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Turkish Antitrust

Turkish Antitrust: An overview of competition law

DOMINANCE (NOTION), FOREWORD, REMEDIES (MERGERS), HIGH MARKET SHARES, TURKEY, MERGER (NOTION), CHANGE OF CONTROL, ANCILLARY RESTRICTION, COMPETITION POLICY, GUN JUMPING, GENERAL ANTITRUST

Gönenç Gürkaynak | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Eda Duru | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Onur Özgümüş | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

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I. Introduction

This Special Issue presents a collection of significant merger precedents issued by the Turkish Competition Board (“Board”), the decisional body of the Turkish Competition Authority (“Authority”), in recent years. The primary goal of this compilation is to offer useful insights on the Board’s approach to merger review, by way of providing a collection of illustrative examples on various trending topics in terms of the Board’s assessment and enforcement practices with respect to merger control.

Merger control review has advanced substantially since the adoption of the Law No. 4054 on the Protection of Competition (“Law No. 4054”) in Turkey, back in 1994. Indeed, the Law No. 4054 has recently gone through the most comprehensive set of amendments since its initial adoption. While the amendments to the Law No. 4054 have spanned a range of new mechanisms with regard to the selection of cases for the Authority, behavioural and structural remedies for anticompetitive conduct, and procedural tools including commitments and settlements, it also included a new substantive test for merger control, namely the “Significant Impediment of Effective Competition” (SIEC) test.

Although merger control under the Turkish competition law regime has always borne certain similarities to the relevant legislation under the European Union (“EU”) competition law regime, the introduction of the SIEC test promises to align the two merger control regimes even further. In line with the EU competition law rules, the SIEC test now replaces the incumbent dominance test. With this new test, the Board will be able to prohibit not only transactions that may result in the creation of a dominant position or the strengthening of an existing dominant position, but also those transactions that could significantly impede competition. As the amendments to the Law No. 4054 have only recently come into force, it remains to be seen just how big a difference the newly introduced SIEC test will make to merger control under the Turkish competition regime. The Authority’s forthcoming secondary legislation is expected to shed some light on any practical concerns regarding the new mechanisms.

The amendment to the Law No. 4054 might also have a significant impact on the day-to-day functioning of the Authority, considering the volume of cases it deals with on an annual basis. Indeed, it would be fair to say that, over the last decade, the Authority has been dealing with approximately 200 merger cases on average each year. While most transactions were dealt with during Phase I investigations, a fair number of transactions were taken into a Phase II review, which is a full-fledged investigation, where the Authority typically assesses the market power of the parties and the potential effects of the given transaction on competition in the relevant market. Indeed, certain cases that were found to be high-risk concentrations, such as the *Luxottica/Essilor* merger, became a great challenge both for the Authority and the parties, which eventually resulted in a constructive experience and created useful future references for competition law enforcers, scholars and practitioners.

This Special Issue primarily focuses on the application of Article 7 of the Law No. 4054, which governs mergers and acquisitions in particular, and authorizes the Board to establish a merger control regime. More specifically, pursuant to the (now amended) Article 7, a merger or acquisition can be blocked when the concentration (i) creates or strengthens a dominant position, and (ii) significantly impedes competition in the whole territory of Turkey or in a substantial part of it. Further to that provision, Communiqué No 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("**Communiqué No. 2010/4**") is the primary legal instrument that creates a merger control mechanism in Turkey and introduces a notification system on the condition that certain turnover thresholds are exceeded. Accordingly, mergers and acquisitions that meet the relevant threshold criteria are subject to the Board's review and approval in order to gain validity in Turkey.

The relevant legislation in Turkey, which consists of the Communiqué No. 2010/4 and additional relevant guidelines, are respectively akin to—if not the same as—the primary and secondary legislations under the EU competition law regime. Furthermore, the Authority closely monitors the new developments introduced by the European Commission ("**Commission**") in terms of potential legislative reforms regarding the EU merger control regime, as well as taking into account the practical approach of the Commission in its review of analogous cases. The Authority is expected to continue its efforts in paying close attention to developments in the EU competition law regime, and thereby to seek harmony between the EU and Turkish competition law instruments.

Alongside the Authority's open approach to the Commission's well-established practice, the Authority still acts independently by thoroughly assessing the Turkey-specific market conditions in its review of mergers and acquisitions that will have an impact on a given Turkish market. By doing so, the Board creates its own case law on merger control, which remains as the main point of reference in its application of Article 7 of the Law No. 4054.

Based on its precedents, it would be fair to say that the Authority takes quite a strong stance on merger control and adopts a non-flexible approach to any competition concerns that need to be eliminated. Indeed, it is evident that the Authority is exceedingly interested in controlling the natural level of competition in a given market and perhaps even in preventing any mergers or acquisitions that could artificially transform companies into dominant entities and substantially harm competition. This is also demonstrated by the Authority's endeavour on gun-jumping cases over the last decade, given that it has geared up for a merger control regime that is focused to a much greater extent on deterrents. As part of the increasing global trend on gun-jumping, the number of cases involving administrative monetary fines imposed on undertakings for violating the suspension requirement, either by closing a notifiable transaction without the approval of the Board or by failing to notify a notifiable transaction in the first place, has also increased in Turkey in recent years. Even in certain scenarios with no monetary fines, given that no violation was found, such as the *Akdağ Beton/Şenerler Beton/Saray Beton/Sarıkaya Beton/Üç Yıldırım* case [1], the Board still probed a couple of transactions in the concrete sector on whether the parties had violated the suspension requirement, which, once again, demonstrates the Board's inclination and willingness to catch and investigate any exceptional cases on gun-jumping.

To that end, the articles within this Special Issue aim to reveal and explain the evolving efforts of the Board in establishing its own case law, by way of following global trends, as well as taking advantage of the well-established practices under the EU competition law regime in recent years, on various fronts. In other words, the precedents laid out in this Special Issue were chosen with the purpose of better illuminating the Board's approach to certain contemporary issues concerning merger control in Turkey.

The decisions discussed in this collection each fall into at least one of the following categories: (i) evaluation of remedies, (ii) evaluation of state-owned enterprises as separate undertakings, (iii) the relationship between dominance and market shares, (iv) assessment on change of control and ancillary restraints, (v) sector-based evaluation, and (vi) evaluation of creeping transactions and gun-jumping.

II. Mergers & Acquisitions

a) Evaluation of Remedies

One of the most important recent developments in Turkish competition law concerns the evaluation of remedies. More specifically, the long-debated *Luxottica/Essilor* merger [2] has been a real challenge particularly in Turkey, due to the Turkey-specific market conditions that were involved. The case, in which the Board eventually granted a conditional approval, is a great example of multi-jurisdictional filing, given that it was filed with the European Commission, the U.S. Federal Trade Commission, as well as the competition authorities of Australia, Brazil, Canada, Chile, China, Israel, New Zealand, Singapore, and South Africa. Therefore, this case is considered to be unique due to the various assessments and regulatory outputs of the relevant competition authorities. In *Luxottica/Essilor* (dated 01.10.2018, numbered 18-36/585-286), there were competitive concerns with respect to the conglomerate effects that could arise from the integrated portfolio, due to the horizontal overlaps within the markets for "the wholesale of branded sunglasses" and "the wholesale of branded optical frames," as well as the market for "ophthalmic lenses" in Turkey. The Board took the transaction into a Phase II review, where the parties proposed several structural and behavioural remedies in order to address the competitive concerns stemming from the horizontal and conglomerate effects of the transaction.

Furthermore, the respective articles regarding the Board's *Nidec/Embraco* and *Valeo/FTE Group* decisions also aim to set forth the Board's competitive analysis within the scope of the dominance test, with a particular focus on the evaluation of the potential effects of global remedies in Turkey. To that end, both the *Nidec/Embraco* decision [3] (dated 18.04.2019, numbered 19-16/231-103) and the *Valeo/FTE Group* decision [4] (dated 26.10.2017, numbered 17-35/560-244) reinforce the Board's case law setting forth that the Board could approve a concentration by way of considering the Turkey-specific effects of the remedies submitted before the Commission or other antitrust authorities abroad. Furthermore, the *Valeo/FTE Group* decision also delves into the details of the Board's assessment of various parameters (e.g., the existence of countervailing buying power, the strengthening of competition in the relevant market as a result of the remedies submitted before the Commission, and the lack of any serious entry barriers) in addition to the market shares of the parties, within the scope of its analysis.

b) Evaluation of State-owned Enterprises as Separate Undertakings

Under the Turkish merger control regime, there is no explicit regulation on concentrations between state-owned enterprises, unlike Paragraphs 52 and 53 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. That being said, it should be noted that, in accordance with Articles 2 and 3 of the Law No. 4054, an undertaking is defined in Turkish competition law as natural and legal persons which produce, market and sell goods or services in the market, and

units which can decide independently and constitute an economic whole. To that end, so long as state-owned enterprises have the ability to take decisions on an independent basis, such enterprises should be considered as separate undertakings from an antitrust standpoint, in terms of the possible transactions that they may be involved in.

On this front, the articles regarding the Board's *Saudi Aramco/Saudi Basic Industries* and *CNNC Capital/Tongfang* decisions highlight and clarify the Board's approach regarding the evaluation of whether or not undertakings that are parties to a concentration, which are directly or indirectly controlled by the same state, would be regarded as interdependent undertakings within the scope of a single economic unit. In the *CNNC Capital/Tongfang* decision [5] (dated 31.10.2019, numbered 19-37/550-226), the Board took into account whether the Chinese government was entitled to elect and appoint the members of the board of directors of the transaction parties when designating them as separate entities. On the other hand, in the *Saudi Aramco/Saudi Basic Industries* decision [6] (dated 29.08.2019, numbered 19-30/448-193), the Board considered the level of the transaction parties' interdependency on the basis of their management structures, financial results, as well as the procedures in place for the exchange of information between them and their respective legal actions, before ultimately resolving that they were not part of the same controlling undertaking.

c) The Relationship Between Dominance and Market Shares

The articles regarding the Board's *IGA Akaryakıt/THY/Total/Zirve* and *Thales/Gemalto* decisions manifest the Board's approach that the undertakings' respective market shares are not the sole indicators of their market power or dominance. In *IGA Akaryakıt/THY/Total/Zirve* [7] (dated 19.12.2019, numbered 19-45/769-331), the Board evaluated that the Target Company (*i.e.*, IGA Havalimanı Akaryakıt Hizmetleri A.Ş.) could be enjoying a dominant position in the relevant product market, while Türk Hava Yolları A.O., one of the acquirers, could strengthen its dominant position in another relevant product market. Despite this assessment, the Board unconditionally approved this transaction due to lack of anticompetitive effects of the relevant transaction. In a similar vein, the *Thales/Gemalto* decision [8] (dated 27.08.2018, numbered 18-29/486-237) presents the Board's approach with respect to the specific dynamics of the relevant market during its analysis of dominance, despite the relatively high market shares of the transaction parties. Within the scope of its evaluation with regards to the affected markets in which the merged entity would enjoy high market shares post-transaction, the Board took into consideration various parameters of the case at hand, such as the number of competitors (including local and global players), expected new entrants that would have remarkable effects on the relevant markets, overall market size, entry barriers, capacity constraints, supplier/distributor relationships, and the lack of requirement of protection by patents or other intellectual property rights, rather than preferring a stand-alone assessment based solely on the market shares of the undertakings.

d) Assessment on Change of Control and Ancillary Restraints

The articles regarding the Board's *Kerry Logistics/Asav HoldCo* and *Jacobs Douwe Egberts* decisions emphasize and illuminate the Board's evaluations with regards to "change of control" issues. In the *Kerry Logistics/Asav HoldCo* decision [9] (dated 04.07.2019, numbered 19-24/371-169), the Board made its assessment on whether the duration of an interim period for three years constituted a change of control on a lasting basis, despite the general rule limiting such interim periods to one year. In its decision, the Board deemed that the 3-year period would not constitute a change of control on a lasting basis, taking into account (i) the parties' ultimate intentions for the original scheme of the transaction as a whole, (ii) the transitory nature of the interim period, and (iii) the legally binding relationship between the parties with regards to the interim period and consummation of the transaction. In its *Jacobs Douwe Egberts* decision [10] (dated 17.10.2018, numbered 18-39/632-307), the Board concluded that

the acquisition of 30% of the shares in Jacobs Douwe Egberts TR Gıda ve Ticaret A.Ş. by the Kasap Family constituted the acquisition of joint control, despite the parties' statements that there was no change of control on a lasting basis and their contention that the concentration would therefore not require a mandatory merger control filing.

The article regarding the Board's *Cinven/Vakıf/Barentz* decision [11] (dated 22.11.2019, numbered 19-41/676-291) is also of considerable importance, as it underlines the Board's approach regarding relatively complex control structures and highlights its detailed analysis of (i) changes in control, (ii) joint control structures which involve veto rights, and (iii) the full-function nature of the joint venture.

As for ancillary restraints, the *Air France/Virgin Atlantic* decision [12] (dated 18.04.2019, numbered 19-16/219-98) is noteworthy, as it clearly sets forth the Board's approach indicating that the Board would not deem those provisions of the transaction agreement, which pertained to the information exchange between the competitors and joint strategies on pricing, marketing and sales, as ancillary restraints.

e) Sector-specific Evaluations

The articles regarding the Board's *MIH PayU/Ilyzi Ödeme* and *Van Leeuwen/Benteler* decisions demonstrate the Board's in-depth assessments of merger transactions, taking into account specific characteristics of the relevant sector. The *MIH PayU/Ilyzi Ödeme* decision [13] (dated 05.09.2019, numbered 19-31/466-199) relates to the fledgling FinTech market in Turkey, and it presents the Board's analysis on product market definition and market share calculation in the payment systems sector, which display ever-changing and evolving characteristics, and the evaluation of the parties' market powers in the financial technology markets through the application of different market share calculation methods. To that end, the Board established the general principles for the assessment of market power for e-payment services, taking into consideration the various market-specific characteristics in order to assess the competitive nature of the market in question. The *Van Leeuwen/Benteler* decision [14] (dated 31.10.2019, numbered 19-37/560-231) is also pertinent in terms of providing an instructive precedent for assessing the iron and steel sector, referring to the Commission's settled practice in its precedents on this front.

f) Evaluation of Creeping Transactions and Gun-Jumping

Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("**Communiqué No. 2017/2**"), which could be seen as a relatively recent development, introduced three specific amendments to Communiqué No. 2010/4. The most significant amendment is related to the control of creeping acquisitions, which foresees a statute of limitations of 3 years—instead of 2 years—for transactions to be realized within the same relevant product market by the same undertaking to constitute a single transaction.

In this respect, the *MP Hotel/Magic Life/TUI Blue/Alaçatı Beach* decision [15] (dated 22.11.2018, numbered 18-44/699-343) is one of the Board's exceptional decisions, as it provides valuable guidance regarding "creeping transactions." Furthermore, as a guide for future transactions, the decision provides comprehensive explanations on the applicability of the principle of non-retroactivity, regulated under the criminal law, by taking into consideration the Board's and the Council of State's precedents.

In terms of gun-jumping, under the Turkish merger control regime, there is an explicit suspension requirement (*i.e.*, a transaction cannot be closed before obtaining the approval of the Turkish Competition Board), which is set out under Article 11 of the Law No. 4054 and Article 10(5) of Communiqué No. 2010/4.

In its *Akdağ Beton/Şenerler Beton/Saray Beton/Sarıkaya Beton/Üç Yıldırım* decision (dated 07.08.2019, numbered 19-28/435-192) regarding the three stand-alone transactions, the Board did not assess the transactions carried out by the same acquirer in the same product market under the concept of “creeping transactions.” Rather, the Board evaluated the transactions under the concept of “gun-jumping,” and proceeded to determine that the jurisdictional thresholds had not been exceeded in this case. Therefore, this decision is also significant in terms of demonstrating the Board’s rigid approach to the concept of gun-jumping.

[1] See **Gönenç Gürkaynak, Eda Duru**, *The Turkish Competition Authority evaluates four stand-alone transactions upon a complaint received in the construction sector, and concludes that the transactions are not subjected to approval given that the jurisdictional turnover thresholds is not met (Akdağ Beton / Şenerler Beton / Saray Beton / Sarıkaya Beton / Üç Yıldırım)*, 7 August 2019, *e-Competitions Turkish Antitrust*, Art. N° 96513.

[2] See **Gönenç Gürkaynak, Eda Duru**, *The Turkish Competition Authority conditionally clears a merger, subject to certain structural commitments, in the design, manufacturing, and distribution of sunglasses and prescription optical glasses (Luxottica / Essilor)*, 1 October 2018, *e-Competitions Turkish Antitrust*, Art. N° 96480.

[3] See **Gönenç Gürkaynak, Onur Özgümüş**, *The Turkish Competition Authority approves the acquisition of a manufacturing company subject to the commitments submitted to the EU Commission (Nidec / Embraco)*, 18 April 2019, *e-Competitions Turkish Antitrust*, Art. N° 96477.

[4] See **Gönenç Gürkaynak, Onur Özgümüş**, *The Turkish Competition Authority conditionally approved an acquisition of sole control in the market for passive hydraulic actuators, subject to the commitments submitted before the European Commission (Valeo / FTE)*, 26 October 2017, *e-Competitions October 2017*, Art. N° 96508.

[5] See **Gönenç Gürkaynak, Onur Özgümüş**, *The Turkish Competition Authority unconditionally approves an acquisition concluding that the parties, both controlled by state authorities of the People’s Republic of China, constitute separate entities (Tsinghua Tongfang / CNNC Capital)*, 31 October 2019, *e-Competitions Turkish Antitrust*, Art. N° 96485.

[6] See **Gönenç Gürkaynak, Onur Özgümüş**, *The Turkish Competition Authority approves a merger focusing its analysis on whether the two state-owned undertakings belong to the same economic unit and whether competition in the relevant product markets takes place on a global level due to their import-oriented nature (Sabic / Saudi Aramco)*, 29 August 2019, *e-Competitions Turkish Antitrust*, Art. N° 96505.

[7] See **Gönenç Gürkaynak, Eda Duru**, *The Turkish Competition Authority acknowledges that market shares are not the sole indicators of market power and grants an unconditional clearance to an acquisition in the airline transport market (GA Akaryakıt / THY / Total / Zirve)*, 19 December 2019, *e-Competitions Turkish Antitrust*, Art. N° 96476.

[8] See **Gönenç Gürkaynak, Onur Özgümüş**, *The Turkish Competition Authority unconditionally approves the acquisition of sole control in the enterprise key management market and in the enterprise encryption software (Gemalto / Thales)*, 27 August 2018, *e-Competitions Turkish Antitrust*, Art. N° 96481.

[9] See **Gönenç Gürkaynak, Onur Özgümüş**, *The Turkish Competition Authority accepts the transitory nature of joint control status despite a relatively long transition period in the transports market (Kerry Logistics / Asav)*, 4 July 2019, *e-Competitions Turkish Antitrust*, Art. N° 96507.

[10] See **Gönenç Gürkaynak, Onur Özgümüş**, *The Turkish Competition Authority does not fine the notifying party for providing misleading information and approves the acquisition (Jacobs Group / Kasap Family / Jacobs TR)*, 17 October 2018, *e-Competitions Turkish Antitrust*, Art. N° 96504.

[11] See **Gönenç Gürkaynak, Eda Duru**, *The Turkish Competition Authority approves the transaction concerning the indirect acquisition of joint control over a chemical company by an investment fund (Cinven / Vakıf / Barentz)*, 22 November 2019, *e-Competitions Turkish Antitrust*, Art. N° 96510.

[12] See **Gönenç Gürkaynak, Eda Duru**, *The Turkish Competition Authority approves the transaction concerning the acquisition of joint control over an airline company but gives a "no-go" to certain provisions of the transaction agreement (Air France / Virgin Atlantic)*, 18 April 2019, *e-Competitions Turkish Antitrust*, Art. N° 96500.

[13] See **Gönenç Gürkaynak, Onur Özgümüş**, *The Turkish Competition Authority approves the acquisition of a company active in the FinTech sector (PayU / İyzico)*, 5 September 2019, *e-Competitions Turkish Antitrust*, Art. N° 96546.

[14] See **Gönenç Gürkaynak, Eda Duru**, *The Turkish Competition Authority approves the transaction concerning the indirect acquisition of control over a coal and steel company and its business unit for the distribution of steel pipes via transfer of shares (Van Leeuwen / Benteler)*, 31 October 2019, *e-Competitions Turkish Antitrust*, Art. N° 96511.

[15] See **Gönenç Gürkaynak, Eda Duru**, *The Turkish Competition Authority approves the sole control acquisition of several resorts in the hospitality sector (MP Hotel)*, 22 November 2018, *e-Competitions Turkish Antitrust*, Art. N° 96512.