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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 2013 and December 2013, the Turkish Competition Authority (Authority) made decisions on a total of 213 concentrations. As to the type of transactions, the decisions concerned 125 acquisitions, 68 joint venture transactions, 1 merger and 19 privatisations. Fifty-one were found to be 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). The rest of the notified transactions, 162 in total, were approved without conditions. The above figures represent a significant decrease from the Competition Board's merger control activity in 2012. In 2012, the Competition Board made decisions on 303 transactions, including 190 acquisitions, 1 merger, 91 joint venture transactions and 21 privatisations. A total of 41 transactions (7 of them privatisations) were found not to require the approval of the Competition Board. The rest of the notified transactions were approved without conditions.

The decrease in merger control activity reflected in the above statistics is likely the result of the changes to the Merger Communiqué which came into force on February 1, 2013, and were designed to reduce the Competition Board's merger control workload. Particularly, there has been a sharper drop in acquisition transactions (from 190 notified transactions to 125 notified transactions, representing a 34% drop) in comparison to joint ventures (from 91 notified transactions to 68 notified transactions, representing a 25% drop). This is in keeping with the amendments which revised the turnover threshold under Article 7 (b) of Communiqué No. 2010/4, but left the turnover threshold under Article 7 (a) unchanged. The amendments which came into force on February 1, 2013 will be discussed in greater detail below.

New developments in jurisdictional assessment or procedure

With the introduction of the new Merger Communiqué, 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 ultimately turned out to be insufficient to screen the extra amount of worldwide mergers, particularly the worldwide

turnover threshold (worldwide turnover of one of the transaction parties exceeds TL 500m, and at least one of the remaining transaction parties has a turnover in Turkey exceeding TL 5m). 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 with Turkey, as well as to provide greater ease for 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, the first prong of the alternative turnover thresholds (Article 7(a) of Communiqué No. 2010/4) remained unchanged. Therefore, a transaction would still trigger a notification requirement in cases where "total turnovers of the transaction parties in Turkey exceed TL 100m (approximately €40m and US$53m), and turnovers of at least two of the transaction parties in Turkey each exceed TL 30m (approximately €12m and US$16m)". In accordance with the applicable Turkish Central Bank average rate for 2013, amounts in US$ for the year 2013 are converted at the exchange rate US$ 1 = TL 1,90 and amounts in EUR for the year 2013 are converted at the exchange rate EUR 1 = TL 2,52.

While the first prong of Article 7 remained the same, the second prong of the alternative was revised in the following manner:

(a) The Turkish turnover threshold has been raised from TL 5m (approximately €1.98m and US$2.6m US$) to TL 30m (approximately €12m and US$16m).

(b) The Turkish turnover threshold of TL 30m (approximately €12m and US$16m) is now sought for "the transferred assets or businesses in acquisitions, and at least one of the parties to the transaction in mergers". Prior to the amendment, the Turkish turnover threshold could be satisfied so long as "one of the transaction parties" had over TL 5m (approximately €1.98m and US$2.6m) Turkish turnover and the other transaction party had over 500m TL (approximately €198m and US$263m) global turnover.

(c) The amount of the worldwide turnover threshold has remained the same, i.e. 500m TL (approximately €198m and US$263m).

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 to 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 notifiability analyses. The concept of affected market still carries weight in terms of the substantive competitive assessment and the notification form.

As provided in the above section, the amendments have had the desired effect. Now that the global 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 (approximately 34% of decrease). This decrease would likely not have been as sharp had the amendment not also dispensed with the affected market requirement.

Since joint venture transactions are analysed as acquisitions, the above revision has also affected joint venture transactions. However, since the first prong of the alternative turnover thresholds has remained unchanged, joint venture transactions where the assets/

businesses included in the joint venture do not have 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 notified joint venture transactions has been less in comparison to acquisition transactions.

With respect to strategic issues such as gun-jumping and carve-out arrangements, the Competition Board's tough attitude remains unchanged. As a recent example, 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 acquisition described below. While in this case the Competition Board found no evidence of gun-jumping, the case could be seen as a further indication of the Competition Authority's willingness to pursue gun-jumping issues, as already shown through past cases such as *Ajans Press* (10-66/1402-523).

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 two 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, the Competition Authority may 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 provided.

Furthermore, the Competition Authority has been publishing 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, barriers to entry, nature of international competition

Traditionally, the Authority pays special attention to those 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 Authority's special scrutiny as well. The 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 at very carefully. In some sectors, the 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 2013 indicate that transactions in the food industry took the lead with 29 notifications. The transportation sector took second place with 22 notifications, followed by the industry for the production and distribution of electricity and gas (19 notifications), and the sectors for medical products and services and manufacturing of machinery (16 notifications each).

In 2012 and 2013, the Competition Board issued some important decisions in the context of the Turkish merger control regime's history:

In *YKM/BBM* (12-41/1162-378), the Competition Board granted clearance to the acquisition of sole control over YKM Yeni Karamürsel Giyim ve İhtiyaç Maddeleri Pazarlama A.Ş ("YKM") by BBM. As the relevant undertakings were two of the major department stores in the domestic market, the Competition Authority undertook an in-depth analysis of the transaction, including a Phase II investigation. Clearance was granted on August 9, 2012 while the reasoned decision was published on July 30, 2013. In light of a variety of factors, such as changes in the department store format, the increasing number of large shopping malls and the role of online sales, the Competition Board defined the relevant market as one which includes "department stores and specialised stores targeting the middle and upper income segments and e-commerce shopping sites (online department stores)". The Competition Board also analysed the effects of the transaction in the upstream markets relating to the supply of goods, as well as the market for shopping mall operations. In its competitive analysis, the Competition Board took note of the fact that BBM and YKM were not the automatic "second choice" for each other, and consumers were likely to regard specialised stores (i.e. those dedicated to one brand) as substitutes to YKM and BBM's department store activities. As a result of its review, the Competition Board decided that the resulting market shares in Turkey, as well as on a city-wide basis, were not large enough to lead to the creation or strengthening of a dominant position in the relevant market. Accordingly, as a result of its Phase II review, the Competition Board granted an unconditional clearance to the transaction.

In *DiaSA* (13-40/513-223), the Competition Board granted clearance to the acquisition of sole control over DiaSA Dia Sabancı Süpermarketler Ticaret A.Ş.("DiaSA") by Yıldız Holding A.Ş. ("Yıldız Holding"). While not subjected to a Phase II review, the transaction received close attention by the Competition Board because both parties were major players in the domestic Fast-Moving Consumer Goods (FMCG)-organised retail sector: Yıldız Holding owned retailers called Şok and Bizim Toptan Satış Mağazaları, both market chains, and DiaSA owned 902 stores across the country in 29 different cities. The Competition Board also noted that Yıldız Holding was a strong player with respect to the supply of goods in the FMCG category such as various types of sweets and candy, dairy products, soft drinks, frozen foods, margarine and cooking oils, baby food, personal care products as well as products for special dietary needs. In its competitive analysis, the Competition Board analysed both the vertical market foreclosure concerns and the horizontal concentration in the FMCG organised retail market. As a result of its analysis, the Competition Board decided that the transaction would not lead to the creation or strengthening of dominant position and the significant lessening of competition in the relevant market, and therefore granted an unconditional clearance to the transaction and dismissed the complaints which were submitted against it.

In *İşbir Optik* (13-22/305-142), the Competition Board granted clearance to the acquisition of sole control over İşbir Optik Sanayi A.Ş. ("İşbir Optik") by Essilor International S.A. and Essilor Optica International Holding ("Essilor"). While the transaction was cleared through a Phase I review, two of the Board members wrote dissenting opinions and stated that the transaction should have been subjected to a Phase II review. In the dissenters' view, the relevant transaction raised competition law concerns in the market for half-processed ophthalmic lenses, as it involved the acquisition of the leading market player by another significant player. As a result of the transaction, the combined market share was to be about four times as high as the market share of the next closest competitor. Furthermore, the

transaction was formally opposed by the Confederation of Opticians and Spectacle-makers, which submitted a petition to the Competition Authority. The Competition Board found that the transaction resulted in a change from an HHI value of 1811.61 to 3185.2. As both the resulting value and the change amount were at levels which signal competition concerns, the Competition Board engaged in a closer analysis of various factors such as barriers to entry, potential competition and buyers' bargaining power. Having found that: i) there were no significant barriers to entry, ii) there was significant chance of potential competition, iii) the buyers in the downstream market were strong retail chains, and iv) the market was characterised by growing demand, the Competition Board cleared the transaction without conditions at the Phase I stage.

In *Promak Enerji* (13-46/585-256), the Competition Board granted clearance to the acquisition of joint control over Promak Enerji Sanayi ve Ticaret A.Ş. ("Promak Enerji") by Prima Energy Trading LLC ("Prima Energy") and Akpol İnşaat Mühendislik Proje ve Ticaret A.Ş.("Akpol"). The transaction was significant in that: i) Prima Energy was a subsidiary of Gazprom, which was deemed to be in a dominant position with respect to the supply of natural gas to Turkey; ii) through the transaction Gazprom would acquire indirect joint control over two private natural gas importers in Turkey; and iii) as a result of the transaction, four of the private importers of natural gas to Turkey would become affiliated through cross-shareholdings. As a result of the transaction dynamics and the potential coordinative effects of the cross-shareholdings, the Competition Board analysed the transaction both under Article 7 (which concerns merger control) and Article 4 (which concerns restrictive agreements between undertakings) of the Competition Act. Ultimately, the Board found that: i) Gazprom's market power was not sufficient to restrict competition in the downstream market through input foreclosure; and ii) any possible coordinative effects as a result of the cross-shareholdings were not sufficiently significant, given that the combined market share of the relevant entities was below 20%. While the transaction was cleared without conditions at the Phase I review stage, two members of the Competition Board wrote dissenting opinions, advocating that the relevant transactions should have been taken into a Phase II review.

In *UPS/TNT* (12-44/1342-447), the Competition Board granted clearance to the acquisition of sole control over TNT by UPS. The transaction received particular attention due to a complaint that it threatened to lead to a dominant position in a sub-segment of express cargo services. To ensure that the transaction posed no competition law concerns, the Competition Board carried out a competitive analysis in the narrow segment level as well and found that, subsequent to the acquisition, UPS would still be only the second strongest player in the market and furthermore would face competition from other players in the market.

Key economic appraisal techniques applied

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 "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". 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 general, the Competition Board evaluates joint-venture notifications according to three criteria: existence of joint control in the joint venture; the joint venture not having as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself; and the joint venture being an independent economic entity (i.e., having adequate capital, labour and an indefinite duration). In recent years, the Competition Board has consistently applied the test of 'full-functioning' while determining whether the joint venture is an independent economic entity. If the transaction is a full-function JV after considering the three criteria above, the standard dominance test is applied.

On the other hand, economic analyses and econometric modelling has been seen more often in the last years. For instance, in the *AFM/Mars Cinema* case (11-57/1473-539), 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. 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 to avoid 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 2 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 presenting some additional divestment, 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 complete the transaction after the clearance but before the remedies have been complied with; however, the transaction gains legal validity after the full compliance. Cases with commitments are increasing in practice; *Diageo Plc/Mey Icki* (11-45/1043-356) and *AFM/Mars Cinema* are recent examples. 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 either during 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 be also served 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 policy of having clear preferences for particular types of remedies. The assessments are made on a case-by-case basis in view of specific circumstances surrounding the merger. Nevertheless, divestitures are the most common procedures that either the Competition Board require or the parties propose, due to its legal certainty feature.

Key policy developments

The amendment of the turnover thresholds in the Merger Communiqué is surely the most important development in the Turkish merger control regime. 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.

The amending of the Merger Communiqué is in keeping with the findings of the Turkish Competition Authority's discussion paper of August 31, 2012 ("Discussion Paper") which had found that the global turnover threshold was the main reason for the high numbers of merger control filings.

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.

Reform proposals

A current proposal to change the entire Competition Act legislation 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 expected to be discussed in the Turkish Parliament's Industry, Trade, Energy, Natural Sources and Information Technologies Commission ("Parliament Commission") during the first half of February.

The Draft Law is designed to be more compatible with the way the existing law is actually being 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 of "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, which was similar to the investigation 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 appraisal 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 time period to obtain a Phase I decision, which currently takes around 45 calendar days, is expected to be extended.

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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