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Merger Control – Turkey

As part of the International Comparison Guide to merger control, this month Lawyer Monthly speaks to Gönenç Gürkaynak, partner of ELIG, an independent Turkish law firm, about the issues surrounding merger control in Turkey. With a legal team of 28, ELIG takes pride in being able to assist clients in almost all fields of law, although the main focus of the practice is centred around competition law, corporate law, mergers & acquisitions, EU law, banking and finance, litigation, energy, oil and gas law, administrative law, real estate law, and intellectual property law. Prior to joining ELIG as a partner, Gönenç worked at the Istanbul, New York, Brussels and again in Istanbul offices of White & Case LLP for more than 8 years

Q What are the main legal implications to arise from merger control? What are the most common issues you deal with?

The New Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Turkish Competition Board (Communiqué 2010/4) was published on 7 October 2010 and put into force on January 1, 2011, and it brings a new Turkish merger control regime into the Turkish competition law system, which is welcomed by competition law circles. Under article 10 of Communiqué 2010/4, a transaction is deemed to be 'realised' (i.e. closed) on the date when the change in control occurs. It remains to be seen if this provision will be interpreted by the Competition Authority in a way that provides the parties to a notification to carve out the Turkish jurisdiction with a hold separate agreement. This has consistently been rejected by the Turkish Competition Board so far, arguing that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

Another important change in the Turkish merger control regime is brought about with Article 13 of Communiqué 2010/4. The Competition Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (e.g. non-compete, non-solicitation, confidentiality, etc.). This will allow the parties to engage in self-assessment, and the Competition Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore.

Conditional approval is also an important issue under the Turkish merger control regime. The Competition Board may grant conditional approvals to mergers and acquisitions, and such transactions may be implemented, provided that measures deemed appropriate by the Competition Board are taken, and the parties comply with certain obligations. In addition, the parties may present some additional divestment, licensing or behavioural commitments to help resolve potential issues that may be raised by the Competition Board. These commitments are increasing in practice and may either be foreseen in the transaction documents or may be given during the review process or an investigation.

Another talking point is incorrect or incomplete filings. If the information requested in the notification form 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. In addition, the Competition Authority may impose a turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the

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financial year nearest to the date of the fining decision will be taken into account) on natural persons or legal entities which qualify as an undertaking or as an association of undertakings, as well as the members of these associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for exemption or negative clearance or for the approval of a merger or acquisition, or in connection with notifications and applications concerning agreements made before the Competition Law entered into force.

Q What is the relevant legislation in your country and who enforces it? Are there current proposals to change the legislation?

The national competition authority for enforcing the Competition Law in Turkey is the Turkish Competition Authority, a legal entity with administrative and financial autonomy. The Turkish Competition Authority consists of the Competition Board, Presidency and Service Departments. As the competent body of the Turkish Competition Authority, the Competition Board is responsible for, inter alia, reviewing and resolving on merger and acquisition notifications. The Competition Board consists of seven members and is seated in Ankara. The Service Departments consist of four technical units and one research unit. There is a 'sectoral' job definition of each technical unit.

The relevant legislation on merger control in Turkey is the Law on Protection of Competition No. 4054 dated 13 December 1994 (Competition Law) and Communiqué 2010/4 published by the Turkish Competition Authority. In particular, article 7 of the Competition Law governs mergers and acquisitions, whereby it is stipulated that the Competition Board is authorised to regulate, through communiqués, which mergers and acquisitions should be notified in order to gain validity. Further to this provision, Communiqué No. 2010/4, replaces Communiqué No.1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué 1997/1) as of 1 January 2011, as a primary instrument in assessing merger cases in Turkey. Communiqué 2010/4 sets forth the types of mergers and acquisitions that are subject to the Competition Board's review and approval, bringing together some significant changes to the Turkish merger control regime.

A current proposal to change the entire competition law legislation is pending before Turkey's Grand National Assembly. If enacted, the proposal will bring about significant amendments to Law No. 4054, such as the introduction of de minimis exceptions. It is still uncertain, however, when the relevant proposal will be on the Grand National Assembly's agenda.

Q What kinds of mergers are caught? Are joint ventures caught?

With the enactment of Communiqué 2010/4, the Turkish competition law regime is now utilising a 'significant lessening of competition' test. Accordingly, the new Communiqué defines the scope of the notifiable transactions in article 5 as follows:

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

According to article 5(3) of Communiqué 2010/4, joint ventures are subject to notification to, and approval of, the Competition Board. Joint ventures that permanently meet all functions of an independent economic entity are deemed notifiable. Article 13 of Communiqué 2010/4 provides that cooperative joint ventures are also subject to a merger control notification and analysis, on top of an individual exemption analysis, if warranted.

Q Is there a definition of 'control' and are minority and other interests less than control caught?

Communiqué 2010/4 provides a definition of 'control', which does not fall far from the definition of this term in article 3 of the Council Regulation No. 139/2004. According to article 5(2) of the new Communiqué:

'Control can be constituted by rights, agreements or any other means which, either separately or jointly, de facto or de jure, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence in particular by ownership or right to use all or part of the assets of an undertaking, or by rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking'.

Pursuant to the presumption regulated under article 5(2) of Communiqué 2010/4:

'Control shall be deemed acquired by persons or undertakings which are the holders of the rights, or entitled to the rights under the agreements concerned, or while not being the holders of the said rights or entitled to rights under such agreements, have de facto power to exercise these rights'.

In short, much like the EC regime, under Turkish Competition Law, mergers and acquisitions resulting in a change of control are subject to the approval of the Competition Board. Control is understood to be the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions; and it can be exercised de jure or de facto.

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Acquisition of a minority shareholding can amount to a merger, if and to the extent it leads to a change in the control structure of the target entity. The Competition Board's precedents accept that acquiring de facto majority at general assembly meetings confer the acquirer de facto control over the target and lead to a change of control within the meaning of the Communiqué (see e.g. Bouygues/ Alstom, 15.06.2006, 06-44/551-149; Total/Cepsa, 20.12.2006, 06-92/1186-355; Jacobs/Adecco, 14.4.2006, 06-27/319-74).

Q What are the jurisdictional thresholds?

Article 7 of the Communiqué 2010/4 brings new and only turnover-based thresholds:

- If the total turnover of the parties to a concentration in Turkey exceeds TL 100 million and the respective turnovers of at least two of the parties individually exceed TL 30 million, OR
- The worldwide turnover of one of the parties exceeds TL 500 million and the Turkish turnover of at least one of the other parties exceeds TL 5 million, then the transaction may be subject to the Board's approval.

Q Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Foreign-to-foreign mergers are caught under the Competition Law to the extent they affect the relevant markets within the territory of the Republic of Turkey. Merely sales into Turkey may trigger notification necessity, to the extent the thresholds are met and the transaction results in an overlap. Article 2 of the Competition Law provides 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 undertakings concerned do not have local subsidiaries, branches, sales outlets, etc, in Turkey, the transaction could still be subject to the provisions of the Turkish competition legislation if the goods or services of such undertakings are sold in Turkey and thus have effects on the relevant Turkish market.

Q Are there any special merger control rules applicable to public takeover bids?

The notification process differs for privatisation tenders. According to Communiqué No. 1998/4, a pre-notification is done before the tender and notifications of the three highest bidders are submitted to the Competition Board following the tender by the Privatisation Authority.

According to Communiqué No. 1998/4, it is necessary to make a pre-notification to the Turkish Competition Authority before tender conditions are announced to the public, if the entity being privatised has a market share over 20 per cent, has turnover exceeding 20 million lira, or enjoys statutory or de facto privileges not accorded to private firms in the relevant market even if the market share and turnover thresholds are not exceeded. This pre-notification stage applies before the tender is announced to the public, so that the Competition Board can provide its views, as its views may be taken as a basis in the preparation of tender documents.

In the case of a public bid, filing can be performed at a stage where the documentation at hand adequately proves the irreversible intention to finalise the contemplated transaction.

Q Is there anything else you would like to add?

The Competition Authority has recently launched public consultation on the Draft Guideline on the Remedies That Would be Permitted by the Competition Authority in Mergers and Acquisitions (Draft Guideline). We would be expecting the finalization of the conclusive form of the Draft Guideline, which will provide detailed explanations in relation to the application of Communiqué 2010/4. **LM**

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