



## Turkey: The Turkish Competition Authority amends the merger notification test

The Turkish Competition Authority has amended the notification test. It simplifies the notification requirements and alleviates the merger notification burden on foreign-to-foreign transactions. The new test will be applicable starting 1 February 2013.

The Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Turkish Competition Board (the “**Communiqué**”), which introduced a new merger control regime, has been in force for two years now. During this time, the new regime has been tested and the shortcomings have been identified by both practitioners and competition authority officials. According to the Communiqué, the Turkish Competition Authority (the “**TCA**”) should consider the notification thresholds once every two years. In this respect, the TCA published a discussion paper (the “**Discussion Paper**”) for public opinion that evaluated the efficiency of the merger notification test under the Communiqué and proposed a number of amendments. Consequently, the TCA has amended the Communiqué, seeking to improve the current merger notification test by providing further legal certainty. The new test will be applicable starting 1 February 2013.

### The new merger notification test

Pursuant to the amendments, for a merger or acquisition transaction specified under the Communiqué to be legally valid, the approval of the Turkish Competition Board (the “**Competition Board**”) is required where:

- 1) the aggregate turnover in Turkey of the parties to the transaction exceeds TL 100 million (approx. EUR 43 million) and at least two of the parties to the transaction each have a turnover of TL 30 million (approx. EUR 13 million) or more in Turkey; OR
- 2) in acquisition transactions, the asset or the activity subject to the acquisition; and in mergers, the turnover of at least one of the transaction parties generated in Turkey exceeds TL 30 million (app. EUR 12 million) and the worldwide turnover of at least one of the other transaction parties exceeds TL 500 million (app. EUR 200 million).

The TCA has not made any amendments on the turnover test under item (1) involving Turkey-based transactions; but it increased the Turkish turnover figure from TL 5 million to TL 30 million under item (2), which involves foreign-to-foreign transactions.

### Review of the new notification test

According to the Discussion Paper, based on the review of past notifications filed within the scope of the Communiqué, the TCA concluded that the worldwide turnover threshold under the current merger test is not an efficient tool for identifying transactions which are expected to cause a competitive effect in Turkey. This was because the Turkish threshold limit was set too low at TL 5 million, capturing too many transactions with no impact on the Turkish market. In this respect, the Discussion Paper proposes abolishing the worldwide threshold test as a whole. Furthermore, the Discussion Paper also acknowledges that the affected market criterion (which requires existence of a horizontal or vertical overlap between the activities of the transaction parties) within the existing notification test leads to legal uncertainty. By stating that the notification test should rest upon objective criteria, the Discussion Paper also proposes abolishing the affected market criterion.



The new test addresses the concerns raised by the Discussion Paper by (i) increasing the Turkish turnover threshold under item (2) from TL 5 million to TL 30 million and (ii) abolishing the affected market criterion.

The increase in the Turkish turnover threshold from TL 5 million to TL 30 million is expected to have an impact on notification of the foreign-to-foreign transactions. According to the new notification test, a foreign-to-foreign transaction should only be notified in cases where there is a substantial presence of (i) the target asset or business in Turkey for acquisitions or (ii) one of the transaction parties in Turkey for mergers. The threshold increase and introduction of the pre-requisite existence of a target asset or business in Turkey has been made as a corollary to the high number of foreign-to-foreign transaction notifications with no major impact on the Turkish market. In this respect, the Discussion Paper points to the heavy workload and the costs borne by the parties arising from the delays on transactions due to the existing notification thresholds. The increased Turkish threshold is expected to alleviate the merger notification burden for the parties and the TCA.

The abolishment of the affected market criterion is expected to relieve the parties from having to make an affected market analysis, which should bring more legal certainty to the notification test. Ensuring legal certainty was an aim of the Communiqué's introduction at the beginning of 2011, which included a new merger control regime and abolished the market share threshold based evaluation. However, legal certainty was not ensured because the vague test was replaced with the requirement of an existing "affected market," which continued to cause ambiguity for the parties during the filing process. In this sense, removal of this criterion will enable the parties to better comprehend the transactions with respect to the merger notification requirement. Also, this amendment provides further harmonisation of the Communiqué with the EU merger rules, which do not have the affected market requirement as part of the merger notification test.

The new notification test is expected to simplify the notification requirement analysis and, most importantly, alleviate the merger notification burden on foreign-to-foreign transactions, which is good news for both foreign parties and the TCA. In this framework, we believe that the new test will be welcomed by competition practitioners. As a corollary to the amendments, the TCA is expected to revise the Guidelines on Undertakings Concerned, Turnovers and Ancillary Restraints in Mergers and Acquisitions, which should shed light on the application of the new test.

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