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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. Further to this provision, Communiqué No. 2010/4, which was published on 7 October 2010, replaced Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board as of 1 January 2011, as a 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, bringing together some significant changes to the Turkish merger control regime. Recently, an amendment to Article 7 of Communiqué No. 2010/4 has changed the merger control thresholds, effective as of 1 February 2013.

With a continued interest in harmonising Turkish competition law with European Union competition law, the Competition Authority published in 2013 the following three guidelines, all in line with European Union antitrust and merger control rules:

- the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control;
- the Guideline on the Assessment of Horizontal Mergers and Acquisitions; and
- the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions.

The remaining guidelines on merger control include the Guidelines on Market Definition; the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions (Guideline on Undertakings Concerned); 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. 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, has introduced new 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.

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 over a period of two years are deemed as a single transaction for turnover calculation purposes. They warrant separate notifications if their cumulative effect exceeds the thresholds, regardless of whether the transactions are in the same market or sector or not and whether they were notified before or not.

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. Communiqué No. 2010/4 has introduced a much more complex notification form to be used in merger filings so the time frame required for the preparation of a notification form would be longer than the old regime.

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 in order 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 new 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 administrative monetary fine to be imposed shall not be less than 15,226 lira. 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 to 50 calendar days before the projected closing.

If a notification leads to a Phase II review, it turns into a fully 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 due 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 amendment of the turnover thresholds in Communiqué No. 2010/4 is surely the most important development in the Turkish

merger control regime. In line with the amendment of Communiqué No. 2010/4, the Competition Board also revised the 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.

The amending of Communiqué No. 2010/4 is in keeping with the findings of the Turkish Competition Authority's discussion paper of 31 August 2012, which found that the global turnover threshold was the main reason for the high number of merger control filings.

Furthermore, as stated above, the Competition Authority has promulgated two guideline documents in relation to the assessment of concentrations: the Horizontal Merger Guideline and 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 per cent can be used as evidence of dominant position. If the market share of the combined entity remains below 20 per cent, 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 anti-competitive effects that a merger would have in the relevant markets;
- buyer power as a countervailing factor to anti-competitive 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 that 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 by increasing the concentration in the market, and may even lead to collective dominance. In its discussion of efficiencies, it indicates that efficiencies should be verifiable and provide a benefit to customers. Significantly, the Horizontal Merger Guideline provides that the failing firm defence has three conditions:

- the allegedly failing firm will soon exit the market if not acquired by another firm;
- there is no less restrictive alternative to the transaction under review; and
- 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 25 per cent 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 Guidelines include the effects arising from vertical mergers and the effects of conglomerate mergers. The Non-Horizontal Merger Guidelines also outline certain other topics, such as customer restraints, general restrictive effects on competition in the market and restriction of access to the downstream market.

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Gönenç Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak holds an LLM degree from Harvard Law School and is qualified in Istanbul, New York and England and Wales (currently a non-practising solicitor). Mr Gürkaynak heads the competition law and regulatory department of ELIG, which currently consists of 13 associates. He has unparalleled experience in Turkish competition law counselling issues with over 15 years of competition law experience, starting with the establishment of the Turkish Competition Authority.

Every year, Mr Gürkaynak represents multinational companies and large domestic clients in more than 10 written and oral defences in investigations of the Turkish Competition Authority, about a dozen antitrust appeal cases in the high administrative court, and over 45 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics. Prior to joining ELIG as partner more than eight years ago, he worked at the Istanbul, New York and Brussels offices of White & Case LLP for more than eight years.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He teaches undergraduate and graduate level courses at three universities, and gives lectures in other universities in Turkey.

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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. Ayşe 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. Ayşe has also published many articles in collaboration with Mr Gürkaynak, and she is particularly experienced in merger control matters.

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ELIG aims at providing its clients with high-quality legal service in an efficient and business-minded manner. All members of the ELIG team are very fluent in English. ELIG represents corporations, business associations, investment banks, partnerships and individuals in a wide variety of competition law matters. The 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 a vast experience in defending companies before the Competition Board in all phases of an antitrust investigation. We have 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 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 almost always contain antitrust law issues, including distributorship, licensing, franchising, and toll manufacturing.

In 2013, ELIG was involved in more than 45 clearances of merger notifications, more than 17 defence projects in investigations, and over eight appeals at the High State Council; together with approximately 37 antitrust education seminars provided to the employees of clients.

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