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Turkey: Merger Control

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The national competition agency for enforcing merger control rules is the Turkish Competition Authority (the Competition Authority), a legal entity with administrative and financial autonomy. The Competition Authority consists of the Competition Board, the Presidency and service departments. As the competent decision-making body of the Turkish Competition Authority, the Competition Board is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Competition Board consists of seven members and is based in Ankara.

Turkish merger control regulation

The applicable legislation on merger control is Law No. 4054 on Protection of Competition (Law No. 4054) and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4, as amended by Communiqué No. 2012/3).

Article 7 of Law No. 4054 authorises the Competition Board to regulate, through communiqués, which mergers and acquisitions should be notified in order to gain validity. Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board is the primary instrument in assessing merger cases in Turkey. Communiqué No. 2010/4 sets forth the types of mergers and acquisitions that are subject to the Competition Board's review and approval.

With a continued interest in harmonising Turkish competition law with the European Union competition law, the Competition Authority published the following guidelines on merger control that are in line with the European Union antitrust and merger control rules: the Guidelines on Market Definition; the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions (Guideline on Undertakings Concerned); the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control (Guideline on Control), the Guideline on the Assessment of Horizontal Mergers and Acquisitions (Guideline on Horizontal Mergers), the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions (Guideline on Non-Horizontal Mergers) and the Guideline on Remedies. The Guidelines on Market Definition was issued in 2008 and is closely modelled after the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C 372/03). The Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions, which was amended in 2013, contains certain topics and explanations about the concepts of undertakings concerned, turnover calculations and ancillary restraints, and is closely modelled after Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings. The Guideline on Control, Guideline on Horizontal Mergers and the Guideline on Non-Horizontal Mergers were published in 2013. Finally, the Guideline on Remedies has also been issued by the Competition Authority, which provides explanations on the possible remedies.

Types of transactions

Communiqué No. 2010/4 defines the scope of the notifiable transactions in article 5 as follows:

- a merger of two or more undertakings; or
- the acquisition of or direct/indirect control over all or part of one or more undertakings by one or more undertakings or persons, who currently control at least one undertaking, through:
  - the purchase of assets or a part or all of its shares;
  - an agreement; or
  - other instruments.

Turkey is a jurisdiction with a pre-merger notification and approval requirement, much like the EU regime. Concentrations that result in a change of control are subject to the Competition Board's approval, provided they exceed the applicable thresholds. 'Control' is defined as the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions of a company, and can be exercised de jure or de facto.

Acquisition of a minority shareholding can constitute a notifiable merger if it leads to a change in the control structure of the target entity. Joint ventures that emerge as independent economic entities possessing assets and labour to achieve their objectives and that do not aim at or effectively result in the restriction of competition among the parties, or between the parties and the joint venture itself, are subject to notification to, and approval of, the Competition Board. As per article 13 of Communiqué No. 2010/4, cooperative joint ventures will also be subject to a merger control notification and analysis on top of an individual exemption analysis, if warranted.

Market dominance

The Turkish merger control provisions rely on the market dominance test to ascertain whether a merger may be cleared. According to article 7 of Law No. 4054 and article 13 of Communiqué No. 2010/4, mergers and acquisitions that do not create or strengthen a dominant position and that do not significantly impede effective competition in a relevant product market within the whole or part of Turkey shall be cleared by the Competition Board.

Article 3 of Law No. 4054 defines 'dominant position' as 'any position enjoyed in a certain market by one or more undertakings by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply'. However, the substantive test is a two-prong test, and 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.

The Competition Board's approval decision will be deemed to also cover the directly related and necessary extent of restraints in competition brought by the concentration (eg, non-compete,

non-solicitation, confidentiality, etc). This will allow parties to engage in self-assessment, and the Competition Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. Non-competition issues are, in principle, not taken into account.

Thresholds

Communiqué No. 2010/4, as amended by Communiqué No. 2012/3, provides the following thresholds:

- the aggregate Turkish turnover of the transaction parties exceeding 100 million lira and the Turkish turnover of at least two of the transaction parties each exceeding 30 million lira; or
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeding 30 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 500 million lira; or
- the Turkish turnover of any of the parties in mergers exceeding 30 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 500 million lira.

The thresholds above are reviewed by the Competition Board every two years. The next deadline for the Board to confirm or revise the thresholds is the beginning of the year 2017.

As demonstrated by the above, the new regulation, after the amendments, no longer seeks the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement, and if a concentration exceeds one of the alternate jurisdictional thresholds, the concentration will automatically be subject to the approval of the Turkish Competition Board.

The implementing regulations provide for important exemptions and special rules. In particular:

- Banking Law No. 5411 provides an exception from the application of merger control rules for mergers and acquisitions of banks. The exemption is subject to the condition that the market share of the total assets of the relevant banks does not exceed 20 per cent;
- mandatory acquisitions by public institutions as a result of financial distress, concordat, liquidation, etc, do not require a pre-merger notification;
- intra-corporate transactions are not notifiable;
- acquisitions by inheritance are not subject to merger control;
- acquisitions made by financial securities companies solely for investment purposes do not require a notification, subject to the condition that the securities company does not exercise control over the target entity in a manner that influences its competitive behaviour; and
- multiple transactions between the same undertakings realised within a period of two years are deemed as a single transaction for turnover calculation purposes. In case such transactions exceed the notification thresholds individually or cumulatively, all of the transactions must be notified, regardless of whether the transactions concerned are related to the same market or sector or whether they were previously notified. The main goal of this regulation is to prevent the conclusion of important mergers or acquisitions without authorisation through the compartmentalisation of those mergers and acquisitions originally subject to authorisation.

There are also specific methods of turnover calculation for certain sectors. These special methods apply to banks, special financial institutions, leasing companies, factoring companies, securities agents and insurance companies. The Turkish merger control regime does not, however, recognise any de minimis exceptions.

Procedure

There is no specific deadline for making a notification in Turkey. There is, however, a suspension requirement (ie, a mandatory waiting period): a notifiable transaction (whether or not it is problematic under the applicable dominance test) is invalid, with all the ensuing legal consequences, unless the Competition Authority approves it.

The notification is deemed filed when the Competition Authority receives it in its complete form. If the information provided to the Competition Board is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Competition Board's subsequent request for further data. The notification is submitted in Turkish. Transaction parties are required to provide a sworn Turkish translation of the final executed or current version of the transaction agreement.

Notification

In principle, under the merger control regime, a filing can be made by either of the parties to the transaction, or jointly. In case of filing by one of the parties, the filing party should notify the other party of the filing. It is advisable to file the transaction at least 45 calendar days before closing.

As for the filing process for privatisation tenders, Communiqué No. 2013/2 provides that it is mandatory to file a pre-notification with the Competition Authority before the public announcement of tender specifications to receive the opinion of the Competition Board which will include a competitive assessment. In the case of a public bid, the merger control filing can be performed when the documentation adequately proves the irreversible intention to finalise the contemplated transaction. Filing can also be performed when the documentation at hand adequately proves the irreversible intent to finalise the contemplated transaction.

The notification form is similar to the Form CO of the European Commission. One hard copy and an electronic copy of the merger notification form shall be submitted to the Competition Board. In parallel with the notion that only transactions with a relevant nexus to the Turkish jurisdiction will be notified, there is an increase in information requested, including data with respect to supply and demand structure, imports, potential competition, expected efficiencies, and so on. Some additional documents, such as the executed or current copies and sworn Turkish translations of some of the transaction documents, annual reports including balance sheets of the parties and, if available, market research reports for the relevant market, are also required.

There is also a short-form notification (without a fast-track procedure) if: a transition from joint control to sole control is at stake or the parties' aggregate market share is less than 20 per cent in horizontally affected markets and the parties' individual market shares are less than 25 per cent in vertically affected markets.

In the event that the parties to a notifiable transaction violate the suspension requirement (ie, close a notifiable transaction without having obtained the approval of the Competition Board or do not notify the notifiable transaction at all), the acquirer party (for formation of a full-function joint venture, all of the parent companies are deemed as the acquirer party separately) would receive a turnover-based monetary fine at a rate of 0.1 per cent over its annual Turkish turnover generated in the financial year preceding the date of the fining decision. In mergers, both merging

parties would be fined. In any event, the minimum amount of this administrative monetary fine is set at 16,765 lira for 2015 and is revised annually. This fine does not depend on whether the Competition Authority will ultimately clear the transaction. This is a fixed ratio (0.1 per cent). The Competition Board does not have the power to increase or decrease such fine. Therefore, the acquirer would automatically incur the administrative monetary fine once the violation of the suspension requirement is detected.

If, however, there truly is a risk that the transaction is problematic under the dominance test applicable in Turkey, the Competition Authority may:

- ex officio launch an investigation into the transaction;
- order structural and behavioural remedies to restore the situation as before the closing (restitutio in integrum); and
- impose a turnover-based fine of up to 10 per cent of the parties' annual turnover.

Executive members and employees of the undertakings concerned who are determined to have played a significant role in the violation (failing to file or closing before the approval) may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings. The transaction will also be invalid and unenforceable in Turkey.

The Competition Board has so far consistently rejected all carve-out or hold-separate arrangements proposed by merging undertakings. Communiqué No. 2010/4 provides that a transaction is deemed to be 'realised' (ie, closed) 'on the date when the change in control occurs'. While the wording allows some room to speculate that carve out or hold-separate arrangements are now allowed, it remains to be seen if the Competition Authority will interpret this provision in such a way. As noted above, this has consistently been rejected by the Competition Board so far, arguing that a closing is sufficient for the suspension violation fine to be imposed and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

The Competition Authority publishes the notified transactions on its official website (www.rekabet.gov.tr) with only the names of the parties and their areas of commercial activity. To that end, once notified to the Turkish Competition Authority, the 'existence' of a transaction will no longer be a confidential matter.

Costs

There are no filing fees required under Turkish merger control proceedings.

Investigation

The Competition Board, upon its preliminary review of the notification (ie, Phase I), will decide either to approve or to investigate the transaction further (ie, Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval' through an implied approval mechanism introduced with the relevant legislation. While the wording of the law implies that the Competition Board should decide within 15 calendar days whether to proceed with Phase II, the Competition Board generally takes more than 15 calendar days to form its opinion concerning the substance of a notification. It is more sensitive to the 30 calendar-day deadline on announcement. Moreover, any written request by the Competition Board for missing information will stop the review process and restart the 30 calendar-day period at the date of provision of such information. In practice, the Competition Authority is quite keen on asking formal questions and adding more time to the review process. Therefore, it is recommendable that the filing be done at least 45 calendar days before the projected closing.

If a notification leads to a Phase II review, it turns into a full-fledged investigation. Under Turkish competition law, Phase II investigations take about six months. If necessary, the Competition Board may extend this period once by up to six months.

In practice, only exceptional cases require a Phase II review, and most notifications obtain a decision within 40 to 45 days from the original date of notification. Neither Law No. 4054 nor Communiqué No. 2010/4 foresees a 'fast-track' procedure to speed up the clearance process. Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

There is no special rule for hostile takeovers; the Competition Board treats notifications for hostile transactions in the same manner as other notifications. If the target does not cooperate and there is a genuine inability to provide information owing to the one-sided nature of the transaction, the Competition Authority tends to use most of its powers of investigation or information request under articles 14 and 15 of Law No. 4054.

The Competition Board may request information from third parties, including customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. The Competition Board uses this power to define the market and determine the market shares of the parties. Third parties, including the customers and competitors of the parties and other persons related to the merger or acquisition, may request a hearing from the Competition Board during the investigation, subject to the condition that they prove their legitimate interest. They may also challenge the Competition Board's decision on the transaction before the competent judicial tribunal, again subject to the condition that they prove their legitimate interest.

Clearance

The Competition Board may either render a clearance or a prohibition decision. It may also give a conditional approval. The reasoned decisions of the Competition Board are served on the representatives to the notifying parties and are also published on the website of the Competition Authority (www.rekabet.gov.tr).

The Competition Board may grant conditional clearance and make the clearance subject to the parties observing certain structural or behavioural remedies, such as divestiture, ownership unbundling, account separation, right of access, and so on. The number of conditional clearances has increased significantly in recent years.

Judicial review

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted for judicial review before the administrative courts. The plaintiff may initiate a lawsuit within 60 days of the parties' receipt of the Competition Board's reasoned decision. Decisions of the Competition Board are considered as administrative acts. Filing a lawsuit does not automatically stay the execution of the Competition Board's decision. However, upon request of the plaintiff, the court may decide to stay the execution. The court will stay the execution of the challenged act only if the execution of the decision is likely to cause irreparable damages, and the decision is highly likely to violate the law. The appeal process may take up to two-and-a-half years.

Recent developments

The Turkish parliament announced that the draft Law on the Protection of Competition was officially added to the drafts and proposals list. The Prime Ministry sent the Draft Law to the Presidency of the Turkish parliament on 23 January 2014. The draft Law is currently under discussion at the Turkish parliament. It is designed to be more compatible with the actual enforcement of the law. It also aims to further comply with the EU competition law legislation on which it is closely modelled. It adds several new dimensions and changes which promise a procedure that is more efficient in terms of time and resource allocation. The Draft Law will only take effect once the text has been approved and published in the Official Gazette by the President of the Turkish Republic. The timing remains unclear.

The Draft Law proposes several significant changes to the merger control regime:

- the Phase I review period will be changed from 30 calendar days to 30 working days, hence approximately 40 days in total. Phase I proceedings are thus expected to last longer;
- the existing heavy Phase II procedure (six or 12 months) will be abolished. Instead, there will be an extension of the review period with four months for cases requiring an in-depth assessment. During this process, the parties can submit written opinions to the Competition Board;
- the current dominance test will be replaced by the SIEC test applicable in the EU;
- the term 'concentration' will be consistently used instead of 'mergers and acquisitions'; and
- the exemption from merger control rules of acquisitions by inheritance will be abolished.

The Draft Law also proposes to abolish the fixed rates for certain procedural violations, including the 0.1 per cent for failure to notify a concentration and hindering on-site inspections, and to set upper limits for the fines for these violations instead. This new arrangement would give the Competition Board more discretion to impose monetary fines adapted to the specifics of individual cases.

Additionally, the other significant recent development in Turkish competition law circles is the announcement for the public consultation on the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition (Draft Regulation). The Draft Regulation was also sent to the Turkish parliament on 17 January 2014. It is set to replace the current Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (Regulation on Fines). The Draft Regulation is heavily inspired by the Commission's Fining Guidelines. The timing for adoption is unclear.

The TCA recently published the 16th Annual Activity Report (the Report). Along with its mission, vision, objectives, priorities and description of its duties and power, the TCA made an assessment in the third part of the Report on its activities between 1 January and 31 December concerning merger control along with the statistical data. To summarise, in 2014, the Board assessed 215 transactions and took seven concentrations into Phase II review. The 215 overall transactions include four mergers, 130 acquisitions, 63 joint ventures and 18 privatisations. Considering the fact that in 2013, the Board assessed 213 transactions and none of these were taken into Phase II, and only two cases were taken into Phase II review in 2012, the significant increase in the number of Phase II reviews in 2014 leaves the impression that the Board will not hesitate to go into Phase II review if it deems it to be necessary based on the potential competition law concerns. This strongly indicates that remedies and conditional clearances are becoming increasingly important under Turkish merger control enforcement. In line with this trend, the number of cases in which the Competition Board decided on divestment or licensing commitments, or other structural or behavioural remedies, has increased dramatically over the past four years.

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Gönenç Gürkaynak is the managing partner of ELIG, Attorneys-at-Law. He holds an LLM degree from Harvard Law School, and is qualified to practice in Istanbul, New York, and England and Wales (at present a non-practising solicitor). Gürkaynak heads the competition and regulatory department of ELIG, and has unparalleled experience in all matters of Turkish Competition Act counselling, with more than 18 years' experience dating from the establishment of the Turkish Competition Authority. Before founding ELIG more than 10 years ago, he worked as an attorney at the Istanbul, New York, and Brussels offices of a global law firm for more than eight years. Gürkaynak frequently speaks at conferences and symposia on competition law matters. He teaches undergraduate and graduate level courses at two universities, and gives lectures in other universities in Turkey. He has had many international and local articles published in English and in Turkish, and is the author of a book published by the Turkish Competition Authority.

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Ayşe Güner received her Juris Doctorate in 2008 from the Southern Methodist University Dedman School of Law in Dallas, Texas, and received her LLM degree from Maastricht University, in the Netherlands. She is qualified in California. Güner is a senior associate in the competition and regulatory department of ELIG. She has assisted Gönenç Gürkaynak with numerous complex matters requiring counselling under the Turkish Competition Act and related laws. Güner has also published many articles in collaboration with Mr Gürkaynak, and she is particularly experienced in merger control matters.

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ELIG, Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition and regulatory department consists of three partners and 23 associates. We represent corporations, business associations, investment banks, partnerships and individuals in a wide range of competition law matters. Our firm also collaborates with many international law firms on Turkish competition law matters.

In addition to an unparalleled experience in merger control issues, ELIG has vast experience in defending companies before the Competition Board in all phases of an antitrust investigation. ELIG has in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all other forms of restrictive horizontal and vertical arrangements, including price fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. Furthermore, in addition to a significant antitrust litigation expertise, our firm has considerable expertise in administrative law, and is therefore well equipped to represent clients before the administrative courts and the High State Council, both on the merits of a case and for injunctive relief. ELIG also advises clients on a day-to-day basis concerning business transactions that often contain complex antitrust law issues, including distributorship, licensing, franchising and toll manufacturing.

In 2014, ELIG was involved in more than 45 clearances of merger notifications, more than 20 defence projects in investigations, and over 12 appeals before the administrative courts; together with approximately 40 antitrust education seminars provided to the employees of clients.

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