

THE OBLIGATION TO GIVE NOTICE TO THE COMPETITION BOARD ABOUT THE MERGERS AND ACQUISITIONS IN TURKEY

I. Relation of Merger and Acquisition Transactions with Competition Law

Competition Law is a rapidly developing and dynamic discipline whose importance in terms of the economic balance is increasing every day. Mergers and acquisitions taking place in the commercial life are the most frequently discussed topics considered from the perspective of Competition Law and still continue to be discussed in respect of ensuring the continuity of market economy and misuse of the dominant position in the market.

As is well known the commercial actors who have reached a definite power in the market sometimes misuse the economic power they possess with an aim to make more profits. This situation impairs the free market economy and gives rise to the formation of a “monopoly” in the market. Just at this point Competition Law legislation and particularly the point of view of Competition Law steps in and imposes limitations and restrictions on the actions of the commercial actors.

Mergers and acquisitions are one of the building stones of Competition Law. In fact, sometimes benefits are derived more than expected or sometimes benefit is derived in the interest of the economy as a result of the entry of a bigger actor into the market thanks to merger and acquisition transactions. Such transactions may either elicit results in favor of the consumer or harm the market and consumers. At this point it must especially be stated that the occupation of a dominant position in the market by a “commercial actor” is indeed not prohibited by the relevant legislation but there are restrictions to be paid attention to as far as the concepts of merger and acquisitions are concerned.

As is well known some commercial enterprises sometimes reach a size bigger than expected as a result of the mergers and acquisitions, thus preventing other small enterprises to remain in the market or the en-

try of new enterprises into the market. Just at this point the system of supervision of mergers and acquisitions by the Competition Board steps in as laid down by the Law No.5054 on the Protection of Competition. The operation of this supervision system starts with the notice to be given by the enterprises that shall realize the merger and acquisition transactions. Supervision system is explained in detail in the Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring Permission from the Competition Board (Communiqué No. 2010/4). Indeed, it has been determined by the Competition Board as one of the missions of the Supervision System to monitor, regulate and supervise the market with a view to prevent the misuse of the dominant position in the market and reduce the mergers and acquisitions so as to prevent the decrease of competition and to prevent the impairment of the competition environment as a result of monopolization and cartelization.

II. Mergers and Acquisitions Before the Competition Board

The article 7 of the Law No. 5054 on the Protection of Competition in summary states that the law ensures the protection of competition by preventing the commercial actors who have established a dominance over the market by means of practices preventing, damaging and restricting competition to misuse that dominance. The merger and acquisition transactions which are to be subject to the permission of Competition Board based on that article are announced by communiques. Under this scope the Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring Permission from the Competition Board (Communiqué No. 2010/4) specifies the merger and acquisition transactions about which the Competition Board must be informed and the merger and acquisition transactions for which the permission of the Competition Board must be obtained. According to the said communiqué the first factor to be considered about the transactions which are to be deemed as a merger and acquisition transaction is if a lasting change has

¹ Erdem, H. Ercüment, Mergers and Acquisitions in Turkish and EC Competition Law, 2013, p.32

² Competition Authority 16th Annual Report 2014

occurred in the control of the relevant company. As shall be understood from the text of the article titled “Transactions which are deemed as merger and acquisition” of the Communiqué No. 2010/4, in cases where no lasting change took place in the control of the company, it is not possible to speak of the existence of a merger and acquisition transaction. Such a change in the control of the company may only be said to have taken place in such cases as mergers, transfer of shares or property and other instruments.

III. Merger and Acquisition Transactions Subject to the Obligation of Notification and Supervision

Some mergers and acquisitions are subject to the permission of the Competition Board pursuant to the article 7 of the Communiqué No. 2010/4 for the purpose of preventing the misuse of the dominant position in the market, maintaining the continuity of competition, providing the new commercial actors the opportunity to enter into the free market economy and protecting the small commercial enterprises. Under this scope, an enterprise must first of all exceed the turnover thresholds stated in the communiqué numbered 2010/4 in order to give notice to the Competition Board about a merger or acquisition transaction. Although it has been stated that the said turnover thresholds shall be re-determined periodically the sum of the turnovers of the parties to the transaction must exceed hundred million Turkish Lira or the turnovers of minimum two of the parties to the transaction must exceed thirty million Turkish Lira separately or, in case of takeover transactions, the turnover of minimum one of the parties to the transaction in Turkey must exceed thirty million Turkish Lira and the turnover of minimum one of the other parties to the transaction all over the world must exceed five hundred million Turkish Lira in order to qualified as the actual turnover threshold. It goes without saying that in case of exceeding the above mentioned threshold, the legal validity of the relevant merger and acquisition transaction pre-requires the permission to be obtained from the Competition Board.

The Competition Board must be informed about the merger and acquisition transaction to be made in order to obtain the above mentioned permission. The article 10 of the Communiqué No. 2010/4 also explains in detail how that notice shall be made. Accord-

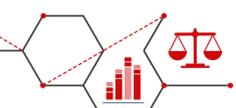
ing to the provisions of the above mentioned article the notice shall be given by using the Notice Form attached to the Communiqué. Liability for the parties shall arise out of the misrepresentations or misleading statements in the Notice Form and consequently administrative fine shall be imposed on the relevant party because the said notice must contain all the information and documents requested completely. The fine to be paid due to the misrepresentations or misleading statements in that notice is stated in the article 16 of the Competition Law where it is further stated that the fine shall be imposed only on the transferee in case of acquisition and on each of the parties in case of merger.

If the Competition Board is not given any notice about this merger and acquisition transaction about which the Competition Board must be informed or that notice is given after the transaction has been made, then the transactions made shall not be deemed legally valid and the date on which the transaction in question was recorded by the Competition Board shall be deemed to be the date of the notice. In that case Competition Board shall inspect the merger and acquisition transaction ex officio. If it is decided that the legal transaction in question does not require giving notice thereof based on that examination, the legal transaction shall be permitted but an administrative fine shall be imposed on the relevant parties due to the failure to give notice; if it is decided that the transaction in question is subject to giving notice thereof it shall be decided to terminate the transaction in question in addition to the administrative fine, invalidate all the actually realized transactions and procedures and return all kinds of shares and assets acquired to their previous owners if possible and, if this is not possible, to assign and transfer them to the third parties and not to let the transferees take part in the management of the enterprises that they have taken over until the latter have been assigned to their previous owners or to the third parties and to take other measures that may be deemed necessary.

IV. Conclusion

As shall be understood from the foregoing explanations the merger and acquisition transactions between the businesses may not be considered independently from the Competition Law. The dynamics

³ Article 5/1 of Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring Permission from the Competition Board



of the commercial life is indeed unpredictable. However, a permanent supervision must be maintained for the sake of ensuring the continuity of competition. It is evident that the supervision process must be considered under two headings. The first one is to determine whether the merger and acquisition transaction in question is subject to the permission of the Competition Board. The second main heading is to deliver the completely and correctly filled out notice form to the Competition Board whereas making misrepresentations and giving misleading information at this phase shall have serious material consequences possibly leading to the dissolution of the relevant commercial enterprises.

As has been stated above, Legislation of the Competition Law does not prohibit the strengthening of commercial enterprises and their rising to a dominant status in the market. However, as has been stated above, it goes without saying that the phases of action specified above must be carried out very carefully and scrupulously in order to prevent the severe consequences.

⁴ Law No. 4054 article 16/1-d

⁵ Article 11/1 of Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring Permission from the Competition Board

⁶ Law No. 4054, article 11/1-b

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