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Turkey: Merger Control

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The national competition agency for enforcing merger control rules is the Turkish Competition Authority (the Competition Authority), a legal entity with administrative and financial autonomy. The Competition Authority consists of the Competition Board, the Presidency and service departments. As the competent decision-making body of the Turkish Competition Authority, the Competition Board is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Competition Board consists of seven members and is based in Ankara.

Turkish merger control regulation

The applicable legislation on merger control is Law No. 4054 on Protection of Competition (Law No. 4054) and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4).

Article 7 of Law No. 4054 authorises the Competition Board to regulate, through communiqués, which mergers and acquisitions should be notified in order to gain validity. Further to this provision, Communiqué No. 2010/4, which was published on 7 October 2010, replaced Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board as of 1 January 2011, as a primary instrument in assessing merger cases in Turkey. Communiqué No. 2010/4 sets forth the types of mergers and acquisitions that are subject to the Competition Board's review and approval, bringing together some significant changes to the Turkish merger control regime.

The Competition Board has also issued guidelines to supplement and provide guidance on the enforcement of Turkish merger control rules. One of the guidelines is on market definition, which was issued in 2008. The guideline is closely modelled after the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C 372/03). The Competition Board has released another comprehensive guideline on merger control matters, on 27 June 2011. The Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions covers certain topics and questions about the concepts of (i) undertakings concerned, (ii) turnover calculations, and (iii) ancillary restraints. It is closely modelled after Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings. Finally, the Guideline on Remedies is issued by the Competition Board.

Types of transactions

With the enactment of Communiqué No. 2010/4, the Turkish competition law regime is now utilising a 'significant lessening of competition' test. Accordingly, Communiqué No. 2010/4 defines the scope of the notifiable transactions in article 5 as follows:

- a merger of two or more undertakings;
- acquisition of or direct/indirect control over all or part of one or more undertakings by one or more undertakings or persons, who currently control at least one undertaking, through:
  - the purchase of assets or a part or all of its shares;
  - an agreement; or
  - other instruments.

Turkey is a jurisdiction with a pre-merger notification and approval requirement, much like the EU regime, concentrations that result in a change of control are subject to the Competition Board's approval, provided that they exceed the applicable thresholds. 'Control' is defined as the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions of a company; and it can be exercised de jure or de facto.

Acquisition of a minority shareholding can constitute a notifiable merger if it leads to a change in the control structure of the target entity. Joint ventures that emerge as independent economic entities possessing assets and labour to achieve their objectives and do not aim at or effectively result in the restriction of competition among the parties, or between the parties and the joint venture itself, are subject to notification to, and approval of, the Competition Board. As per article 13 of Communiqué No. 2010/4, cooperative joint ventures will also be subject to a merger control notification and analysis on top of an individual exemption analysis, if warranted.

The Competition Authority, with its recent precedent dated 27April 2012, concluded that if a foreign-to-foreign transaction that concerns the acquisition of sole control over the target is leading to a change of control in an already existing Turkish joint venture of the target, the transaction is to be deemed as a joint venture transaction for the purposes of Turkish merger control regime.

Effects doctrine

Aside from joint ventures, transactions that do not result in an affected market do not trigger a pre-merger notification or approval requirement, even if they exceed the thresholds. A market is deemed as being affected when the market has 'a possibility to be impacted by' the transaction, and (i) where two or more of the parties have commercial activities in the same product market (horizontal relationship), or (ii) where at least one of the parties is engaged in commercial activities in markets which are upstream or downstream from the product market of the other party (vertical relationship).

The recently introduced guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions provides that a horizontal or vertical overlap between the worldwide activities of the transaction parties is sufficient to infer the existence of an affected market, provided that one of the transaction parties is active in such overlap segment in Turkey.

Joint venture transactions require pre-merger notification and approval if they exceed the thresholds, regardless of whether they result in an affected market or not. Foreign-to-foreign transactions are caught if they exceed the applicable thresholds and they result in an affected market – except for joint ventures for which the existence of an affected market is not sought.

Market dominance

The Turkish merger control provisions rely on the market dominance test to ascertain whether a merger may be cleared. As a matter of article 7 of Law No. 4054 and article 13 of the Communiqué No. 2010/4, mergers and acquisitions which do not create or strengthen a 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 Law No. 4054 defines 'dominant position' as 'any position enjoyed in a certain market by one or more undertakings by virtue of which, those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply'. However, the substantive test is a two-prong test and a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position but also significantly impedes the competition in the whole territory of Turkey or in a substantial part of it.

The Competition Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (non-compete, non-solicitation, confidentiality, etc). This will allow the parties to engage in self-assessment, and the Competition Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. Non-competition issues are in principle not taken into account.

Thresholds

Communiqué No. 2010/4 has abolished the market share thresholds and replaced them with turnover thresholds. The reason behind this move was to reduce the number of merger notifications and to help undertakings more easily reach legal certainty, without bothering to deal with market definitions and shares. A pre-merger notification and approval is required where either (i) the total turnover of the parties exceeds 100 million Turkish lira in Turkey and the respective Turkish turnovers of at least two of the parties individually exceed 30 million Turkish lira; or (ii) the worldwide turnover of one of the parties exceeds 500 million Turkish lira and the Turkish turnover of at least one of the other parties exceeds 5 million Turkish lira, then the transaction will be subject to the Competition Board's approval.

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

- Banking Law No. 5411 provides an exception from the application of merger control rules for mergers and acquisitions of banks. The exemption is subject to the condition that the market share of the total assets of the relevant banks does not exceed 20 per cent;
- mandatory acquisitions by public institutions as a result of financial distress, concordat, liquidation, etc, do not require a pre-merger notification;
- intra-corporate transactions are not notifiable;
- acquisitions by inheritance are not subject to merger control;
- acquisitions made by financial securities companies solely for investment purposes do not require a notification, subject to the condition that the securities company does not exercise control over the target entity in a manner that influences its competitive behaviour; and
- multiple transactions between the same undertakings realised over a period of two years are deemed as a single transaction for turnover calculation purposes. They warrant separate notifications if their cumulative effect exceeds the thresholds, regardless of whether the transactions are in the same market/same sector or not and/or whether they were notified before or not.

There are also specific methods of turnover calculation for certain sectors. These special methods apply to banks, special financial institutions, leasing companies, factoring companies, securities agents and insurance companies. The Turkish merger control regime does not, however, recognise any de minimis exceptions.

Procedure

There is no specific deadline for making a notification in Turkey. There is, however, a suspension requirement (ie, a mandatory waiting period): a notifiable transaction (whether or not it is problematic under the applicable dominance test) is invalid, with all the ensuing legal consequences, unless and until the Competition Authority approves it.

The notification is deemed filed when the Competition Authority receives it in its complete form. If the information provided to the Competition Board is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Competition Board's subsequent request for further data. The notification is submitted in Turkish. Transaction parties are required to provide a sworn Turkish translation of the final executed or current version of the transaction agreement.

Notification

In principle, under the merger control regime, a filing can be made by either of the parties to the transaction, or jointly. In case of filing by one of the parties, the filing party should notify the other party of the fact of filing.

It is advisable to file the transaction at least 45 calendar days before closing. The Communiqué No. 2010/4 has introduced a much more complex notification form to be used in merger filings so the time frame required for the preparation of a notification form would be longer than the old regime.

The filing process differs for privatisation tenders. Communiqué No. 1998/4 provides that a pre-notification is done before the tender 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. Filing can also be performed when the documentation at hand adequately proves the irreversible intent to finalise the contemplated transaction.

The notification form is similar to the form CO of the European Commission. One hard copy and an electronic copy of the merger notification form shall be submitted to the Competition Board. In parallel with the new notion of that only transactions with a relevant nexus to the Turkish jurisdiction will be notified anyway, there is an increase in information requested, including data with respect to supply and demand structure, imports, potential competition, expected efficiencies, etc. Some additional documents such as the executed or current copies and sworn Turkish translations of some of the transaction documents, annual reports including balance sheets of the parties, and, if available, market research reports for the relevant market are also required.

There is also a short-form notification (without a fast-track procedure) if: (i) a transition from joint control to full control is at stake; and (ii) the total of the parties' respective market shares is less than 20 per cent in horizontally affected markets and one party's market share is less than 25 per cent in vertically affected markets.

There is an extensive suspension requirement. Therefore, if a merger or an acquisition is closed before clearance, the substantive test is the main important issue for determination of the consequences. If the Competition Board reaches the conclusion that the transaction creates or strengthens a dominant position and

significantly lessens competition in any relevant product market, the undertakings concerned as well as their employees and directors will be subject to the monetary fines and sanctions.

In the event that parties to a notifiable transaction violate the suspension requirement (ie, close a notifiable transaction without having obtained the approval of the Competition Board or do not notify the notifiable transaction at all), the acquirer party (for formation of a full-function joint venture, all of the parent companies are deemed as the acquirer party separately) would receive a turnover based monetary fine at a rate of 0.1 per cent over its annual Turkish turnover generated in the financial year preceding the date of the fining decision. In any event, the administrative monetary fine to be imposed shall not be less than 13,591 Turkish lira. This monetary fine does not depend on whether the Competition Authority will ultimately clear the transaction. This is a fixed ratio (0.1 per cent). The Competition Board does not have power to use any discretion to impose more or less of such fine. Therefore, the acquirer would automatically incur the administrative monetary fine once the violation of the suspension requirement is detected.

If, however, there truly is a risk that the transaction is problematic under the dominance test applicable in Turkey, the Competition Authority may:

- ex officio launch an investigation into the transaction;
- order structural and behavioural remedies to restore the situation as before the closing (restitutio in integrum); and
- impose a turnover-based fine of up to 10 per cent of the parties' annual turnover.

Executive members and employees of the undertakings concerned who are determined to have played a significant role in the violation (failing to file or closing before the approval) may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings. The transaction will also be invalid and unenforceable in Turkey.

The Competition Board has so far consistently rejected all carve-out or hold-separate arrangements proposed by merging undertakings. Communiqué No. 2010/4 provides that a transaction is deemed to be 'realised' (ie, closed) 'on the date when the change in control occurs'. While the wording allows some room to speculate that carve out or hold-separate arrangements are now allowed, it remains to be seen if the Competition Authority will interpret this provision in such a way. As noted above, this has consistently been rejected by the Competition Board so far, arguing that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

The Competition Authority will publish the notified transactions on its official website (www.rekabet.gov.tr) with only the names of the parties and their areas of commercial activity. To that end, once notified to the Turkish Competition Authority, the 'existence' of a transaction will no longer be a confidential matter.

Costs

There are no filing fees required under Turkish merger control proceedings.

Investigation

The Competition Board, upon its preliminary review of the notification (ie, Phase I), will decide either to approve or to investigate the transaction further (ie, Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval' through an implied approval mechanism introduced with the relevant legislation. While the wording of the law implies that the Competition Board should decide within 15 calendar days whether to proceed with Phase II, the Competition Board generally takes more than 15 calendar days to form its opinion concerning the substance of a notification. It is more sensitive to the 30-calendar-day deadline on announcement. Moreover, any written request by the Competition Board for missing information will stop the review process and restart the 30-calendar-day period at the date of provision of such information. In practice, the Competition Authority is quite keen on asking formal questions and adding more time to the review process. Therefore, it is recommendable that the filing be done at least 45 to 50 calendar days before the projected closing.

If a notification leads to a Phase II review, it turns into a full-fledged investigation. Under Turkish law, the Phase II investigation takes about six months. If necessary, the Competition Board may extend this period 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 30 to 45 days from the original date of notification. Neither Law No. 4054 nor Communiqué No. 2010/4 foresees a 'fast-track' procedure to speed up the clearance process. Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

There is no special rule for hostile takeovers; the Competition Board treats notifications for hostile transactions in the same manner as other notifications. If the target does not cooperate and 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.

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.

Clearance

The Competition Board may either render a clearance or a prohibition decision. It may also give a conditional approval. The reasoned decisions of the Competition Board are served on the representatives to the notifying parties and are also published on the website of the Competition Authority (www.rekabet.gov.tr).

The Competition Board may grant conditional clearance and make the clearance subject to the parties observing certain structural or behavioural remedies, such as divestiture, ownership unbundling, account separation, right of access, etc. The number of conditional clearances has increased significantly in recent years.

Judicial Review

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted for judicial review before the High State Council. 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, first, execution of the decision is likely to cause irreparable damages, and second, the decision is highly likely to violate the law. The deadline to appeal the Competition Board's final decisions to the High State Council is 60 days starting from receipt of the reasoned decision. The appeal process may take up to two-and-a-half years.

Recent developments

The Communiqué No. 2010/4 raised certain questions as to the notifiability of merger and acquisition transactions and transactions concerning the creation of a joint venture where the parties do not have any overlapping activities in any market in Turkey. This question stemmed from the wording of the Communiqué No. 2010/4 regarding the definition of affected markets and the provision that requires joint ventures to be notified regardless of whether they result in an affected market or not if they exceed the thresholds.

In *LurBerri/LBOF/Financière de Kiel* (12 December 2011, 11-61/1580-565), the Turkish Competition Board concluded that the joint venture transaction (where the parties do not have any overlapping activities in any market in Turkey) was notifiable, and rendered an approval decision.

In *Sorgenia/KKR* (14 July 2011, 11-43/919-288), the Competition Board did not find the transaction to be notifiable, since the joint venture's products (generation and wholesale of electricity) could not in any possible scenario be sold in Turkey due to direct infrastructure constraints.

Furthermore, one of the recent developments is the *Mars Sinema* decision of the Turkish Competition Authority. In Decision No. 11-57/1473-539 dated 17 November 2011, after extensive evaluations the Turkish Competition Board cleared the transaction conditional upon divestment of certain assets.

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ELIG aims at providing its clients with high-quality legal service in an efficient and business-minded manner. All members of the ELIG team are fluent in English. ELIG represents corporations, business associations, investment banks, partnerships and individuals in a wide variety of competition law matters. The firm also collaborates with many international law firms on Turkish competition law matters.

In addition to an unparalleled experience in merger control issues, ELIG has a vast experience in defending companies before the Competition Board in all phases of an antitrust investigation. We have in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all other forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. Furthermore, in addition to a significant antitrust litigation expertise, our firm has considerable expertise in administrative law, and is therefore well equipped to represent clients before the High State Council, both on the merits of a case, and for injunctive relief. ELIG also advises clients on a day-to-day basis concerning business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising, and toll manufacturing.

In 2011, ELIG was involved in more than 35 clearances of merger notifications, more than 17 defence projects in investigations, and over eight appeals at the High State Council; together with approximately 37 antitrust education seminars provided to the employees of clients.

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Gönenç Gürkaynak holds an LLM degree from Harvard Law School, and he is qualified in Istanbul, New York and England & Wales (currently a non-practising solicitor). Mr Gurkaynak heads the competition law and regulatory department of ELIG, which currently consists of five associates. He has unparalleled experience in Turkish competition law counselling issues with over 10 years of competition law experience, starting with the establishment of the Turkish Competition Authority. He files notifications to and obtains clearances from the Turkish Competition Authority in more than 35 notifications every year, he has led defence teams in several written and oral defences before the Turkish Competition Authority, represented numerous multinational companies and large Turkish entities before Administrative Courts and the High State Court on tens of appeals, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics. Prior to joining ELIG as a partner more than seven years ago, he worked at the New York, Brussels and (twice) Istanbul offices of White & Case LLP for more than eight years.

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Bora İkiler graduated from Bilkent University Faculty of Law in 2006, where he was admitted for his undergraduate studies in 2002. He began his career in the field of competition law at ELIG, Attorneys-at-Law in 2006. Bora İkiler obtained his LLM degree from Michigan University Law School in the USA in 2010. Bora İkiler is admitted to the Istanbul Bar and he has represented various multinational and national companies before the Turkish Competition Authority in their merger control filings, incorporation of joint ventures and cartel investigations concerning various sectors. He has an extensive experience in areas of compliance to competition law rules, cartel agreements, abuse of dominance and merger control.

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