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Merger Control

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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, which was recently amended on June 24, 2020 ("Amendment Law"), and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("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 2020, the Competition Board ("Board") reviewed 220 transactions in total, including: 190 mergers and acquisitions that were approved unconditionally; one decision that was approved conditionally; and one decision that was not approved. Twenty-eight 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 a lack of change in control).

New developments in jurisdictional assessment or procedure

The major development in the Turkish competition law regime is the Amendment Law. The draft law was officially approved by the Turkish Parliament on June 16, 2020. The Amendment Law entered into force on June 24, 2020 – on the day it was published in the Official Gazette. The Amendment Law aims to achieve further compliance with the EU competition regime, on which it is closely modelled. The Amendment Law continues to set out the main rules under Article 4 (concerning agreements, concerted practices and decisions restricting competition), Article 6 (concerning abuse of dominant position) and Article 7 (concerning mergers and acquisitions) of Law No. 4054, yet the amendments: (i) introduce efficient enhancing procedures and mechanisms; and (ii) clarify mechanisms to sustain legal certainty in practice, to a certain extent. To this extent, new mechanisms adopted in relation to a selection of cases include the following: (i) the substantive test applicable to merger control analysis; (ii) behavioural and structural remedies applicable to anticompetitive conduct; and (iii) procedural tools enabling the Board to end its proceedings in certain cases without going through the whole procedure when the parties opt for a commitment or settlement mechanism. Below are the key changes introduced by the Amendment Law:

- *De minimis* principle: The Board can decide not to launch a fully fledged investigation for agreements, concerted practices and/or decisions of association of undertakings which do not exceed the market share and/or turnover thresholds that will be determined by the Board.

- Significant impediment of effective competition ("SIEC") test: In parallel with EU competition law, the current dominance test is replaced by the SIEC test. Accordingly, M&A transactions significantly impeding competition can also be prohibited. On the other hand, the SIEC test is regarded to reduce over-enforcement as focus is placed on whether and how much the competition is impeded as a result of a transaction.
- Behavioural and structural remedies: In cases where the behavioural remedies have failed, structural remedies may be applied for anticompetitive conducts. Application of the remedy mechanism has been newly introduced to Articles 4 and 6, and the mechanism previously applicable under Article 7 has changed. Accordingly, the new mechanism applicable for all anticompetitive conduct assessments sets application/proof of ineffectiveness of behavioural remedies as a precondition for structural remedies.
- Settlement: The Board, *ex officio* or on the parties' request, can initiate a settlement procedure. Parties that admit to an infringement can apply for the settlement procedure up until the official notification of the investigation report.
- Commitment: Undertakings or associations of undertakings can voluntarily offer commitments during a preliminary investigation or fully fledged investigation to eliminate the Competition Authority's ("Authority") competitive concerns in terms of Articles 4 and 6. Depending on the sufficiency and the timing of the commitments, the Board can decide not to launch a fully fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. In any event, the commitments will not be accepted for violations such as price-fixing between competitors, territory- or customer-sharing or restriction of supply.
- On-site inspections: This amendment confirms the current practice of the case handlers, who inspect and make copies of all information and documents in companies' physical and electronic records.
- Self-assessment procedure: The amendment provides legal certainty to the individual exemption regime as it is sets forth that the "self-assessment" principle applies to certain agreements, concerted practices and decisions that potentially restrict competition.
- Time extension for the additional opinions: The 15-day time period for submission of the Authority's additional opinion can be now doubled if deemed necessary.

The Authority recently published its Guidelines on Examination of Digital Data during On-Site Inspections on October 8, 2020, which set forth the general principles regarding the examination, processing and storage of data and documents held in electronic media and information systems during on-site inspections. Furthermore, the secondary legislation regarding the commitment mechanism and the *de minimis* mechanism (Communiqué No. 2021/2 on Remedies for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position; and Communiqué No. 2021/3 on *De Minimis* Applications for Agreements, Concerted Practices and Decisions of Associations of Undertakings) came into force on March 16, 2021.

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

Traditionally, the Authority pays special attention to transactions which take place in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors important to the country's economy (such as automotive, construction, telecommunications, energy, etc.) also attract the Authority's special scrutiny. The sector reports published annually by the Authority might also be an indicator of the sectors that attract the attention of the Authority.

The last three sector reports examined the expo, nut and television broadcasting sectors, respectively. The 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 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 2020 show that the transactions in the chemical and mining sector took the lead with 39 notifications, followed by the vehicle and transportation sector with 28 notifications.

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

The transaction concerning the combination of the two automotive companies Fiat Chrysler Automobiles N.V. and Peugeot S.A., through the merger of Peugeot S.A. with and into Fiat Chrysler Automobiles N.V. ("Fiat"), had been taken to Phase II (July 17, 2020; 20-34/441-M). The short-form decision indicates that the notified transaction would not result in the significant impediment of effective competition in the market for manufacturing and sales of passenger cars and the market for manufacturing and sales of light commercial vehicles between the gross weight of 3.5–6 tonnes. However, pursuant to Article 7 of Law No. 4054, the notified transaction would result in the significant impediment of effective competition in the market for manufacturing and sale of light commercial vehicles up to the gross weight of 3.5 tonnes. Accordingly, the transaction has been approved within the scope of the commitments submitted to the Authority by Fiat and Koç Holding A.Ş. (December 30, 2020; 20-57/794-354). The reasoned decision has not yet been published.

In another Phase II decision related to the transaction concerning the acquisition of sole control over Gülçiçek Kimya ve Uçan Yağlar Sanayi ve Ticaret A.Ş. by Fragar (Europe) SA, the unconditional approval decision rendered in this regard is prominent in the sense that even though the combination of the undertakings in question would give rise to significant market power in Turkey, the Board cleared the transaction by taking into account the parties' and their competitors' Turkish and global market shares and the competitive dynamics of the market both globally and in Turkey (June 25, 2020; 20-31/388-174). The Board determined that the parties' activities (i) horizontally overlap with respect to the sale and production of fragrances, and (ii) vertically overlap with respect to the sale and production of fragrances and aromatic chemicals. In terms of the assessment of other players within the market, the Board found that there are many global competitors who are active in the Turkish markets via imports. Therefore, the Board decided that these players and the global market conditions should also be taken into consideration for the assessment of the transaction. Thereby, upon its assessment of the parties' Turkish and global market shares and the global market dynamics, the Board found that the parties' competitors hold significant market power in Turkey. The Board has also assessed that the "aroma chemicals" product used as an input for the perfume market where Gülçiçek operates globally and in Turkey is sold to customers in Turkey by Firmenich through its affiliate. Ultimately, the Board decided that the transaction would not give rise to anticompetitive effects due to the: (i) dynamic nature of the market; (ii) homogenous structure of the retail level; (iii) lack of or very limited entry barriers; (iv) existence of and the ease of switching between local and global suppliers; and (v) level of countervailing buyer power. Therefore, the Board unconditionally cleared the transaction within the scope of the Phase II review.

Another interesting decision rendered in 2020 was the acquisition of sole control over the business solutions branch of Johnson Controls International plc by Brookfield Asset Management Inc. ("Brookfield") (April 30, 2020; 20-21/278-132). In this decision, the Board imposed two separate administrative fines on Brookfield after finding that: (i) Brookfield closed the acquisition of the power solutions business of Johnson Controls International plc without notifying the Board and waiting for its approval; and (ii) Brookfield submitted false and misleading information regarding its Turkish turnover.

In its assessment of violation of the suspension requirement, the Board compared the closing and notification dates, and consequently found that Brookfield notified the transaction approximately five months after its closing. The Board also acknowledged that the contemplated transaction was notified before the Commission and was unconditionally approved on February 14, 2019.

As a result, while the Board ultimately approved the transaction, it imposed an administrative monetary fine of 0.1% of Brookfield's annual turnover for gun-jumping. Furthermore, the Board imposed a separate monetary fine due to misleading information, as Brookfield provided its Turkish turnover without including the turnover of one of its recently acquired subsidiaries.

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 SIEC test in the evaluation of concentrations. In line with EU law, the Amendment Law replaces the dominance test with the SIEC test. Based on the new substantive test, mergers and acquisitions that do not significantly impede effective competition in a relevant product market within the whole or part of Turkey would be cleared by the Board. This amendment aims to allow a more reliable assessment of the unilateral and cooperation effects that might arise as a result of mergers or acquisitions. The Board will be able to prohibit not only transactions that may result in the creation of a dominant position or strengthen an existing dominant position, but also those that can significantly impede effective competition.

On the other hand, the SIEC test may also reduce over-enforcement as it focuses more on whether and how much competition is impeded as a result of a transaction. Thus, pro-competitive mergers and acquisitions may benefit from the test even though a transaction leads to significant market power based on, for instance, major efficiencies. Likewise, dominant undertakings contemplating transactions with *de minimis* impact may also benefit from this new approach.

As the amendments to Law No. 4054 have only recently come into force, although the Board has started to apply the relevant SIEC test in its decisions, it has not published detailed assessments pertaining to the implementation of such test. However, as the guidelines and secondary legislation have not been revised and new guidelines have not been introduced as a result of the changes in the primary legislation, how the SIEC test will be incorporated remains unclear.

Within the previous implementation of the Law, 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 which do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Board. Article 3 of Law No. 4054 defines a dominant position as: "[T]he 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 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 Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the ground that they 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 creation of joint dominance by certain players in the market whereby competition would be significantly impeded. Nonetheless, the High State Court overturned the Board's decision and decided that the dominance test does not cover joint dominance. This has been a very controversial topic ever since, as the Board has not prohibited any transaction on the grounds of joint dominance following 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, it should not have as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself.

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 Board used the OLS and 2SLS estimation models in order to define the price increases 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. In 2019, the Board also published the *Handbook on Economic Analyses Used in Board Decisions*, which outlines the most prominent methods utilised by the 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 Board, upon its preliminary review (Phase I) of the notification, will decide either to approve

or to investigate the transaction further (Phase II). The Board 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 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 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 is 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 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 Authority does not have a clear preference on 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 major development in the Turkish competition law regime is the Amendment Law, which changes the substantive test by replacing the dominance test with the SIEC test. Accordingly, M&A transactions significantly impeding competition are prohibited. Having said that, the secondary legislation which should be providing further insight into the application of the new SIEC test is yet to change. Apart from the Amendment Law, the following guidelines promulgated prior to the Amendment Law are still in effect and serve as the most important documents in relation to the assessment of concentrations: (i) the Guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("Guideline on Undertakings Concerned"); (ii) the Horizontal Merger Guideline; and (iii) the Guideline on the Assessment of Non-Horizontal Mergers ("Non-Horizontal Merger Guideline"). These Guidelines are in line with EU competition law regulations and seek to retain harmony between EU and Turkish competition law instruments.

The approach of the Board to market shares and concentration levels is similar to the approach taken by the European Commission and enumerated 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 a 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 resulting from the combined entity. Although a brief mention of the 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 still remains 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 that set out in 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 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.

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

- The Guidelines on Examination of Digital Data during On-Site Inspections were accepted on October 8, 2020.
- Communiqué No 2021/2 on Remedies for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position.
- Communiqué No 2021/3 on *De Minimis* Applications for Agreements, Concerted Practices and Decisions of Associations of Undertakings came into force on March 16, 2021.

Reform proposals

Recently, on March 18, 2021, the Authority began the public consultation process on the Settlement Regulation, which is set to end on April 19, 2021.

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Mr. Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 47 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, beginning with the establishment of the Turkish Competition Authority.

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