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Competition Authority prepares to raise jurisdictional turnover thresholds and catch killer acquisitions

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Introduction

Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (Communiqué No. 2010/4) on the Mergers and Acquisitions Subject to the Approval of the Competition Board (the Amendment Communiqué) was published on the *Official Gazette* on 4 March 2022 and will enter into force on 4 May 2022.

This article provides an overview of the substantive amendments introduced by the Amendment Communiqué.

Raised merger control thresholds

The Amendment Communiqué raised the Turkish merger control thresholds. Further to the Amendment Communiqué, if a transaction is closed (ie, the concentration is realised) as of or after 4 May 2022, that transaction will be required to be notified in Turkey if one of the following alternative turnover thresholds is met:

- the aggregate turnover of the transaction parties exceeds 750 million Turkish liras (approximately €7.19 million or \$84.9 million) and the turnover of at least two of the transaction parties each exceeds 250 million Turkish liras (approximately €23.9 million or \$28.3 million); or
- the turnover of the transferred assets or businesses in acquisitions exceeds 250 million Turkish liras and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion Turkish liras (approximately €287.9 million \$339.7 million) or the Turkish turnover of any of the parties in mergers exceeds 250 million Turkish liras and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion Turkish liras.

In summary, the Amendment Communiqué updates the Turkish merger control thresholds as follows:

- the previous threshold of 30 million Turkish liras (approximately €2.8 million or \$3.3 million) has been raised to 250 million Turkish liras;
- the previous threshold of 100 million Turkish liras (approximately €9.5 million or \$11.3 million) has been raised to 750 million Turkish liras (approximately €71.9 million or \$84.9 million); and
- the previous threshold of 500 million Turkish liras (approximately €47.9 million or \$56.6 million) has been raised to 3 billion Turkish liras.

(All currency conversions are based on the Turkish Central Bank's applicable average buying exchange rates for the financial year 2021.) Before 4 May 2022, the current regime will apply.

These new notification thresholds have updated the previous thresholds, which had remained in force for more than nine years. During that period, the exchange and inflation rates increased significantly. Based on the US dollar and euro equivalents of the applicable thresholds at the time of their introduction, the update will serve as an equaliser, as the new dollar and euro thresholds are close to the levels that were applicable when the previous updates were enacted.

The previous update on notification thresholds was made in February 2013, which means that the national competition law enforcement regime has used the same thresholds for more than nine years. Before the February 2013 amendments, the older figures had remained in use for only a little more than two years.

In February 2013, the US dollar and euro equivalent of the applicable thresholds were, respectively, in the vicinity of:

- \$57 million – €42 million;
- \$17 million – €13 million; and
- \$286 million – €210 million.

The corresponding figures in dollars and euros are now very close to the figures that were applicable in February 2013:

- \$53 million – €48 million;
- \$18 million – €16 million; and

- \$212 million – €192 million.

Therefore, the Amendment Communiqué has closely aligned the figures with their 2013 levels in order to correspond with the increases in exchange and inflation rates.

New merger control regime for undertakings active in certain markets/sectors

Due to both rapid changes in the technology industry, the Amendment Communiqué has also introduced a new merger control regime for undertakings active in certain markets/sectors. Further to the Amendment Communiqué, the "Turkish turnover threshold of 250 million Turkish liras" mentioned above will not be sought for the acquired undertakings active in the numerous fields or assets related to these fields if they:

- operate in the Turkish geographical market;
- conduct research and development activities in the Turkish geographical market; or
- provide services to Turkish users.

The fields and related assets include:

- digital platforms;
- software or gaming software;
- financial technologies;
- biotechnology;
- pharmacology;
- agricultural chemicals; and
- health technologies.

Turnover calculations

The Amendment Communiqué also updated the rules that apply to the calculation of turnover of financial institutions in accordance with recent changes to financial regulations. The recent updates to article 9 of Communiqué No. 2010/4 are as follows:

- the calculation of financial institutions' turnovers. The Amendment Communiqué aligns the wording and terms in view of the applicable banking and financial regulation – namely, it excludes the term "participation banks" and refers to the term "banks" in general, which covers all legal forms of banks; and
- the names and references of the relevant regulations issued by the Banking Regulatory and Supervisory Agency and the Capital Markets Board.

E-Devlet

Under Communiqué No. 2010/4, the notification form and its attached documents are submitted to the Competition Authority's headquarters in Ankara by physical delivery. The recent updates allow notifying parties to submit the notification form via e-Devlet, an elaborate system of web-based services, one of which is electronic submission. E-Devlet was already made available for submissions, with increased usage during the pandemic period. Communiqué No. 2010/4 explicitly mentions this alternative methods of submission in order to make it official.

Dominance testing

In June 2020, the dominance test that is applicable to the review of mergers was reformulated from the "creation or strengthening of a dominant position, thereby significantly lessening of competition" test into the significant impediment to effective competition (SIEC) test. In order to align with this modification in the underlying regulation, the Amendment Communiqué now provides that:

[m]ergers and acquisitions which would result in a significant lessening of effective competition within the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position are prohibited.

This reflects the recently introduced SIEC test, as the wording of "one or more undertakings with a view to creating a dominant position" has been replaced with "particularly in the form of creating dominant position".

Notification form

The Amendment Communiqué also revises the structure and content of the notification form, which is annexed to the Amendment Communiqué. In terms of the definition of "affected markets", the Amendment Communiqué excludes the expression: "possibly affected by the transaction subject to the notification"; instead, it provides that:

in Turkey affected markets consist of all the relevant product markets and geographical markets where a) two or more of the parties are engaged in commercial activities in the same product market (horizontal relationship), b) At least one of the parties are engaged in commercial activities in the downstream or upstream market of any product market in which the other operates (vertical relationship).

Communiqué No. 2010/4 provided that the information requested under sections 6, 7 and 8 of the notification form (eg, import conditions, supply structure, demand structure, market entry conditions and potential competition and efficiency gains) was not required in cases where:

- the aggregate market share of the parties did not exceed 20% in terms of the horizontal relationships; and
- the market share of one of the parties did not exceed 25% in terms of the vertical relationships within the affected markets.

On the other hand, the new template form requires parties to provide some of the detailed information that was sought under sections 6, 7 and 8 of the former template form in cases where there are affected markets in Turkey, irrespective of market shares held by the parties in such markets.

Further, the Amendment Communiqué requires that information subject to a request for confidential treatment be highlighted in red,

which was not necessary on the previous template notification form.

The template form emphasises that the transaction value reflects the value of all assets and pecuniary and non-pecuniary benefits (denominated in Turkish lira) that the acquirer has acquired or will acquire from the seller within the scope of the transaction. In this respect, the transaction value now includes all pecuniary payments to be made within the scope of:

- the transaction;
- voting rights;
- securities;
- movable and immovable assets;
- conditional payments;
- additional payments for non-compete obligations (if any); and
- obligations of the acquirer.

Comment

Updated local turnover thresholds of notification were due for a long time. The last update was nine years ago, in 2013. The adjustment of the applicable thresholds (ie, an increase by five times for the worldwide turnover thresholds and by seven times for the Turkish turnover thresholds) has returned the equivalent value in US dollars and euros close to their 2013 levels. However, the Competition Authority has now clarified with the threshold exemptions in the new regulation that it wants to review the transactions of companies that reach the following markets (and users), regardless of whether they exceed Turkish thresholds:

- digital platforms;
- software;
- fintech;
- biotech;
- pharmacology;
- agriculture chemicals; and
- health technology.

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