GLOBAL LEGAL INSIGHTS

# 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 (the Competition Act) dated December 13, 1994, and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the Merger Communiqué) published on October 7, 2010. The Merger Communiqué entered into force as of January 1, 2011 and was subsequently amended on February 1, 2013.

Between January 2014 and August 2014, the Turkish Competition Authority (Competition Authority) decided on a total of 137 concentrations (as of January 30, 2014, official merger control statistics of the Competition Authority pertaining only to the first eight months of 2014 are available). As to the types of transactions, the decisions concerned 79 acquisitions, 40 joint venture transactions, 4 mergers and 14 privatisations. The Competition Board found that 28 of the notified transactions were not subject to the approval of the Competition Board (they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to lack of change in control). Two were approved conditionally. The rest of the notified transactions, 107 in total, were approved without conditions. In 2013, in total, the Competition Board decided on a total of 213 transactions, including 125 acquisitions, 1 merger, 68 joint venture transactions and 19 privatisations. A total of 51 transactions were found not to require the approval of the Competition Board. The remainder of the notified transactions were approved without conditions.

The merger control activities reflected in the above statistics demonstrate a mild drop in the number of transactions reviewed by the Competition Board: in the first eight months of 2013, the Competition Board decided on 160 notified transactions, whereas in 2014, it decided on 137 notified transactions, representing a 14.3% drop.

## New developments in jurisdictional assessment or procedure

With the introduction of the new Merger Communiqué in 2011, two measures were thought to be sufficient to decrease the number of merger notifications: increasing the jurisdictional turnover thresholds, and putting in place an additional condition that seeks the existence of an affected market for notifiability. However, these measures, particularly the worldwide turnover threshold (worldwide turnover of one of the transaction parties exceeding TL 500m, and at least one of the remaining transaction parties having a turnover in Turkey that exceeds TL 5m), ultimately turned out to be insufficient to screen out the considerable amount of worldwide mergers without any significant connection to Turkey. Indeed, only 16% of the transactions notified to the Competition Authority in the first eight months of 2011 were between Turkish parties, and 41% of them were between non-Turkish parties.

In an effort to reduce the merger control workload of the Competition Board, particularly in relation to those transactions without a significant connection to Turkey, as well as to provide ease in analysing whether a transaction is subject to the approval of the Competition Board, on February 1, 2013, the turnover thresholds under Article 7 of Communiqué No. 2010/4 were amended.

As a result of the amendments, a transaction would still trigger a notification requirement in cases where:

1. Pursuant to the first prong of the alternative turnover thresholds (Article 7(a) of Communiqué No. 2010/4), the total Turkish turnover of the transaction parties exceeds TL 100m (approximately €34m and US$46m), and the Turkish turnover of at least two of the transaction parties each exceeds TL 30m (approximately €10m and US$14m) (In accordance with the applicable Turkish Central Bank average rate for 2014, amounts in US$ for the year 2014 are converted at the exchange rate US$ 1 = TL 2.19 and amounts in EUR for the year 2014 are converted at the exchange rate EUR 1 = TL 2.91).
2. Pursuant to the second prong of Article 7, a transaction would still trigger a notification requirement in cases where:
   (a) in acquisitions, the Turkish turnover of the transferred assets or businesses exceeds TL 30m (approximately €10m and US$14m) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500m (approximately €172m and US$228m); or
   (b) in mergers, the Turkish turnover of any of the transaction parties exceeds TL 30m (approximately €10m and US$14m) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 500m (approximately €172m and US$228m).

Additionally, the new regulation no longer seeks the existence of an "*affected market*" in assessing whether a transaction triggers a notification requirement. The parties no longer need to go through the trouble of checking to see whether the transaction results in horizontal/vertical overlaps among the parties' activities. This amendment is designed to have an impact solely on the notifiability analysis. The concept of "affected market" still carries weight in terms of the substantive competitive assessment and the notification form.

The amendments have had the desired effect. Now that the worldwide turnover threshold for acquisitions has been revised to require that the "transferred assets or businesses in acquisitions" have the requisite Turkish turnover, the acquisition transactions where the target does not have turnover in Turkey are no longer caught, which has led to a decrease in the number of notified acquisitions.

Since joint venture transactions are analysed as acquisitions, the above revision has also affected the joint venture transactions. However, since the first prong of the alternative turnover thresholds has remained unchanged, joint venture transactions where the assets/businesses transferred to the joint venture do not have any Turkish turnover may still be caught by the first prong due to the Turkish turnover of the joint venture parents. As such, the decrease in the notified joint venture transactions has been lower in comparison to acquisition transactions.

With respect to strategic issues such as gun-jumping and carve-out arrangements, the Competition Board's tough attitude has remained unchanged. In 2012, the Competition Authority went after Boyner Büyük Mağazacılık A.Ş. ("BBM") in connection with gun-jumping allegations (see decision no. 12-44/1359-M) in the context of the *YKM/BBM* transaction (12-41/1162-378, 9.8.2012) concerning the acquisition of sole control over

YKM Yeni Karamürsel Giyim ve İhtiyaç Maddeleri Pazarlama A.Ş. by BBM. While in this case the Competition Board found no evidence of gun-jumping, the case could be seen as a concrete indication of the Competition Authority's willingness to pursue gun-jumping issues, which unsurprisingly led to more recent cases such as *Ersoy/Sesli* (14-22/422-186, 25.6.2014). In *Ersoy/Sesli*, while analysing the transaction concerning the acquisition of 33.3% shares of Anayurt Kömür Madencilik San. ve Tic. A.Ş. ("Anayurt") by Mahmut Can Çalık (14-22/421-185, 25.6.2014), the Competition Board detected that the actual formation of Anayurt was not notified to the Competition Authority, despite the fact that the thresholds of the Merger Communiqué were exceeded. In this respect, the Competition Board imposed administrative fines of TL 15,226 on both Ali Murat Ersoy and the Sesli Family separately, each of whom owned 50% shares in Anayurt (14-22/422-186, 25.6.2014).

Similarly, though the wording of the Merger Communiqué allows some room to speculate that carve-out or hold-separate arrangements could be allowed, there have not been any cases in the last three years which could signal a change in the Competition Board's dismissive stance towards carve-out and hold-separate arrangements.

Another issue to focus on is incorrect or incomplete filings. If the information requested in the notification form 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. In addition, Article 16 of the Competition Act provides that the Competition Board shall impose a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) on the parties, in cases where incorrect or misleading information is submitted to the Competition Authority.

In the event that the parties to a merger or an acquisition that requires the approval of the Competition Board realise the transaction without first obtaining the approval of the Competition Board, a monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) shall be imposed on the incumbent undertakings (acquirers in the case of an acquisition; both merging parties in the case of a merger), regardless of the outcome of the Competition Board's review of the transaction. The minimum fine for 2015 is 16,765 TL.

Furthermore, the Competition Authority has been publishing the notified transactions on its official website with 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.

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

Traditionally, the Competition Authority pays special attention to transactions that take place in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors that are important to the country's economy (such as automotive, telecommunications, energy, etc.) attract the Competition Authority's special scrutiny as well. The Competition 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

Competition 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 2014 (between January and August) indicate that transactions in the industries for energy and food took the lead with 17 notifications each. The sectors for transportation and chemical products took the second place with 13 notifications each, followed by the iron, steel and other metals industry (10 notifications).

In 2014, the Competition Board issued some important decisions, examples of which are summarised below:

In *Beğendik* (14-45/808-363, 12.11.2014), the Competition Board reviewed the acquisition of 15% of shares in Real Hipermarketler Zinciri A.Ş. ("Real") by Beğendik Mağaza İşletmeleri Tic. ve San. A.Ş. ("Beğendik") and the acquisition of 17.5% shares in Beğendik by Real. The transaction was significant in that: (i) Beğendik and Real are competitors to each other in the "fast moving consumer goods ("FMCG") market"; and (ii) the transaction does not give rise to a change of control but leads to a cross-shareholding and potential coordinative effects emerging from the relations among family members. The Competition Board, having found that the share purchases did not give rise to a change in control, and thus were not subject to the Competition Board's merger control review, analysed the share purchases under Article 4 (which concerns restrictive agreements among undertakings) of the Competition Act, ultimately finding that any potential coordinative effects resulting from the cross-shareholdings would be insignificant.

In *UCZ Mağazacılık* (14-12/221-97, 26.03.2014), the Competition Board granted clearance to the acquisition by Ertan ACAR, İsmet OR, Ahmet ÖZAKTAÇ, Veysel TAŞKIN and Ergün BODUR of 60% shares in UCZ Mağazacılık Tic. A.Ş. ("UCZ"), an undertaking active in the FMCG market. The buyers did not control any undertakings in the FMCG market. However, the Competition Board found that the transaction could still result in coordination among competitions, i.e. between UCZ and its competitor Yıldız Holding A.Ş. ("Yıldız Holding") in the FMCG retail market, even though Yıldız Holding was not actually party to the transaction due to the following factors, among others: the acquirers had, for example, certain positions in the Board of Directors or the management of the entities of Yıldız Holding, and the capital to acquire UCZ would be provided by Yıldız Holding. The Competition Board therefore also conducted an Article 4 analysis, eventually concluding that the transaction did not constitute an infringement risk. Another significant point regarding the transaction was that the Competition Authority interfered with the duration and geographic scope of the non-compete obligation imposed on the seller.

When it comes to foreign-to-foreign transactions, *Indesit/Whirlpool* (14-28/557-240, 13.8.2014) and *Mitsubishi/Siemens* (14-30/619-271, 3.9.2014) are among the significant foreign-to-foreign transactions which were cleared by the Competition Board in 2014.

## 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 'dominance test' in the evaluation of concentrations. 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 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 the Competition Act defines a dominant position as: "the 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% could 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 the Competition Act.

On the other hand, there were a couple of exceptional cases where the Competition 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 Competition 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 Competition 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 has overturned the Competition Board's decision and decided that the 'dominance test' does not cover 'joint dominance'. This has been a very controversial topic ever since, because the Competition Board has not prohibited any transaction on the grounds of joint dominance after 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, the joint venture 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, 17.11.2011), the Competition Board used the OLS and 2SLS estimation models in order to define price increases that are 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 (*AFM/Mars Cinema* was annulled on the grounds that the parties' commitments were not sufficent to eliminate the competitive concerns. The transaction is currently being reviewed in Phase II). 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.

## Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Pursuant to Article 10 of the Competition Act, once the formal notification has been made, the Turkish Competition Board, upon its preliminary review (Phase I) 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. Regarding the procedure and steps of a Phase II review, the Competition Act makes reference to the relevant articles which govern the investigation procedures for cartel and abuse of dominance cases.

The Competition 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 Turkish Competition 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.

There was a significant increase in the Competition Board's Phase II activity in 2014: in 2013, the Competition Board assessed a total of 213 concentrations and none of these were taken into a Phase II review. In 2014, however, over seven transactions were taken into Phase II. The Competition Board's decisions in 2014 in the context of Phase II review, and which involve commitments, include *THY Opet/MOTAŞ* (14-24/482-213, 16.07.2014) and *Dosu Maya/Lesaffre* (14-52/903-411, 15.12.2014).

As 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 Competition Board proposals for possible remedies during either 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 Competition Authority does not have a clear preference for any particular types 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 amendment of the turnover thresholds in the Merger Communiqué is surely the most important development in Turkish merger control regime in the past few years. In line with the amendment of the Merger Communiqué, the Competition Board also revised its Guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("Guideline on Undertakings Concerned") and took out the relevant section on affected markets, so that the concept of affected markets is now only relevant to the preparation of the notification form and the analysis of the transaction.

Furthermore, the Competition Authority has promulgated two guideline documents in relation to the assessment of concentrations: i) the Horizontal Merger Guideline; and ii) the Guideline on the Assessment of Non-Horizontal Mergers ("Non-Horizontal Merger Guideline"). The Guidelines are in line with EU competition law regulations and seek to retain the harmony between EU and Turkish competition law instruments.

The approach of the Competition Board to market shares and concentration levels is similar to the approach taken by the European Commission and spelled out 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 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 emanating from the combined entity. Although a brief mention of the Competition 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 remains still subject to Article 7 of the Competition Act.

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 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 Competition 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:

- Block Exemption Communiqué On Specialization Agreements (Communiqué No: 2013/3) came into force on 26.07.2013.
- Guidelines On Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions were accepted on 26.03.2013.
- Guidelines on Active Cooperation for the Exposure of Cartels were accepted on 17.04.2013.

- Guidelines on the Protection of Horizontal Agreements, in line with Article 4 and 5 of the Competition Law Act No. 4054, were accepted on 30.04.2013.
- Guidelines on the Assessment of Horizontal Mergers and Acquisitions were accepted on 04.06.2013.
- Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions were accepted on 04.06.2013.
- Guidelines on Cases Considered as Merger and Acquisition and Concept of Control were accepted on 16.07.2013.
- Guidelines on General Principles of Exemption were accepted on 28.11.2013.
- Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position were accepted on 01.29.2014.

## Reform proposals

A current proposal to change the entire Competition Act is being discussed in Turkey's Grand National Assembly. The Prime Ministry sent the Draft Law to the Presidency of the Turkish Parliament on January 23, 2014. The Draft Law is currently discussed in the Turkish Parliament's Industry, Trade, Energy, Natural Sources and Information Technologies Commission ("Parliament Commission"). At this point, even though the specific effective date remains unknown, it seems fair to expect it soon.

The Draft Law is designed to be more compatible with the way the existing legislation is applied. 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 proposes several significant changes in concentration provisions. First, the substantive test for concentrations will be changed. The EU's SIEC Test (significant impediment of effective competition) will replace the current dominance test. Secondly, in accordance with the EU competition law legislation, the Draft Law adopts the term "concentration" as an umbrella term for mergers and acquisitions. Thirdly, the Draft Law eliminates the exemption of acquisitions by inheritance. Fourthly, the Draft Law abandons the Phase II procedure, and instead provides a four-month extension for cases requiring in-depth assessments. During in-depth assessments, the parties can deliver written opinions to the Competition Board, which will be akin to written defences. Finally, the Draft Law extends the review period for concentrations from the current 30-day period to 30 working days, which equates to approximately 40 days in total. As a result, the review period before a Phase I decision, which currently takes around 45 calendar days, is expected to be extended.

Another significant recent proposal is the announcement of 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 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 covers infringements of Article 7 of the Competition Act, which are currently not covered by the Regulation on Fines. Based on this, the Draft Regulation, if it enters into force, will be applicable to the extent possible to Article 7 infringements.

Another significant change that the Draft Regulation brings about is the delimitation of the turnover definition. Unlike the Regulation on Fines, according to which the base fine is determined on the basis of "the total turnover", the Draft Regulation provides that "the turnover generated in the relevant market which is directly or indirectly related to the respective competition law infringement" should be taken into consideration. Furthermore, as regards the calculation of turnover, the Draft Regulation refers to the calculation method set out under the Communiqué No.2010/4. This would result in the explicit recognition of the parental liability principle, since Communiqué No.2010/4 takes into account not solely the Turkish turnover of the investigated legal entity, but the Turkish turnover of the entire group, which includes the investigated legal entity, when calculating the turnover.

Under the Draft Regulation, the impact and the duration of the infringement would also be taken into account in calculating the base fine. As a general rule, the base fine is determined at a level of up to 30% of the turnover generated in the relevant market, multiplied by the amount of years during which the infringement continued. In the course of deciding whether the base fine should be set at the lower or higher end of the 30% scale, the Competition Board will take into account factors such as: (i) the concerned undertaking's market power; (ii) the infringement's nature; and (iii) actual or potential damages of the infringement.

The above proposals will enter into force if the Turkish Parliament approves the Draft Law. Even though the specific effective date remains unknown, it is fair to expect that the law will enter into force soon.

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