

# Increased security for concentrations involving stock exchange transactions

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## Amendments

### Case law

### Comment

Communique 2017/2 on the Amendment of Communique 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board was published in the *Official Gazette* on February 24 2017 and entered into force the same day. This update outlines the substantive amendments introduced by Communique 2017/2.

## Amendments

Article 8(5) of Communique 2010/4 stated 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 Communique". Article 2 of Communique 2017/2 has amended Article 8(5) of Communique 2010/4 as follows: "two or more transactions carried out between the same persons or parties or within the same relevant product market by the same undertaking concerned within a period of three years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué".

Article 3 of Communique 2017/2 introduced the following paragraph to Article 10 of Communique 2010/4:

*"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 completeness, the Competition Board may impose conditions and obligations in terms of such derogation in order to ensure conditions of effective competition. This newly introduced provision is similar to Article 7(2) of the EU Merger Regulation (139/2004/EC).

## Case law

Although no similar statutory rule on this matter existed in Turkey until the promulgation of Communique 2017/2, Competition Board case law had started to clarify this matter. To that end, in *Camargo Corrêa SA* (12-24/665-187, May 3 2012), the Competition Board reviewed the merger filing for the acquisition of Cimpor-Cimentos de Portugal, SGPS, SA by Camargo Corrêa SA through a public tender offer. Cimpor is a public company and no single person or entity holds control over it – rather, it is controlled by a shifting alliance of shareholders.

Camargo had filed this transaction following its public tender offer, but before acquiring the shares. As is clear from the reasoned decision, Camargo claimed that the exact date for the transfer of shares

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that would enable the acquisition of control over the target could not be determined at the time of filing to the Competition Board. In particular, the share transfer could have occurred before the Competition Board's approval of the transaction. However, Camargo explicitly emphasised 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 Competition Board resolved that if Camargo acquired the majority of shares (providing control) before the antitrust clearance – provided that it did not exercise these voting rights – it would not violate Law 4054 on the Protection of Competition.

In this respect, the board referred to Article 7(2) of the EU Merger Regulation and stated that if 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 actualised before the antitrust clearance. To that end, even before the promulgation of Communiqué 2017/2, based on the aforementioned precedent, the Competition Board recognised that the parties can close a public bid on a listed company before obtaining the Competition Board's approval, subject to the condition that the transaction is notified to the Competition Board without delay and the acquirer does not exercise control over the target pending the Competition Board's approval decision.

### **Comment**

Since the *Camargo* approach was not solidified through subsequent decisions and appears to be unique, legislative guidance on this type of concentration is most welcome.

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