Merger Control

2020

Ninth Edition

Editor:
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Turkey

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Overview of merger control activity during the last 12 months

The Turkish merger control regime is primarily regulated by the Law on Protection of Competition No. 4054 ("Law No. 4054") dated December 13, 1994, and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("the Merger Communiqué") published on October 7, 2010. The Merger Communiqué entered into force as of January 1, 2011 and was amended on February 1, 2013. Subsequently, on February 24, 2017, Communiqué No. 2010/4 was amended by Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("Communiqué No. 2017/2").

According to the annual statistics of the Mergers and Acquisitions Status Report for 2019, the Competition Board reviewed 208 transactions in total, including: 185 mergers and acquisitions that were approved unconditionally; two decisions that were approved conditionally; and one privatisation. Twenty-one were out of the scope of merger control (i.e. they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to lack of change in control). None of the notified transactions were rejected in 2019.

New developments in jurisdictional assessment or procedure

The most recent development for jurisdictional assessment is the amendments made to the Guidelines on Vertical Agreements ("Vertical Guidelines") by the Competition Authority and announced through the official website of the Authority on March 30, 2018. The amended Guidelines incorporate certain significant amendments as regards the Authority's current Guidelines on Vertical Agreements No. 15-36/537-RM(2) ("Guidelines") as well as several assessments relating to the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("Communiqué No. 2002/2"). The amended Vertical Guidelines address the need to regulate and/or update the legislation which relate to (i) the most favoured nation/customer ("MFN") clauses, and (ii) internet sales, in light of the changing market conditions.

The Authority's announcement on the revision of the Guidelines indicates that the emergence of the internet platform as a new distribution channel provides consumers with the ability to (i) access a large set of information without difficulty, (ii) compare prices, and (iii) access more products and more sellers. On the other hand, it enables suppliers to market their products to wider geographical markets with lower costs. For that reason and due to the rapid increase in the yearly average of internet sales in Turkey, a regulation on internet sales has become a necessity. The Authority's announcement further states that the amendments seek a balance between (i) re-evaluation of competition law rules with respect to sales through the internet, thereby ensuring preservation of the internet's contribution to consumers and

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resellers, and (ii) protection of suppliers' commercial interests. The Authority's announcement further explained that the MFN clause is one of the recent frequently examined issues by the competition authorities throughout the world and the competition law practitioners and thereby the necessity of establishing a new regulation on this matter has arisen. In principle, an agreement containing MFN clauses may benefit from block exemption on the conditions that the market share of the party that is a beneficiary of the clause does not exceed 40% and that the other conditions stipulated in the Communiqué No. 2002/2 are met. The evaluation of MFN clauses in the traditional markets differs from those in the online platforms. For example, while the party that is the beneficiary of the clause is the buyer in the traditional markets, it may be either a supplier, buyer or intermediary in the online platform markets depending on the relevant product market. Therefore, Communiqué No. 2002/2 does not provide any indication as to which party's market share should be taken into account.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Traditionally, the Competition Authority pays special attention to transactions that take place in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors that are important to the country's economy (such as automotive, construction, telecommunications, energy, etc.) attract the Competition Authority's special scrutiny as well. The sector reports published annually by the Competition Authority might also be an indicator of the sectors that attract the attention of the Authority. The last three sector reports were regarding the expo, nut and television broadcasting sectors. The Competition Authority's case handlers are always extremely eager to issue information requests (thereby cutting the review period) in transactions relating to these sectors, and even transactions that raise low-level competition law concerns are looked into very carefully. In some sectors, the Competition Authority is also statutorily required to seek the written opinion of other Turkish governmental bodies (such as the Turkish Information Technologies and Communication Authority, pursuant to Section 7/2 of the Law on Electronic Communication No. 5809). In such instances, the statutory opinion usually becomes a hold-up item that slows down the review process of the notified transaction.

The consolidated statistics regarding merger cases in 2019 show that the transactions in the sector transportation, vehicles and services took the lead with 33 notifications, followed by the chemical products industry with 22 notifications.

The Competition Board adopted many **significant decisions** in the past year, examples of which are summarised below.

The Board has pronounced its final decision on the Phase II review regarding the transaction concerning the acquisition of sole control of Embraco, the compressor manufacturing business of Whirlpool Corporation, by Nidec Corporation. As a result of the Phase II review, the Board was unanimous in its decision (April 18, 2019, 19-16/231-103) that pursuant to Article 7 of Law No. 4054, as the notified transaction, in its notified form it cannot be approved. Notwithstanding the foregoing, the transaction was approved and the commitment package was submitted to the EU Commission about the divestment of Nidec's own light commercial compressor and household compressor businesses.

As regards merger control, in June 2019, the Board conditionally approved the transaction regarding the acquisition of sole control by Harris Corporation over L3 Technologies, Inc. (20 June 2019, 19-22/327-145) based on the commitments submitted to the European Commission. The Board held that the commitments have completely eliminated the overlap

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between the parties and thus, the transaction does not result in the creation or strengthening of a dominant position and does not significantly impede competition. In line with the commitments submitted to the Commission, Harris has submitted that it would divest its businesses for night vision devices and image intensifier tube technologies used in these devices to eliminate the vertical overlap.

Key economic appraisal techniques applied, e.g., as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The Turkish merger control regime currently utilises a "dominance test" in the evaluation of concentrations. Pursuant to Article 13/II of the Merger Communiqué, mergers and acquisitions which do not create or strengthen a sole or joint dominant position, and do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Competition Board. Article 3 of Law No. 4054 defines a dominant position as: "the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers". The Guideline on the Assessment of Horizontal Mergers and Acquisitions ("Horizontal Merger Guideline") states that market shares higher than 50% may be used as an indicator of a dominant position, whereas aggregate market shares below 25% may be used as a presumption that the transaction does not pose competition law concerns. In practice, market shares of about 40% and higher are generally considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position, but also significantly impedes competition in the whole territory of Turkey or in a substantial part of it, pursuant to Article 7 of Law No. 4054.

On the other hand, there were a couple of exceptional cases where the Competition Board discussed the coordinated effects under a "joint dominance test" and rejected some transactions on those grounds. For instance, transactions for the sale of certain cement factories by the Savings Deposit Insurance Fund were rejected after the Competition 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 Competition 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 creation of joint dominance by certain players in the market whereby competition would be significantly impeded. Nonetheless, the High State Court has overturned the Competition Board's decision and decided that the "dominance test" does not cover "joint dominance". This has been a very controversial topic ever since, because the Competition Board has not prohibited any transaction on the grounds of joint dominance after the decision of the High State Court.

In terms of joint venture transactions, to qualify as a concentration subject to merger control, a joint venture must be of a full-function character, satisfying two criteria: (i) existence of joint control in the joint venture; and (ii) the joint venture being an independent economic entity established on a lasting basis (i.e. having adequate capital, labour and an indefinite duration). If the transaction is a full-function joint venture, the standard dominance test is applied. Additionally, regardless of whether the joint venture is full-function, the joint venture should not have as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself.

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On the other hand, economic analysis and econometric modelling has been seen more often in the last years. For instance, in the *AFM/Mars Cinema* case (11-57/1473-539, November 17, 2011), the Competition Board used the OLS and 2SLS estimation models in order to define price increases that are expected from the transaction. It also employed the *Breusch/Pagan*, *Breusch-Pagan/Godfrey/Cook-Weisberg*, *White/Koenker* NR2 tests and the Arellano-Bond test on the simulation model. Such economic analyses are rare, but increasing in practice. Economic analyses which are used more often are the HHI and CRN indices to analyse concentration levels. The Competition Board also published in 2019 the Handbook on Economic Analyses Used in Competition Board Decisions, which outlines the most prominent methods utilised by the Competition Authority (e.g. correlation analysis, SSNIP test, Elzinga-Hogarty test).

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

Pursuant to Article 10 of Law No. 4054, once the formal notification has been made, the Turkish Competition Board, upon its preliminary review (Phase I) of the notification, will decide either to approve, or to investigate the transaction further (Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. Regarding the procedure and steps of a Phase II review, Law No. 4054 makes reference to the relevant articles which govern the investigation procedures for cartel and abuse of dominance cases.

The Competition Board may grant conditional clearances to concentrations. In the case of a conditional clearance, the parties comply with certain obligations such as divestments, licensing or behavioural commitments to help overcome potential competition issues. The Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions provide guidance regarding remedies. The parties can close the transaction after the clearance and before the remedies have been complied with; however, the clearance becomes void if the parties do not fully comply with the remedy conditions.

As evident from the above, the Merger Communiqué enables the parties to provide commitments to remedy substantive competition law issues that may result from a concentration. The parties may submit to the Competition Board proposals for possible remedies either during the preliminary review (Phase I) or the investigation period (Phase II). If the parties decide to submit the commitment during the preliminary review period (Phase I), the notification is deemed filed only on the date of the submission of the commitment. The commitment can also be submitted together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

The Competition Authority does not have a clear preference for any particular type of remedies. The assessments are made on a case-by-case basis in view of the specific circumstances surrounding the concentration. Nevertheless, divestitures are the most common commitment procedure in the Turkish merger control regime.

Key policy developments

The amendment of the turnover thresholds in the Merger Communiqué is surely the most important development in the Turkish merger control regime in the past few years. In line with the amendment of the Merger Communiqué, the Competition Board also revised its Guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("Guideline on Undertakings Concerned") and took out the relevant section

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on affected markets, so that the concept of affected markets is now only relevant to the preparation of the notification form and the analysis of the transaction. Furthermore, the Competition Authority has promulgated two guideline documents in relation to the assessment of concentrations: (i) the Horizontal Merger Guideline; and (ii) the Guideline on the Assessment of Non-Horizontal Mergers ("Non-Horizontal Merger Guideline"). The Guidelines are in line with EU competition law regulations and seek to retain the harmony between EU and Turkish competition law instruments.

The approach of the Competition Board to market shares and concentration levels is similar to the approach taken by the European Commission and spelled out in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03). As the first factor discussed under the Horizontal Merger Guideline, market shares above 50% can be used as evidence of dominant position. If the market share of the combined entity remains below 25%, this would not lead to a need for further investigation into the likelihood of harmful effects emanating from the combined entity. Although a brief mention of the Competition Board's approach to market shares and HHI levels is provided, the Horizontal Merger Guideline's emphasis on an effects-based analysis (coordinated/non-coordinated effects), without further discussing the criteria to be used in evaluating the presence of dominant position, indicates that the dominant position analysis remains still subject to Article 7 of Law No. 4054.

Other than the market share and concentration level discussion, the Horizontal Merger Guideline covers the following main topics: the anticompetitive effects that a merger would have in the relevant markets; buyer power as a countervailing factor to anticompetitive effects resulting from the merger; the role of entry in maintaining effective competition in the relevant markets; efficiencies as a factor counteracting the harmful effects on competition which might otherwise result from the merger; and conditions of the failing company defence. The Horizontal Merger Guideline also discusses coordinated effects in the market that might arise from a merger of competitors via increasing concentration in the market, and may even lead to collective dominance. In its discussion of efficiencies, it indicates that the efficiencies should be verifiable and should provide a benefit to customers. Significantly, the Horizontal Merger Guideline provides that the failing firm defence has three conditions: (i) the allegedly failing firm will soon exit the market if not acquired by another firm; (ii) there is no less restrictive alternative to the transaction under review; and (iii) it should be the case that unless the transaction is cleared, the assets of the failing firm will inescapably exit the market.

The Non-Horizontal Merger Guideline confirms that non-horizontal mergers where the post-merger market share of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2,000 (except where special circumstances are present) are unlikely to raise competition law concerns, similar to the Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07). Other than the Competition Board's approach to market shares and concentration levels, the other two factors covered in the Non-Horizontal Merger Guideline include the effects arising from vertical mergers, and the effects of conglomerate mergers. The Non-Horizontal Merger Guideline also outlines certain other topics, such as customer restraints, general restrictive effects on competition in the market, and restriction of access to the downstream market.

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Apart from the foregoing, the below communiqués and guidelines are the recent key legislative developments:

- Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position were accepted on January 29, 2014.
- Communiqué on the Increase of the Lower Threshold for Administrative Fines Specified in Paragraph 1, Article 16 of the Act No. 4054 on the Protection of Competition, came into force on December 10, 2016.
- Block Exemption Communiqué on Research and Development Agreements (Communiqué No. 2016/5) came into force on March 16, 2016.
- Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board, came into force on February 24, 2017. Block Exemption Communiqué on the Vertical Agreements in the Motor Vehicle Sector in Turkey (Communiqué No. 2017/3) came into force on February 24, 2017.
- Guidelines on the Explanation on the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicle Sector in Turkey, were accepted on March 7, 2017.
- Communiqué No. 2017/4 on the Payments of Joint Stock Companies and Limited Liability Companies as per Law No. 4054, came into force on March 31, 2017.

Reform proposals

The Draft Competition Law, which was issued by the Authority in 2013 and officially submitted to the Presidency of the Turkish Parliament on January 23, 2014, is now null and void following the beginning of the new legislative year of the Turkish Parliament. In order to re-initiate the parliamentary process, the draft law must again be proposed and submitted to the presidency of the Turkish Parliament. At this stage, it remains unknown whether the Turkish Parliament or the government will renew the draft law.

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Mr. Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, 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. Every year, Mr. Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

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