Merger Control

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Editors:
Nigel Parr & Ross Mackenzie

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Turkey

Gönenç Gürkaynak & Öznur İnanılır
ELIG, Attorneys-at-Law

Overview of merger control activity during the last 12 months

The Turkish merger control regime is primarily regulated by the Law on Protection of Competition No. 4054 (the Competition Act) dated December 13, 1994, and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the Merger Communiqué) published on October 7, 2010. The Merger Communiqué entered into force as of January 1, 2011 and was amended on February 1, 2013. Subsequently, on February 24, 2017 the Communiqué No. 2010/4 was amended by the Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("Communiqué No. 2017/2").

According to the annual Mergers and Acquisitions Status Report for 2016, the Competition Board reviewed 209 transactions in total, including 191 mergers and acquisitions, nine privatisations, eight out of the scope of merger control (i.e. they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to lack of change in control), and one information note.

New developments in jurisdictional assessment or procedure

On February 24, 2017, the Communiqué No. 2010/4 was amended by the Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("Communiqué No. 2017/2"). The new amendments brought by the Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4, are as follows:

1. Prior to the amendment brought by the Communiqué No. 2017/2, the Article 8(5) of Communiqué No. 2010/4 was stating that "two or more transactions carried out between the same persons or parties within a period of two years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué". Article 2 of Communiqué No. 2017/2 amended Article 8(5) of Communiqué No. 2010/4 as follows: "two or more transactions carried out between the same persons or parties or within the same relevant product market, within a period of three years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué".
2. Article 3 of Communiqué No. 2017/2 introduced a new paragraph to be included to Article 10 of Communiqué No. 2010/4, which reads as follows: "If the control is acquired from various sellers by way of series of transactions in terms of securities within the stock exchange, the concentration could be notified to the Turkish Competition Board after the realisation of the transaction provided that the following conditions are satisfied: (a) the concentration should be notified to the Turkish Competition Board without delay; and (b) the voting rights attached to the acquired securities are not exercised or exercised

solely to maintain the full value of its investments based on a derogation granted by the Turkish Competition Board. For the sake of completeness, the Turkish Competition Board may impose conditions and obligations in terms of such derogation in order to ensure conditions of effective competition."

This newly introduced provision by Article 3 of Communiqué No. 2017/2 is similar to Article 7(2) of European Commission Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, even before the promulgation of Communiqué No. 2017/2, the case law of the Turkish Competition Board was shedding light on this matter. In the Camargo decision (Camargo Corrêa S.A. decision 12-24/665-187, 03.05.2012), the Board recognised that the parties can close a public bid on a listed company before the Turkish Competition Board's approval, subject to the condition that: (i) the transaction is notified to the Turkish Competition Board without any delay; and (ii) the acquirer does not exercise the control over the target pending the Turkish Competition Board's approval decision. That said, since this approach had not been solidified through subsequent decisions on that front and the Camargo decision appears to be rather unique, a legislation-based security on these type of concentrations would be most welcome.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Traditionally, the Competition Authority pays special attention to transactions that take place in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors that are important to the country's economy (such as automotive, telecommunications, energy, etc.) attract the Competition Authority's special scrutiny as well. The Competition Authority's case handlers are always extremely eager to issue information requests (thereby cutting the review period) in transactions relating to these sectors, and even transactions that raise low-level competition law concerns are looked into very carefully. In some sectors, the Competition Authority is also statutorily required to seek the written opinion of other Turkish governmental bodies (such as the Turkish Information Technologies and Communication Authority, pursuant to Section 7/2 of the Law on Electronic Communication No. 5809). In such instances, the statutory opinion usually becomes a hold-up item that slows down the review process of the notified transaction.

The consolidated statistics regarding merger cases in 2016 show that the transactions in the sector for chemical products and transportation services took the lead with 22 notifications in each sector, followed by the energy industry and the information & communications technologies (ICT) sector, each with 21 notifications.

In addition, the consolidated statistics regarding merger cases in 2015 indicate that the industries for food, the sectors for machinery and equipment, followed by the energy and transportation industries, were the sectors subject to the most merger and acquisition decisions, comprising 50% of the Competition Board's total amount of decisions regarding merger and acquisition transactions.

The Competition Board adopted many significant decisions in the past year, examples of which are summarised below:

In the ABI/SABMiller decision (16-19/311-140, 06.06.2016), regarding Anheuser-Busch InBev's (ABI) acquisition of SABMiller plc (SABMiller); the Board took the transaction into Phase II review, deeming that the transaction would potentially lead to competitive concerns in the beer market as ABI was also indirectly acquiring a minority interest in Anadolu Efes

(which holds a dominant position in the beer market in Turkey). However, after its in-depth Phase II review, the Board granted an unconditional approval to the relevant transaction.

Another noteworthy decision of 2016 is the APMT/Grup Maritim decision (16-16/267-118, 11.05.2016), concerning the acquisition of 100% shares of Grup Maritim TCB, S.L. (Grup Maritim) by APM Terminals B.V. (APMT). Grup Maritim has only one subsidiary in Turkey, namely TCE EGE. In this regard, the Board evaluated the transaction considering TCE EGE as the target. There have been several complaints with regard to the relevant transaction and, within this context, the complainants' concerns were mainly concentrated on the possibility that APMT could shift up to a dominant position in the market for container terminal services, since TCE EGE is the only competitor of APMT. The Board on the other hand, determinedly examined the relevant concerns and decided at the end of its Phase II review that the transaction does not lead to any significant competitive concerns. Within this context, the Board concluded that the number of players in the relevant market and the total capacities of the ports would increase given that Çandarlı Port will start operating right after the planned closing of the transaction, and thus the Board adopted an unconditional approval to the transaction.

Apart from the abovementioned decisions, the Board has granted an unconditional approval for the acquisition of Weyerhaeuser Company's paper pulp business by International Paper Company in International Paper/Weyerhaeuser (16-31/519-233, 23.09.2016). In the decision, the Board has taken into consideration facts such as the absence of paper pulp manufacturing in Turkey and the fact the sales in Turkey with regard to paper pulp are being generated by way of imports. At the end of its review, the Board has indicated that the significant impact of the global market dynamics should be taken into account, even though the geographical market has not been defined as "worldwide". This decision is of utmost importance, as it signals that a broader approach in terms of geographical market is being tested by the Authority.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The Turkish merger control regime currently utilises a 'dominance test' in the evaluation of concentrations. Pursuant to Article 13/II of the Merger Communiqué, mergers and acquisitions which do not create or strengthen a sole or joint dominant position and do not significantly impede effective competition in a relevant product market within the whole or part of Turkey shall be cleared by the Competition Board. Article 3 of the Competition Act defines a dominant position as: "the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers". The Guideline on the Assessment of Horizontal Mergers and Acquisitions ("Horizontal Merger Guideline") states that market shares higher than 50% could be used as an indicator of a dominant position, whereas aggregate market shares below 25% may be used as a presumption that the transaction does not pose competition law concerns. In practice, market shares of about 40% and higher are generally considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position but also significantly impedes competition in the whole territory of Turkey or in a substantial part of it, pursuant to Article 7 of the Competition Act.

On the other hand, there were a couple of exceptional cases where the Competition Board discussed the coordinated effects under a 'joint dominance test', and rejected some transactions on those grounds. For instance, transactions for the sale of certain cement factories by the Savings Deposit Insurance Fund were rejected after the Competition Board evaluated the coordinated effects of the mergers under a joint dominance test, and blocked the transactions on the ground that the transactions would lead to joint dominance in the relevant market. The Competition Board took note of factors such as 'structural links between the undertakings in the market' and 'past coordinative behaviour', in addition to 'entry barriers', 'transparency of the market', and the 'structure of demand'. It concluded that certain factory sales would result in the creation of joint dominance by certain players in the market whereby competition would be significantly impeded. Nonetheless, the High State Court has overturned the Competition Board's decision and decided that the 'dominance test' does not cover 'joint dominance'. This has been a very controversial topic ever since, because the Competition Board has not prohibited any transaction on the grounds of joint dominance after the decision of the High State Court.

In terms of joint venture transactions, to qualify as a concentration subject to merger control, a joint venture must be of a full-function character, satisfying two criteria: (i) existence of joint control in the joint venture; and (ii) the joint venture being an independent economic entity established on a lasting basis (i.e. having adequate capital, labour and an indefinite duration). If the transaction is a full-function joint venture, the standard dominance test is applied. Additionally, regardless of whether the joint venture is full-function, the joint venture should not have as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself.

On the other hand, economic analysis and econometric modelling has been seen more often in the last years. For instance, in the *AFM/Mars Cinema* case (11-57/1473-539, 17.11.2011), the Competition Board used the OLS and 2SLS estimation models in order to define price increases that are expected from the transaction. It also employed the Breusch/Pagan, Breusch-Pagan/Godfrey/Cook-Weisberg, White/Koenker NR2 tests and the Arellano-Bond test on the simulation model. Such economic analyses are rare but increasing in practice. Economic analyses which are used more often are the HHI and CRN indices to analyse concentration levels.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Pursuant to Article 10 of the Competition Act, once the formal notification has been made, the Turkish Competition Board, upon its preliminary review (Phase I) of the notification, will decide either to approve, or to investigate the transaction further (Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. Regarding the procedure and steps of a Phase II review, the Competition Act makes reference to the relevant articles which govern the investigation procedures for cartel and abuse of dominance cases.

The Competition Board may grant conditional clearances to concentrations. In the case of a conditional clearance, the parties comply with certain obligations such as divestments, licensing or behavioural commitments to help overcome potential competition issues. The Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions provide guidance regarding remedies. The parties can close the transaction after the clearance and before the remedies have been complied with;

however, the clearance becomes void if the parties do not fully comply with the remedy conditions.

In 2015, only two transactions were taken into Phase II review, one of which is Migros/ Anadolu Endüstri, concerning the acquisition of sole control over Migros Ticaret A.Ş. by Anadolu Endüstri Holding A.Ş. through the acquisition of the majority shares of MH Perakendecilik ve Ticaret A.Ş. and the other is Essilor/Merve, concerning the acquisition of 65% shares of Merve Gözlük Camı San. ve Tic. A.Ş. by Essilor Optica International Holding SL. So far, the Competition Board granted conditional approval to the Migros/ Anadolu Endüstri transaction, based on certain structural and behavioural remedies (29/420-117, 09.07.2015). On the other hand, with respect to the Essilor/Merve transaction, during the Phase-II review in 2016, the Parties to the transaction notified the Competition Board that they have decided not to consummate the transaction; therefore the Competition Board ceased its Phase-II review (16-31/520-234, 23.09.2016).

Also, the pending transactions in the beginning of 2015 were finalised. One of them is the acquisition of majority shares of AFM and 50% 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 Competition Board, after its Phase II review, notified a conditional clearance decision (11-57/1473-539, 17.11.2011), 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 Competition Board for five years – on an annual and location basis – of average ticket prices and the changes thereof in order to allow the Competition Board to monitor the market. While the parties to the transaction had fully complied with the obligations imposed by the Competition Board, the 13th Chamber of the Council of State annulled the Competition Board's decision on June 17, 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 re-taken for final examination. Both MARS and the Competition 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 Competition Board's decision of 2011 was recognised as lawful. Therefore, the Phase II review of the relevant transaction was finalised without any administrative act.

As evident from the above, the Merger Communiqué enables the parties to provide commitments to remedy substantive competition law issues that may result from a concentration. The parties may submit to the Competition Board proposals for possible remedies either during the preliminary review (Phase I) or the investigation period (Phase II). If the parties decide to submit the commitment during the preliminary review period (Phase I), the notification is deemed filed only on the date of the submission of the commitment. The commitment can also be submitted together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

The Competition Authority does not have a clear preference for any particular types of remedies. The assessments are made on a case-by-case basis in view of the specific circumstances surrounding the concentration. Nevertheless, divestitures are the most common commitment procedure in the Turkish merger control regime.

Key policy developments

The amendment of the turnover thresholds in the Merger Communiqué is surely the most important development in Turkish merger control regime in the past few years. In line with the amendment of the Merger Communiqué, the Competition Board also revised its Guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("Guideline on Undertakings Concerned") and took out the relevant section on affected markets, so that the concept of affected markets is now only relevant to the preparation of the notification form and the analysis of the transaction. Furthermore, the Competition Authority has promulgated two guideline documents in relation to the assessment of concentrations: i) the Horizontal Merger Guideline; and ii) the Guideline on the Assessment of Non-Horizontal Mergers ("Non-Horizontal Merger Guideline"). The Guidelines are in line with EU competition law regulations and seek to retain the harmony between EU and Turkish competition law instruments.

The approach of the Competition Board to market shares and concentration levels is similar to the approach taken by the European Commission and spelled out in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03). As the first factor discussed under the Horizontal Merger Guideline, market shares above 50% can be used as evidence of dominant position. If the market share of the combined entity remains below 25%, this would not lead to a need for further investigation into the likelihood of harmful effects emanating from the combined entity. Although a brief mention of the Competition Board's approach to market shares and HHI levels is provided, the Horizontal Merger Guideline's emphasis on an effects-based analysis (coordinated/non-coordinated effects), without further discussing the criteria to be used in evaluating the presence of dominant position, indicates that the dominant position analysis remains still subject to Article 7 of the Competition Act.

Other than the market share and concentration level discussion, the Horizontal Merger Guideline covers the following main topics: the anticompetitive effects that a merger would have in the relevant markets; buyer power as a countervailing factor to anticompetitive effects resulting from the merger; the role of entry in maintaining effective competition in the relevant markets; efficiencies as a factor counteracting the harmful effects on competition which might otherwise result from the merger; and conditions of the failing company defence. The Horizontal Merger Guideline also discusses coordinated effects in the market that might arise from a merger of competitors via increasing concentration in the market, and may even lead to collective dominance. In its discussion of efficiencies, it indicates that the efficiencies should be verifiable and should provide a benefit to customers. Significantly, the Horizontal Merger Guideline provides that the failing firm defence has three conditions: i) the allegedly failing firm will soon exit the market if not acquired by another firm; ii) there is no less restrictive alternative to the transaction under review; and iii) it should be the case that unless the transaction is cleared, the assets of the failing firm will inescapably exit the market.

The Non-Horizontal Merger Guideline confirms that non-horizontal mergers where the post-merger market share of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2,000 (except where special circumstances are present) are unlikely to raise competition law concerns, similar to the Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07). Other than the Competition Board's approach to market shares and concentration levels, the other two factors covered in the Non-Horizontal

Merger Guideline include the effects arising from vertical mergers and the effects of conglomerate mergers. The Non-Horizontal Merger Guideline also outlines certain other topics, such as customer restraints, general restrictive effects on competition in the market, and restriction of access to the downstream market.

Apart from the foregoing, the below communiqués and guidelines are the recent key legislative developments:

- Block Exemption Communiqué On Specialisation Agreements (Communiqué No: 2013/3) came into force on 26.07.2013.
- Guidelines On Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions were accepted on 26.03.2013.
- Guidelines on Active Cooperation for the Exposure of Cartels were accepted on 17.04.2013.
- Guidelines on the Protection of Horizontal Agreements, in line with Article 4 and 5 of the Competition Law Act No. 4054, were accepted on 30.04.2013.
- Guidelines on the Assessment of Horizontal Mergers and Acquisitions were accepted on 04.06.2013.
- Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions were accepted on 04.06.2013.
- Guidelines on Cases Considered as Merger and Acquisition and Concept of Control were accepted on 16.07.2013.
- Guidelines on General Principles of Exemption were accepted on 28.11.2013.
- Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position were accepted on 29.01.2014.
- Communiqué on the Increase of the Lower Threshold for Administrative Fines Specified in Paragraph 1, Article 16 of the Act No 4054 on the Protection of Competition, came into force on 10.12.2016.
- Block Exemption Communiqué on Research and Development Agreements (Communiqué No. 2016/5) came into force on 16.03.2016.
- Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board, came into force on 24.02.2017.
- Block Exemption Communiqué on the Vertical Agreements in the Motor Vehicle Sector in Turkey (Communiqué No: 2017/3), came into force on 24.02.2017.
- Guidelines on the Explanation on Block Exemption Communiqué on the Vertical Agreements in the Motor Vehicle Sector in Turkey, were accepted on 07.03.2017.

Reform proposals

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) were officially added to the drafts and proposals list. The Prime Ministry sent the Draft Law and the Draft Regulation to the Presidency of the Turkish Parliament on 23 January 2014 and 17 January 2014, respectively. In 2015, the Draft Law became obsolete again due to the general elections in June and November 2015. It is yet to be seen whether the new Turkish Parliament or the Government will renew the Draft

Law. As reported in the 2015 Annual Report of the Competition Authority, the Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law. The 2015 Annual Report of the Competition Authority notes that the Competition Authority may take steps toward the amendment of certain articles if the parliament of Turkey does not pass the Draft Law.

The Draft Law aims to further comply with the EU competition law legislation on which it is closely modelled. It adds several new dimensions and changes which promise a procedure that is more efficient in terms of time and resource allocation. The Draft Law proposes several significant changes in terms of merger control. First, the substantive test for concentrations will be changed. The EU's SIEC Test (significant impediment of effective competition) will replace the current dominance test. Secondly, the Draft Law adopts the term "concentration" as an umbrella term for mergers and acquisitions. Thirdly, the Draft Law eliminates the exemption of acquisition by inheritance. Fourthly, the Draft Law abandons the Phase II procedure, which was similar to the investigation procedure, and instead provides a four-month extension for cases requiring in-depth assessments. During in-depth assessments, the parties can deliver written opinions to the Competition Board, which will be akin to written defences. Finally, the Draft Law extends the review period for concentrations from the current 30-day period to 30 working days, which equates to approximately 40 days in total. As a result, obtaining a Phase I decision is expected to be extended.

The Draft Law proposes to abandon the fixed rates for certain procedural violations, including failure to notify a concentration and hindering on-site inspections, and set upper limits for the monetary fines for these violations. This new arrangement gives the Competition Board discretionary space to set monetary fines by conducting case-by-case assessments. Additionally, the Draft Regulation is set to replace the Regulation on Fines. The content of the Draft Regulation also seems to be heavily inspired by the European Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (2006/C 210/02). Thus, the introduction of the Draft Regulation clearly demonstrates the motive of the Competition Authority to bring the secondary legislation in line with the EU competition law principles during the harmonisation process.

Gönenç Gürkaynak
Tel: +90 212 327 1724 / Email: gonenc.gurkaynak@elig.com

Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 70 lawyers based in Istanbul, Turkey. Gönenç graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr. Gürkaynak received his LL.M. degree from Harvard Law School, and is qualified to practice in Istanbul, New York, Brussels and England and Wales (currently a non-practising Solicitor). Before founding ELIG, Attorneys-at-Law 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.

Gönenç heads the competition law and regulatory department of ELIG, Attorneys-at-Law, which currently consists of 36 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 19 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Gönenç represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 50 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Öznur İnanılır
Tel: +90 212 327 1724 / Email: oznur.inanilir@elig.com

Öznur İnanılır joined ELIG, Attorneys-at-Law in 2008. She graduated from Başkent University, Faculty of Law in 2005 and following her practice at a reputable law firm in Ankara, she obtained her LL.M. degree in European Law from London Metropolitan University in 2008. She is a member of the Istanbul Bar. Öznur became a partner within the "Regulatory and Compliance" department in 2016 and has extensive experience in all areas of competition law, in particular, compliance to competition law rules, defences in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters. She has represented various multinational and national companies before the Turkish Competition Authority. Öznur has authored and co-authored articles published internationally and locally in English and Turkish pertaining to her practice areas.

ELIG, Attorneys-at-Law

Çitlenbik Sokak, No:12, Yıldız Mahallesi 34349, Beşiktaş, İstanbul, Turkey
Tel: +90 212 327 1724 / Fax: +90 212 327 1725 / URL: www.elig.com

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