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COMMUNIQUÉ CONCERNING THE MERGERS AND ACQUISITIONS CALLING FOR THE AUTHORIZATION OF THE COMPETITION BOARD

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As per article 7 of Law on the Protection of Competition, there are mergers and acquisitions which require the permission of the Competition Board. Procedures and principles concerning the determination of mergers and acquisitions which require authorization and notification of the Competition Board are regulated by the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (the "Communiqué") published on the Official Gazette on 07.10.2010 and numbered 27722.

This regulation has been amended by another communiqué numbered 2012/3 published on the Official Gazette dated 29.12.2012 and numbered 28512. This amendment has changed article 7 of the Communiqué which sets the thresholds for the mergers and acquisitions which require the Competitions Board permission.

The new form of the Communiqué's article 7 is as follows:

Mergers or Acquisitions Subject to Authorization

"ARTICLE 7 – (1) In a merger or acquisition transaction as specified under Article 5 of this Communiqué, authorization of the Board shall be required for the relevant transaction to carry legal validity in case,

(a) Total turnovers of the transaction parties in Turkey exceed one hundred million TL, and turnovers of at least two of the transaction parties in Turkey each exceed thirty million TL, or

(b) At least one of the transaction parties has a turnover in Turkey exceeds thirty million TL and at least one of the remaining parties has a global turnover exceeding five hundred million TL in merger transactions, asset or activity subject to transfer in acquisition transactions.

(2) The Board shall re-establish the thresholds listed in paragraph 1 of this article every two years."

This new form of the article 7 enters into force on February 1st, 2013. With this regulation, among the thresholds enforced, the first one stipulated at above article 7/(a) in relation to the domestic turnover is left unaffected, while the Turkish turnover threshold of TL 5 million, set for the second threshold system which also takes global turnover into account was raised to TL 30 million. In the determination of the mentioned threshold, the turnover of the merging parties or of the acquired asset or operation shall be taken as the basis.

The latest communiqué numbered 2012/3 also revoked the existing exceptions in relation to the affected market which was stipulated at article 7/2 in the previous form of the article. In accordance with the Communiqué amendment in question, authorization applications to be made after 01.02.2013 must take the new thresholds into account.[1]

It should be noted that the transactions which should be considered as a merger and acquisition is determined in accordance with article 5 of the Communiqué.

Cases Considered as a Merger or an Acquisition

ARTICLE 5 – (1) Under Article 7 of the Act,

(a) The merger of two or more undertakings, or

(b) The acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means shall be considered a merger or acquisition transaction, provided there is a permanent change in control.

(2) For the purposes of this Communiqué, control may be acquired through rights, contracts or other instruments which, separately or together, allow de facto or de jure exercise of decisive

[1] Turkish Competition Authority *The Communiqué on the Amendments Made to the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board was published in the Official Gazette* http://www.rekabet.gov.tr/default.aspx?nsw=MWfHtWN6vV2sgr5m9SXqow==-SgKWD+pQItw=

influence over an undertaking. In particular, these instruments consist of ownership right or operating right over all or part of the assets of an undertaking, and those rights or contracts granting decisive influence over the structure or decisions of the bodies of an undertaking. Control may be acquired by right holders, or by those persons or undertakings who have been empowered to exercise such rights in accordance with a contract, or who, while lacking such rights and powers, have de facto strength to exercise such rights.

(3) Formation of a joint venture which would permanently fulfil all of the functions of an independent economic entity shall constitute an acquisition transaction under sub-paragraph (b) of paragraph 1 of this Article. In such transactions, each transaction party is considered to be the acquiring party.

(4) Closely related transactions which are tied to conditions or which are realized rapidly through securities within a short period of time shall be considered as single transactions under the scope of this Article.

In conclusion, the first step to determine whether a transaction requires the permission of the Competition Board or not is to assess the concerned transaction as per article 5. If such transaction is considered as a merger or an acquisition pursuant to the Communiqué, then the second step should be to watch the thresholds set out in article 7. In the event the concerned parties' turnovers in a merger or the property in an acquisition transaction exceed the limits; such merger or acquisition requires the permission of the Competition Board.

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