The Merger Control Review

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, particularly in Asia, are poised to add pre-merger notification regimes within the next year or so. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 41 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States and China may

end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and their participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine, the competition authority focused its efforts on discovering consummated transactions that had not been notified, and imposed fines in 32 such cases in 2015 alone.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia and India provide for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada,

China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the EC and the United States in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun-jumping' fine in 2014 and recently issued guidelines on gun-jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction nonreportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

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

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

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

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

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multijurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe, and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, it is becoming the norm for coordination among the jurisdictions in multinational transactions that raise competition issues.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey),

or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The UK also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the International Merger Remedies chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2016

Chapter 37

TURKEY

Gönenç Gürkaynak and K Korhan Yıldırım[1]

I INTRODUCTION

The national competition agency for enforcing merger control rules in Turkey is the Turkish Competition Authority, a legal entity with administrative and financial autonomy. The Turkish Competition Authority consists of the Competition Board, the Presidency, Service Departments and the Advisory Department. As the competent decision-making body of the Turkish Competition Authority, the Competition Board is responsible for, *inter alia*, reviewing and resolving merger and acquisition notifications. The Competition Board consists of seven members and is based in Ankara. The Service Departments consist of five technical units, one research unit, one leniency unit, one decisions unit, one information management unit, one external relations unit and one strategy development unit. There is a 'sectoral' job definition for each technical unit.

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

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

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

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

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

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

The above thresholds are reviewed by the Competition Board once every two years. The Competition Board will next confirm or revise these thresholds at the beginning of 2017.

In addition to the changes in turnover thresholds, Communique No. 2010/4 no longer seeks the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement. Prior to the amendment, transactions that did not affect a market did not trigger a pre-merger notification or approval requirement, even if they exceeded the turnover thresholds. Joint venture transactions were the exception to this rule, and they required pre-merger notification and approval if they exceeded the thresholds, regardless of whether they resulted in an affected market. Now, the existence of an affected market is not a condition to triggering a merger control filing requirement.

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

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

Acquisition of a minority shareholding can constitute a notifiable merger if and to the extent that it leads to a change in the control structure of the target entity. Joint ventures that emerge as independent economic entities possessing assets and labour to achieve their objectives are subject to notification to, and the approval of, the Competition Board. As per Article 13 of Communiqué No. 2010/4, cooperative joint ventures will also be subject to a merger control notification and analysis on top of an individual exemption analysis, if warranted.

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

a Banking Law No. 5411 provides an exception from the application of merger control rules for mergers and acquisitions of banks. The exemption is subject to the condition that the market share of the total assets of the relevant banks does not exceed 20 per cent;

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

c intra-corporate transactions that do not lead to a change in control are not notifiable;

d acquisitions by inheritance are not subject to merger control;

e acquisitions made by financial securities companies solely for investment purposes do not require a notification, subject to the condition that the securities company does not exercise control over the target entity in a manner that influences its competitive behaviour;

f multiple transactions between the same undertakings realised over a period of two years are deemed a single transaction for turnover calculation purposes. They warrant separate notifications if their cumulative effect exceeds the thresholds, regardless of whether the transactions are in the same market or sector, or whether they were notified before; and

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

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

Failing to file or closing the transaction before the Competition Board's approval can result in a turnover-based monetary fine. The fine is calculated according to the annual local Turkish turnover of the acquirer generated in the financial year preceding the fining decision at a rate of 0.1 per cent. It will be imposed on the acquiring party. In the case of mergers, it will apply to both merging parties. The monetary fine will, in any event, not be less than 17,700 liras. This monetary fine does not depend on whether the Turkish Competition Authority will ultimately clear the transaction.

If, however, there truly is a risk that the transaction is problematic under the dominance test applicable in Turkey, the Competition Authority may *ex officio* launch an investigation into the transaction; order structural and behavioural remedies to restore the situation as before the closing (*restitutio in integrum*); and impose a turnover-based fine of up to 10 per cent of the parties' annual turnover. Executive members and employees of the undertakings concerned who are determined to have played a significant role in the violation (failing to

file or closing before the approval) may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings. The transaction will also be invalid and unenforceable in Turkey.

The Competition Board has so far consistently rejected all carveout or hold-separate arrangements proposed by merging undertakings.[2] Communiqué No. 2010/4 provides that a transaction is deemed to be 'realised' (i.e., closed) 'on the date when the change in control occurs'. While the wording of the new regulation allows some room to speculate that carveout or hold-separate arrangements are now allowed, it remains to be seen if the Competition Authority will interpret this provision in such a way. As noted above, this has so far been consistently rejected by the Competition Board, which argues that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

II YEAR IN REVIEW

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

The Competition Board reviewed a total of 159 merger cases in 2015. These merger cases included 132 cases that received unconditional clearance, three cases that were cleared with conditions and 22 cases that were found to be not notifiable (i.e., a decision that the notified concentration does not exceed the applicable jurisdictional thresholds) or that fell outside the merger control regime (i.e., a decision that the notified transaction falls outside the scope of applicability of the merger control rules for not bringing about a change of control). Six were found to be out of scope of the merger control regime, while eight were privatisations. Twenty-nine transactions were Turkish-to-Turkish, whereas 64 were foreign-to-foreign.

The Competition Board's most important merger control decisions in 2015 were as follows.

In *Anadolu Endüstri Holding/Migros*,[3] the Competition Board granted conditional approval to the acquisition of sole control over Migros Ticaret AŞ by Anadolu Endüstri Holding AŞ (AEH), which solely or jointly controls major food and beverage companies including Coca-Cola Turkey and Anadolu Efes Biracılık ve Malt Sanayi AŞ, through the

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

3 15-29/420-117, 9 July 2015.

acquisition of the majority shares in MH Perakendecilik ve Ticaret AŞ, which is controlled by Moonlight Capital SA and is one of the major retailer companies in Turkey (transaction). The Board issued its decision based on the commitments submitted by AEH with respect to the beer market. The Board defined several relevant product markets. The Board determined that the transaction would not result in the creation or strengthening of a dominant position, and thus would not impede competition in the relevant product markets, except the market for beer. The Board argued that Anadolu Efes Biracılık ve Malt Sanayi AŞ holds a dominant position in the market for beer in Turkey. The Board determined that Migros Ticaret AŞ is the largest retailer in the beer market as far as direct sales to consumers are concerned. The Board argued that the transaction would likely lead to customer foreclosure in the downstream beer market and could strengthen the alleged dominant position of AEH. Also, the Board emphasised that the Migros Club Card system would allow AEH to access competitively sensitive information, and thus increase the level of market transparency between AEH and its competitors, thereby potentially strengthening the dominant position of AEH in the downstream beer market.

In *Setur/Beta and Pendik Turizm*,[4] the Competition Board rejected the transaction concerning the acquisition of sole control over Beta Turizm and Pendik Turizm by Setur, a wholly owned subsidiary of the Koç Group, on the grounds that the transaction will lead to the creation of a dominant position, and thereby restrict competition in the relevant markets. The Board argued that Setur's offer to exclude the acquisition of the operating rights of Kalamış Marina was not a sufficient commitment to remove the alleged competition law concerns raised by the transaction.

In *Bekaert/Pirelli*,[5] the Competition Board granted conditional approval to the acquisition by NV Bekaert SA of the steel tire cord business of Pirelli Tyre SpA based on the commitments provided by Bekaert in a Phase II review. The Board evaluated the parties' market shares and the potential competition, and concluded that Bekaert would be in a dominant position in the markets for steel tire cord and bead wire in Turkey following the completion of the transaction. The decision emphasised the characteristics and dynamics of the competitive structure of the relevant product markets in Turkey. In this respect, it established that:

a the number of undertakings active in the Turkish market is low in general;

b in fact, there are only two undertakings producing steel tire cord in the Turkish market, in contrast to the market conditions in the European Economic Area; and

c the Asian producers that play a significant role in the assessments of the European Commission and Brazilian Competition Authority are not active in Turkey.

Consequently, the Board indicated it has found 'strong indications that the parties would become dominant in the relevant markets and restrict competition significantly'. However, the Board found Bekaert's proposed commitments sufficient to eliminate the alleged competition law concerns that might arise as a result of the transaction, and thus granted conditional approval to the transaction.

4 15-29/421-118, 9 July 2015.

5 15-04/52-25, 22 January 2015.

In *SASA/Indorama*,[6] the Competition Board unconditionally cleared a transaction for the acquisition of 51 per cent of the shares in Sasa Polyester Sanayi AŞ (SASA), a prominent domestic producer of polyester chips, polyester staple fibre, polyester filament yarn and polymer and intermediate products in Turkey. The acquirer was lndorama Netherlands BV (Indorama), a global fibres and petrochemicals producer. The transaction became a hot topic in the Turkish textile sector owing to SASA's strategic importance as the sole domestic producer of polyester products. The Turkish Competition Authority decided to conduct a Phase II review due to numerous complaints against the takeover. However, the Turkish Competition Board decided that the transaction would not significantly impede effective competition in the market, and cleared the transaction without conditions or commitments. Sabancı Holding AŞ announced shortly after the Competition Board's clearance decision that it had cancelled the sell-off to Indorama, and had decided to sell the shares to Erdemoğlu Holding AŞ.

In *General Electric Company/Alstom*,[7] the Competition Board cleared the transaction for the acquisition of sole control of the thermal power, renewable power and grid businesses of the parent companies of the Alstom Group, Alstom SA and Alstom Holdings by General Electric Company. The transaction was a cross-border deal between two main players in the power generation equipment, solutions, services and grid sectors, and involved the French government. The transaction was subject to merger control filing in over 20 jurisdictions.

In *Allergan/Actavis*[8] the Competition Board unanimously cleared the high-profile global transaction for the acquisition of sole control of Allergan Inc by Actavis Plc, and the Board concluded that the transaction would not create or strengthen a dominant position as prohibited by the Law No. 4054, and will not result in significant lessening of competition in the market.

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

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

The approach of the Competition Board to market shares and concentration levels is similar to that of the European Commission, and in line with the approach spelled out in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03). The first factor discussed under the Horizontal Guidelines is that market shares above 50 per cent can be considered an indication of a dominant position, while the market share of the combined entity remaining below 20 per cent would not require further inquiry into the likelihood of harmful effects emanating from the combined entity. Although a brief mention of the Competition Board's approach to market shares and the Herfindahl-Hirschman Index

6 15-02/24-10, 8 January 2015.

7 15-03/30-15, 15 January 2015.

8 15-08/102-40, 19 February 2015.

(HHI) levels is provided, the Horizontal Guidelines' emphasis on an effects-based analysis (coordinated and non-coordinated effects) without further discussion of the criteria to be used in evaluating the presence of a dominant position indicates that the dominant position analysis still remains subject to Article 7 of Law No. 4054 on the Protection of Competition. Other than market share and concentration level considerations, the Horizontal Guidelines cover the following main topics:

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

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

The Non-horizontal Guidelines confirm that non-horizontal mergers where the post-merger market share of the new entity in each of the markets concerned is below 25 per cent and the post-merger HHI is below 2,500 (except where special circumstances are present) are unlikely to raise competition law concerns, similarly to the Guidelines on the Assessment of Non-horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07). Other than the Competition Board's approach to market shares and concentration levels, the other two factors covered in the Non-horizontal Guidelines include the effects arising from vertical mergers and the effects of conglomerate mergers. The Non-horizontal Guidelines also outline certain other topics, such as customer restraints, general restrictive effects on competition in the market and restriction of access to the downstream market.

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

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

Recent indications in practice show that remedies and conditional clearances are becoming increasingly important in Turkish merger control enforcement. The number of cases in which the Competition Board decided on divestment or licensing commitments or other structural or behavioural remedies has increased dramatically over the past five years. Examples include some of the most important decisions in the history of Turkish merger control enforcement.[9]

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

III THE MERGER CONTROL REGIME

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

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

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

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

If a notification leads to a Phase II review, it turns into a fully fledged investigation. Under Turkish law, the Phase II investigation takes about six months. If necessary, the Competition Board may extend this period only once, for an additional period of up to six months. In practice, only extremely exceptional cases require a Phase II review, and most notifications obtain a decision within 40 to 45 days after the original date of notification.

The filing process differs for privatisation tenders. Communiqué No. 2013/2 provides that a pre-notification is conducted before the tenders and notifications of the three highest bidders are submitted to the Competition Board following the Privatisation Authority's public privatisation tender. In the case of a public bid, the merger control filing can be performed when the documentation adequately proves the irreversible intention to finalise the contemplated transaction.

There is no special rule for hostile takeovers; the Competition Board treats notifications for hostile transactions in the same manner as other notifications. If the target does not cooperate and if there is a genuine inability to provide information due to the one-sided nature of the transaction, the Competition Authority tends to use most of its powers of investigation or information request under Articles 14 and 15 of Law No. 4054.

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

The Competition Board may request information from third parties, including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. The Competition Board uses this power especially to define the market and determine the market shares of the parties. Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition, may request a hearing from the Competition Board during the investigation, subject to the condition that they prove their legitimate interest. They may also challenge the Competition Board's decision on the transaction before the competent judicial tribunal, again subject to the condition that they prove their legitimate interest.

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

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted for judicial review before Ankara Administrative Court. The appellants may make a submission by filing an appeal within 60 days of the parties' receipt of the Competition Board's reasoned decision. Decisions of the Competition Board are considered as administrative acts. Filing an appeal does not automatically stay the execution of the Competition Board's decision. However, upon request of the plaintiff, the Court may decide to stay the execution. The Court will stay the execution of the challenged act only if execution of the decision is likely to cause irreparable damages, and there is a *prima facie* reason to believe that the decision is highly likely to violate the law.

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

IV OTHER STRATEGIC CONSIDERATIONS

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

Many cross-border transactions meeting the jurisdictional thresholds of Communiqué No. 2010/4 also will require merger control approval in a number of other jurisdictions. Current indications in practice suggest that the Competition Board is willing to cooperate more with other jurisdictions in reviewing cross-border transactions.[10] Article 43 of Decision No. 1/95 of the EC–Turkey Association Council authorises the Turkish Competition Authority to notify and request the European Commission (Competition Directorate-General) to apply relevant measures.

V OUTLOOK AND CONCLUSIONS

The two most recent developments in Turkish competition law enforcement are the Draft Proposal for the Amendment of the Competition Law (Draft Law) and the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition (Draft Regulation on Monetary Fines).

After a long wait on the sidelines, the Draft Law was submitted to the Presidency of the Grand National Assembly of the Turkish Republic on 24 January 2014. The Draft Law introduces a *de minimis* rule that enables the Competition Board to ignore certain cases that do not exceed a certain market share or turnover threshold (or both), and brings the EU's SIEC (significant impediment of effective competition) test to the Turkish control regime in place of the current dominance test.

The Draft Law proposal became a hot topic when the Parliament announced that the Draft Law, containing these amendments, had officially been added to the current drafts and proposals list. However, it appears that the Draft Law has become obsolete yet again according to the internal regulation of the Grand Assembly. The relevant regulation states that draft laws become obsolete if they are not finalised within the relevant legislative year. Yet, the government or the Grand Assembly is entitled to renew obsolete draft laws. The Draft Law is currently being evaluated by the relevant commissions of the Grand Assembly, and it is expected that the commissions will submit the Draft Law to the Grand Assembly

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

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

Public comment was sought for the Draft Regulation on Monetary Fines. Briefly, the Draft Regulation refers to the new calculation method for administrative monetary fines, which would result in the explicit recognition of the parental liability principle. The upper limit of the administrative monetary fines is 10 per cent of the overall turnover as determined by the Competition Board and generated by the undertaking in the financial year preceding the decision. The Draft Regulation also brings new aggravating and mitigating factors. The content of the Draft Regulation seems to be heavily inspired by the European Commission's guidelines on the method of setting fines imposed under Article 23(2)(a) of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty).

The Competition Board recently published the 17th Annual Activity Report (Report). Along with its mission, vision, objectives, priorities and a description of its duties and powers, the Competition Board made a general assessment of its activities between 1 January and 31 December 2015. In the Report, the Competition Board provides information and statistics concerning the cases concluded in 2015, and assesses that there is an easily detectable decrease in the number of cases concluded compared with recent years.

Appendix 1

ABOUT THE AUTHORS

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Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 65 lawyers based in Istanbul, Turkey. Mr Gürkaynak holds an LLM degree from Harvard Law School, and he is qualified to practise in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). Prior to founding ELIG in 2005, he worked as an attorney in the Istanbul, New York and Brussels offices of a global law firm for more than eight years. Mr Gürkaynak heads the competition law and regulatory department of ELIG, which currently consists of 36 competition law specialists. He has unparalleled experience in all matters of Turkish competition law counselling with over 18 years' experience starting with the establishment of the Turkish Competition Authority. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey. He has published more than 100 international and local articles in English and Turkish, and a book published by the Turkish Competition Authority.

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Mr Yıldırım was promoted to the firm's partnership on 1 January 2014.

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