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MERGER CONTROL IN TURKEY

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Before founding ELIG Gürkaynak in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. He heads the competition law and regulatory department of ELIG Gürkaynak, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority.

Hakan Özgökçen holds an LLB degree from Marmara University Law School and an LLM degree from Istanbul Bilgi University. He is a partner in the competition law and regulatory department of ELIG Gürkaynak and has been a member of the Istanbul Bar since 2005. Hakan has extensive experience in competition law, mergers & acquisitions, contracts law, administrative law and general corporate law matters. He has assisted Gönenç Gürkaynak in representing various multinational and national companies before the Turkish Competition Authority and Turkish courts.

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GTDT: What have been the key developments in the past year or so in merger control in your jurisdiction?

Gönenç Gürkaynak and Hakan Özgökçen: The regulatory developments in Turkey are still an ongoing process in terms of merger control. Indeed, in 2017, the Turkish Competition Authority (the Authority) has introduced Communiqué No. 2017/2 Amending Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2017/2), which entered into force on 24 February 2017. Three amendments were introduced with Communiqué No. 2017/2 to Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4). First, the Turkish Competition Board (the Board) no longer has the duty to re-establish turnover thresholds for concentrations every two years. Therefore, there is no specific timeline for the review of the relevant turnover thresholds set forth under Communiqué No. 2010/4.

The second amendment is related to the calculation of turnover within the scope of the notifiability thresholds under article 8(5) of Communiqué No. 2010/4. Pursuant to the relevant amendment, two or more transactions realised between the same persons or parties within three years, or two or more transactions realised by the same undertaking within the same relevant product market, are to be considered as a single transaction in terms of the calculation of the turnover for the turnover thresholds. Before this amendment was introduced, Communiqué No. 2010/4 was somewhat aligned with European Commission (EC) merger regulation, which set forth a period of two years instead of three. In addition, the amendment foreseeing two or more transactions realised by the same undertaking within the same relevant product market is an entirely new concept foreign to EC merger regulation.

The third amendment is related to article 10 of Communiqué No. 2010/4 and introduced is an exception to the stand-still obligation for a series of transactions in securities. Accordingly, when control is acquired in serial transactions from different sellers through the stock exchange, such transactions could be notified before the Authority after their implementation without violating the Law No. 4054 on the Protection of Competition (the Competition Law), provided that the transaction is notified to the Board without delay and the voting rights attached to the acquired securities are not exercised or are exercised solely to maintain the full value of the investments based on a derogation to be granted by a Board decision. This amendment is akin to article 7(2) of EC merger regulation and thus brings the legislative framework of the Turkish merger control regime more in line with the EC merger regulation. Nonetheless, while there was no specific regulation concerning the stand-still obligation, the precedents of the Board will provide guidance for these types of transactions.

According to the annual statistics of the Authority's Mergers and Acquisitions Status Report for 2018, the Board reviewed 223 transactions in 2018, including four decisions that were approved conditionally (*Bayer/Monsanto*, 8 May 2018, 18-14/261-126; *Luxottica/Essilor*, 1 October 2018, 18-36/585-286; *Mardaş/Limar*, 8 May 2018, 18-14/267-129 and *Lesaffre/Dosu*, 31 May 2018, 18-17/316-156). None of the transactions were rejected in 2018. It can be observed that the number of transactions has increased from 2016 and 2017 figures, which are 209 and 184 respectively. In addition, 119 transactions notified to the Board were foreign-to-foreign transactions, which constitutes over half of the concentrations notified in 2018.

The Board adopted many significant decisions in the past year. Among them was the transaction concerning the merger of Luxottica Group SpA (Luxottica) and Essilor International SA (Essilor) (*Luxottica/Essilor*, 1 October 2018, 18-36/585-286). There were competitive concerns with respect to the conglomerate effects that could arise from the integrated portfolio that the combined entity would have when the horizontal overlap within the markets for 'the wholesale of branded sunglasses' and 'the wholesale of branded optical frames', as well as the ophthalmic lenses, were taken into consideration and thus the Authority initiated a Phase II review on 1 October 2017. Some structural and behavioural remedies were proposed in order to address the horizontal and conglomerate effects of the transaction, which included the divestiture of Merve Optik Sanayi ve Ticaret AŞ (Merve Optik), which is an affiliate of Essilor that distributes several brands of both sunglasses and optical frames. The Board conditionally approved the transaction on 1 October 2018.

Another noteworthy decision of 2018 is the transaction concerning the acquisition of sole control over Monsanto Company (Monsanto) by Bayer Aktiengesellschaft (Bayer) (*Bayer/Monsanto*, 8 May 2018, 18-14/261-126). The Board considered that the transaction could result in a creation or strengthening of Bayer's dominant position and thus, could significantly impede effective competition in the relevant market and therein decided to take the transaction into a Phase II review through its decision of 15 May 2017. Eventually, the Board conditionally approved the transaction based on the commitments submitted to the EC by Bayer with regard to the vegetable, cotton, corn seeds and insecticides for corn seeds. The Board emphasised that the commitments submitted to the EC would eliminate horizontal and vertical overlaps in Turkey and, hence, the transaction would not result in the creation or strengthening of a dominant position and would not significantly impede competition in Turkey.

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Gönenç Gürkaynak

Hakan Özgökçen

GTDT: What lessons can be learned from recent cases to help merger parties manage the review process and allay authority concerns at an early stage?

GG & HÖ: With the recent changes in the Competition Law, the Board has geared up for a merger control regime that focuses much more on deterrents. As part of this trend, monetary fines have increased for not filing or for closing a transaction without the Board's approval. The minimum fine was fixed at 21,036 Turkish lira in 2018 and 26,027 lira in 2019. Breaching this obligation and failing to obtain the approval of the Board before the transaction is closed can be very expensive for the undertakings concerned, since the Board may impose on them a fine of up to 0.1 per cent of the local turnover generated in the previous financial year. This is particularly important when transaction parties intend to put in place carve-out or hold-separate measures to override the operation of the notification and suspension requirements in foreign-to-foreign mergers.

Thus far, the Turkish competition law regulations do not hold any normative regulation allowing or disallowing carve-out arrangements and the Board consistently rejected all carve-out or hold-separate arrangements proposed by merging undertakings based on the argument that the closing of a transaction is sufficient for the Board to impose a fine and a deep analysis of whether change in control actually took effect in Turkey is unwarranted. In line with this approach, in many cases such as *Total/Cepsa* (20 December 2006, 06-92/1186-355) and *CVR Inc/Inco Limited* (1 February 2007, 07-11/71-23), the Board did not evaluate the parties' carve-out arrangements while reviewing whether there was a violation of the suspension requirement.

However, the Board's approach to carve-out or hold-separate arrangements has shown to shift while reviewing an effective arrangement which included splitting the transaction into two separate transactions in the *Bekaert/Pirelli* case (22 January 2015, 15-04/52-25). Accordingly, the parties have prepared two separate sale and purchase agreements considering that the Board does not accept carve-out arrangements. The agreements were split between the Turkey-related aspects of the transaction and the global part of the transaction, which did not trigger the jurisdictional thresholds in Turkey and did not raise any competitive issues. Consequently, the Board granted an approval to the relevant arrangements, stating that Bekaert's acquisition of Pirelli's assets outside of Turkey is a separate transaction from the acquisition in Turkey and focused its review on the Turkey-related aspects of the transaction. While the outcome of the arrangement is the same as a carve-out arrangement, the transaction remains an atypical case as the split into two separate transactions resulted in one transaction that was not notifiable in Turkey.

Furthermore, the Board's recent cases shed light on the issue of global commitments having Turkey-specific effect. To that end, the Board granted unconditional approval to several transactions taking the commitments submitted before the EC into account.

As previously stated, the Board granted conditional approval to the transaction concerning the acquisition of Monsanto by Bayer upon its Phase II review, which lasted approximately one year. Once the parties submitted the commitments before the EC, they also informed the Board with regard to Turkey-specific effects of the commitments and demonstrated that the competition law concerns arising in Turkey will be also addressed. The Board concluded that these commitments remove the horizontally and vertically affected markets in Turkey and, thus, the transaction does not result in the creation or strengthening of a dominant position and does not significantly impede competition. Therefore, the Board conditionally approved the transaction pursuant to the commitments submitted before the EC.

In an attempt to explain the review process, the Board, upon its preliminary review of the notification, will decide either to approve or to investigate the transaction further (Phase II).

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> *"Unilateral effects have been the predominant criteria in the Authority's assessment of mergers and acquisitions in Turkey."*

It notifies the parties of the outcome within 30 calendar days following a complete filing. In the absence of such a decision at the end of the 30 calendar day-period, the decision is deemed an 'implicit approval', according to article 10(2) of the Competition Law. While the timing in the Competition Law gives the impression that the decision to proceed with Phase II should be formed within 15 days, the Board generally uses more than 15 days to form its opinion concerning the substance of a notification, but is more meticulous in respecting the 30-day deadline on announcement. Moreover, any written request by the Board for missing information will restart the 30-day period. If a notification leads to an in-depth investigation (that is, Phase II), it changes into a fully-fledged investigation. Under Turkish law, a Phase II investigation takes about six months. If deemed necessary, this period may be extended only once, by the Board, for an additional period of up to six months.

The Board generally keeps the above-mentioned deadlines. Indeed, according to the Mergers and Acquisitions Status Report for 2018, the transactions that have been notified to the Authority during this time period have been concluded within an average of 14.9 calendar days following the final submissions.

GTDT: What do recent cases tell us about the enforcement priorities of the authorities in your jurisdiction?

GG & HÖ: Unilateral effects have been the predominant criteria in the Authority's assessment of mergers and acquisitions in Turkey. Concentrations, where parties have a market share of 40 per cent and above, are generally caught by the Board's radar and will be evaluated in an extensive manner. Obtaining unconditional approval decisions becomes more difficult particularly where the following, among others, persist:

- legal, physical or technical barriers to entry or expansion;
- lack of bargaining power of the purchasers;
- high concentration level in the affected markets;
- a low number of competitors in the market; or
- high transportation costs.

There have been a couple of exceptional cases in the Turkish merger control regime where the Board discussed the coordinated effects under a 'joint dominance test' and rejected the transaction on these grounds. These cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund. The Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the ground that the transactions would lead to joint dominance in the relevant market. The Board took note of factors such as 'structural links between the undertakings in the market' and 'past coordinative behaviour', in addition to 'entry barriers', 'transparency of the market' and the 'structure of demand'. It concluded that certain factory sales would result in the establishment of joint dominance by certain players in the market whereby competition would be significantly impeded. Regarding one such decision, when an appeal was made before the Council of State it ruled by mentioning, inter alia, that Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Board, which was based on collective dominance. No transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects' yet.

However, recently, in *Toyota/Vive* (6 April 2017, 17-12/143-63) and *Luxottica/Essilor* decisions, the Board focused on conglomerate effects of the relevant transactions. In *Luxottica/Essilor*, the Board analysed the conglomerate effects of the transaction that could arise from the integrated portfolio of the combined entity. The Board indicated that Luxottica was already determined to be in a dominant position in the wholesale of branded sunglasses in *Luxottica* decision (23 February 2017, 17-08/99-42), while the wholesale of ophthalmic lenses does not constitute an affected market for the purposes of the merger

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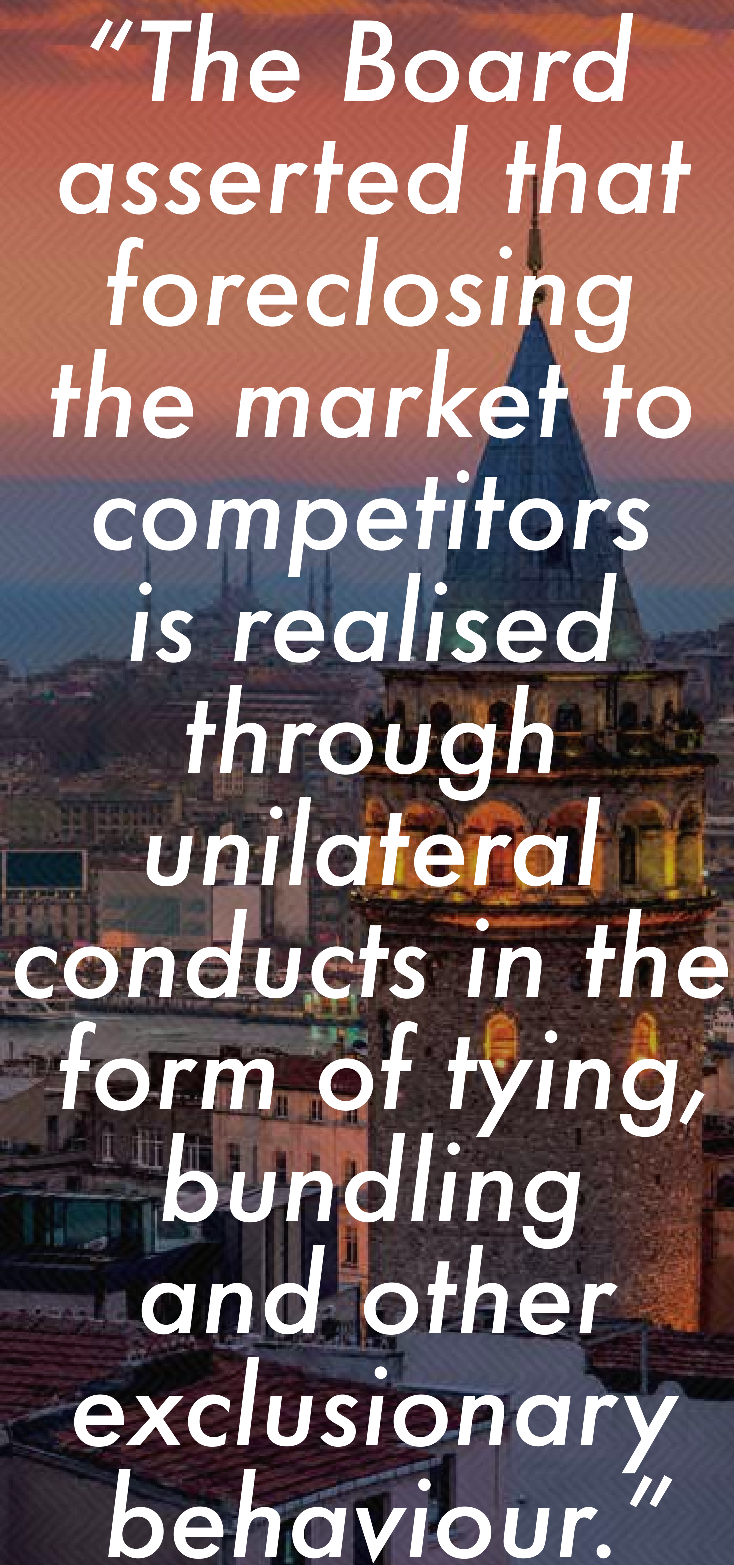

control filing and the combined entity’s market share will be at the threshold for dominant position and within the market for the wholesale of branded prescription optical frames, therein meaning the combined entity’s market share would be below the dominant position threshold accepted in practice. In this regard, the Board considered that, in addition to the combined entity’s strength in the sunglasses market, which could be used as leverage, the fact that it will reach a strong position in two markets, where one of them is evident, increases the concern that the transaction could cause conglomerate effects. In their analysis, the Board took into account that the combined entity could fulfil the majority of an optician’s needs by obtaining significant market power and supporting important portfolio power that could be used against competitors, and that the tying and bundling practices of the combined entity would constitute risk in face of competition rules. The Board decided that the commitments of the divestiture of Merve Optik not to implement tied sales of sunglasses, optical prescription frame and ophthalmic lens and not to impose contractual exclusivity or de facto exclusivity clauses on opticians prohibiting or restricting from selling the products of their competitors, removed the concerns in the field of conglomerate effects.

Additionally, in the *Toyota/Vive* decision, the Board provided an assessment on the main factors that should be considered for the evaluation of the conglomerate concentrations. The transaction concerns the acquisition of sole control over Vive BV by Toyota ultimately by Toyota Industries Corporation. While the parties to the transaction submitted that there would not be an affected market since their activities did not horizontally or vertically overlap in Turkey, the Board decided that the transaction would lead to a conglomerate concentration, given that the activities of the parties are complementary and substitute to each other. Accordingly, the Board asserted that foreclosing the market to competitors is realised through unilateral conducts in the form of tying, bundling and other exclusionary behaviour, and in addition to the market shares of the parties, the incentive and the ability to foreclose a market should be considered while assessing the existence of conglomerate effects. Upon its review process, the Board ultimately decided that the market shares of the transaction parties and the market structures of the two relevant product markets would not give transaction parties the market power and ability to foreclose the market and granted an unconditional approval to the transaction.

GTDT: Have there been any developments in the kinds of evidence that the authorities in your jurisdiction review in assessing mergers?

GG & HÖ: Currently, the Board analyses concentrations on an economic basis. In this

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> *"Between 2014 and 2018, the Board has taken 17 concentrations into Phase II review, which gives the impression that the Board is more eager to go into Phase II review if it decides to further investigate the transaction."*

sense, economic parameters (such as market shares, sales volume and amounts, the level of concentration, entry conditions and the degree of vertical integration; in other words, quantitative evidence) has been used as evidence in the analysis of concentration cases. Especially in the establishment of the Economic Analyses and Research department within the Authority, more and more economical analyses are used as a tool for merger control review.

The Board may request information from third parties including customers, competitors and suppliers of the parties, as well as other persons related to the merger or acquisition. It should be noted that, in case the Authority asks for another public authority's opinion, this would also cut the 30-day review period and restart it anew from day one. While not common in practice, it is possible for third parties to submit complaints about a transaction during the review period. Additionally, related third parties may request a hearing from the Board during the investigation (such as if the transaction will be taken into Phase II review), on condition that they prove a legitimate interest. They may also challenge the Board's decision on the transaction before the competent judicial tribunal, again on condition that they prove a legitimate interest.

GTDT: Talk us through any notable deals that have been prohibited, cleared subject to conditions or referred for in-depth review in the past year.

GG & HÖ: Between 2014 and 2018, the Board has taken 17 concentrations into Phase II review, which gives the impression that the Board is more eager to go into Phase II review if it decides to further investigate the transaction. This indicates that remedies and conditional clearances are becoming increasingly important under Turkish merger control regime. In line with this trend, the number of cases in which the Board decided on divestment or licensing commitments, or other structural or behavioural remedies, has increased in recent years. For example, in 2018 the Board conditionally cleared four transactions upon a Phase II review, concerning the sectors for agriculture, port services, yeast and optics (*Bayer/Monsanto*; *Lesaffre/Dosu*; *Mardaş/Limar*; and *Luxottica/Essilor*).

The Board conditionally approved the transaction concerning the acquisition of Mardaş Marmara Deniz İşletmeciliği AŞ (Mardaş), which is active in the Ambarlı Port, by Limar Liman ve Gemi İşletmeleri AŞ (Limar) controlled by Arkas Group upon its Phase II review (*Mardaş/Limar*, 8 May 2018, 18-14/267-129). Limar conducts various activities in the maritime sector and upon the consummation of the transaction, Atak Holding AŞ and Asmar Holding AŞ that control Mardaş will cease their activities in the relevant markets by transferring their activities related to container handling, bonded temporary storage, pilotage and towage and Ambarlı Port ancillary services to Limar. The Board found the risk of a collective dominant position in the market for port operations with respect to container handling services, with effects that could arise due to collusion in the relevant market. Additionally, in terms of vertical effects of the transaction, the Board considered that the transaction could result in input foreclosure and discriminatory conduct in the vertically affected markets. Upon the submission of a commitment package, the Board conditionally approved the transaction upon its Phase II review.

Another notable transaction that was concluded is the Board's *Lesaffre/Dosu* decision where the Board reinitiated the Phase II review of the transaction concerning the acquisition of Dosu Maya Mayacılık AŞ by Lesaffre et Compagnie (Lesaffre) (*Lesaffre/Dosu*). In 2014, the Board had conditionally approved the relevant transaction upon a Phase II review, by way of commitments including both behavioural and structural remedies (*Lesaffre/Dosu*, 15 December 2014, 14-52/903-411). However, the Board's 2014 decision was annulled by Ankara 8th Administrative Court on 19 January 2017 (No. 2015/2488 E, 2017/172 K). Upon the annulment decision of the Ankara administrative court, the Board reinitiated its Phase II review in May 2017. Upon its Phase II review, the Board conditionally approved the transaction with commitments where Lesaffre has extended the scope of its previous commitments (31 May 2018, 18-17/316-56).

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THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

As a rule of thumb, drafting the notification form requires identifying the crucial information provided under the notification form and stating all the necessary information in an order of importance. As competition law heavily depends on case law, it is important to have perfect knowledge of the Board's precedents and key sensitivities. In addition, merger control cases require the skill to closely follow up the process and build close contacts with the case-handlers in order to ensure a smooth review process.

What are the key things for the parties and their advisers to get right for the review process to go smoothly?

In order to ensure a smooth and successful review process, it is essential that all the necessary information in the notification form is provided to minimise the risk of receiving additional questions. The review process must be followed closely. In addition, having the skills to anticipate the potential competition law concerns that the case handlers could raise beforehand and taking the necessary measures to avoid such concerns by providing comprehensive and satisfactory representations with the notification form is important for timing. If the potential competition law concerns cannot be foreseen in advance (that is, while preparing the merger control filing) this could entail back and forth correspondences with the Authority and lengthen the review process. Another key issue is to file the notification form in sufficient time prior to the closing of the transaction (at least 45 calendar days before closing). Although the Competition Law provides no specific deadline for filing, and assuming a transaction is a good candidate to be cleared during Phase I review, it is advisable to file the transaction at least 45 calendar days before closing.

What were the most interesting or challenging cases you have dealt with in the past year?

Apart from *Luxottica/Essilor* and *Bayer/Monsanto* transactions, summarised in detail above, one of the most challenging cases that we have dealt with in 2018 is the transaction concerning the acquisition of sole control over Gemalto NV by Thales SA (*Thales/Gemalto*, 27 August 2018, 18-29/486-237). During the review process of the transaction before the Board, the EC had opened in-depth investigation into the relevant transaction. As also recognised by the Board in its reasoned decision, the combined entity's market share in the enterprise key management market would be be high after the transaction. However, the Board took into account the market structure (such as the facts that the total size of the market is very low in Turkey, the presence of significant competitors and lack of significant entry barriers). In this respect, the Board concluded that Thales would not have the power to determine the economic parameters independently from its competitors after the transaction and ultimately granted unconditional approval to the transaction upon its Phase I review. The EC has also approved the transaction based upon the commitments submitted in December 2018.

Another interesting case that we have dealt with is the transaction concerning the acquisition of sole control of the film and television studios, cable entertainment networks and international television businesses of 21st Century Fox, Inc by the Walt Disney Company (*Disney/Fox*, 4 October 2018, 18-37/595-290). As both parties are global media companies who have various TV channels and produce and supply movies and the value of the transaction is significantly high (US$71.3 billion), the transaction attracted the attention of the media. Furthermore, the parties' activities were horizontally and vertically overlapping in various markets. Nevertheless, the Board granted an unconditional approval to the transaction upon its Phase I review.

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GTDT: Do you expect enforcement policy or the merger control rules to change in the near future? If so, what do you predict will be the impact on business?

GG & HÖ: In 2013, the Authority prepared the Draft Competition Law (the Draft Law). In 2015, the Draft Law was under discussion in the Turkish parliament's Industry, Trade, Energy, Natural Sources and Information Technologies Commission. The Draft Law proposed various changes to the current legislation; particularly in terms of allocating time and resources more efficiently in terms of procedures set out under the current legislation. The Draft Law became obsolete owing to the general elections in June 2015. The Competition Authority has requested the reinitiation of the legislative procedure concerning the Draft Law, as noted in the 2015 Annual Report of the Competition Authority. However, at this stage, there is no indication on whether the Draft Law should be expected to be renewed anytime soon. However, it could be anticipated that the main topics to be held in the discussions on the potential new draft competition law will not significantly differ from the changes that were introduced by the previous draft. Therefore, in this hypothetical scenario, the discussions are expected to mainly focus on:

- compliance to EU competition law legislation;
- introduction of the EU's Significant Impediment of Effective Competition Test instead of the current dominance test;

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- adoption of the term 'concentration' as an umbrella term for mergers and acquisitions;
- elimination of the exemption of acquisition by inheritance;
- abandonment of Phase II procedure;
- extension of the appraisal period for concentrations from the current 30-day period to 30 working days; and
- removal of the fixed turnover rates for certain procedural violations, including the failure to notify a concentration and hindering on-site inspections, and setting upper limits for the monetary fines for these violations.

Currently, the most significant expected development in the Turkish competition law regime is the Draft Regulation on Administrative Monetary Fines for the Infringement of the Competition Law (the Draft Regulation on Fines), which is set to replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance. There is no anticipated date for the enactment of the Draft Regulation on Fines but it can be stated that the draft regulation is heavily inspired by the EC's guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation 1/2003. Thus, the introduction of the draft regulation clearly demonstrates the Authority's intention to bring the secondary legislation into line with EU competition law during the harmonisation process. The draft regulation was sent to the Turkish parliament on 17 January 2014, but as yet no enactment date has been announced.

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