The Merger Control Review

Fifth Edition

Editor
Ilene Knable Gotts

Law Business Research

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CONTENTS

EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 45 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; and Hungary, Ireland and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., United States, Ukraine, Greece, and Portugal). Brazil issued its first 'gun jumping' fine this year. In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in merger hearings before the Competition Tribunal, and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection to a clearance decision.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with Chile. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include as a reportable situation the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., EU and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. Several agencies in the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, International Merger Remedies, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or US. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past year have imposed a variety of such behavioural remedies (e.g., China, the EU, France, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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Chapter 41

TURKEY

Gönenç Gürkaynak and K Korhan Yıldırım[1]

I INTRODUCTION

The national competition agency for enforcing merger control rules in Turkey is the Turkish Competition Authority, a legal entity with administrative and financial autonomy. The Turkish Competition Authority consists of the Competition Board, 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. The Service Departments consist of five technical units, one research unit, one leniency unit, one decisions unit, one information management unit, one external relations unit and one strategy development unit. There is a 'sectoral' job definition for each technical unit.

The relevant legislation on merger control is Law No. 4,054 on Protection of Competition and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board. The Competition Board has also issued many guidelines to supplement and provide guidance on the enforcement of Turkish merger control rules. The Guideline, on Market Definition was issued in 2008, and is closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C372/03). The Competition Board very recently released five comprehensive guidelines on merger control matters. The first is the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions, covering certain topics and questions about the concepts of undertakings concerned, turnover calculations and ancillary restraints. It is closely modelled on Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings. The second is the Guideline on Remedies Acceptable to the

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Turkish Competition Authority in Mergers and Acquisitions (Remedy Guideline). The Remedy Guideline is an almost exact Turkish translation of the Commission Notice on Remedies Acceptable Under Council Regulation (EC) No. 139/2004 and Under Commission Regulation (EC) No. 802/2004. The third and fourth are the Guidelines on Horizontal Mergers and Acquisitions (Horizontal Guidelines) and the Guidelines on Non-horizontal Mergers and Acquisitions (Non-horizontal Guidelines). These Guidelines are in line with EU competition law regulations and seek to retain harmony between EU and Turkish competition law instruments. Finally, the Competition Board released the Guidelines on Merger and Acquisition Transactions and the Concept of Control, also closely modelled on the respective EC guidelines.

Turkey is a jurisdiction with a suspensory pre-merger notification and approval requirement. Much like the EC regime, concentrations that result in a change of control are subject to the Competition Board's approval, provided that they reach the applicable turnover 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 it can be exercised *de jure* or *de facto*.

The Turkish Competition Authority recently enacted a substantial amendment to the merger control thresholds in Communiqué No. 2010/4. The new turnover thresholds are as follows:

a the total turnover of the parties to a concentration in Turkey exceeds 100 million liras and the respective Turkish turnover of at least two of the parties individually exceed 30 million liras; or

b the Turkish turnover of the transferred assets or businesses in acquisitions exceeds 30 million liras, or the Turkish turnover of any of the parties in mergers exceeds 30 million liras; and the worldwide turnover of at least one of the other parties to the transaction exceeds 500 million liras.

In addition to the changes in turnover thresholds, the new regulation no longer seeks the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement. Prior to the amendment, transactions that did not affect a market did not trigger a pre-merger notification or approval requirement, even if they exceeded the turnover thresholds. Joint venture transactions were the exception to this rule, and they required pre-merger notification and approval if they exceeded the thresholds, regardless of whether they resulted in an affected market. Now, the existence of an affected market is not a condition to triggering a merger control filing requirement.

The Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions has also been recently amended in line with the changes in the jurisdictional thresholds. Before the amendments, a horizontal or vertical overlap between the worldwide activities of the transaction parties was sufficient to infer the existence of an affected market, provided that one of the transaction parties was active in such an overlapping segment in Turkey. Following the recent amendments, existence of an affected market is no longer a requirement for a merger filing to the Competition Authority, and all discussions and explanations on the concept of affected market have been removed from the Guideline altogether.

Foreign-to-foreign transactions are caught if they exceed the applicable thresholds.

Acquisition of a minority shareholding can constitute a notifiable merger if and to the extent that 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 are subject to notification to, and the 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.

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

a 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;

b mandatory acquisitions by public institutions as a result of financial distress, concordat, liquidation, etc., do not require a pre-merger notification;

c intra-corporate transactions are not notifiable;

d acquisitions by inheritance are not subject to merger control;

e 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;

f multiple transactions between the same undertakings realised over a period of two years are deemed 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 whether they were notified before; and

g transactions that are closely connected in that they are linked by conditions or take the form of a series of transactions in securities taking place within a reasonably short period of time are treated as a single concentration (interrelated transactions theory).

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, insurance companies and pension companies. The Turkish merger control regime does not, however, recognise any *de minimis* exceptions.

Failing to file or closing the transaction before the Competition Board's approval can result in a turnover-based monetary fine. The fine is calculated according to the annual local Turkish turnover of the acquirer generated in the financial year preceding the fining decision at a rate of 0.1 per cent. It will be imposed on the acquiring party. In the case of mergers, it will apply to both merging parties. The monetary fine will, in any event, not be less than 15,226 liras. This monetary fine does not depend on whether the Turkish Competition Authority will ultimately clear the transaction.

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.[2] Communiqué No. 2010/4 provides that a transaction is deemed to be 'realised' (i.e., closed) 'on the date when the change in control occurs'. While the wording of the new regulation 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 so far been consistently rejected by the Competition Board, which argues 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.

II YEAR IN REVIEW

With the introduction of new turnover thresholds and the removal of the affected market requirement, the Competition Board has finally been able to shift its focus from merger control cases to the fight against cartels and cases of abuse of dominance. The new merger control thresholds are solid measures to decrease the number of merger notifications and to lower the number of notifications. The previous merger control thresholds – and the alternative global turnover threshold in particular – proved too low, and the definition of affected market proved too broad to result in the appropriate level of resources being deployed in merger review. The Competition Authority publicly announced a significant increase in the number of merger control filings before the introduction of the new regime. This was the signal that the Competition Board was inclined to modify the thresholds. Consequently, the new thresholds entered into force in 2013, and have resulted in a significant decrease in the number of merger cases.

The Competition Board reviewed a total of 213 merger cases in 2013. This represents a 25 per cent drop compared with 2012. These merger cases included 162 cases that received unconditional clearance, and 51 cases that were found to be not notifiable (i.e., a decision that the notified concentration does not exceed the applicable jurisdictional thresholds) or that fell outside the merger control regime (i.e., a decision that the notified transaction falls outside the scope of applicability of the merger control rules for not bringing about a change of control). Of these 213 cases, 125 involved acquisitions, one involved mergers, 68 involved joint ventures and 19 involved privatisations.

2013 also saw the Competition Board taking some of the most important decisions in the history of the Turkish merger control regime:

2 *Total/Cepsa*, 20 December 2006, 06-92/1186-355; *Ajans Press MedyaTakip AŞ/İnterpressMedya HizmetleriTicaret AŞ*, 21 October 2010, 10-66/1402-523.

In *Allianz/Yapı Kredi*,[3] the Competition Board unconditionally cleared a transaction concerning the acquisition of Yapı Kredi Sigorta (non-life insurance) and Yapı Kredi Emeklilik (life insurance and individual pensions), two of the largest players in the Turkish insurance and individual pensions markets, by Allianz SE, a global player in the insurance sector. Allianz SE already had Turkish subsidiaries in the non-life insurance (Allianz Sigorta) and life insurance (Allianz Emeklilik) sectors, both of which are large players in the sector. The transaction resulted in high aggregated market shares in the health insurance segment, with the closest competitor's market share being only around one-quarter of that of the merged entity. In clearing the transaction, the Competition Board considered the impact of heavy foreign investment, the government's role in health insurance payments, different profiles and tendencies of different customers, and the importance of relationships with hospitals for insurance companies.

In *Baxter*,[4] the Competition Board granted clearance for the acquisition of the Swedish dialysis equipment manufacturer Gambro by US rival healthcare company Baxter. Although the European Commission conditioned the transaction upon the parties' fulfilling certain commitments proposed by Baxter, the Competition Board granted an unconditional clearance.

In *Avrasya Gaz*,[5] the Competition Board granted clearance to the participation by Prima Energy and Akpol in Promak JV. The transaction concerned the natural gas market. It resulted, *inter alia*, in significant vertical integration issues, because Prima Energy is controlled by Gazprombank and Gazprom, a very large supplier of natural gas. Gazprom has significant market power in the upstream market, so the transaction was reviewed mainly on the basis of the resulting vertical integration. The Board assessed whether Gazprom would be in a position to foreclose input in the downstream market for the supply of natural gas. It took into account the ongoing liberalisation of the natural gas market (through Law No. 4646 on the Market for Natural Gas) and the imminent market entries. It eventually concluded that market shares in the downstream market are not sufficient to restrict competition due to vertical integration.

In *AFM/Mars*,[6] the transaction parties requested authorisation for the merger of AFM and Mars, which are the two largest movie theatre operators in Turkey. AFM operates in nine of Turkey's provinces and owns 182 movie theatres, while Mars operates in 14 of Turkey's provinces and owns 239 movie theatres. In defining the relevant geographical market, the Competition Board divided the overlapping provinces in which both undertakings operate. It concluded that consumers would prefer movie theatres within a 20-minute driving distance. Given that AFM and Mars have a significant combined market share in the relevant markets, the transaction would have a significant impact on effective competition. The transaction parties proposed several remedies to the Competition Board, including divestitures concerning 12 movie theatres. The Competition Board granted conditional clearance, reserving that clearance would be

3 13-40/520-229, 26 June 2013.

4 13-19/266-129, 4 April 2013.

5 13-46/585-256, 18 July 2013.

6 11-57/1473-539, 17 November 2011.

revoked in the event of a failure to transfer the 12 movie theatres to third parties. The Competition Board requested the parties to regularly supply information on annual average ticket prices and changes thereto for the next five years. The Competition Board confirmed that the conditions were duly fulfilled, and the process was completed by a decision of 22 November 2012.[7] The decision was challenged and submitted for judicial review before the competent court. The High State Court accepted the request for the suspension of the execution of the decision.[8] The Court's decision relied on the following grounds:

a there were high barriers to entry in the relevant market;
b post-merger figures did not indicate or justify a competitive market structure;
c there were no competitors capable of putting sufficient competitive pressure on the merged entity;
d the transaction would create an unbalanced buying power against upstream and downstream market players;
e commitments comprised relatively small-sized theatres, and even in the event that the biggest rival acquired them all, its size would amount to a quarter of the merged entity; and
f commitments would lower the market share relatively, but would not be able to frustrate the alleged dominant position created by the acquisition.

In 2013,[9] the Competition Board decided on a complaint against AFM and Mars that they continued to implement the transaction despite the High State Court's suspension. The Competition Board denied the request because there was no evidence to this effect.

In 2013, the Competition Authority issued three new guidelines: the Horizontal Guidelines, the Non-horizontal Guidelines and the Guidelines on the Concept of Control. They are all in line with EU competition law regulations and seek to retain harmony between EU and Turkish competition law instruments.

The Competition Authority also very recently enacted substantial revisions in the 'privatisation communiqué'. Communiqué No. 2013/2 replaced Communiqué No. 1998/4 on the procedures and principles to be pursued in pre-notifications and authorisations to be filed with the Competition Authority in order for acquisitions via privatisation to become legally valid.

The new regulation brought about several changes in terms of both procedure and substance. Most importantly, it eliminated the market share threshold altogether and increased the turnover threshold. A new feature of Communiqué No. 2013/2 is that the Competition Board's opinions on privatisation deals are valid for a period of three years.

The approach of the Competition Board to market shares and concentration levels is similar to that of the European Commission, and in line with the approach 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).

7 12-59/1590-M, 22 November 2012.
8 2012/2013 E, 9 October 2012.
9 13-44/550-M, 11 July 2013

The first factor discussed under the Horizontal Guidelines is that market shares above 50 per cent can be considered an indication of a dominant position, while the market share of the combined entity remaining below 20 per cent would not require further inquiry 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 the Herfindahl-Hirschman Index (HHI) levels is provided, the Horizontal Guidelines' emphasis on an effects-based analysis (coordinated and non-coordinated effects) without further discussion of the criteria to be used in evaluating the presence of a dominant position indicates that the dominant position analysis still remains subject to Article 7 of Law No. 4054 on the Protection of Competition. Other than market share and concentration level considerations, the Horizontal Guidelines cover the following main topics:

a the anti-competitive effects that a merger would have in the relevant markets;
b the buyer power as a countervailing factor to anti-competitive effects resulting from the merger;
c the role of entry in maintaining effective competition in the relevant markets;
d efficiencies as a factor counteracting the harmful effects on competition that might otherwise result from the merger; and
e conditions of a failing company defence.

The Horizontal Guidelines also discuss coordinated effects that might arise from a merger of competitors. They confirm that coordinated effects may increase the concentration levels and may even lead to collective dominance. As regards efficiencies, the Horizontal Guidelines indicate that efficiencies should be verifiable and that the passing-on effect should be evident.

The Non-horizontal Guidelines confirm 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 2,500 (except where special circumstances are present) are unlikely to raise competition law concerns, similarly 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 Guidelines include the effects arising from vertical mergers and the effects of conglomerate mergers. The Non-horizontal 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.

The ongoing legislative activity signals that modernisation of the Turkish merger control regime will remain one of the priorities of the Turkish Competition Authority in 2014. The amendment to the notifiability thresholds under Communiqué No. 2010/4 and the fact that the Horizontal and Non-horizontal Guidelines were issued are clear indications that the Competition Authority's 2014 agenda will contain similar merger control-related items. This trend is also supported by the recent issuing of the Guidelines on Mergers and Acquisitions and the Concept of Control. With this secondary legislation, the Turkish merger control regime now has more concrete grounds, with the welcome result that undertakings will be able to act more freely (although carefully) when considering a merger or an acquisition. The Turkish Competition Authority is expected to retain its well-established practice of paying close attention to developments in EU competition law and seeking to retain harmony between EU and Turkish competition law instruments.

Another significant development in competition law enforcement is the change in the competent body for appeals against the Competition Board's decisions. Previously, the court of first instance was the High State Court, which is the highest administrative court in Turkey. The court of first instance for appeals against Competition Board decisions is now Ankara Administrative Court. Decisions of Ankara Administrative Court can still be challenged and submitted to judicial review before the High State Court.

Recent indications in practice show that remedies and conditional clearances are becoming increasingly important in Turkish merger control enforcement. The number of cases in which the Competition Board decided on divestment or licensing commitments or other structural or behavioural remedies has increased dramatically over the past four years. Examples include some of the most important decisions in the history of Turkish merger control enforcement.[10]

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

III THE MERGER CONTROL REGIME

There is no specific deadline for making a notification in Turkey. There is, however, a suspension requirement (i.e., 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 and until the Turkish 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.

The Competition Board, upon its preliminary review of the notification (i.e., Phase I), will decide either to approve or to investigate the transaction further (i.e., Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. In

10 *AFM/Mars*, 17 November 2011, 11-57/1473-539; *Vatan/Doğan*, 10 March 2008, 08-23/237-75; *ÇimSA/Bilecik*, 2 June 2008, 08-36/481-169; *OYAK/Lafarge*, 18 November 2009, 09-56/1338-341; *THY/HAVAS*, 27 August 2009, 09-40/986-248; *Burgaz/MeyIckı*, 8 July 2010, 10-49/900-314.

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 law, the Phase II investigation takes about six months. If necessary, the Competition Board may extend this period only once, for an additional period of up to six months. In practice, only extremely exceptional cases require a Phase II review, and most notifications obtain a decision within 45 to 50 days after the original date of notification.

The filing process differs for privatisation tenders. Communiqué No. 2013/2 provides that a pre-notification is conducted before the tenders and notifications of the three highest bidders are submitted to the Competition Board following the Privatisation Authority's public privatisation tender. 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.

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 if 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.

Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

The Competition Board may request information from third parties, including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. The Competition Board uses this power especially 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.

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 and right of access. As noted above, the number of conditional clearances has increased significantly in recent years.

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted for judicial review before Ankara Administrative

Court. The appellants may make a submission by filing an appeal 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 an appeal 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 execution of the decision is likely to cause irreparable damages, and there is a *prima facie* reason to believe that the decision is highly likely to violate the law.

The deadline to appeal the Competition Board's final decisions to Ankara Administrative Court is 60 days starting from receipt of the reasoned decision. The appeal process may take up to two-and-a-half years.

IV OTHER STRATEGIC CONSIDERATIONS

With the recent changes in Law No. 4054, the Competition Board has geared up for a merger control regime focusing much more on deterrents. As part of that trend, monetary fines have increased significantly for not filing or for closing a transaction without the Competition Board's approval. It is now even more advisable for the transaction parties to observe the notification and suspension requirements and avoid potential violations. This is particularly important when transaction parties intend to put in place carve-out or hold-separate measures to override the operation of the notification and suspension requirements in foreign-to-foreign mergers. As noted above, the Competition Board is currently rather dismissive of carve-out and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carve-out or hold-separate arrangements are now allowed. Because the position the Competition Authority will take in interpreting this provision is not yet clear, such arrangements cannot be considered as safe early-closing mechanisms recognised by the Competition Board.

Many cross-border transactions meeting the jurisdictional thresholds of Communiqué No. 2010/4 also will require merger control approval in a number of other jurisdictions. Current indications in practice suggest that the Competition Board is willing to cooperate more with other jurisdictions in reviewing cross-border transactions.[11] Article 43 of Decision No. 1/95 of the EC–Turkey Association Council authorises the Turkish Competition Authority to notify and request the European Commission (Competition Directorate-General) to apply relevant measures.

V OUTLOOK AND CONCLUSIONS

A proposal to change the entire competition law legislation has been pending for a long time before Turkey's Grand National Assembly. If enacted, the proposal will bring about significant amendments to Law No. 4054, such as the introduction of *de minimis* exceptions. The proposal became a hot topic when the Turkish Parliament announced

11 The trend for more zealous inter-agency cooperation is even more apparent in leniency procedures for international cartels.

that the draft law containing the amendments had officially been added to the current drafts and proposals list. In a recent public message, the President of the Competition Board, Professor Dr Nurettin Kaldirimci, wrote that:

> *[…] our greatest wish is the enactment, in the current legislative year, of the Draft Law concerning Amendments to the Act no 4054, which was prepared within the framework of the 15-year experience of the Competition Board, was presented to the Turkish Grand National Assembly as a draft law in the preceding legislative year and which, we believe, will significantly improve organizational efficiency.*

Subsequent to the enactment of the amendments, the Competition Board is expected to put important implementing regulations in place. The details of these regulations are not yet entirely clear.

Appendix 1

ABOUT THE AUTHORS

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Gönenç Gürkaynak holds an LLM degree from Harvard Law School, and he is qualified in Istanbul, New York, and England and Wales (he is currently a non-practising solicitor). He has unparalleled experience in all matters of Turkish competition law counselling with over 17 years' experience, starting with the establishment of the Turkish Competition Authority. Prior to joining ELIG as a partner more than nine years ago, Mr Gürkaynak worked as an attorney in the Istanbul, New York, Brussels and again in the Istanbul offices of a global law firm for more than eight years. He also holds a teaching position at the undergraduate and graduate levels at the Bilkent University Law School in the fields of competition law, and law and economics. Mr Gürkaynak heads the competition law and regulatory department of ELIG. ELIG consists of 50 lawyers, 18 of whom are in the competition law and regulatory department. He has had many international and local articles published in English and in Turkish, and a book published by the Turkish Competition Authority.

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K Korhan Yıldırım holds an LLB degree from the Galatasaray University Law School, and he is qualified to practise in Istanbul. Mr Yıldırım is a partner in the competition law and regulatory department of ELIG. He has been advising clients on a vast number of complex matters of Turkish competition law, and also in numerous other fields of Turkish law, for more than nine years. Mr Yıldırım has also published a number of articles in collaboration with Mr Gürkaynak, and he is particularly experienced in merger control matters. Mr Yıldırım was promoted to the firm's partnership on 1 January 2014.

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