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Merger Control

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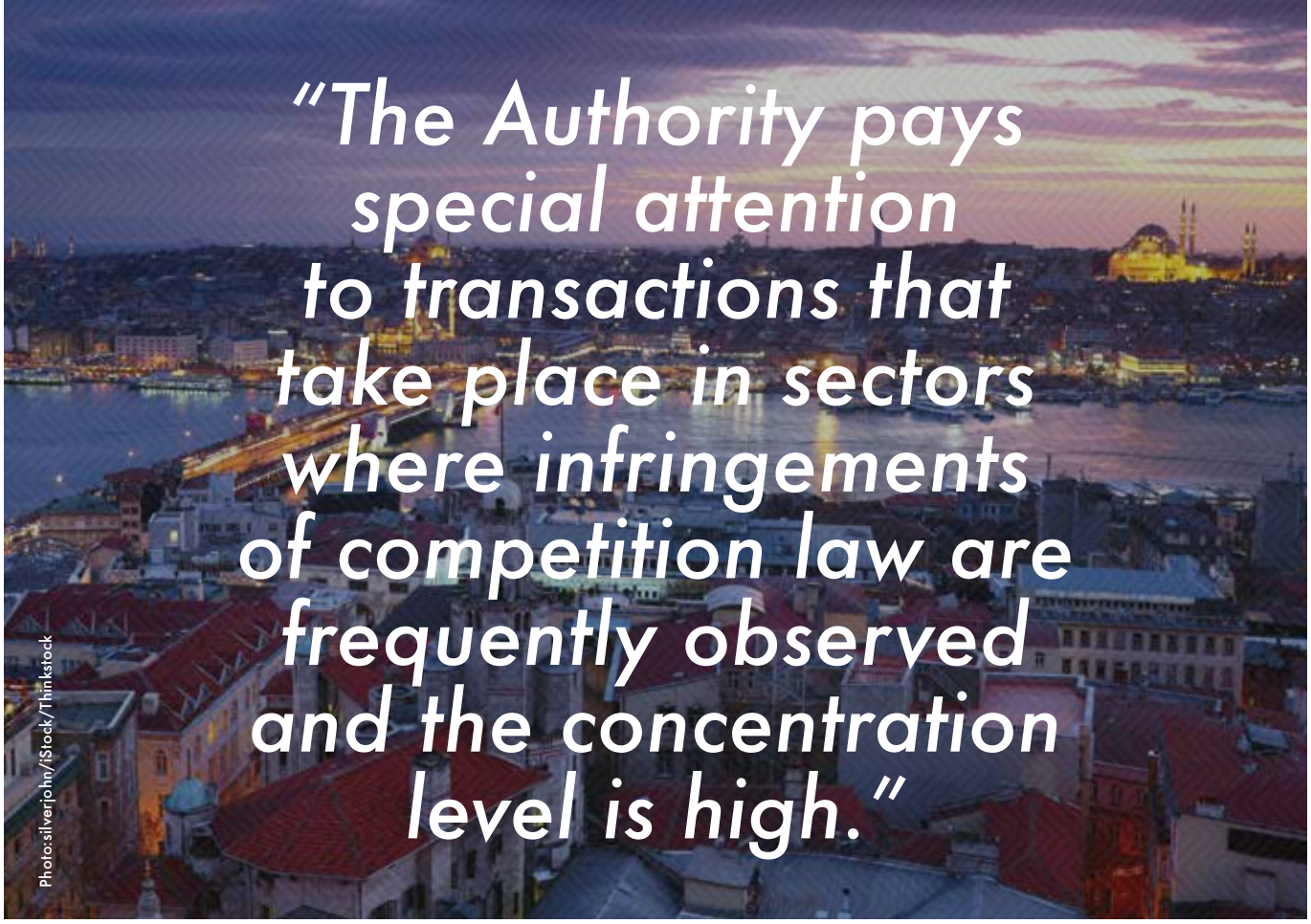
Gönenç Gürkaynak

MERGER CONTROL IN TURKEY

Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law. He graduated from Ankara University, Faculty of Law in 1997, holds an LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, and England & Wales (currently non-practising solicitor). He also heads the competition and regulatory department of ELIG. He has experience in Turkish competition law counselling issues, with over 17 years' experience dating from the establishment of the Turkish Competition Authority. Prior to founding ELIG 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. He also holds teaching positions at undergraduate and graduate levels at two universities in the fields of law and economics, competition law and Anglo-American law.

M Hakan Özgökçen holds an LLB degree from Marmara University Law School and an LLM degree from Istanbul Bilgi University. He is a partner in the competition and regulatory department of ELIG and has been a member of the Istanbul Bar since 2005. Hakan has experience in competition law, mergers and acquisitions, contracts law, administrative law and general corporate law matters. He has assisted Gönenç Gürkaynak in representing various multinational and national companies before the Turkish Competition Authority and Turkish courts.



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

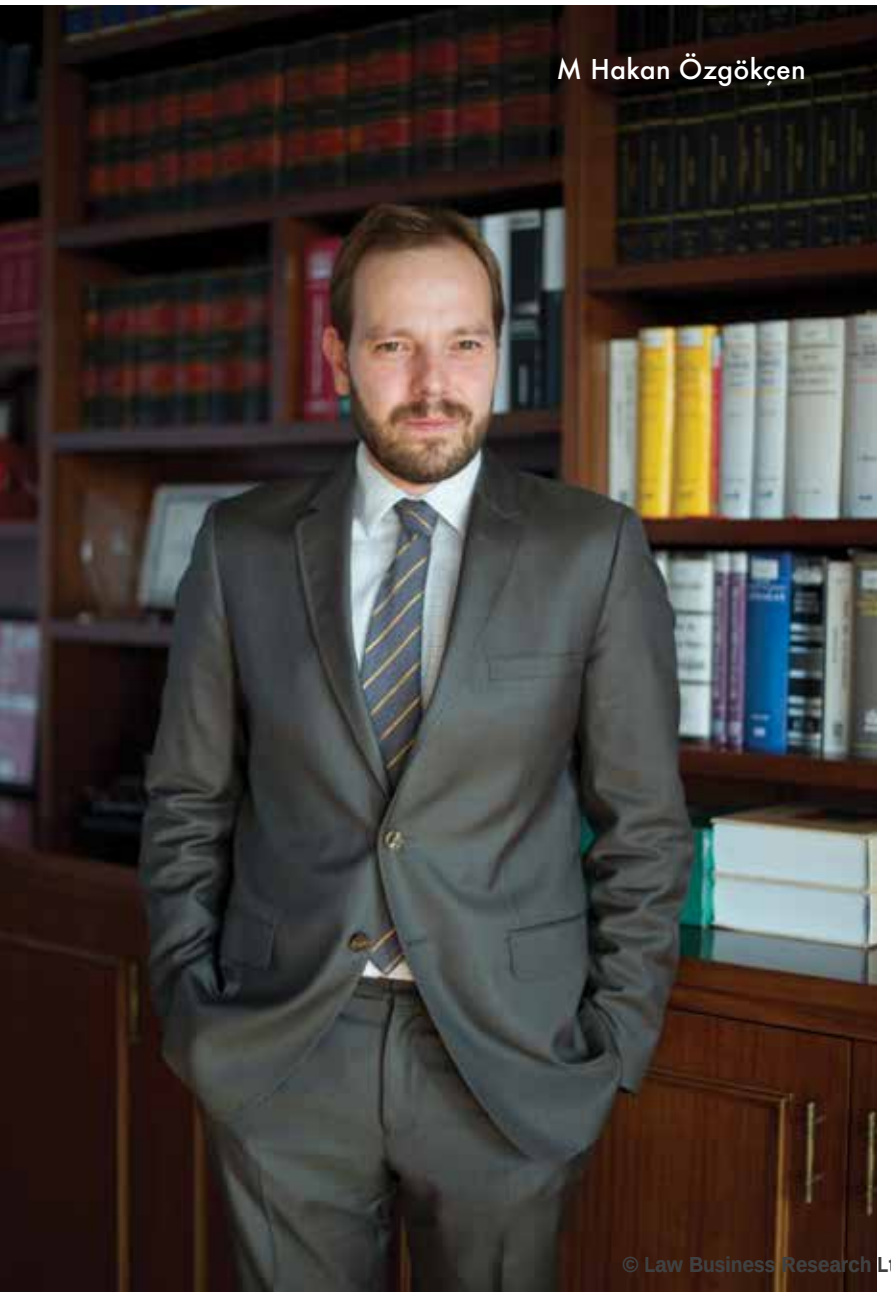
Gönenç Gürkaynak & M Hakan Özgökçen: Recent years have witnessed various regulatory developments in Turkey in terms of merger control. First, the Turkish merger control regime underwent great changes in early 2013 with the amendment of the 'famous' Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the Amended Communiqué). Two main changes that have been introduced are the increase of the thresholds that the turnover of the parties to an M&A transaction should exceed to be subject to merger control review, and the removal of the necessity for the existence of an affected market for notifiability. The publication of a set of guidelines governing the practical aspects of the merger control review handled by the Competition Authority (the Authority) followed this amendment and literally reconstructed the Turkish merger review system (for example, guidelines on undertakings concerned by the merger control regulation, calculation of turnover, ancillary restraints, assessment of horizontal and non-horizontal mergers and acquisitions, concept of control, etc).

Until 2013, the Turkish Competition Board (the Board) was dealing with a significant number of merger control cases. Following the increase of the notification threshold, this trend has been changing and the number of transactions reviewed by the Authority has gradually decreased since 2013. As expected, the Board shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuses of dominance. To be more specific, the Board finalised 303 merger control cases in 2012, whereas this number decreased to 213 and 215 in 2013 and 2014 respectively, (a decrease of approximately 30 per cent).

Traditionally, the Authority pays special attention to transactions that take place in sectors where infringements of competition law are frequently observed (such as cement and ready mixed concrete) and the concentration level is high. Concentrations concerning strategic sectors that are important to the national economy (such as automotive, telecommunications, energy, pharmaceutical, airline, etc) attract the Authority's special scrutiny as well. The 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 at very carefully. In some sectors, the Authority is also statutorily required to seek the written opinion of other Turkish governmental bodies (such as the Turkish Information Technologies and Communication Authority). In such particular instances, the statutory opinion usually becomes a hold-up item that slows down the review process of the notified transaction.

The Board adopted many significant decisions in the past year. One of which is *Ersoy/Sesli*, where the independent economic undertaking notion was

explained in detail and it was clarified that even in cases where the undertakings do not generate turnover and do not have a market share in the relevant product market, they are accepted as independent economic undertakings. Moreover, in this case the Board imposed an administrative fine on the parties to the transaction for gun jumping. Another noteworthy decision is *Kraton/LCY Chemical*. The parties to the relevant transaction at issue in this decision had a high market share in the relevant product market for the manufacture of styrenic block copolymers through their import sales in Turkey while they did not have any subsidiary and affiliate in Turkey. As a result, the Board became concerned about the risks of creation or the strengthening of dominance in the relevant market. However, the Board eventually cleared the transaction in Phase I review taking into account the fact that the relevant market is completely based on imports, lack of legal or physical entry barriers, low transportation costs and a large number of global players. Apart from the decisions already mentioned, the transaction concerning the acquisition by MARS of a majority shareholding in AFM and a 50 per cent shareholding of Spark Entertainment, which are the two largest movie theatre operators in Turkey, was taken to Phase II review and the process is still ongoing. Back in November 2011, the Board, after its Phase II review, notified of a conditional clearance decision 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 Board for five years – on an annual and geographical basis – of average ticket prices and the changes thereof in order to allow the Board to monitor the market. While the parties to the transaction had fully complied with the obligations imposed by the Board, the 13th Chamber of the Council of State annulled the Board's decision on 17 June 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 taken in for final examination and is currently still ongoing.


M Hakan Özgökçen

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 & MHÖ: First of all, it is worth noting that where relevant turnover thresholds are met, notification of the M&A transaction to the Authority is mandatory under the Turkish merger control system. Breaching this obligation and failing to obtain approval from the Board before the transaction is closed can be very expensive for the undertakings concerned, since the Board may impose on them a fine of up to 0.1 per cent of the local turnover generated in the previous financial year. The minimum fine was fixed to 15,226 Turkish lira in 2014 and 16,765 Turkish lira in 2015.

In addition to the foregoing, if there is truly a risk that the relevant notifiable transaction be viewed as problematic under the 'dominance test' applicable in Turkey, this would mean that the stakes will be higher if the transaction is closed before clearance. In such a situation, article 11(b) of the Competition Law entitles the Authority to launch an investigation ex officio in case the transaction is closed before clearance, and order structural as well as behavioural remedies to restore the situation to the same state as before the closing (restitutio in integrum), and impose a turnover-based fine (of up to 10 per cent of the parties' annual turnover) on the undertakings concerned. In such a scenario, executive members of the undertakings concerned who are considered to have played a significant role in the infringement may also receive monetary fines of up to 5 per cent of the fine imposed on the undertakings as a result of implementing

a problematic transaction without obtaining approval of the Board.

A notifiable concentration is also invalid with all its legal consequences, unless and until it is approved by the Board. The implementation of a notifiable transaction is suspended until clearance by the Board is obtained. Therefore, a notifiable merger or acquisition shall not be legally valid until the approval of the Board has been granted, and such notifiable transactions cannot be closed in Turkey before the clearance of the Board.

Moreover, it should be stressed that the notification form should provide the Authority with all the information necessary for the Board's review. Failing this, any written request by the Board for missing information will restart the 30 calendar days period of the preliminary review (Phase I review), which will lengthen the review process of the transaction.

As the Authority adopted the typical 'dominance test' for the substantive assessment of the concentrations (that is, the Board shall clear any concentration that does not create or strengthen a dominant position and does not significantly lessen competition in a relevant product market within the whole or a part of Turkey) it could be easily defended that transactions exceeding the turnover threshold but not creating or strengthening a dominant position and not lessening the competition in the relevant market could be granted unconditional approval following the Board's Phase I review. In contrast, in cases where the Board has concerns that there is a risk that a transaction could create or strengthen a dominant position and significantly lessen competition in a relevant product market, the Board could scrutinise the transaction in more depth.

Dominance is defined as any position enjoyed in a certain relevant market by one or more undertakings by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters, such as the amount of production, distribution, price and supply. Market shares of about 40 per cent and higher are considered an indicator of a dominant position in a relevant product market, along with other factors such as vertical foreclosure or barriers to entry. In that sense, any transaction that could create or strengthen a dominant position would require a more in-depth analysis. Indeed, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position, but also significantly lessens the competition in a part or in the whole of Turkey, pursuant to article 7 of Law on the Protection of Competition (the Competition Law). Also, article 14 of the Amended Communiqué enables the parties to provide commitments to remedy substantive competition law issues of a concentration at their sole discretion. In the event the Board considers the submitted remedies insufficient, it may enable the parties to make further changes to these remedies. If the proposed remedies remain insufficient to resolve the competition problems, the Board may decide not to grant clearance.

"For the first half of 2014, the transactions that have been notified to the Authority during this period have been concluded within an average of 18 calendar days following the final submissions."

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 as 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, as mentioned, 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 (Phase II), it changes into a fully fledged investigation. Under Turkish law, the 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 to the stated deadlines. Indeed, according to the Board's 2014 half-annual report on mergers and acquisitions,

the transactions that have been notified to the Authority during this period have been concluded within an average of 18 calendar days following the final submissions.

With the adoption of the new Amended Communiqué, there is now a short-form notification procedure (without a fast-track procedure). If one of the parties to the transaction will be acquiring sole control of an undertaking over which it has joint control or the totality of the parties' respective market shares is less than 20 per cent in horizontally affected markets and each party's market share is less than 25 per cent in vertically affected markets this procedure would be applied. Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process. There are no informal ways to speed up the procedure.

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

GG & MHÖ: Unilateral effects have been the predominant criteria in the Authority's assessment of mergers and acquisitions in Turkey. Most certainly, 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. Where there are legal, physical or technical barriers to entry or expansion, a lack of bargaining power of the purchasers, a high concentration level in the affected market, 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 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 the transactions 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, when an appeal was made before the Council of State it ruled by mentioning, among other things, that the Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Board which was based on collective dominance. To date, no transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects'.

The Authority is smooth-functioning. There is only one fact that might impede and question the independence of the Authority. This is the fact that the President and second member of the Board are appointed by the Board of Ministry. It could be considered that this hinders the Board in being isolated from political expectations and earnings, and of being completely impartial. An attempt at diminishing this negative effect was made by empowering other ministries besides the Board of Ministries and also empowering the High Court and the High State Court to appoint members to the Board. All in all, so far no distinctive political influence has been observed in relation to any given decision of the Board.

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

GG & MHÖ: Currently, the Board analyses the concentrations on an economic basis. In that sense, economic parameters, for example, 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. Particularly, upon the establishment of the Economic Analyses and Research department within the Authority more and more economical analyses are used as tools 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. It should be noted that where the Authority asks for another public authority's opinion, this would also stop the 30-day review period and restart it anew from day 1. While uncommon, 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, on condition that they prove a legitimate 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 & MHÖ: It is worth noting that in 2014, the Board took seven concentrations into Phase II review and so far it has cleared four of them

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 provided under the notification form and stating all the necessary information in order of importance. As competition law heavily depends on case law, it is important to have perfect knowledge of 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 (that is, while preparing the merger control filing) this could entail back and forth correspondences 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 (at least 45 calendar days before closing). Although the Competition Law provides no specific deadline for filing, and assuming a transaction is a good candidate 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?

An interesting case that we have recently dealt with is the *Kraton/LCY* concentration. This transaction related to both merger and joint control issues and despite the lack of physical presence of the parties in Turkey the Board still evaluated the transaction as to whether it could create or strengthen dominance in the markets. Having conducted such evaluations, the Board granted an unconditional clearance. A further case was the acquisition of Pirelli's steel tyre cord business by Bekaert, which was recently granted clearance based on the proposed remedies. Since the Board's reasoned decision concerning the *Bekaert/Pirelli* transaction has not yet been released no detailed information can be provided, but since we have dealt with the case we anticipate that it will attract the attention of competition law circles in Turkey and abroad, as it involves a behavioural remedy concerning an uninterrupted supply commitment to local customers of the parties.

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either conditionally or unconditionally (*THY OPET/Mobil Türk*, *Dosu Maya/Lesaffre*, *SASA/Indoroma* and *Bekaert/Pirelli*). One transaction, *Çimsa/Sançim*, was withdrawn after the Board took it to Phase II review. Two transactions are still pending in Phase II: the first concerns the acquisition of a majority shareholding in AFM and a 50 per cent shareholding in Spark Entertainment by MARS. The second concerns the acquisition of Beta Marina and Pendik Turizm by Setur. Considering the fact that in 2013, the Board assessed 213 transactions and none of these transactions were taken into Phase II, and only two cases were taken into Phase II review in 2012, the significant increase in the number of Phase II reviews in 2014 leaves the impression that the Board will not hesitate to go into Phase II review if it deems it to be necessary based on the potential competition law concerns. This strongly indicates that remedies and conditional clearances are becoming increasingly important under Turkish merger control enforcement. In line with this trend, the number of cases in which the Board decided on divestment or licensing commitments, or other structural or behavioural remedies, has increased dramatically over the past four years. As mentioned earlier, providing commitments to remedy substantive competition law issues of a concentration is at the parties' sole discretion and although the Board has power to do so, the recent decisional practice of the Board showed that it neither imposes any remedies nor does it change ex parte the submitted remedies. However, it may enable the parties to amend the remedies if the proposed remedies are found to be insufficient to remove competition law concerns.

"The major development expected in the Turkish competition system is the upcoming adoption of the Draft Law amending the current Competition Law."

To provide the most important examples of such decisions in the history of Turkish merger control enforcement, one must mention the recent decision of *THY OPET/Mobil Oil*. This decision concerned the acquisition by THY OPET of 25 per cent right of property of Mobil Oil's assets subject to the Aviation Operation Agreement for Refuelling and Storage at the Airports in Turkey. The commitments proposed by THY OPET were not found sufficient and the concentration concerned was taken into Phase II review by the Board. The market share of THY OPET, which has been above 60 per cent for two years, THY OPET's indirect partnership with Tüpraş and direct partnership with THY, the supply agreement between THY and THY OPET, the high level of concentration and the lack of powerful players in the market and legal, administrative and physical entry barriers were taken into consideration. Conditional approval was granted after the submission of additional commitments.

The acquisition by MARS of a majority shareholding in AFM and a 50 per cent shareholding in Spark Entertainment, which are the two largest movie theatre operators in Turkey, is also significant, since this case is a clear indication that even when the commitment package was deemed satisfactory by the Board, the transaction may still be blocked during judiciary review.

Another example is *YKM/Boyner*. While considering the acquisition of sole control over YKM by Boyner, which are two of the major department stores in the domestic market, the Board granted unconditional clearance upon Phase II review and concluded that the resulting market shares in Turkey, as well as on a city-wide basis, were not large enough to lead to the creation or strengthening of a dominant position in the relevant market. Also worth noting are *Vatan/Doğan*, *ÇimSA/Bilecik*, *OYAK/Lafarge*, *THY/HAVAŞ*, *Burgaz/Mey İçki* and *Diageo Plc/Mey İçki*.

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 & MHÖ: The major development expected in the Turkish competition system is the upcoming adoption of the Draft Law amending the current Competition Law. The Turkish parliament announced in early 2014 that the Draft Law was officially submitted to the Presidency of the Turkish parliament on 23 January 2014 and is currently being reviewed by the subcommittee of the Turkish parliament. All of the proposals the Draft Law offers will enter into force if the Turkish parliament approves it. However, the specific date of enactment remains unknown.

The Draft Law aims to further comply with EU competition law legislation on which it is closely modelled. It adds several new dimensions and changes. These changes 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 (significant impediment of effective competition) test will replace the current dominance test. Second, in accordance with EU competition law legislation, the Draft Law adopts the term of 'concentration' as an umbrella term for mergers and acquisitions. Third, the Draft Law eliminates the exemption of acquisition by inheritance. Fourth, 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 Board, which will be akin to written defences. Finally, the Draft Law extends the appraisal period for concentrations from the current 30 calendar days period to 30 working days, which equates to approximately 40 days in total. As a result, obtaining a decision upon the preliminary review is expected to be extended.

Further, the Draft Law proposes to abandon the fixed turnover rates for certain procedural violations, including the failure to notify a concentration and hindering on-site inspections, and to set upper limits for the monetary fines for these violations. This new arrangement gives the Board discretionary space to set monetary fines by conducting case-by-case assessments.

Another significant expected development in the Turkish competition law regime is the Draft Regulation, 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 on Fines.

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