MERGER CONTROL IN TURKEY

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Gönenç Gürkaynak

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

Gönenç Gürkaynak and Hakan Özgökçen: The regulatory developments in Turkey are still an ongoing process in terms of merger control. Indeed, in 2017, the Turkish Competition Authority (the Authority) introduced Communique No. 2017/2 amending Communique No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board, which entered into force on 24 February 2017. Three amendments were introduced with Communique No. 2017/2 to Communique No. 2010/4. First, the Turkish Competition Board (the Board) no longer has the duty to re-establish turnover thresholds for concentrations every two years. Therefore, there is no specific timeline for the review of the relevant turnover thresholds set forth under Communique No. 2010/4.

The second amendment is related to the calculation of turnover within the scope of the notifiability thresholds under article 8(5) of Communique No. 2010/4. Pursuant to the relevant amendment, two or more transactions realised between the same persons or parties within three years, or two or more transactions realised by the same undertaking within the same relevant product market are to be considered as a single transaction in terms of the calculation of the turnover for the turnover thresholds. Before this amendment was introduced, Communique No. 2010/4 was somewhat aligned with the European Commission (EC) Merger Regulation, which set forth a period of two years instead of three. In addition, the amendment foreseeing two or more transactions realised by the same undertaking within the same relevant product market is an entirely new concept foreign to the Merger Regulation.

The third amendment relates to article 10 of Communique No. 2010/4 and introduced an exception to the standstill obligation for a series of transactions in securities. Accordingly, when control is acquired in serial transactions from different sellers through the stock exchange, such transactions could be notified before the Authority after their implementation without violating Law No. 4054 on the Protection of Competition (the Competition Law) provided that the transaction is notified to the Board without delay and the voting rights attached to the acquired securities are not exercised, or are exercised solely to maintain the full value of the investments based on a derogation to be granted by a Board decision. This amendment is akin to article 7(2) of the EC Merger Regulation and thus it brings the legislative framework of the Turkish merger control regime more in line with the EC Regulation. Nonetheless, while there was no specific regulation concerning the standstill obligation, the precedents of the Board will provide guidance for these types of transactions.

According to the Mergers and Acquisitions Status Report for 2017 and the 19th Annual Report published by the Authority, in 2017, the Board reviewed 184 concentrations, of which two concentrations were approved conditionally (*Valeo/FTE*, 26 October 2017 and *Migros/Tesco*, 9 February 2017) and one transaction was not granted approval (*Un Ro-Ro*, 9 November 2017), whereas 150 concentrations were approved unconditionally. In addition, 94 transactions notified to the Board were foreign-to-foreign transactions, which constitutes over half of the concentrations notified in 2017.

The Board adopted many significant decisions in the past year. One of which is the transaction concerning the acquisition of all shares and sole control of Hamburg Süd (HSDG) by Maersk Line A/S. The Board granted unconditional approval for the relevant transaction on 4 May 2017. Maersk is the largest container shipping company and the target, HSDG is also among the world's largest container shipping companies. The EC's analysis concluded that the transaction would have resulted in anticompetitive effects on five trade routes and the EC had cleared the proposed acquisition conditionally upon the withdrawal of HSDG from the stated five trade routes. While reviewing the transaction, the Board decided that the commitments submitted before the EC also contained the routes that could lead to potential competition law concerns in Turkey, specifically with respect to the trade routes from and to the Mediterranean Sea. Therefore, the Board unconditionally approved the transaction, deeming the commitments submitted before the

EC sufficient upon the conclusion of its Phase I review.

Another noteworthy decision of 2017 is the transaction concerning the reinstatement of certain minority protection rights granted to Anheuser-Busch InBev (ABI) over Anadolu Efes and the formation of a joint venture between those two undertakings. On 23 November 2017, the Board granted unconditional approval for the relevant transaction through concluding that it would not result in the creation or strengthening of a dominant position and would not significantly impede competition. The transaction is important because it was a cross-border deal between ABI, an important player in the production of beer worldwide, and Anadolu Efes, the largest beer producer in Turkey and a significant player in eastern Europe where ABI acquired joint control over Anadolu Efes owing to reinstatement of certain strategic veto rights.

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

GG & HÖ: With the recent changes in the Competition Law, the Board has prepared for a merger control regime that focuses much more on deterrents. As part of that trend, monetary fines have increased for not filing or for closing a transaction without the Board's approval. The minimum fine was fixed at 18,377 Turkish lira in 2017 and 21,036 Turkish lira in 2018. Breaching this obligation and failing to obtain the approval of the Board before the transaction is closed can be very expensive for the undertakings concerned, as the Board may impose a fine of up to 0.1 per cent of the local turnover generated in the previous financial year. 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.

Thus far, the Turkish competition law regulations do not hold any normative regulation allowing or disallowing carve-out arrangements and the Board consistently rejected all carve-out or hold-separate arrangements proposed by merging undertakings based on the argument that the closing of a transaction is sufficient for the Board to impose a fine, and a deep analysis of whether change in control actually took effect in Turkey is unwarranted. In line with this approach, in many cases, including *Total/Cepsa* (20 December 2006) and *CVR Inc/Inco Limited* (1 February 2007), the Board did not evaluate the parties' carve-out arrangements while reviewing whether there was a violation of the suspension requirement.

However, the Board's approach to carve-out or hold-separate arrangements has shown to shift while reviewing an effective arrangement, which

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included splitting the transaction into two separate transactions in the *Bekaert/Pirelli* case (22 January 2015). Accordingly, the parties have prepared two separate sale and purchase agreements considering that the Board does not accept carve-out arrangements. The agreements were split between the Turkey-related aspects of the transaction and the global part of the transaction that did not trigger the jurisdictional thresholds in Turkey and did not raise any competitive issues. Consequently, the Board granted an approval to the relevant arrangements, stating that Bekaert's acquisition of Pirelli's assets outside of Turkey is a separate transaction from the acquisition in Turkey and focused its review on the Turkey-related aspects of the transaction. While the outcome of the arrangement is the same as a carve-out arrangement, the transaction remains an atypical case as the split into two separate transactions resulted in one transaction that was not notifiable in Turkey.

Furthermore, the Board's recent cases shed light on the issue of global commitments having Turkey-specific effect. To that end, the Board granted unconditional approval to several transactions, taking the commitments submitted before the EC into account. As previously stated, the Board granted unconditional approval to Maersk Line-HSDG (4 May 2017) evaluating the Turkey-specific effects of the commitments submitted before the EC. In addition, the Board granted conditional approval to several transactions on the condition that the commitments submitted before the EC would be implemented. For instance, in the scope of the transaction concerning the acquisition

of FTE by Valeo where both parties were automotive equipment suppliers. Valeo submitted commitments before the EC to alleviate any competitive concerns raised by the EC at a preliminary stage. The transaction was also raising competition law concerns in the relevant product markets in Turkey but the Board took the Turkey-specific effects of the commitments submitted before the EC into consideration. In this regard, the Board concluded that the commitments will prevent the increase of the concentration in the market and will preserve the competitive landscape of the market in Turkey as well. To that end, the Board conditionally approved the transaction upon its Phase I review on the condition that commitments submitted before the EC will be implemented (26 October 2017).

Recently, the Board granted a conditional approval to the transaction concerning the acquisition of Monsanto Company by Bayer upon its Phase II review, which lasted approximately one year (8 May 2018). Once the parties submitted the commitments before the EC, they also informed the Board with regard to Turkey-specific effects of the commitments and demonstrated that the competition law concerns arising in Turkey will be also addressed. The Board considered the commitments submitted to the EC regarding the vegetables, cotton, corn seeds and insecticides for corn seeds and concluded that these commitments remove the horizontally and vertically affected markets in Turkey and, thus, the transaction does not result in the creation or strengthening of a dominant position and does not significantly impede competition. Therefore, the Board conditionally approved the transaction pursuant to the commitments submitted before the EC.

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

The Board generally keeps the above-mentioned deadlines. Indeed, according to the Mergers and Acquisitions Status Report for 2017, the transactions that have been notified to the Authority during this time period have been concluded within an average of 15 calendar days following the final submissions.

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

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

Furthermore, there have been a couple of exceptional cases in records of the Turkish merger control regime where the Board discussed the coordinated effects under a 'joint dominance test', and rejected the transaction on these grounds. These cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund. The Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the ground that they would lead to joint dominance in the relevant market. The Board took note of factors such as structural links between the undertakings in the market and past coordinative behaviour, in addition to entry barriers, transparency of the market and the structure of demand. It concluded that certain factory sales would result in the establishment of joint dominance by certain players in the market whereby competition would be significantly impeded. Regarding one such decision that was appealed, the Council of State ruled by mentioning, inter alia, that Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Board, which was based on collective dominance. No transaction has been blocked on the grounds of vertical foreclosure or conglomerate effects yet.

However, in the *Toyota/Vive* decision (6 April 2017), the Board provided an assessment on the main factors that should be considered for the evaluation of the conglomerate concentrations. This decision is significant because while the conglomerate effects of transactions have been an

important issue for the EC in 2017 (ie, *Qualcomm/NXP*, *Bayer/Monsanto* and *Luxottica/Essilor*), the Board did not focus on conglomerate effects of transactions with the exception of the *Toyota/Vive* decision. The transaction concerns the acquisition of sole control over Vive BV by Toyota, ultimately by Toyota Industries Corporation. While the parties to the transaction submitted that there would not be an affected market since their activities did not horizontally or vertically overlap in Turkey, the Board decided that the transaction would lead to a conglomerate concentration, given that the activities of the parties are complementary to and substitute each other. Accordingly, the Board asserted that foreclosing the market to competitors is realised through unilateral conduct in the form of tying, bundling and other exclusionary behaviours, and in addition to the market shares of the parties, the incentive and the ability to foreclose a market should be considered while assessing the existence of conglomerate effects. Upon its review process, the Board ultimately decided that the market shares of the transaction parties and the market structures of the two relevant product markets would not give transaction parties the market power and ability to foreclose the market, and granted unconditional approval for the transaction.

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

GG & HÖ: Currently, the Board analyses the concentrations on an economic basis. In that sense, economic parameters (eg, market shares, sales volume and amounts, the level of concentration, entry conditions and the degree of vertical integration – in other words, quantitative evidence) has been used as evidence in the analysis of concentration cases. In particular, upon the establishment of the economic analyses and research department within the Authority, economic analysis is increasingly being used as a tool for merger control review.

The Board may request information from third parties including customers, competitors and suppliers of the parties, as well as other persons related to the merger or acquisition. If the Authority asks for another public authority's opinion, the 30-day review period restarts from day one. While not common in practice, it is possible for third parties to submit complaints about a transaction during the review period. Additionally, related third parties may request a hearing from the Board during the investigation (ie, if the transaction will be taken into Phase II review), on condition that they prove a legitimate

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THE INSIDE TRACK

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

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

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

In order to ensure a smooth and successful review process, it is essential that all the necessary information in the notification form is provided to minimise the risk of receiving additional questions. The review process must be followed closely. In addition, having the skills to anticipate the potential competition law concerns that the case handlers could raise beforehand and taking the necessary measures to avoid such concerns by providing comprehensive and satisfactory representations with the notification form is important for timing. If the potential competition law concerns cannot be foreseen in advance (ie, while preparing the merger control filing) this could entail back-and-forth correspondence with the Authority and lengthen the review process.

Another key issue is to file the notification form in sufficient time prior to the closing of the transaction. Although the Competition Law provides no specific deadline for filing, and assuming a transaction is likely to be cleared during Phase I review, it is advisable to file the transaction at least 45 calendar days before closing.

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

One of the most challenging cases that we have recently dealt with is the transaction concerning the acquisition of Monsanto by Bayer, to which the Board granted conditional approval after a Phase II review that lasted approximately one year. During the review process of the Board, we carried out multiple meetings with the Authority to develop effective and feasible mechanisms to accelerate the closing of the transaction. In May 2018, the Board granted a conditional approval to the transaction following its assessment on the Turkey-related aspects of the commitments submitted before the EC.

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interest. They may also challenge the Board's decision on the transaction before the competent judicial tribunal, again on condition that they prove a legitimate interest.

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

GG & HÖ: In 2017, five transactions concerning the sectors for roll-on/roll-off (ro-ro) transportation services, agriculture, port services, yeast and optics were taken into Phase II review. In November 2017, the Board concluded its Phase II review of the acquisition of Ulusoy Deniz Taşımacılığı AŞ, Ulusoy Gemi İşletmeleri AŞ, Ulusoy Ro-Ro İşletmeleri AŞ, Ulusoy Ro-Ro Yatırımları AŞ, Ulusoy Gemi Acenteliği AŞ, Ulusoy Lojistik Taşımacılık ve Konteyner Hizmetleri AŞ and Ulusoy Çeşme Liman İşletmesi AŞ (Ulusoy Ro-Ro) by UN Ro-Ro İşletmeleri AŞ (UN Ro-Ro). It evaluated that (1) the transaction would strengthen UN Ro-Ro's dominant position in the market for ro-ro transport between Turkey and Europe, (2) UN Ro-Ro would be in a dominant position in the market for port management concerning ro-ro ships upon the consummation of the transaction, (3) the transaction would significantly impede competition in these markets, and (4) the behavioural remedies submitted by the parties were not sufficient to eliminate the competition law concerns arising from the transaction. Consequently, the Board did not grant approval for the transaction (9 November 2017).

Another notable transaction that was taken into Phase II review was the acquisition of Dosu Maya Mayacılık AŞ by Lesaffre et Compagnie. Previously, the Board had conditionally approved the transaction upon a Phase II review, by way of commitments (*Lesaffre/Dosu*, 15 December 2014). However, that decision was annulled by the Ankara 8th Administrative Court's decision of 19 January 2017. The transaction was then retaken into Phase II review in May 2017.

Other transactions that were taken into Phase II review in 2017 were: (1) *Bayer/Monsanto*, which was conditionally approved by the Board pursuant

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to the commitments submitted to the EC (8 May 2018), (2) the acquisition of Mardaş Marmara Deniz İşletmeciliği AŞ operating in the Ambarlı Port by Limar Liman ve Gemi İşletmeleri AŞ, for which the Board recently granted conditional approval pursuant to the commitments submitted (8 May 2018), and (3) the merger of Luxottica Group SpA and Essilor International SA (October 2017).

Additionally, the Board granted conditional approval for two transactions upon its Phase I review, namely *Valeo/FTE* (26 October 2017) and *Migros/Tesco* (9 February 2017). With respect to the latter, the Board conditionally approved the transaction pursuant to the commitments submitted by Migros, which included: (1) structural remedies with respect to efficient divestments within the districts in which the parties' activities horizontally overlap and the post-transaction undertaking's market share exceeds 40 per cent; and (2) behavioural remedies with respect to:

- maintenance of trade relationships with the competitors of Efes (a significant beer producer in Turkey and sister company of Migros);
- maintenance of the shelf availability of the products of competitors of Efes;
- Anadolu Endüstri Holding, parent company of Migros, refraining from sharing Tesco Kipa's confidential information with its competitors (and vice versa); and
- launching a supervisory and reporting system for rendering the commitments in order to eliminate the competition law concerns.

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

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

Currently, the significant expected development in the Turkish competition law regime is the Draft Regulation on Administrative Monetary Fines for the Infringement of the Competition Law, which is set to replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance. There is no anticipated date for the enactment of the Draft Regulation but it can be stated that it is heavily influenced by the EC's guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation 1/2003. Thus, the introduction of the Draft Regulation clearly demonstrates the Authority's intention to bring the secondary legislation in line with EU competition law during the harmonisation process. The Draft Regulation was sent to the parliament on 17 January 2014, but no enactment date has been announced.