Market Intelligence

MERGER CONTROL 2020

Global interview panel led by White & Case LLP

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Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager
Dan Brennan
dan.brennan@gettingthedealthrough.com

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Turkey

Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak, Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. He received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels and England and Wales

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.

Öznur İnanılır is a partner in ELIG Gürkaynak's regulatory and compliance department. She graduated from Başkent University Faculty of Law in 2005 and obtained her LLM in European law from London Metropolitan University in 2008. Öznur has extensive experience in all areas of competition law, including compliance matters, defences in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters.

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

The regulatory developments in Turkey are still an ongoing process in terms of merger control. Indeed, in 2017, the Turkish Competition Authority (the Authority) 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 the 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.

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Gönenç Gürkaynak


Öznur İnanılır

Recently, Law No. 7246 on the Amendment to the Law No. 4054 on Protection of Competition was published in the Official Gazette and entered into force on 24 June 2020 (the Amendment Law). However, the secondary legislation has not been revised nor new secondary legislation been introduced in view of the Amendment Law.

The Amendment Law amends article 7 of Law No. 4054 and introduces the significant impediment of effective competition (SIEC) test, similar to the approach under the EC Merger Regulation. With this new test, the Turkish Competition Board will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition. As a matter of article 7 of the Competition Law, mergers and acquisitions that do not create or strengthen a dominant position or do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Board.

According to the annual statistics of the Authority's Mergers and Acquisitions Status Report for 2019, the Board reviewed 208 transactions in 2019, including two decisions that were approved conditionally (*Nidec/Embraco*, 18 April 2019, 19-16/231-103; *Harris Corporation*/L3, 20 June 2019, 19-22/327-145)). None of the

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transactions were rejected in 2018. It can be observed that the number of transactions has increased from the 2016 and 2017 figures, which were 209 and 184 respectively, although the number of transactions slightly decreased in 2018, to 223. In addition, 113 transactions notified to the Board were foreign-to-foreign transactions, which constitute over half of the concentrations notified in 2019.

The Board adopted many significant decisions in the past year. Among them was the transaction concerning the acquisition of sole control of Embraco, the compressor manufacturing business of Whirlpool Corporation, by Nidec Corporation (*Nidec/Embraco*, 20 June 2019, 19-16/231-103). As a result of the Phase I review, the Board took the transaction into Phase II review due to the potential competition law concerns arising from the transaction. Notwithstanding the foregoing, the transaction was approved pursuant to the commitment package submitted to the EU Commission about the divestment of Nidec's own light commercial compressor and household compressor businesses as the Board concluded that the relevant commitments eliminate the horizontal and vertical overlaps in Turkey regarding the sales of household-type reciprocating hermetic cooling compressors, reciprocating hermetic light commercial cooling compressors and sales of condenser units.

Another noteworthy decision of 2019 is the transaction concerning the acquisition of sole control by Harris Corporation over L3 Technologies, Inc (20 June 2019, 19-22/327-145) upon a Phase I review. The Board held that the commitments have completely eliminated the overlap between the parties and thus, the transaction did not result in the creation or strengthening of a dominant position and did 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.

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

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 26,027 Turkish lira in 2019 and 31,903 lira in 2020. 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

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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 contain 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 been 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

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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 sole control of Embraco by Nidec Corporation upon its Phase II review, which lasted approximately four months. Once the parties submitted

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the commitments before the EC, which also covers Turkey, they also informed the Board with regard to the Turkey specific effects of the commitments and demonstrated that the competition law concerns arising in Turkey will also be addressed. The Board concluded that these commitments remove the overlaps that will arise in the 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). 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-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 2019, the transactions that have been notified to the Authority during this time period have been concluded within an average of 14 calendar days following the final submissions.

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

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;

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- 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 effective 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 the *Toyota/Vive* (6 April 2017, 17-12/143-63) and *Luxottica/Essilor* (1 October 2018, 18-36/585-286) 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 the *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 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 that 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.

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"The new Amendment Law aims to bring Turkish competition law closer to EU competition law.

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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 of 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, and 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 to and substitute 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.

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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.

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

Currently, the Board analyses the concentrations on an economic basis. In that 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 (for example, if the transaction is to 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.

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

In the period 2014–2019, the Board has taken 19 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 2019 the Board conditionally cleared two transactions upon a Phase II review, concerning the sectors for compressor manufacturing and technology *(Nidec/Embraco; Harris/L3)*.

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6 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?

The newly introduced Amendment Law, which entered into force on 24 June 2020, aims to embody the Authority's 20 years plus of enforcement experience and bring Turkish competition law closer to EU competition law. It is designed to be more compatible with the way the law is being applied in practice and aims to further comply with EU competition law. The most prominent changes introduced by the Amendment Law are as follows:

- de minimis principle for agreements, concerted practices or decisions of association of undertakings;
- SIEC test for merger and acquisitions;
- behavioural and structural remedies for anti-competitive conduct;
- commitments and settlement mechanisms;
- clarification on the powers of the Authority in on-site inspections; and
- clarification on the self-assessment procedure in individual exemption mechanism.

Gönenç Gürkaynak
gonenc.gurkaynak@elig.com

Öznur İnanılır
oznur.inanilir@elig.com

ELIG Gürkaynak Attorneys-at-Law
Istanbul
www.elig.com

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The Inside Track

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

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 depends heavily 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 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?

All the necessary information in the notification form must be provided to minimise the risk of receiving additional questions. The review process must be followed closely. Anticipate potential competition law concerns that the case handlers could raise beforehand, taking the necessary measures to avoid such concerns. File the notification form at least 45 calendar days before closing.

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

The *Saudi Aramco/Sabi*c (29 August 2019, 19-30/448-193) and *CNNC/Tsinghua* (31 October 2019, 19-37/550-226) decisions are examples where the board considered the relevant state-owned undertakings as separate economic entities and the transactions as notifiable.

The recent *BP/Bunge* decision (11 October 2019, 19-35/526-216) further bolsters the consistent case law of the board, setting forth that full-function JV transactions would be subject to mandatory merger control filings whenever the jurisdictional turnover thresholds are exceeded, even in cases where the JV is not or will not be active in Turkey and will not have any effects in the near future (or perhaps ever) on Turkish markets.

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