MERGER CONTROL 2019

Turkey

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MARKET OVERVIEW

Protection of Competition Law No. 4054 of December 13 1994 is Turkey's primary piece of legislation. Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué 2010/4), published on October 7 2010, is the secondary piece of legislation. The Competition Authority (Authority) is the enforcement authority and the Competition Board (Board) is the decision-making body. The Authority was established in 1997 and has by now been enforcing Law 4054 for almost 22 years.

One notable aspect of the regime is that Turkish merger control rules do not provide a pre-notification mechanism (ie, submission of a draft notification form). Otherwise, the Authority closely follows developments in other jurisdictions, especially in the EU. In fact, its guidelines are in line with EU competition law regulations and seek to maintain harmony between EU and Turkish competition law instruments. Apart from looking to the EU regime, the Authority also evaluates developments in the Turkish market and takes the necessary steps to stay aligned to its own aims and policies.

Among other key characteristics, parties to a proposed transaction can provide commitments to remedy substantive competition law issues relating to a concentration under Article 7 of the Competition Law (Article 14, Communiqué) and the Authority stipulates that structural and behavioural remedies can be imposed to restore the situation as before the closing (*restitutio in integrum*). Parties have the discretion to offer and submit behavioural or structural remedies (Guidelines on the Remedies that Would Be Permitted by the Turkish Competition Authority in the Mergers and Acquisitions (Guidelines)) and although structural remedies take precedence over behavioural remedies, in some cases, the Board has accepted behavioural remedies. If the Board considers the submitted remedies insufficient, it may allow the parties to make further changes to the remedies. There are very few cases where the Board has blocked a transaction. In recent years, the Board blocked

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Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Gönenç graduated from Ankara University Faculty of Law in 1997 and was called to the Istanbul Bar in 1998. He received his LLM 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 Gürkaynak 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 Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law, with over 20 years of experience. Gönenç represents multinational companies and large domestic clients in over 35 Turkish Competition Authority investigations each year, as well as about 15 antitrust appeal cases and over 85 merger clearances.

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Öznur İnanılır joined ELIG Gürkaynak Attorneys-at-Law in 2008. She graduated from Başkent University Faculty of Law in 2005 and after training at a reputable law firm in Ankara, she obtained her LLM in European Law from London Metropolitan University in 2008. She is a member of the Istanbul Bar. Öznur became a partner in the regulatory and compliance department in 2016 and has extensive experience in all areas of competition law, in particular compliance to competition law rules, defence 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.

only two of notified transactions (one in 2015 and one in 2017).

Aside from the above, there have been no significant recent legal developments with respect to the Turkish merger control regime. However, the Authority has recently enacted some new amendments, communiqués and draft guidelines to regulate and supplement the Turkish antitrust enforcement regime:

- Guidelines on Vertical Agreements: amended by the Authority and announced through the official website of the Authority on March 30 2018;
- Guidelines on the Explanation on the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicle Sector in Turkey: accepted on March 7 2017;
- Communiqué No. 2017/4 on the Payments of Joint Stock Companies and Limited Liability Companies as per Law No. 4054: came into force on March 31 2017.

JURISDICTION TEST

A merger of two or more undertakings; or an acquisition of control by an entity or a person of another undertaking's assets or a part or all of its shares or instruments granting the management rights are notifiable, if they result in a permanent change of control.

Joint-ventures (JVs) are deemed acquisitions. To qualify as a concentration subject to merger control, a JV must be of a full-function character and satisfy two criteria: the existence of joint control in the JV and the JV being an independent economic entity established on a lasting basis.

Pursuant to the presumption regulated under Article 5(2) of Communiqué No. 2010/4, control may be acquired through rights, contracts or other instruments which, separately or together, allow de facto or de jure exercise of decisive influence over an undertaking. In particular, these instruments consist of ownership or operating rights over all or part of the assets of an undertaking, and those rights or contracts granting decisive influence over the structure or decisions of the bodies of an undertaking. Control may be acquired by right holders, or by those persons or undertakings who have been empowered to exercise such rights in accordance with a contract, or who, while lacking such rights and powers, have de facto strength to exercise such rights.

A transaction is subject to the Board's approval if the aggregate Turkish turnover of the parties exceeds TL100 million (approximately $20.7 million) and the Turkish turnover of at least two of the parties each exceeds TL30 million. The Board's approval is also needed in acquisition transactions where the Turkish turnover of the transferred assets or acquired businesses exceeds TL30 million and the worldwide turnover of at least one of the other parties exceeds TL500 million. In merger transactions, the Board needs to approve transactions where the Turkish turnover of any of the parties in the merger exceeds TL30 million and the worldwide turnover of at least one of the other parties exceeds TL500 million.

Article 7 of Law No. 4054 prohibits all concentrations leading to a dominant position and the significant lessening of competition in a product market. As a matter of fact, while the question on whether the transaction is subject to the Board's approval should be taken into consideration within the scope of secondary legislation (ie the notification thresholds specified under Communiqué No. 2010/4), the question of whether the same transaction creates competition law sensitivities should be assessed within the scope of the primary legislation (Article 7 of Law No. 4054).

The assessment of whether a transaction creates competition law sensitivities is independent from the question of whether the transaction is subject to the Board's approval within the scope of Article 7 of Communiqué No. 2010/4. As per the hierarchy of norms, the fact that a transaction is not subject to the Board's approval would not have an effect on the assessment of the same transaction in terms of its merits.

Under Article 7 of Law No. 4054 regulating the control of mergers and acquisitions, any mergers by one or more undertakings or acquisitions by any undertaking from another undertaking (including the transactions realized by global technology and online companies), which creates a dominant position or strengthens a dominant position, and which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country are prohibited.

Therefore, Law No. 4054 deems mergers or acquisitions which result in significant lessening of competition illegal, regardless of whether the relevant turnover thresholds are exceeded or not. The jurisdictional threshold provided under Communique No. 2010/4 acts as a filter by excluding some transactions from the notification obligation, as such transactions do not attain a certain economic size.

Foreign-to-foreign mergers

In terms of foreign-to-foreign transactions, there is no exemption granted under the Turkish merger control regime and if one of the turnover thresholds is triggered, a foreign-to-foreign transaction will be notifiable as well. Law No. 4054 defines the "effects criteria", pursuant to which the criterion to apply is whether the undertakings concerned affect the goods and services markets in Turkey. Even if the relevant undertakings do not have local subsidiaries, branches, sales outlets or other in Turkey, the transaction could still be subject to merger control if the relevant undertakings have sales in Turkey and the merger therefore impacts the relevant Turkish market.

Furthermore, with regards to merger control transactions, the Competition Authority is empowered to get in contact with certain regulatory authorities around the world including the EU Commission Competition Directorate-General (DG Comp), to exchange information. In this respect, Article 43 of Decision No. 1/95 of the EC-Turkey Association Council (Decision No. 1/95) authorises the Authority to notify and request the Commission to apply relevant measures if the Competition Board believes that transactions realised in the territory of the EU adversely affect competition in Turkey. This provision grants reciprocal rights and obligations to the parties (EU-Turkey).

Additionally, the research department of the Turkish Competition Authority makes periodic consultations with relevant domestic and foreign institutions and organisations.

There have been cases where the Authority has exchanged information with the EU Commission and other competition authorities; however it can be said that the EU Commission has been reluctant to share any evidence or arguments with the Turkish Competition Authority in the few cases where the Turkish Competition Authority explicitly asked for them.

NOTIFICATION

Filing is mandatory once the parties' turnovers exceed the thresholds. The existence of an affected market is not sought in assessing whether a transaction triggers a notification requirement.

If the parties violate the suspension requirement or do not notify the transaction, the Board imposes a turnover-based monetary fine. The minimum fine in 2019 is TL 26,027.

If there is a risk that the transaction might be viewed as problematic under the dominance test and the transaction is closed before clearance, the Authority may launch an investigation. It may order structural or behavioural remedies to restore the situation as to before closing, and impose a fine up to 10% of the parties' annual turnover. Executive members who have a significant role in the infringement may also receive monetary fines of up to 5% of the fine imposed on the undertakings.

A notifiable concentration is invalid with all its legal consequences, unless and until it is approved by the Board.

Even though there is no specific deadline for filing, it is advisable to file the notifiable concentration to the Authority at least 45

Key

- Indicates a regime in which regulation is predictable, light touch and low impact
- Indicates a regime in which regulation is generally predictable or moderately intrusive
- Indicates a regime in which regulation is unpredictable or highly intrusive

Jurisdiction test
Notification
Review process and timetables
Judicial review

	JURISDICTION TEST			NOTIFICATION				REVIEW PROCESS AND TIMETABLES			JUDICIAL REVIEW
	Types of M&A and JV caught	Thresholds for notification	Foreign-to-foreign mergers	Mandatory or voluntary	Filing fees	Filing requirements/deadline	Pre-notification contacts	Timetable for clearance	Substantive test	Remedies available	Ability to appeal
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calendar days before closing (a transaction is deemed closed on the date the change of control occurs (Article 10, Communiqué)).

The filing can be made by either one of the parties to the transaction, or jointly and there is no filing fee.

There is also no specific deadline for filing but it is advisable to file the transaction at least 45 calendar days before closing. (A transaction is deemed closed on the date when the change of control occurs (Article 10, Communiqué)). However, there is an explicit suspension requirement (ie, the transaction cannot be closed before obtaining the approval of the Board), which is set out under Article 11(1)(a) of Law No. 4054 and Article 10(5) of Communiqué No. 2010/4.

The notification form is similar to the European Commission's Form CO. Certain additional documents are also required (such as the transaction documents and their sworn Turkish translations and annual reports.)

The Turkish merger control rules do not provide a pre-notification mechanism (i.e. submission of a draft notification form).

REVIEW PROCESS AND TIMETABLES

After its preliminary review of the notification, the Board decides either to approve or to further investigate the transaction (Phase II). There is an implied approval mechanism where a tacit approval is deemed if the Board does not react within 30 calendar days of a complete filing. If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed only on the date when this information is completed after the Board's request for data. A Phase II review takes about six months and may be extended for only one additional period of up to six months.

During either phase, the Authority can send written requests to the parties, to any other party relating to the transaction or to any third parties, such as competitors, customers or suppliers.

If the Authority asks for another public authority's opinion in reviewing a transaction, the applicable time periods for the deemed approval mechanism automatically restart from day one as of the date on which the relevant public authority submits its opinion to the Competition Authority.

Substantive test

The substantive test for clearance is the dominance test. Efficiencies may play a more important role in cases where the combined market shares of the parties exceed 20% for horizontal overlaps and the market share of either of the parties exceeds 25% for vertical overlaps. The Board may consider efficiencies to the extent they operate as a beneficial factor in terms of better-quality production or cost-savings.

Remedies

Parties to a merger can provide commitments to remedy substantive competition law issues in concentration. It is at the parties' own discretion whether to submit a remedy. The Board will neither impose nor ex-parte change any submitted remedies. In the event the Board considers the submitted remedies insufficient, it may enable the parties to make further changes to its remedies. If the remedy is still insufficient to resolve the competition concerns, the Board may block the transaction.

Parties can submit proposals for possible remedies either during the preliminary review (Phase I) or the investigation period (Phase II). While the parties can submit the commitments during Phase I, the notification is deemed filed only on the date of the submission of the commitments. In any case, a signed version of the commitments that contains detailed information on their context and a separate summary should be submitted to the Authority. The Authority's Remedy Guidelines also provide a form that lists the necessary information and documents to be submitted in relation to the commitments.

JUDICIAL REVIEW

The Board's final decisions can be submitted to judicial review before the administrative courts by filing a lawsuit within 60 days of the receipt by the parties of the Board's reasoned decision. Rights of judicial review are available only to the parties to the decision. Third parties can challenge the Board's decision before the competent judicial tribunal, provided that they prove their legitimate interest. The judicial review period before the administrative court usually takes about 24 to 30 months.

OUTLOOK

In 2018, major merger control decisions concerning high-value transactions were taken by the Authority.

The Board pronounced its final decision on the Phase II review regarding the merger of Luxottica Group and Essilor International. As the result of the Phase II review, the Board was unanimous in its decision (October 1 2018, 18-36/585-286) that pursuant to Article 7 of Law No. 4054 the transaction in its notified form could not be approved under scope of Article 7 of Law No. 4054 and therefore, the transaction was only conditionally approved with the commitment package submitted. This package included structural commitments concerning the divestiture of Merve Optik Sanayi ve Ticaret AŞ and behavioural commitments, which will be re-evaluated by the Competition Board after the three-year period.

The Board also reviewed the acquisition of sole control of Monsanto by Bayer (May 8 2018, 18-14/261-126). The Board considered that the transaction may result in the creation or strengthening of Bayer's dominant position and thus, may significantly impede effective competition in the relevant market. In May 15 2017, it therefore decided to take the transaction to a Phase II review. Bayer's commitment to divest its global cotton and vegetable seeds businesses was then submitted to the EU Commission. The Board conditionally approved the transaction based on the commitments submitted to the Commission due to the fact that the new transaction would not result in the creation or strengthening of a dominant position not significantly impede competition, since the commitments submitted by Bayer with regards to the vegetable seeds, cotton seeds and corn seeds businesses and insecticide seed dressings for corn subject to the investigation would eliminate horizontal and vertical overlaps occurring in the relevant markets in Turkey.

With respect to the legislative reforms, the Draft Competition Law, which was issued by the Authority in 2013 and officially submitted to the Presidency of the Turkish Parliament on January 23 2014, is now null and void following the beginning of the new legislative year of the Turkish parliament. In order to re-initiate the parliamentary process, the draft law must again be proposed and submitted to the presidency of the Turkish Parliament. At this stage, it remains unknown whether the Turkish Parliament or the government will renew the draft law.