

Enriched Security for the Concentrations Involving Series of Transactions within the Stock Exchange - Amendments on the Merger Control Regulation in Turkey

Communique No. 2017/2 on the Amendment of Communique No. 2010/4 ("Communique No. 2010/4") on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("Communique No. 2017/2") has been published on the Official Gazette on February 24th, 2017 and entered into force on the same day. Below are our remarks in terms of the substantive amendments introduced by Communique No. 2017/2:

(I) Article 8(5) of Communique No. 2010/4 was stating that "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 listed in Article 7 of this Communiqué". Article 2 of Communique No. 2017/2 amended Article 8(5) of Communique No. 2010/4 as follows: "two or more transactions carried out between the same persons or parties within a period of three years within the same relevant product market shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué".

(II) Article 3 of Communique No. 2017/2 introduced a new paragraph to be included to Article 10 of Communique No. 2010/4, which reads as follows: "If the control is acquired from various sellers by way of series of transactions in terms of securities within the stock exchange, the concentration could be notified to the Turkish Competition Board after the realization of the transaction provided that the following conditions are satisfied: (a) the concentration should be notified to the Turkish Competition Board without delay, (b) the voting rights attached to the acquired securities are not exercised or exercised solely to maintain the full value of its investments based on a derogation granted by the Turkish Competition Board. For the sake of completeness, the Turkish Competition Board may impose conditions and obligations in terms of such derogation in order to ensure conditions of effective competition. This newly introduced provision by Article 3 of Communique No. 2017/2 is similar to Article 7(2) of European Commission Merger Regulation ("ECMR"). At any rate, although there was no similar specific statutory rule in Turkey on this matter until the promulgation of Communique No. 2017/2, the case law of the Turkish Competition Board were shedding light on this matter. To that end, In *Camargo Corrêa S.A. (12-24/665-187, 03.05.2012)*, the Turkish Competition Board reviewed the merger filing for the acquisition of *Cimpor-Cimentos de Portugal, SGPS, S.A. ("Cimpor")* by *Camargo Corrêa S.A. ("Camargo")* by way of a public tender offer. In this case, *Cimpor* is a public company and no single person or entity holds control over it, and rather *Cimpor* is controlled by a shifting alliance.

At any rate, *Camargo* had filed this transaction following its public tender offer but before acquiring the shares. As apparent from the reasoned decision, *Camargo* provided that the exact date for the transfer of shares which will enable the acquisition of control over the Target cannot be determined at the time of filing to the Board. In other words, the share transfer could have happened even before the Board's approval of the transaction. However, *Camargo* explicitly emphasized that even if it had acquired the shares, it had no intention to exercise the voting rights before obtaining the antitrust clearance regarding this transaction. Accordingly, the Board resolved that in case *Camargo* acquires the majority of the shares (providing control) before the antitrust clearance, provided that it does not exercise these voting rights, it would not constitute a violation of Law No. 4054 on the Protection of Competition. In this respect, the Board referred to Article 7(2) of the ECMR and stated that in

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case the transaction is notified for merger control clearance "without delay" and the acquirer does not exercise its voting rights arising from the securities pending the Commission's merger control decision, the transaction may be actualized before the antitrust clearance. To that end, even before the promulgation of Communiqué No. 2017/2, based on the aforementioned precedent the Board recognized that the parties can close a public bid on a listed company before the Turkish Competition Board's approval, subject to the condition that (i) the transaction is notified to the Turkish Competition Board without any delay; and (ii) the acquirer does not exercise the control over the target pending the Turkish Competition Board's approval decision. That said, since this approach had not been solidified through subsequent decisions on that front and Camargo decision appears to be rather unique, a legislation based security on these type of concentrations would be most welcomed.

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