these transactions are not overlooked, the Board has made some changes to its regulations in the historical process.

26. Communiqué No. 1997/1, which was firstly issued to explain the mergers and acquisitions subject to notification and authorisation, did not contain any provision on serial acquisitions.

27. However, in 2011, with the Communique No. 2010/4, a regulation was introduced regarding how the turnover would be calculated in serial acquisitions. In this context, Article 8 of Communiqué No. 2010/4 included the following provision: "Two or more transactions under paragraph 2 of this Article, 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 listed in Article 7 of this Communiqué." Therefore, serial acquisitions came under the radar of TCA.

28. During the amendment of the relevant provision, three different approaches were discussed in order to include certain acquisitions that are considered significant but do not exceed the prescribed turnover thresholds within the scope of the examination of the TCA. These approaches were; the "sectorial method", the "aggregation model" and "the substantial market power model". Before describing the Board's preferred approach, it would be useful to mention these three approaches.

29. Under the "sectorial method", transactions that would normally not trigger a notification are nevertheless subject to merger control if they take place in a sector where staggered transactions are seen as a means of acquiring market power and increasing concentration. In such cases, sector specific regulation may be the preferred approach, requiring the notification of transactions that would not normally be notifiable.

30. Under the "aggregation model" a series of transactions that would normally not be subject to notification requirements are subject to merger control when the acquisitions are made by the same parties and in the same or a related market over a given period of time.

31. Under the "substantial market power model" any acquisition by a firm with a certain level of market power, regardless of the size or the market share of the target, is subject to merger control.[1]

32. The Board has established the legal framework for the calculation of turnover in serial acquisitions according to the aggregation model.

33. However within the scope of the 2016 cinema sector review, it was determined that Mars Sinema ve Sportif Tesisler İşletmeciliği AŞ (MARS) acquired several movie theatres belonging to different undertakings in 2014-2015 in the "movie theatre services" market, and that these acquisitions were not subject to notification as they were below the turnover thresholds specified in Communiqué No. 2010/4 and therefore could not be examined by the Board.

34. In 2017, the legislative study focusing on the effectiveness of the provision of the fifth paragraph of Article 8 of Communiqué No. 2010/4, which was introduced in order to subject serial acquisitions to the Board's examination. In this framework, it has been observed that the mentioned provision is insufficient in terms of supervision of mergers and acquisitions, which are deemed significant in terms of their nature in competition law, but which are not subject to the Board's authorization due to the fact that they do not exceed the notification thresholds.

35. Therefore, in order to include such transactions within the scope of supervision of the TCA, it is considered necessary to adopt a more comprehensive regulation that adopts the aggregation model, which is also considered to be the most appropriate method in terms of Turkish practice. Consequently, it was deemed appropriate to extend the scope of the fifth paragraph of Article 8 of Communiqué No. 2010/4 to cover a longer period and the transactions carried out by the same undertaking in the same relevant product market within that period. With this re-regulation, the current legal framework for the calculation of turnover in serial acquisitions was established.

36. The most important example in which the cumulative turnover of acquisitions made by the same undertaking in the same market in the last three years is calculated within the

[1] OECD (2015), "Investigations of Consummated and Non-Notifiable Mergers", DAF/COMP/WP3(2014)1, p.16

framework of this provision is the acquisitions in which Migros Ticaret AŞ (MIGROS), the third largest undertaking in the fast moving consumer goods (FMCG) organized retailing sector in Türkiye, partially acquired some stores of retailers in the same market.

37. The last decision published from these acquisitions is the Board decision[2] authorizing the acquisition of 25 stores of Ay-Mar Ticaret Ltd. Şti in Trabzon and Giresun by MIGROS. In the decision, the turnovers of the six acquisitions realized by MIGROS in the same market in recent years are also included in the calculation. When this acquisition is evaluated individually, it is seen that the 2021 turnover related to the acquisition is below the thresholds specified in Article 7 of Communiqué no. 2010/4. When these acquisitions are examined individually, it is concluded that the turnover related to the relevant acquisition is below the thresholds stipulated in Article 7 of Communiqué No. 2010/4.

5. Conclusion

38. In Türkiye, many legislative studies have been carried out on mergers and acquisitions from past to present. Within these studies, the turnover thresholds, which are subject to the approval of the Board for mergers and acquisitions to be valid are of great importance. When revising regulation the legal framework for merger and acquisition transactions, both the economic changes in Türkiye and the regulations in the sample countries were taken into account in the regulations on serial acquisitions. It is believed that reviewing the serial acquisition regulation as often as possible in the future will minimise the possibility of distortion of effective competition in the market through acquisitions.

[2] Decision dated 23.06.2022 and numbered 22-28/449-181.