Evaluating the Notification Requirement of Foreign-to-Foreign Transactions under the Turkish Merger Control Regime

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Per the general application of the effects theory, transactions that do not directly or indirectly impact Turkish markets are outside the scope of the Turkish merger control regime. The Turkish Competition Board ("***Board***") applied the effects theory in some of its decisions regarding highly exceptional foreign-to-foreign transactions. However, the precedent line of the Board suggests that a mandatory merger control filing will be required, as long as the parties exceed the turnover threshold applicable under Article 7 of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("***Communiqué No.2010/4***"), regardless of whether the contemplated post-transaction entity will have operations and/or generate turnover in Turkey. This interpretation of the effects theory and the Board's current understanding of this concept are closely related to the notifiability of foreign-to-foreign transactions with extremely low or even no effects in Turkey.

This article aims to discuss the notification requirement of foreign-to-foreign transactions and its relation to the application of the effects theory. The risks of failing to notify a notifiable transaction will also be explained with specific examples from the Board's relevant case law.

Effects Theory

Article 2 of the Law No. 4054 on the Protection of Competition ("***Competition Law***") suggests that foreign-to-foreign transactions fall within the scope of the Turkish merger control regime if and to the extent that they affect the relevant markets for goods and services within the borders of the Republic of Turkey. Accordingly, the legislative preamble (rationale) of this article states that this act adopts the effects theory system of the competition law literature, therefore encompassing the companies that are seated outside of Turkey with sales into Turkey. In other words, even mere sales into Turkey by the transaction parties fall within the scope of the Turkish merger control regime. Therefore, Turkey is indeed one of the 'effects theory' jurisdictions.

The Board's Approach

In terms of the current and considerably consistent application of the Board, even apparent lack of effects on Turkish markets cannot altogether rule out the necessity of a mandatory merger control filing, so long as the applicable turnover thresholds are exceeded. Within the context of its handling of foreign-to-foreign transactions, the Board indicates its belief that it must review and approve such transactions, regardless of whether the post-transaction entity would have operations and/or turnover generated in Turkey.

The Board's coherent precedent line contains a number of conveniently straightforward decisions where the Board has found foreign-to-foreign transactions with extremely low or even no effects at all on Turkish markets to be notifiable and has granted them approval.

- *Eksim-Rönesans/Acıbadem* (16.05.2012, 12-26/759-213), one of the outstanding decisions to demonstrate the Board's assessment of direct and indirect effects, sets a good example. The Board found the Eksim-Rönesans/Acıbadem transaction to be notifiable regardless of the fact that the post-transaction entity would not (or even could 'considerably' not) have any effects in the near future on Turkish markets. In this decision, the Board ruled a greenfield healthcare joint venture in Kuwait to be notifiable on the grounds that the increase of market power through the revenue generated from the joint venture would 'indirectly' affect Turkish markets by way of increasing the parties' market power in Turkey.

- In *Ocean* (17.08.2011, 11-45/1106-382), the parties established a greenfield joint venture which would generate electrical power using parabolic trough technology -a system which did not exist in Turkey, and was unlikely to gain existence in the near future-. The Board ruled that there is still a possibility that, upon the advancement of technology, the potential (and currently non-existing) market for power generation with parabolic trough technology in Turkey might be affected by this acquisition and found the transaction to be notifiable.

- In *Lur Berri/LBOF/Financière de Kiel* (12.12.2011, 11-61/1580-565), the Board considered the transaction to be 'potentially' capable of affecting the Turkish market due to the fact that the joint venture's products (i.e. festive food) could 'potentially' be imported into Turkey. The Board rendered its decision stating that the transaction was notifiable and granted it an approval.

- In *Galenica/Fresenius* (24.11.2011, 11-59/1515-540), the Board found a transaction with no relation to Turkey to be notifiable and granted clearance. The transaction concerned a joint venture to be incorporated outside of Turkey, carrying out R&D and distribution activities for certain kidney treatment medicines. The joint venture had no nexus with Turkey and the parties' anticipated time for the distribution of the product was as late as 2028.

- In *Angola LNG Limited* (25.04.2012, 12-22/564-162) the Board ruled that the transaction was notifiable and eventually cleared it. The joint venture was designed to be active in the market for the production and sale of LNG (Liquefied Natural Gas). It did not consider Turkey as one of its target customers. However, upon the increasing demand for LNG in Turkey, the Board concluded that it would always be possible for the joint venture to consider Turkey as a customer in the future.

Potential Effects Approach

Beside the foregoing precedents, there are also developments weakening the "effects" requirement of Article 2 of the Competition Law. The Turkish High State Court, reviewing the Board's *Total/CEPSA* decision (20.12.2006, 06-92/1186-355), has upheld the argument that merger control rules necessitate some sort of *ex post* review on the potential effects of a transaction, and upheld that the Board does not need to prove effects at the time of review (*Total/TCA*; *05.01.2010, 2007/4872 E., 2010/09 K*).

In *Total/CEPSA*, the Board reviewed the acquisition by Total of 4.35% shares of CEPSA. The transaction resulted in Total gaining sole control over CEPSA, while pre-transaction CEPSA was under the joint control of Total and BSCH. The Board, while granting an approval to the transaction, also imposed administrative monetary fines on both Total and BSCH and certain members of their boards of directors on the ground that the transaction was closed without the approval of the Board. In the filing, Total stated that they had taken all precautions to ensure that the transaction would not produce any effects on any markets in Turkey prior to the Board's approval. The Board disregarded this commitment of Total and imposed administrative monetary fines. Total then lodged an appeal with the High State Court against this fining decision.

In the High State Court's *Total/TCA* case, the Turkish Competition Authority ("***TCA***") argued that merger control rules automatically implied a review of "potential effects" of a transaction as opposed to "actual effects" and challenged its duty to even look into the question of whether effects of a transaction were actually borne in the Turkish markets, arguing that most transactions take years to really produce effects anyway. The TCA won the case before the High State Court and now there is a finalized court ruling that confirms the Board's approach.

Merger Control Statistics

The statistics from the TCA's 2014 Mergers-Acquisitions Overview Report ("***2014 Report***") indicate that the Board reviewed 193 transactions in 2014 (excluding privatizations and out-of-scope transactions), of which 76 transactions were among foreign companies. The 2013 Report statistics showed 68 foreign-to-foreign transactions out of a total of 182 transactions (excluding privatizations and out-of-scope transactions).

In terms of the volume of the transactions that were reviewed by the Board in 2014, the total value of foreign-to-foreign transactions was TL 454,510,661,587 (approx. EUR 162,325,236,281); while the total value of all the transactions (excluding privatizations and out-of-scope transactions) was TL 473,190,707,539 (approx. EUR 168,996,681,264). These numbers demonstrate that approximately 95% of the total value of all transactions notified in 2014 consisted of foreign-to-foreign transactions. The gravity of such transactions in the preceding year was no less than its 2014 rate, as set out in the 2013 Report.

Foreign-to-foreign transactions have therefore a considerable magnitude for the purposes of merger control enforcement in Turkey.

The Risks of Failing to Notify

Failure to file a notification or closing a notifiable transaction before the Board's approval may trigger all or part of the following consequences:

Monetary Fines:

If the parties close a notifiable transaction without the approval of the Board, a turnover-based administrative monetary fine of 0.1% of the turnover generated in the financial year preceding

the date of the fining decision is imposed on the acquirer(s) (or both of the merging companies in the case of a merger). There have been many cases in the past where the Board imposed administrative monetary fines for failure to notify in Turkey or closing before clearance, even in cases where there was no overlap in Turkey (see e.g. *CVRD Canada Inc.*, 08.07.2010, 10-49/949-332; *Georgia Pacific Corporation/Fort James Corporation*, 29.12.2005, 05-88/1219-352; *Flir Systems Holding/Raymarine PLC*, 17.06.2010, 10-44/762-246; *Simsmetal East LLC/ Fairless Iron& Metal, LLC*, 16.9.2009, 09-42/1057-269). Once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically by the Board (i.e. there is no discretion conferred to the Board for not imposing turnover based monetary fine in case of a violation of suspension requirement).
The minimum amount of administrative monetary fine for 2015 is TL 16,765 TL (approx. USD 6,700 and EUR 5,980). The abovementioned administrative monetary fine is not contingent upon whether the Board will ultimately grant an approval to the transaction.

If the Board decides, at the end of its review of a notifiable transaction that was not notified, that the transaction is problematic under the dominance test applicable in Turkey, the parties may be subject to fines of up to 10% of their turnover generated in the financial year preceding the date of the fining decision. Employees and/or managers of the companies that had a determining effect on the creation of the violation may also be fined up to 5% of the fine imposed on the companies.

In some instances, companies fined by the Board have been foreign entities headquartered outside of Turkey. In most cases, the fined entities had a physical presence in Turkey. In rare occurrences, the Board has even fined parties to entirely foreign-to-foreign transactions where they had no physical presence in Turkey (e.g. *Simsmetal East LLC/ Fairless Iron & Metal, LLC* decision). That being said, in such instances, it was not easy for the TCA to collect the administrative monetary fine mostly due to enforcement handicaps such as difficulties of formal service or failure to identify a tax ID number (see e.g. *Total/CEPSA*).

Legal Status:

Article 7 of the Competition Law and Article 10 of the Communiqué No. 2010/4 provide that a notifiable transaction is invalid with all its legal consequences, unless and until it is approved by the Board. The implementation of a notifiable transaction is suspended until the parties obtain the approval of the Board. Therefore, such transactions cannot be realized in Turkey before obtaining approval of the Board. In such situations, the parties might be unable to enforce their rights under the agreement before Turkish courts.

The Board is authorized to take all necessary measures to terminate the transaction, remove all *de facto* legal consequences of every action that has been taken unlawfully, return all shares and assets if possible to entities or persons who owned these shares or assets before the transaction or, if such measure is not possible to implement, assign the shares/assets to third parties; and meanwhile may forbid participation in the control of these companies until this assignment takes place and to take all other necessary measures.

Conclusion

In conclusion, the Turkish merger control regime provides no exemption for the notification of foreign-to-foreign transactions. Thus, unless the parties are looking at extremely exceptional circumstances, any transaction, resulting in a change of control on a lasting basis and where the parties exceed the jurisdictional turnover thresholds, would trigger a merger control filing requirement. If the parties fail to comply with this requirement, they would be subject to administrative monetary fines.

Even though the effects theory does provide a window of opportunity to argue that the Turkish merger control rules would not apply due to the lack of effects, the Board's precedents provide clear guidance about notification requirements.

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