Market Intelligence

MERGER CONTROL 2021

Global interview panel led by White & Case LLP

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Merger Control 2021

Turkey

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1 What are the key developments in the past year in merger control in your jurisdiction?

Pursuant to the Decision Statistics of the Competition Authority (Authority) for 2020, the Competition Board (Board) reviewed a total of 220 transactions in 2020 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 (ie they either did not meet the turnover thresholds or fell outside the scope of the article 7 of the Law No. 4054 on the Protection of Competition). The indecision Statistics for 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.

Some of the Board's most important recent merger control decisions are as follows.

FCA/PSA transaction concerned the combination of two automotive companies Fiat Chrysler Automobiles N.V. (FCA) and Peugeot S.A. (PSA), through the merger of PSA with and into FCA had been taken to Phase-II review (17 July 2020; 20-34/441-M). The short form decision indicates that the 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 weights of 3.5-6 tonnes. However, the Board concluded that the transaction would result in coordinated effects in the market for manufacturing and sales of light commercial vehicles up to the gross weight of 3.5 tonnes. The transaction has been approved within the scope of the commitments submitted to the Authority by FCA and Koç Holding A.Ş. (30 December 2020; 20-57/794-354). The reasoned decision has not yet been published.

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 (25 June 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 (downstream market) and aromatic chemicals (upstream market). 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


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Board decided that these players and the global market conditions should also be taken into consideration for the assessment of the transaction. 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 e of the retail level, (iii) lack of or very limited entry barriers, (iv) existence of and the switching ease 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 noteworthy decision rendered in 2020 was the acquisition of sole control over the business solutions business unit of Johnson Controls International plc by Brookfield Asset Management Inc. (Brookfield) (30 April 2020; 20-21/278-132). In this decision, the Board imposed two separate administrative fines on Brookfield

based on the following: (i) the parties to the transaction failed to comply with the notification and suspension requirement (i.e. the concentration was filed to the Authority after five months from the closing date of the transaction) and (ii) the Board have found out that Brookfield had provided false or misleading information regarding its Turkish turnover by way of excluding the turnover of one of its controlled entities within a past merger control review (The Board's *Brookfield/JC Autobatterie* decision dated 22 November 2019 and numbered 19-41/679-293). In terms of the administrative monetary fine imposed based on false/misleading information, it is noteworthy that the Board noted that exclusion of the relevant controlled entity's turnover information did not alter the Board merger control analysis (ie, in terms of its notifiability analysis). As a result, while the Board ultimately approved the transaction, it imposed an administrative monetary fine of 0.1 per cent of Brookfield's annual turnover for gun-jumping. Furthermore, the Board imposed a separate administrative monetary fine due to provision of misleading information.

2 Have there been any developments that impact how you advise clients about merger clearance?

With the recent changes in Law No. 4054, the Board has geared up for a merger control regime focusing much more on deterrents. As part of that trend, monetary fines have increased significantly for not filing or for closing a transaction without the Board's approval. For instance according to the Decision Statistics for 2019 and 2020, the Board have imposed an administrative monetary fine amounting to approximately 21 million Turkish lira amounting to approximately , while in 2019 there have been no administrative monetary fine imposed on that basis. It is now even more advisable for the transaction parties to keep an eye on the notification and suspension requirements and avoid potential violations on that front. This is particularly important when transaction parties intend to put in place carve-out or hold-separate measures to override the operation of the notification and suspension requirements in foreign-to-foreign mergers. The Board is currently rather dismissive of carve-out and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carve-out or hold-separate arrangements are now allowed. Because the position the Authority will take in interpreting this provision is not yet clear, such arrangements cannot be considered as safe early closing mechanisms recognised by the Board.

Many cross-border transactions meeting the jurisdictional thresholds of Communiqué No. 2010/4 will also require merger control approval in a number of other jurisdictions. Current indications in practice suggest that the Board is willing to cooperate more with other jurisdictions in reviewing cross-border transactions.

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Article 43 of Decision No. 1/95 of the EC–Turkey Association Council authorises the Authority to notify and request the European Commission (the Competition Directorate-General) to apply relevant measures.

The Turkish merger control regime currently utilises a SIEC test in the evaluation of concentrations. In line with EU law, the Law No. 7246 Amending the Law No. 4054 on the Protection of Competition (Amendment Law), entered into on June 2020, has replaced 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.

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.

Furthermore, economic analysis and econometric modelling have been seen more often in recent years. For example, in *AFM/Mars Cinema* (17.11.2011; 11-57/1473-539), the Board employed the ordinary, least-squared and the two-staged, least-squared estimation models to determine price increases that would be expected as a result of the transaction. The Board also used the *Breusch–Pagan, Breusch–Pagan/Godfrey/Cook–Weisberg* and *White/Koenker NR2* tests and the Arellano–Bond test on the simulation model. Such economic analyses are rare, but increasing in practice. Economic analyses that are used more often are the HHI and concentration ratio indices to analyse concentration levels. In 2019, the

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Board also published the Handbook on Economic Analyses Used in Board Decisions, which outlines the most prominent methods utilised by the Authority (eg, correlation analysis, the small but significant and non-transitory increase in price test and the *Elzinga–Hogarty* test).

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Generally, the Competition Authority pays special attention to those transactions in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors such as automotive, construction, telecommunications, energy, etc, are on the front. As stated above, 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 sector reports published annually by the Competition Authority also indicate concentration trends. The last three sector reports were regarding the expo, nut and television broadcasting sectors. Additionally the Authority has published its preliminary report regarding E-Marketplace Platforms on 7 May 2021 and on 5 February 2021 a preliminary report on the fast-moving consumer goods (FMCG) Sector has been published.

To the extent that these decisions were also supported by worries over high levels of concentration, it would be prudent to anticipate that the Competition Authority will scrutinise notifications of transactions leading to a concentration in any one of the markets for construction materials.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

As per the amendments introduced to Law No. 4054 via the Amendment Law, the Board is explicitly granted with the power to impose behavioural and/or structural remedies in case of a competition law infringement. This also applies to the infringement of article 7 of the Law No. 4054, which prohibits concentrations, which would result in a significant lessening of effective competition within a market for goods or services, particularly in the form of creating or strengthening a dominant position. Article 9 of Law No. 4054 aims to grant the Board the power to order structural remedies for anti-competitive conduct infringing articles 4, 6 and 7 of the Law No. 4054, provided that behavioural remedies are first applied and failed. Further, if the Board determines with a final decision that behavioural remedies have failed,

undertakings or association of undertakings will be granted at least six months to comply with structural remedies. Both behavioural and structural remedies should be proportionate to and necessary to end the infringement effectively.

Recent indications in practice show that remedies and conditional clearances are becoming increasingly important in Turkish merger control enforcement. The number of cases in which the Board decided on divestment or licensing commitments or other structural or behavioural remedies has increased dramatically over the past years. Examples include some of the most important decisions in the history of Turkish merger control enforcement such as *PSA/FCA*, 17 July 2020; 20-34/441-M; *Bekaert/Pirelli*, 22 January 2015, 15-04/52-25, *Migros/Anadolu*, 9 July 2015, 29/420-117; *Luxottica/Essilor*, 1 October 2018, 18-36/585-286; *AFM/Mars*, 17 November 2011, 11-57/1473-539; *Vatan/Doğan*, 10 March 2008, 08-23/237-75; *ÇimSA/Bilecik*, 2 June 2008, 08-36/481-169; *OYAK/Lafarge*, 18 November 2009, 09-56/1338-341; *THY/HAVAS*, 27 August 2009, 09-40/986-248; *Burgaz/Mey Icki*, 8 July 2010, 10-49/900-314..

In line with this trend, the Authority issued the Guidelines on Remedies. The Guidelines on Remedies aim to provide guidance on remedies that can be offered to dismiss competition law concerns regarding a particular concentration that may otherwise be deemed as problematic under the SIEC test. The Guidelines on Remedies set out the general principles applicable to the remedies acceptable to the Board, the main types of commitments that may be accepted by the Board, the specific requirements that commitment proposals need to fulfil and the main mechanisms for the implementation of such commitments.

Separately, in *TIL /Marport*, the Board refused to grant approval to the transaction, concerning Terminal Investment Limited Sàrl's (TIL) acquisition of sole control over Marport Liman İşletmeleri Sanayi ve Ticaret Anonim Şirketi (Marport), which was under the joint control of TIL before the transaction, on the grounds that the notified transaction was likely to cause significant impediment of effective competition pursuant to article 7 of Law No. 4054. The Board found, among others, that (i) the relevant transaction would lead to a horizontal overlap in the relevant product market for the 'port management for container handling services' and a vertical overlap in the relevant product market for the 'container line transportation', (ii) TIL has significant market power in the 'port management for container handling services' and its sub-segments, (iii) the parent of TIL (Mediterranean Shipping Company (MSC)) (ie, holding joint control over TIL) is the biggest customer of TIL, and another JV of MSC (Asyaport Liman A.Ş. (Asyaport)) also almost entirely serves to the MSC regarding transit and local loads, and, in terms of local loads, MSC is the major customer of Marport, (iv) in the port management for container handling services market for local loads in the North-west Marmara Region, Marport is the

"Recent indications in practice show that remedies and conditional clearances are becoming increasingly important in Turkish merger control enforcement."

biggest player and Asyaport is in the third place, hence the market share of the TIL's parent group would significantly increase post-transaction, (v) the HHI level in the relevant product market was already high and would increase to 4573 by a rise of 1187 and (vi) because MSC is one of the biggest line operators on a global scale, when evaluated together with its significant presence in the area of line transportation, the fact that MSC would operate a significant part of the container handling capacity of the North-west Marmara region is likely to build a disadvantage for other line operators that use the ports in the Northern Marmara region.

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

On 5 February 2021, the Competition Authority published its Preliminary Report on its Sector Inquiry on FMCG Sector. Also, on 7 May 2021, the Competition Authority published its Preliminary Report on its Sector Inquiry on E-Marketplace Platforms.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

The proposal for an amendment to the Law No. 4054 has been approved by the Turkish parliament, namely the Grand National Assembly of Turkey, on 17 June 2020. The Amendment Law that has been published in the Official Gazette and entered into force on 24 June 2020 essentially: clarifies certain mechanisms in Law No. 4054 that might have led to legal uncertainty in practice to a certain extent, and introduces new mechanisms as to the selection of cases for the Authority to focus on, such as the: de minimis principle for agreements; concerted practices or decisions of association of undertakings (except hardcore violations); SIEC test for merger and acquisitions; behavioural and structural remedies for anticompetitive conduct; commitments and settlement mechanisms; clarification on the powers of the Authority in on-site inspections; clarification on the self-assessment procedure in individual exemption mechanism. The amendments that directly relate to merger control are (i) SIEC test and (ii) Board's power to apply behavioural and structural remedies for anticompetitive conduct.

In terms of the secondary legislation, the Authority has published two Communiqués on the de minimis concept (Communiqué No. 2021/3) and commitment mechanism (Communiqué No. 2021/2) respectively on 16 March 2021. Additionally, the Authority published the Settlement Regulation on 15 June 2021.

In terms of the significant changes to the merger control rules, with the SIEC test introduced via the Amendment Law the 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.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

In a multi-jurisdictional transaction, a prospective client may need to consider that the Competition Authority may be inclined to cooperate and get in contact with authorities from other jurisdictions if the contemplated transaction may raise competition-related issues.

In any case, it should be noted that the Competition Authority is familiar with contacts with other competition authorities and indeed there have been cases where they have fielded such requests and/or they requested to contact other competition authorities. However, the Competition Board will conduct its own analyses and assessments and thus, any concerns raised in another jurisdiction will not, by itself, effect the assessment of the transaction. We have seen a number of cases where the Authority cleared a transaction in Turkey while other authorities went into Phase II, or vice versa, by taking into account the Turkey-specific aspects of the transaction.

In your experience, what makes a difference in obtaining clearance quickly?

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, 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. Other significant factors are anticipating potential competition law concerns that the case handlers could raise beforehand, taking the necessary measures to avoid such concerns and also filing the notification form at least 45 calendar days before closing.

What merger control issues did you observe in the past year that surprised you?

Within the past one year, where all public authorities and private businesses compelled to adapt to the covid-19 circumstances, the Competition Authority have handled hundreds of merger cases with an impressive swiftness, against the compelling conditions of the covid-19 pandemic.

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