GLOBAL LEGAL INSIGHTS

Merger Control

Second Edition

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Published by Global Legal Group

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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 13 December 1994 and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the new Merger Communiqué) published on 7 October 2010. The new Merger Communiqué entered into force as of 1 January 2011.

In the first year of the new Merger Communiqué's application, the Competition Authority reviewed more than 230 merger cases (239 to be precise, including mergers, acquisitions and joint ventures) and 14 privatisation cases. Figures and statistics for 2012 were not available at the time of writing.

The number of concentrations notified to the Competition Authority in 2011 (239) is higher than the number for 2010 (210). Although the new Merger Communiqué has brought significant changes by abolishing the market share threshold and replacing it by two alternative turnover thresholds, the number of notified concentrations has slightly increased. The Competition Authority seems inclined to interpret this increase to be the result of the "still relatively low" jurisdictional thresholds. For more information, please see the next section.

The Competition Board granted unconditional clearances for the vast majority of transactions notified to it in 2011. Very few transactions fell to Phase II reviews (i.e. where the Competition Board takes the merger case/transaction to a second stage, which then becomes a fully-fledged investigation), and only three transactions received conditional clearances. There has not been any transaction prohibited in the last 12 months.

The Competition Board reviewed a total of 239 merger cases in 2011, which included 186 cases that received unconditional clearance, 50 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 of the merger control regime (i.e. a decision that the notified transaction falls outside of the scope of applicability of merger control rules for not bringing about a change of control). 168 of the 239 cases were about acquisitions, whereas three of the remaining were about mergers and 68 were about joint ventures. The high number of joint venture notifications is a result of the exception for joint ventures from the affected market threshold. For more information concerning this exception, please see the next section.

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 have turned out to be insufficient to net the extra amount of worldwide mergers, particularly the worldwide turnover threshold (worldwide turnover of one of the transaction parties exceeds TRY 500m, and at least one of the remaining transaction parties has a turnover in Turkey exceeding TRY 5m). Indeed, only 16% of the transactions notified to the Competition Authority in the first 8 months of 2011 were between Turkish parties, and 41% of them were between non-Turkish parties.

The introduction of the new guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions ("Merger Guidelines") has also reversed the trend for dealing with fewer merger control notifications because the guideline finds the existence of one or more overlaps at the global level sufficient to trigger a notification requirement, provided that one of the transaction parties has activities in Turkey in at least one of such overlap areas. On the other hand, the Merger Guidelines define the overlapping markets extremely broadly and as a result of this definition, the affected market threshold remains less helpful for decreasing the merger control notifications.

While fewer notifications were expected with the new Merger Communiqué, the past 12 months witnessed an increase in the number of notified concentrations. This increase led the Competition Board to significantly shorten the reasoned decisions with respect to mergers, acquisitions and joint ventures. The Competition Board's reasoned decisions on merger cases rarely exceed three pages now.

After the reactions, the Competition Authority opened the "Discussion Paper on the Thresholds Included in the Communiqué Concerning the Mergers and Acquisitions" to public opinion in August 2012. The Discussion Paper aims to abolish the global threshold in an effort to lighten the Competition Authority's workload. For more information concerning the Discussion Paper, please see the section on key policy developments.

Following a public consultation process, the Turkish Competition Authority has also introduced another guideline on the remedies that would be accepted by the Competition Authority in mergers and acquisitions. The guideline provides detailed explanations in relation to different forms of remedies such as divestiture, ownership unbundling, compulsory licensing, compulsory granting access to facilities, etc. The guideline also lays down procedures for the operation of trustees. The principles and procedures adopted by the guideline are very similar to, if not the same as, the EU system.

Key industry sectors, barriers to entry, nature of international competition

As a traditional trend, the Turkish Competition Authority typically 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 Turkish Competition Authority's special scrutiny as well. The Turkish Competition Authority's case handlers are always extremely eager to issue information requests (thereby cutting the review period) in transactions relating to these sectors, where even transactions that raise low-level competition law concerns are looked at very carefully. In some sectors, the Turkish Competition Authority is also statutorily required to seek the written opinion of other Turkish governmental bodies (such as the Turkish Information Technologies and Communication Authority pursuant to Section 7/2 of Law on Electronic Communication No. 5809). In such cases, 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 indicate that transactions in the industry for chemicals and chemical products took the lead by 28 notifications. The sectors for food products, machinery and defence industry and medical instruments followed the chemicals industry with over 20 transactions per each. The most significant decrease has been noted for transactions in the energy sector. Statistics for 2012 have not been released yet.

2011 and 2012 witnessed the Competition Board taking some of the very important decisions in the history of the Turkish merger control regime:

In AFM/Mars (11-57/1473-539), transaction parties requested authorisation on the merger of AFM and Mars, which are the two largest movie theatre operators in Turkey. AFM operates in nine provinces of Turkey with 182 movie theatres, whereas Mars operates in 14 provinces of Turkey with 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 these submarkets, the transaction would have a significant impact on the effective competition. The transaction parties proposed several remedies to the Competition Board. These remedies include divestitures concerning 12 movie theatres. In this transaction, the Competition Board

granted conditional clearance, reserving that clearance would be revoked in case 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.

In Total/Aygaz (11-41/873-274), the Competition Board decided that Aygaz's acquisition of Total's LPG dealer contracts and a part of its LPG distribution business assets would not lead to a significant lessening of competition. The Competition Board stated that Aygaz is Turkey's leading bottled LPG distributor and acquiring Total's assets would increase its current market share by 4.51%. The Competition Board addressed the HHI Index by indicating highly concentrated market structure, homogeneity of the product and the resulting potential to create a dominant position in favour of Aygaz. However, the Competition Board took into consideration other factors in the market such as the low switching costs for customers, several parts of the Turkish market which will not be affected, shrinking capacity and vertical integration. Finally the Competition Board cleared the transaction unconditionally by stating that the transaction would not create or strengthen a dominant position.

In Diageo Plc/Mey Icki (11-45/1043-356), the Competition Board found that Mey Icki was in the dominant position in the gin market, while it was not in the markets for vodka and liquor. The Competition Board indicated that the proposed transaction would give rise to competition problems in the markets for gin and liquor but not in the market for vodka. It launched a Phase II review into the transaction. Diageo Plc unsuccessfully proposed several remedies, which the Competition Board did not find to be acceptable. Subsequently, Diageo Plc proposed more complex and radical solutions, including the transfer of "Maestro Assets" in the gin market and "Hare Assets" in the liquor market, together with the "Bilecik Production Facilities" to third parties. The Competition Board accepted these new remedies. It cleared the transaction but conditioned the clearance upon the fulfilment of the remedies within a certain period of time. Six months after the conditional clearance decision, Diageo Plc transferred the said assets to Antalya Alkollu Ickiler and the Competition Board approved this transfer as fulfilling Diageo's obligation.

In Dardanel (12-04/151-42), the Competition Board cleared the transaction for the acquisition by Yildiz Holding of Dardanel. The transaction concerned the market for canned fish and received unconditional clearance. Prior to the transaction, Yildiz Holding already owned Kerevitas in the same market and thus the Competition Board assessed whether the proposed transaction would create or strengthen a dominant position in the relevant market. The Competition Board cleared the transaction by majority. It took into account factors such as the increasingly-successful private label products. Three of the seven members of the Competition Board objected to the decision by stating that the transaction should have been taken to a Phase II review.

In Sok Markets (11-45/1044-357), the Competition Board granted clearance to the acquisition of Sok Markets, a retail market chain, by Ulker Group. Ulker Group is a market leader in several FMCG food products in Turkey and it has a 4.94% shareholding in BIM Markets, Turkey's leading retail market chain in 2010 controlled by the Topbas Group. Both Sok Markets and BIM Markets are regarded as discount retail markets which represent a sub-segment of retail markets. Ulker committed to not gain control over BIM Markets by increasing its shareholdings percentage or placing its employees on the boards of BIM Markets. The Competition Board placed strong emphasis on the resulting vertical integration and the relations between the two groups. It concluded that the two retail market chains would act with separate economic interest, have diverse decision-making mechanisms, not be economically dependent to each other and consequently would remain in competition with each other. As a result, the Competition Board cleared the transaction by accepting Ulker's commitment.

Key economic appraisal techniques applied

The Turkish Competition Act regime currently utilises a 'dominance test' in the evaluation of concentrations. Pursuant to article 13/II of the new 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 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". There is no market share threshold above which a firm would be presumed to be dominant. Having said that, market shares of about 40 per cent 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 the competition in the whole territory of Turkey or in a substantial part of it, pursuant to article 7 of the Competition Act.

That said, there is a current proposal of a new law which could result in a shift to the 'substantial lessening of competition' test. The timing of enactment is not clear.

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 on that ground. 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 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 this decision of the Competition Board and decided that 'dominance test' does not cover 'joint dominance'. This has been a very controversial topic ever since, because the Competition Board has never prohibited any transaction on the grounds of joint dominance after the decision of the High State Court.

The new affected market condition for notifiability requires the existence of one or more overlaps at the global level sufficient to trigger a notification requirement, provided that one of the transaction parties has activities in Turkey in at least one of such overlap areas. This requirement does not necessitate conglomerate mergers or acquisitions to be notified to the Competition Authority for lack of overlapping markets. Nevertheless, there is an exception for joint venture cases to this requirement. As per the article 7 (2) of the new Merger Communiqué, authorisation of the Competition Board shall be required for joint venture transactions even without any affected market.

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 year of 2012. For instance, in the AFM/Mars Cinema case, 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.

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 1) of the notification, will decide either to approve, or to investigate the transaction further (Phase 2). 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 Competition Board recently enacted Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions in order to provide guidance to 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, for instance Diageo Plc/Mey Icki and AFM/Mars Cinema have been concluded in the last year.

The new 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 either the Competition Board required or the parties proposed, due to its legal certainty feature.

Key policy developments

In 2011 and 2012, the entry into force and enforcement of the new Merger Communiqué was surely the most significant development in the Turkish merger control regime. In addition to this Communiqué, the Competition Board also released a comprehensive guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions published on 3 May 2011 and Guideline on Remedies Acceptable to the Competition Authority in Mergers and Acquisitions, 16 June 2011.

The Turkish Competition Authority made an announcement on applications made to the Turkish Competition Authority which fall outside the scope of the Competition Act (such as applications relating to unfair competition, protection of the consumer, and regulated industries). This step in clarifying the boundaries of the Turkish Competition Authority's ambits might indicate the overwhelming number of irrelevant submissions that the Authority has had to process and evaluate in the past. In a similar vein, the Turkish Competition Authority released Communiqué No. 2012/2 on the Application Procedure for Competition Infringements in August 2012. Communiqué No. 2012/2's main purpose is to lay down the procedure and principles relating to the evaluation of applications that are to be made to the Turkish Competition Authority with respect to the alleged violations of Articles 4, 6 and 7 of the Competition Act.

The Turkish Competition Authority also opened the efficiency of the current global and local turnover threshold system to discussion. On 31 August 2012, a discussion paper ("Discussion Paper") was published on the Turkish Competition Authority's official website. The Discussion Paper analyses statistics on the Turkish Competition Board's decisions in 2010 and 2011 to draw conclusions as to whether the current turnover thresholds are adequate or are in need of an amendment.

According to the current threshold system, the Board's approval is required for transactions where:

- Total turnovers of the transaction parties in Turkey exceed TRY 100m, and turnovers of at least two of the transaction parties in Turkey each exceed TRY 30m; or
- Global turnover of one of the transaction parties exceeds TRY 500m, and at least one of the remaining transaction parties has a turnover in Turkey exceeding TRY 5m.

According to the Discussion Paper, (i) 60% of the notified transactions exceeded the global turnover thresholds only, and (ii) only 17% of the same exceeded the local turnover threshold in 2011. In 25% of the transactions that exceeded only the global turnover, either the acquirer or the target did not have local turnover in Turkey.

In the light of this data, the Discussion Paper finds the global turnover aspect to be the main reason for the high numbers of merger control filings and the resulting heavy workload of the Turkish Competition Authority. Consequently, the Turkish Competition Authority signals that it may gear up for an amendment to the turnover thresholds after the public consultation on the Discussion Paper.

The new Merger Communiqué also extended the notification form and introduced a new and much more complex notification form, which is similar to the Form CO of the European Commission, in order to receive more information in detail from the parties at once and to reach a decision expeditiously. There is an increase in the economic and legal information requested, including data with respect to supply and demand structure, imports, potential competition, expected efficiencies and synergies, etc. Some additional documents such as the executed or current copies, and sworn Turkish translations of the document(s) that bring(s) about the notified transaction, annual reports including balance sheets of the parties, and, if available, market research reports for the relevant market, are also required. With an amendment to the new Merger Communiqué by Communiqué No. 2011/2 in order to keep up with the technological developments, the Notification Form and attached documents shall be prepared also in electronic form.

The new notification form no longer insists on "signed copies of the agreement leading to the notified concentration". This is a much welcome change allowing the parties to file before the transaction document is signed. This will save very valuable time and certainly constitute an improvement over the currently applicable regime.

With the recent changes observed in Turkish merger control legislation, 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 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. The Competition Board is currently rather dismissive of carve-out and hold-separate arrangements, 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 that the Competition Authority will take in interpreting this provision is not clear as yet, such arrangements cannot be considered as safe early-closing mechanisms recognised by the Competition Board. Under Article 10 of the new Merger Communiqué, a transaction is deemed to be 'realised' (i.e., closed) on the date when the change in control occurs. It remains to be seen if this provision will be interpreted by the Competition Authority in a way that provides the parties to a notification to carve out the Turkish jurisdiction with a hold-separate agreement. This has consistently been rejected by the Turkish 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 a change in control actually took effect in Turkey is unwarranted.

Another important change in the Turkish merger control regime is brought about with Article 13 of the new Merger Communiqué. The Competition Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (e.g. non-compete, non-solicitation, confidentiality, etc.). This now allows the parties to engage in self-assessment, and the Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore.

Another talking point is the 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 per cent 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.

The Competition Authority now publishes the notified transactions on its official website 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.

Finally, the Competition Authority has released two new draft guidelines for public opinion, one about horizontal mergers and the other about non-horizontal mergers, just one day prior to the time of writing (4 December 2012).

Reform proposals

A current proposal to change the entire Competition Act legislation is pending before Turkey's Grand National Assembly. If enacted, the proposal will bring about significant amendments to the Competition Act, such as the SIEC Test as the substantive test for merger appraisals and the introduction of *de minimis* exceptions. It is still uncertain, however, when the relevant proposal will be on the Grand National Assembly's agenda. President of the Competition Board Prof. Dr. Nurettin Kaldirimci writes in his message for 2012 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, presented to the Turkish Grand National Assembly as a draft law in the preceding legislative year and which, we believe, will significantly improve organisational efficiency". However there is no solid sign that the draft will be enacted soon.

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