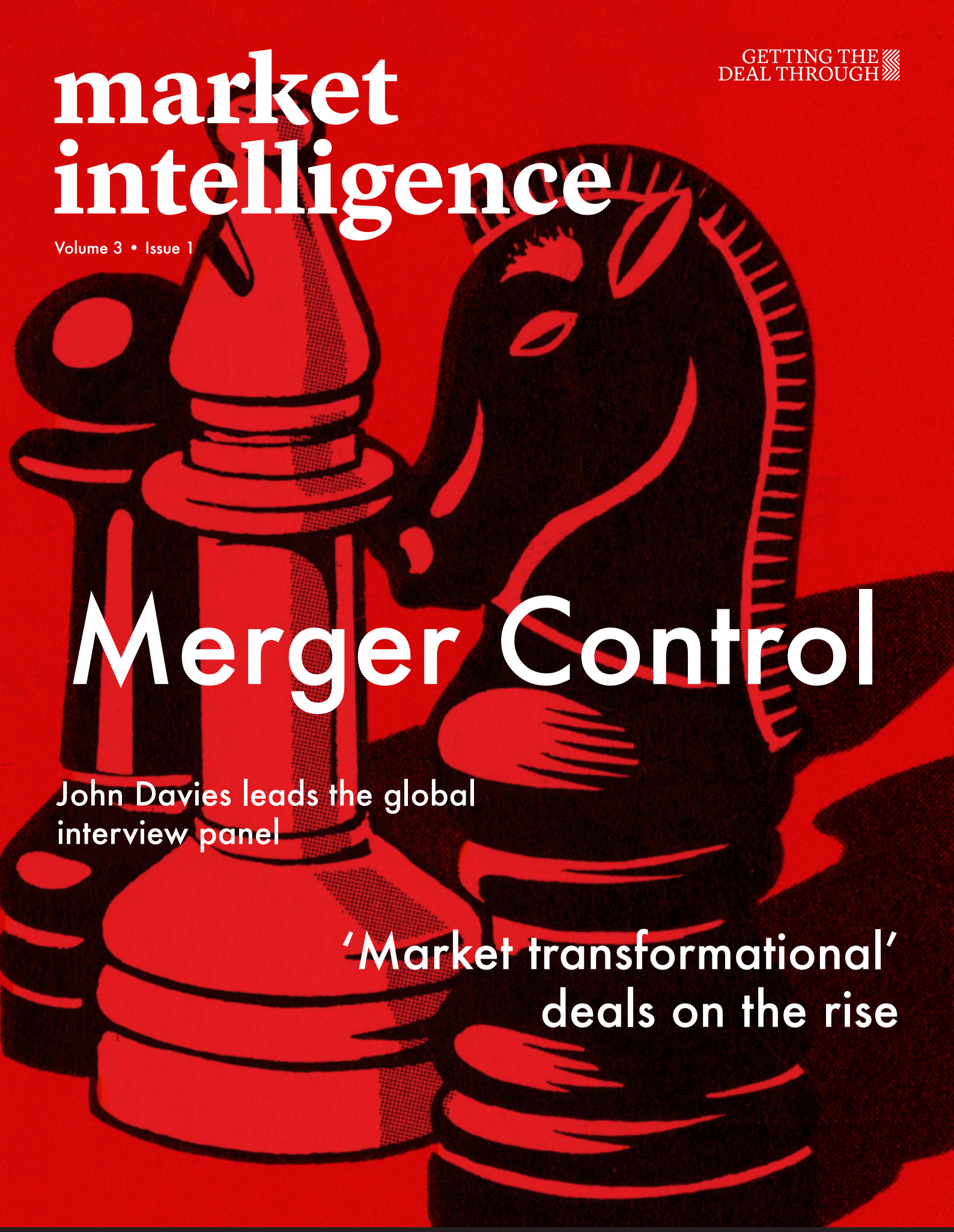
GETTING THE DEAL THROUGH

market intelligence

Volume 3 • Issue 1



Merger Control

John Davies leads the global interview panel

'Market transformational' deals on the rise

Activity levels • Enforcement priorities • Keynote deals • 2016 outlook
Europe • North America • Asia-Pacific • Latin America

Publisher: Gideon Roberton
Senior business development manager: Adam Sargent
adam.sargent@gettingthedealthrough.com
Business Development Manager: Dan Brennan
dan.brennan@gettingthedealthrough.com
Readership Development Manager: Rosie Oliver
Rose.Oliver@gettingthedealthrough.com
Product marketing manager: Kieran Hansen
subscriptions@gettingthedealthrough.com

Head of production: Adam Myers
Editorial coordinator: Eve Ryle-Hodges
Subeditor: Claire Ancell
Designer/Production editor: Nathan Clark

Cover: iStock.com/CSA-Images

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4104
Fax: +44 20 7229 6910

ISSN: 2056-9025

ABA Section of International Law
Your Gateway to International Practice
Strategic Research Sponsor of the ABA Section of International Law

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

market intelligence

A note from John Davies, Panel Leader

A global trend towards consolidation of markets is visible in the increased volume of transactions, as well as in the proliferation of 'market transformational' deals – four to three or three to two mergers, where the transaction could be the last major consolidation possible in the relevant sector. The contributions in this issue of *GTDT: Market Intelligence – Merger Control* show that such mergers are likely to face more intense scrutiny by competition authorities, not least because of the heightened attention they may draw from third parties and from political spheres. Consequently, competition authorities are also likely to take a closer look at the kind of remedies they find acceptable.

In particular, mergers in fields as diverse as healthcare, food retail as well as media and telecoms have faced challenges in several jurisdictions. For example, in Germany, the Bundeskartellamt blocked a merger between two of the country's largest food retail chains, Edeka and Kaiser's Tengelmann (later cleared by governmental intervention). In the US, the FTC required the divestment of 330 Family Dollar stores as a condition of closing its investigation into *Dollar Tree/Family Dollar Store*. In China, MOFCOM cleared the acquisition of Alcatel Lucent by Nokia subject to conditions related to the licensing of standard-essential patents – notably after the transaction had already received unconditional clearance in the US and the EU.

In this environment, it is more essential than ever to have up-to-date advice on current trends from local experts who also understand the international landscape. This issue of *GTDT: Market Intelligence – Merger Control* presents views and observations from leading competition practitioners around the world, offering valuable insight into the evolving legal and regulatory landscapes in their respective jurisdictions.

We would like to express our gratitude to the interview panel for assisting with this project and providing their insights into major market, regulatory and enforcement trends, and the impact these are having on this complex field of practice.

Freshfields Bruckhaus Deringer LLP
March 2016

In this issue

Gönenç Gürkaynak

MERGER CONTROL IN TURKEY

Gönenç Gürkaynak graduated from Ankara University, Faculty of Law in 1997, holds an LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, and England & Wales (currently a non-practising solicitor). He is the firm's managing partner and heads the competition law and regulatory department of ELIG. He has unparalleled experience in Turkish competition law counselling issues, with more than 18 years' of experience dating from the establishment of the Turkish Competition Authority. Before founding ELIG in 2005, Gönenç worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. He also holds teaching positions at undergraduate and graduate levels at two universities, in the fields of law and economics, competition law and Anglo-American law.

M Hakan Özgökçen holds an LLB degree from Marmara University Law School and an LLM degree from Istanbul Bilgi University. He is a partner in the competition law and regulatory department of ELIG and has been a member of the Istanbul Bar since 2005. He has extensive experience in competition law, mergers & acquisitions, contracts law, administrative law and general corporate law matters. He has assisted Gönenç Gürkaynak in representing various multinational and national companies before the Turkish Competition Authority and Turkish courts.

GTDT: What have been the key developments in the past year or so in merger control in your jurisdiction?

Gönenç Gürkaynak & M Hakan Özgökçen:
The past years have witnessed various regulatory developments in Turkey in terms of merger control. First, the Turkish merger control regime underwent deep changes in early 2013 with the amendment of the 'famous' Communiqué No. 2010/4 on Mergers and Acquisitions subject to merger control regime (the Amended Communiqué). Two main changes have been introduced: the increase of the thresholds that the turnover of the parties to a M&A transaction should exceed to be subject to merger control review, and the removal of the necessity for the existence of an affected market for notifiability. The publication of a set of guidelines governing the practical aspects of the merger control review handled by the Competition Authority (the Authority) followed this amendment, and literally reconstructed the Turkish merger review system (eg, guidelines on undertakings concerned with the merger control regulation; calculation of turnover; ancillary restraints; assessment of horizontal and non- horizontal mergers and acquisitions; and concept of control).

Until 2013, the Turkish Competition Board (the Board) was dealing with a significant number of merger control cases. Following the increase of the notification threshold, this trend has been changing and the number of transactions reviewed by the Authority has gradually decreased since 2013. As expected, the Board shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuses of dominance. To be more specific, the Board finalised 303 merger control cases in 2012, whereas this number decreased to 213 and 215 in 2013 and 2014, respectively (a decrease of approximately 30 per cent) (the number of transactions reviewed by the Authority in 2015 has not yet been published).

Traditionally, the Authority pays special attention to transactions that take place in sectors where infringements of competition laws are frequently observed (such as cement and ready mixed concrete) and the concentration level is high. Concentrations concerning strategic sectors that are important to the national economy (automotive, telecommunications, energy, pharmaceutical, airline, etc) attract the Authority's special scrutiny as well. The Authority's case handlers are always 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). In such instances, the statutory opinion usually becomes a hold-up item that slows down the review process of the notified transaction.

The Board adopted many significant decisions in the past year. One of them is the *Bekaert/Pirelli* decision concerning the acquisition by NV Bekaert of steel tire cord business of Pirelli Tyre SpA (22 January 2015, 15-04/52-25). The Board took the relevant transaction into Phase II review in the last quarter of 2014 as the Board (i) determined that the transaction would significantly increase the market power of the parties given the structural indications such as concentration levels in the market and market shares; and (ii) found strong indications that the parties would become dominant in the relevant markets and restrict competition significantly. Bekaert committed to enter into long-term supply agreements with its local customers for a period of three years at most, and at competitive prices in an attempt to eliminate the potential competition law concerns of the Board. Upon the submission of the proposed commitments, the Board concluded that the commitments are sufficient to eliminate the competition law concerns, and granted conditional approval. As the Board's conditional approval decision is solely based on behavioural remedies, the *Bekaert/Pirelli* decision could be deemed as a benchmark precedent.

Another noteworthy decision is *Lesaffre/Dosu,* concerning the acquisition by Lesaffre et Compaigne (having a Turkish subsidiary: Ozmaya Sanayi, a player in the market for yeast) of sole control over Dosu Maya Mayacılık, which is one of the most powerful yeast producers in Turkey and controlled by Yıldız Holding (15 December 2014, 14-52/903-411). The concentration would produce its affects in two different product markets: the markets for dry yeast and fresh yeast. While the Board concluded that the transaction would not raise any competition law sensitivities in the dry yeast market, upon the consummation of the transaction, the combined undertaking (Özmaya plus Dosu Maya) and Pak Maya would hold a joint dominant position in the market for fresh bread yeast in Turkey, which could impede competition. The Board did not find the initial commitments sufficient to remove the competition law concerns, and consequently took the transaction into Phase II review. Upon the submission of the amended commitments, the Board has granted a conditional approval to the transaction. The commitments include the divestiture of Özmaya's exclusive distributor; execution of a distributorship agreement with a potential buyer for a minimum period of three years; protection of the fresh yeast brands of Dosu Maya while expanding the geographical presence of Dosu Maya in Turkey; keeping the prices at a certain level; removal of the territorial exclusivity and the supplier exclusivity clauses from the agreement between Özmaya and its dealers; conducting competition compliance programmes; and not acquiring Akmaya Sanayi ve Ticaret for a certain time period. Even though

the majority of the Board decided to grant conditional approval to the transaction based on the proposed commitments, three of the Board members disagreed with the Board's approval decision since they consider that (i) the transaction would result in creating a joint dominance in the market for fresh yeast and significantly impede the effective competition in the market; and (ii) the commitments are not sufficient to eliminate the competitive concerns arising from the transaction due to the market structure, product characteristics and features of the sales-distribution system. This decision has the importance of being another case where the Board accepted a behavioural remedy as sufficient to remove the competition law concerns – even along with the structural remedies – and where the Board granted approval to a transaction even while it accepted that it will result in joint dominance in the market.

Apart from the above-mentioned decisions, the Board rejected the acquisition of full shares of Beta Marina Liman ve Çekek İşletmesi and Pendik Turizm Marina Yat ve Çekek İşletmesi by Setur Servis Turistik (9 July 2015, 15-29/421-118). The Board concluded that the transaction would not result in creation of or strengthening of a dominant position, and thus would not impede effective competition in the markets for 'mooring services provided in boat parks and fishing ports' in terms of Göcek Village Port Marina and Göcek Exclusive Marina; 'marina land services' in terms of Istanbul City Port Marina, Göcek Village Port Marina and Göcek Exclusive Marina; and 'land leasing services'. However, the majority of the Board ultimately rejected the transaction as the transaction would lead Koç Holding, the ultimate parent company of Setur, to become dominant with respect to Istanbul City Port Marina and would impede the effective competition in the relevant product market.

Recently, the Board granted conditional approval to the transaction concerning the acquisition of sole control over Migros Ticaret by Anadolu Endüstri Holding, which controls the major food and beverages companies including Coca-Cola Turkey and Anadolu Efes, through the acquisition of the majority shares of MH Perakendecilik ve Ticaret, which is controlled by Moonlight Capital and is one of the major retail companies in Turkey (9 July 2015, 15-29/420-117). The relevant product markets within the scope of the transaction include the markets for beer, cola drinks, orange (aromatised) soft drinks, soft drinks, bottled water, fruit juices, nectar, iced tea, sports drinks, energy drinks, olive oil, fast-moving customer goods, organised retail, wholesale retail, stationery equipment, and raw vegetables and fruits. The Board conducted an in-depth analysis on whether the transaction would result in any input or customer restrictions in the relevant product markets. Consequently, the Board concluded that the transaction would not result in creation or strengthening a dominant position, and thus would not impede the competition in the relevant product markets except the market for beer. The Board took the transaction into Phase II review in the first quarter of 2015 due to the competitive concerns that might arise in the beer market. To eliminate the Board's concerns with respect to the transaction's effect in the beer market, certain commitments were submitted such as: (i) Migros would maintain its current commercial relationships with Anadolu Efes' competitors and enter into new commercial relations with Anadolu Efes' potential competitors; (ii) Migros would not prevent the sale of the competitor products of Anadolu Efes; (iii) Anadolu Holding would not interfere with Migros's relations with Anadolu Efes' competitors in the market for beer; (iv) assignment of an independent third-party firm for monitoring and reporting the implementation of the aforementioned commitments; (v) maintenance of Migros's separate operational staff and organisational structure from the Anadolu Group companies; (vi) neither Migros nor Anadolu Endüstri Holding will share the competitively sensitive information of each other's competitors obtained due to their commercial relations; and (vii) the relevant commitments will continue to be applicable if Migros is to be acquired within the scope of an intra-group transaction that does not lead to a change of control. The Board granted conditional approval to the transaction by majority. This decision is also in line with the Board's recent approach towards acceptability of behavioural remedies.

GTDT: What lessons can be learned from recent cases to help merger parties manage the review process and allay authority concerns at an early stage?

GG & MHÖ: First of all, where relevant turnover thresholds are met, notification of the M&A transaction to the Authority is mandatory under the Turkish merger control system. Breaching this obligation and failing to obtain approval from the Board before the transaction is closed can be very expensive for the undertakings concerned, since the Board may impose on them a fine of up to 0.1 per cent of the local turnover generated in the previous financial year. The minimum fine was fixed at 16,765 Turkish lira in 2015 and 17,700 Turkish lira in 2016.

In addition to the foregoing, if there is truly a risk that the relevant notifiable transaction be viewed as problematic under the 'dominance test' applicable in Turkey, this would mean that the stakes will be higher if the transaction is closed before clearance. In such a situation, article 11(b) of the Competition Law entitles the Authority to launch an investigation ex officio in case the transaction is closed before clearance, and order structural as well as behavioural remedies to restore the situation to the same state as before

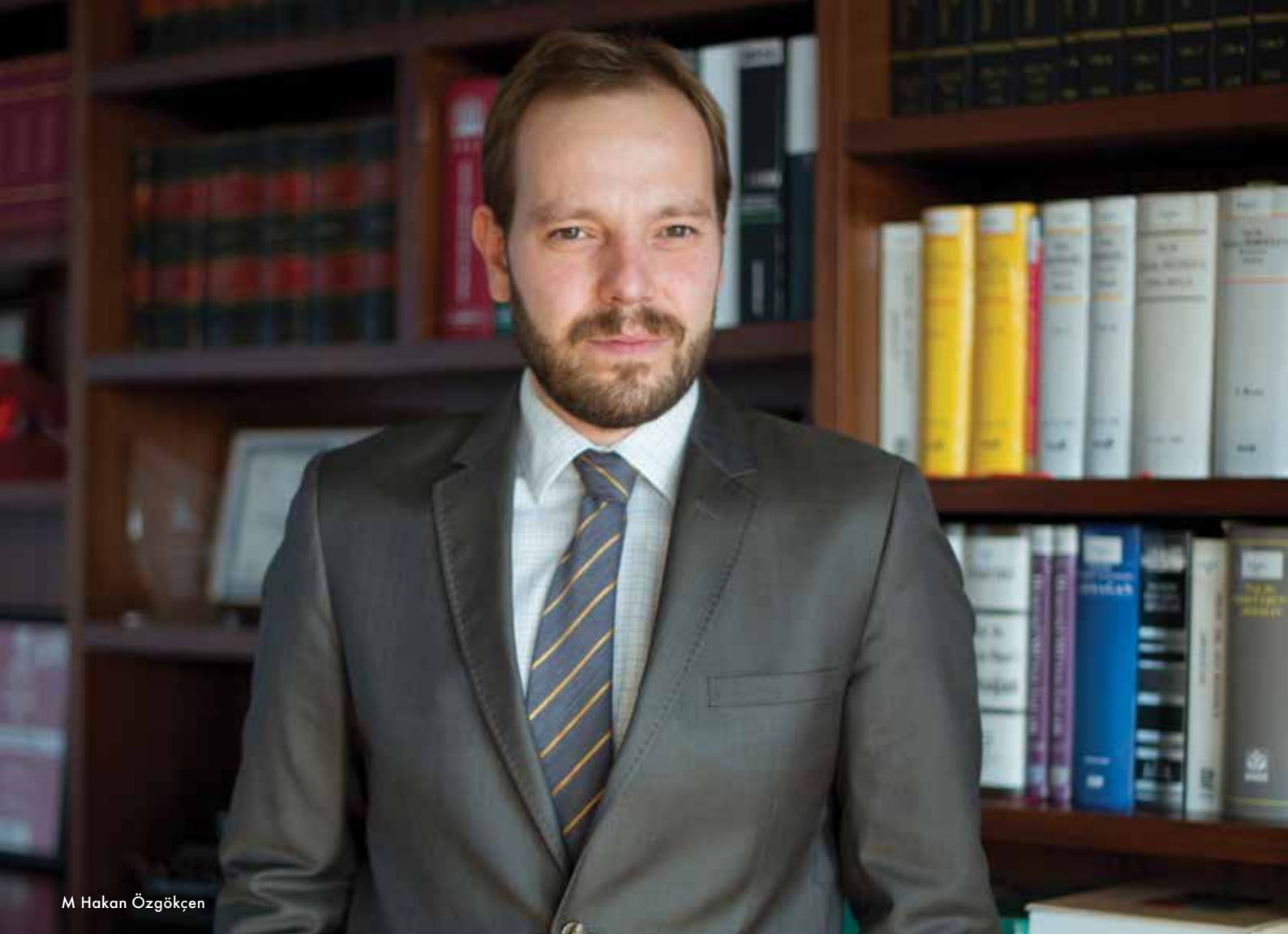
the closing (*restitutio in integrum*), and impose a turnover-based fine (of up to 10 per cent of the parties' annual turnover) on the undertakings concerned. In such a scenario, executive members of the undertakings concerned who are considered to have played a significant role in the infringement may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings as a result of implementing a problematic transaction without obtaining approval of the Board.

A notifiable concentration is also invalid with all its legal consequences, unless and until it is approved by the Board. The implementation of a notifiable transaction is suspended until clearance by the Board is obtained. Therefore, a notifiable merger or acquisition shall not be legally valid until the approval of the Board has been granted, and such notifiable transactions cannot be closed in Turkey before the clearance of the Board.

Moreover, it should be stressed that the notification form should provide the Authority with all the information necessary for the Board's review. Failing that, any written request by the Board for missing information will restart the 30 calendar day period of the preliminary review (Phase I review), which will lengthen the review process of the transaction.

As the Authority adopted the typical 'dominance test' for the substantive assessment of the concentrations (ie, the Board shall clear any concentration that does not create or strengthen a dominant position and does not significantly lessen competition in a relevant product market within the whole or a part of Turkey), it could be easily defended that transactions exceeding the turnover threshold but not creating or strengthening dominant position and not lessening the competition in the relevant market could be granted unconditional approval following the Board's Phase I review. In contrast, in cases where the Board has concerns that there is a risk that a transaction could create or strengthen a dominant position and significantly lessen competition in a relevant product market, the Board could scrutinise the transaction in a more in-depth fashion.

Dominance is defined as any position enjoyed in a certain relevant 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. Market shares of about 40 per cent and higher are considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant product market. In that sense, any kind of transaction that could create or strengthen a dominant position would require a more in-depth analysis. Indeed, a merger or an acquisition can only be blocked when the concentration not only creates or strengthens a dominant position,



M Hakan Özgökçen

but also significantly lessens the competition in a part or in the whole of Turkey, pursuant to article 7 of Law on the Protection of Competition (the Competition Law). Also, article 14 of the Amended Communiqué enables the parties to provide commitments to remedy substantive competition law issues of a concentration at their sole discretion. In the event that the Board considers the submitted remedies insufficient, the Competition Board may enable the parties to make further changes to these remedies. If the proposed remedies are still insufficient to resolve the competition problems, the Board may decide not to grant clearance.

In an attempt to explain the review process, upon its preliminary review of the notification the Board 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. In the absence of such a decision at the end of the 30 calendar day period, the decision is deemed as an 'implicit approval', according to article 10(2) of the Competition Law. While the timing in the Competition Law gives the impression that the decision to proceed with Phase II should be formed within 15 days, the Board generally uses more than 15 days to form its opinion concerning the substance of a notification, but is more meticulous in respecting the 30-day deadline on announcement. Moreover, as mentioned above, any written request by the Board for missing information will restart the 30 calendar day period. If a notification leads to an in-depth investigation (ie, Phase II), it changes into a fully fledged investigation. Under Turkish law, the Phase II investigation takes about six months. If deemed necessary, this period may be extended only once, by the Board, for an additional period of up to six months.

The Board generally keeps the abovementioned deadlines. Indeed, according to the Board's 2014 annual report on mergers and acquisitions, the transactions which have been notified to the Authority during this time period have been concluded within an average of 16 calendar days following the final submissions.

With the adoption of the new Amended Communiqué, there is now a short-form notification procedure (without a fast-track procedure) if: (i) one of the parties to the transaction will be acquiring the sole control of an undertaking over which it has joint control; or (ii) the totality of the parties' respective market shares is less than 20 per cent in horizontally affected markets and each party's market share is less than 25 per cent in vertically affected markets. 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 are no informal ways to speed up the procedure.

GTDT: What do recent cases tell us about the enforcement priorities of the authorities in your jurisdiction?

GG & MHÖ: Unilateral effects have been the predominant criteria in the Authority's assessment of mergers and acquisitions in Turkey. Most certainly, concentrations, where parties have a market share of 40 per cent and above, are generally caught by the Board's radar and will be evaluated in an extensive manner. Particularly, where legal, physical or technical barriers to entry or expansion, a lack of bargaining power of the purchasers, a high concentration level in the affected market or markets, a low number of competitors in the market, high transportation costs and other factors persist, getting unconditional approval decisions becomes more difficult.

Furthermore, there have been a couple of exceptional cases in records of Turkish merger control regime where the Board discussed the coordinated effects under a 'joint dominance test', and rejected the transaction on these grounds. These cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund. The 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 establishment of joint dominance by certain players in the market whereby competition would be significantly impeded. Regarding one such decision, when an appeal was made before the Council of State it ruled by mentioning, inter alia, that Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Board, which was based on collective dominance. As yet, no transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects'.

The Authority is functioning smoothly. However, there is only one fact that might impede and question the independence of the Authority, namely the fact that the president and second member of the Board are appointed by the Board of Ministry, which could be considered to be hindering the Board from being isolated from political expectations and earnings, and being completely impartial. However, an attempt at diminishing this negative effect was made by empowering other Ministries besides the Board of Ministries, and also empowering the High Court and the High State Court to appoint members to the Board. All in all, so far no distinctive politician influence has been observed behind any given decision of the Board.

GTDT: Have there been any developments in the kinds of evidence that the authorities in your jurisdiction review in assessing mergers?

GG & MHÖ: Currently, the Board analyses the concentrations on an economic basis. In that sense, economic parameters, for example, market shares, sales volume and amounts, the level of concentration, entry conditions and the degree of vertical integration – in other words, quantitative evidence – has been used as evidence in the analysis of concentration cases. Particularly, upon the establishment of the Economic Analyses and Research department within the Authority more and more economical analyses are used as a tool for merger control review.

The Board may request information from third parties including customers, competitors and suppliers of the parties, as well as other persons related to the merger or acquisition. It should be noted that in case the Authority asks for another public authority's opinion, this would also cut the 30-day review period and restart it anew from day one. While not common in practice, it is possible for third parties to submit complaints about a transaction during the review period. Additionally, related third parties may request a hearing from the Board during the investigation (ie, if the transaction will be taken into Phase II review) on condition that they prove a legitimate interest. They may also challenge the Board's decision on the transaction before the competent judicial tribunal, again on condition that they prove a legitimate interest.

"Currently, the significant expected development in the Turkish competition law regime is the Draft Regulation, which is set to replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (Regulation on Fines)."

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

As a rule of thumb, drafting the notification form requires identifying the crucial information provided under the notification form and stating all the necessary information in an order of importance. As competition law heavily depends on case law, it is important to have perfect knowledge of the Board's precedents and key sensitivities. In addition, merger control cases require the skill to closely follow up the process and build close contacts with the case-handlers in order to ensure a smooth review process.

What are the key things for the parties and their advisers to get right for the review process to go smoothly?

In order to ensure a smooth and successful review process, it is essential that all the necessary information in the notification form is provided to minimise the risk of receiving additional questions. The review process must be followed closely. In addition, having the skills to anticipate the potential competition law concerns that the case handlers could raise beforehand and taking the necessary measures to avoid such concerns by providing comprehensive and satisfactory representations with the notification form is important for timing. If the potential competition law concerns cannot be foreseen in advance (ie, while preparing the merger control filing) this could entail back and forth correspondences with the Authority and lengthen the review process. Another key issue is to file the notification form in sufficient time prior to the closing of the transaction (at least 45 calendar days before closing). Although Competition Law provides no specific deadline for filing, and assuming a transaction is a good candidate to be cleared during Phase I review, it is advisable to file the transaction at least 45 calendar days before closing.

What were the most interesting or challenging cases you have dealt with in the past year?

One of the most challenging cases that we have recently dealt with is the transaction concerning the acquisition of Pirelli's steel tire cord business by Bekaert, which was granted clearance based on the proposed remedies. This transaction was taken into Phase II review in the last quarter of 2014 and the global closing of the transaction was pending for the Turkish Competition Board's approval. In the course of the review process, we carried out multiple meetings with the Turkish Competition Authority to develop effective and feasible mechanisms to accelerate the closing of the transaction globally. Additionally, as this transaction was conditionally cleared solely based on a behavioural remedy concerning uninterrupted supply commitment to local customers of the parties, it has an importance of indicating the Turkish Competition Board's gradually moderating approach towards the behavioural remedies. Another interesting case that we have dealt with is the transaction concerning the concentration of *Kraton/LCY*. This transaction related to both merger and joint control issues and despite the lack of physical presence of the parties in Turkey the Board still evaluated the transaction as to whether it could create or strengthen dominance in the markets. Having conducted such evaluations, the Board granted an unconditional clearance.

Gönenç Gürkaynak & M Hakan Özgökçen
ELIG, Attorneys-at-Law
Istanbul
www.elig.com

GTDT: Talk us through any notable deals that have been prohibited, cleared subject to conditions or referred for in-depth review in the past year.

GG & MHÖ: In 2015, only two transactions were taken into Phase II review, one of which concerns the acquisition of sole control over Migros Ticaret by Anadolu Endüstri Holding through the acquisition of the majority shares of MH Perakendecilik Perakendecilik ve Ticaret, which is controlled by Moonlight Capital and the other concerning the acquisition by Essilor Optica International Holding of 65 per cent shares of Merve Gözlük Camı San ve Tic. So far, the Board granted conditional approval to the acquisition by Anadolu Endüstri Holding of the majority shares of MH Perakendecilik Perakendecilik ve Ticaret based on certain structural and behavioural remedies. However, the transaction concerning the acquisition by Essilor Optica International Holding of 65 per cent shares of Merve Gözlük Camı San ve Tic is still pending. Also, the pending transactions at the beginning of 2015 were finalised, one of which is the acquisition of majority shares of AFM and 50 per cent shares of Spark Entertainment by Mars, which are the two largest movie theatre operators in Turkey. The relevant transaction was taken under Phase II review in August 2014. Earlier, in November 2011, the Board, after its Phase II review, granted a conditional clearance decision (17 November 2011, 11-57/1473-539) where the parties had to comply with remedies, such as the divestiture of nine movie theatre businesses and the closure of three movie theatre businesses. In addition, the parties were required to notify the Board for five years – on an annual and location basis – of average ticket prices and the changes thereof in order to allow the Board to monitor the market. While the parties to the transaction had fully complied with the obligations imposed by the Board, the 13th Chamber of the Council of State annulled the Board's decision on 17 June 2014 on the ground that the existing commitment

package was not sufficient to eliminate competition concerns in the market. As a result, the transaction was taken in again for final examination. Both Mars and the Authority appealed the decision of the 13th Chamber of the Council of State before the Plenary Session of Administrative Law Divisions of the Council of State. As the counterparty withdrew the suit during the judicial review, the Plenary Session of Administrative Law Divisions of the Council of State annulled the 13th Chamber of the Council of State and consequently, the Board's decision of 2011 was recognised as lawful. Therefore, the Phase II review of the relevant transaction was finalised without any administrative act.

The other transaction pending at the beginning of 2015 was the acquisition of Beta Marina and Pendik Turizm by Setur, which was rejected by the Board. This has been the first rejection decision of the Board since its decision regarding the *Burgaz/Mey İçki* transaction in 2009. As stated above, the transaction was rejected since the majority of the Board concluded that the transaction will lead Koç Holding to become dominant with respect to Istanbul City Port Marina and will impede the effective competition in the relevant product market. While reaching this conclusion, the Board took into consideration that upon the consummation of the transaction (i) the market shares of the ports controlled by Koç Holding within the relevant market would be 60–65 per cent; (ii) only three market players will continue to be active in the relevant market; (iii) there was a high HHI and delta level; (iv) the closest competitor's inability to exert competitive pressure to eliminate the potential price increase; (v) the low level of substitutability between the products and services of combined entity and the competitors due to the distance between the ports; (vi) the competitors' difficulty to increase the capacity; and (vii) the lack of countervailing buying power of the customers. In this case, the parties had not proposed any commitments to eliminate the aforementioned competitive concerns. No commitments had been submitted by the parties in the course of the review of this case. Ultimately, the Board rejected the transaction.

Considering the recent cases including *Anadolu Endüstri Holding/Migros*, *Bekaert/Pirelli* and *Lesaffre/Dosu*, remedies and conditional clearances are clearly becoming increasingly important under Turkish merger control enforcement. In line with this trend, the number of cases where the Board decided on divestment or licensing commitments or other structural or behavioural remedies has increased dramatically over the past four years. As stated above, providing commitments to remedy substantive competition law issues of a concentration is at the parties' sole discretion and although the Board has power to do so, the recent decisional practice of the Board showed that it neither imposes any remedies nor does it change ex parte the submitted remedies, but it may enable the parties to amend the remedies if the proposed remedies are found to be insufficient to remove competition law concerns.

Additionally, until recently, the Board had been adopting a conservative approach towards behavioural remedies and found the structural remedies more properly fit within the expected purpose (ie, to eliminate the competitive concerns) due to their characteristics, such as bringing about a sustainable result in the short term and not requiring supervision after being implemented. However, in particular, the Board's *Anadolu Endüstri Holding/Migros*, *Bekaert/Pirelli* and *Lesaffre/Dosu* decisions could indicate that the Board's conservative approach has been moderating and the Board will continue to assess the acceptability of the behavioural remedies in a liberal manner.

GTDT: Do you expect enforcement policy or the merger control rules to change in the near future? If so, what do you predict will be the impact on business?

GG & MHÖ: The Draft Competition Law, which was issued by the Turkish Competition Authority in 2013 and officially submitted to the Presidency of the Turkish Parliament on 23 January 2014, is now null and void following the beginning of the new legislative year of the Turkish Parliament. At this stage, it remains unknown whether the new Turkish Parliament or the government will renew the draft law. However, it could be anticipated that the main topics to be held in the discussions on the potential new Draft Competition Law will not significantly differ from the changes that were introduced by the previous draft. Therefore, in this hypothetical scenario, the discussions are expected to mainly focus on (i) compliance to the EU competition law legislation; (ii) introduction of the EU's SIEC (significant impediment of effective competition) test instead of the current dominance test; (iii) adoption of the term of 'concentration' as an umbrella term for mergers and acquisitions; (iv) elimination of the exemption of acquisition by inheritance; (v) abandonment of Phase II procedure; (v) extension of the appraisal period for concentrations from the current 30 calendar days period to 30 working days; and (vi) removal of the fixed turnover rates for certain procedural violations, including the failure to notify a concentration and hindering on-site inspections, and set upper limits for the monetary fines for these violations.

Currently, the significant expected development in the Turkish competition law regime is the Draft Regulation, which is set to replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (Regulation on Fines). There is no anticipated date for the enactment of the Draft Regulation on Fines.

Also available online

www.gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law