market intelligence

GETTING THE DEAL THROUGH

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Merger Control

Pre-emptive remedies support growth in Phase I clearances

John Davies leads the global interview panel

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A note from John Davies, Panel Leader

The past year has been one of the busiest for competition authorities around the world. The very active M&A market saw many large, cross-border transactions such as *AB Inbev/SABMiller*, *Halliburton/Baker Hughes*, *Staples/Office Depot*, *ChemChina/Syngenta*, *LSE/Deutsche Borse*, *Bayer/Monsanto* and *Dow/Dupont* reviewed by multiple agencies. In addition to managing a high merger control case load, competition authorities have also been active in protecting their mandates by investigating companies for gun-jumping and procedural failures within the merger control processes. For example, MOFCOM has shown an increased willingness to sanction companies for failure to file, as exemplified by its recent decision to fine Canon for failure to notify its acquisition of Toshiba Medical Systems Corporation. In another example, the European Commission sent Facebook a statement of objections in December 2016 alleging it provided misleading information in its acquisition of WhatsApp.

While recent political shifts have not yet seemed to chill global M&A, it is clear that merger control is sensitive to such developments. While changing economic dynamics may drive foreign investment, populist movements may bring about, for example, increased protectionism in the form of foreign investment controls and increased intervention in strategically important areas. In the US, a number of recent foreign investment transactions, in particular involving Chinese investors, were blocked on national security grounds or faced extensive reviews. Chinese investments in German technology companies have similarly led to calls for tighter foreign investment controls in key sectors. The French government changed its foreign investment regime following the *GE/Alstom* transaction and the UK government is expected to amend its regime in the near future.

This changing landscape will require stakeholders to keep a close eye on both competition and foreign investment developments. The contributions in this issue of *GTDT: Market Intelligence – Merger Control* provide a good introduction to these developments locally. We hope that this will be helpful for readers operating in this active and dynamic environment.

We are grateful to the interview panel for assisting with this project and providing their insights into major market, regulatory and enforcement trends, and the impact these are having on this complex field of practice.

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In this issue

MERGER CONTROL IN TURKEY

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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. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. He received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels and England and Wales.

Before founding ELIG in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years. He heads the competition law and regulatory department of ELIG, 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.

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 extensive experience in competition law, mergers & 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.

Gönenç Gürkaynak

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

Gönenç Gürkaynak & Hakan Özgökçen:
The past few years have seen various regulatory developments in Turkey in terms of merger control. The Turkish merger control regime underwent deep changes in early 2013 with the amendment of the 'famous' Communiqué No. 2010/4 on Mergers and Acquisitions subject to merger control regime (the Amended Communiqué). Two main changes have been introduced: an 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 Turkish Competition Authority (the Authority) followed this amendment and literally reconstructed the Turkish merger review system (eg, 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).

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) and decreased to 132 and in 2015. The 2016 figures have not been published yet.

Traditionally, the Authority pays special attention to transactions that take place in sectors where infringements of competition laws 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, retail, 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 being subject to the Board's thorough analysis. In some sectors, the Authority is also statutorily required to seek the written opinion of other Turkish governmental bodies (such as the Turkish Information and Communication Technologies Authority). In such particular cases, 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 *ABI/SABMiller*

(6 June 2016, 16-19/311-140), 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 (enjoys 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 *APMT/Grup Maritim*, (11 May 2016, 16-16/267-118) concerning the acquisition of 100 per cent shares of Grup Maritim TCB, SL (Grup Maritim) by APM Terminals BV (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 regards 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 above-mentioned 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* (September 23, 2016, 16-31/519-233). In the decision, the Board has taken into consideration the facts such as the absence of paper pulp manufacturing in Turkey and the fact the sales in Turkey with regards to paper pulp are being generated through the 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.

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: 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 at 17,700 Turkish lira in 2016 and 18,377 lira in 2017.


Hakan Özgökçen

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 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 (ie, 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 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 a transaction could create or strengthen a dominant position and significantly lessen competition in a relevant product market, the Board could scrutinise the transaction more in-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, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant product market. In that sense, any kind of transaction that could create or strengthen dominant position would require a more in-depth analysis. Indeed, a merger or an 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, the Competition Board may enable the parties to make further changes to these remedies. If the proposed remedies are still insufficient to resolve the competition problems, the Board may decide not to grant clearance.

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, as mentioned above, 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 Board's 2015 annual report on mergers and acquisitions, the transactions which have been notified to the Authority during this time period have been concluded within an average of 16 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 the 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. 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 & HÖ: 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. 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 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 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, 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.

The Turkish Competition Authority is one of the authorities that is functioning smoothly. However, there is only one fact that might impede and question the independence of the Authority, namely the fact that the president and second member of the Board are appointed by the Board of Ministry, which could be considered to be hindering the Board from being isolated of political expectations and earnings, and being completely impartial. However, 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 politician influence was observed behind 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 & 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. Particularly, upon the establishment of the Economic Analyses and Research department within the Authority, more and more economical analyses are 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. It should be noted that in case the Authority asks for another public authority's opinion, this would also cut the 30-day review period and restart it anew 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 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 2016, only two transactions were taken into Phase II review, one of which is *ABI/SABMiller*, regarding Anheuser-Busch InBev's (ABI) acquisition of SABMiller plc (SABMiller). The Board has granted unconditional approval to Anheuser-Busch InBev's (ABI) acquisition of SABMiller plc Ticaret AŞ after a brief Phase II review without taking the remedies proposed by the parties into consideration. The other one is *APMT/Grup Maritim TCB, SL* (11 May 2016, 16-16/267-118), concerning the acquisition of 100 per cent shares of Grup Maritim TCB SL by APM Terminals BV (APMT). The Board has granted an unconditional approval to the transaction on the grounds that it would not lead to any significant competitive concerns since the number of players in the market and the total port capacity would increase in near future.

Also, pending transactions from the beginning of 2015 were finalised, including *Essilor/Merve Gözlük Camı* (23 September 2016, 6-31/520-234), concerning the acquisition by Essilor Optica International Holding SL of 65 per cent shares of Merve Gözlük Camı San ve Tic AŞ, which was taken into Phase II review in 2015 and concluded in 2016. Nevertheless, the Board indicated that the possible competitive concerns could not be eliminated through the remedies proposed by the parties. The parties thus decided to waive from the acquisition transaction and the filing submission

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 an 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 (ie, 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?

One of the most challenging cases that we have recently dealt with is the transaction concerning the acquisition of SABMiller by ABI, of which the Board adopted an unconditional approval after a Phase II review. In the course of the review process, we carried out multiple meetings with the Turkish Competition Authority to develop effective and feasible mechanisms to accelerate the closing of the transaction. The Board's indication of competitive concern arising from the transaction was that through the acquisition of a minority interest in Anadolu Efes, there was a substantial likelihood for Anadolu Efes to become dominant in the market for premium beers. Against the foregoing, the Board has granted an unconditional approval to the transaction after a brief Phase II review.

Another interesting case that we have dealt with is the transaction concerning the concentration of *Konecranes/Terex* (16 November 2016, 16-39/645-289). The Board has evaluated the case in depth as to whether it could create or strengthen dominance in the relevant markets. Nevertheless, the Board granted an unconditional approval to the transaction.

Gönenç Gürkaynak and Hakan Özgökçen
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has been withdrawn by the parties. Therefore, the Board decided that rendering a decision with regard to the outcome of the transaction is not necessary due to lack of merits.

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 Turkish Competition Authority in 2013 and officially submitted to the Presidency of the Turkish Parliament on 23 January 2014, is still pending and has not been renewed by the government yet. At this stage, it remains unknown whether the Turkish 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, in this hypothetical scenario, the discussions are expected to mainly focus on: compliance to EU competition law legislation; introduction of the EU's SIEC Test (significant impediment of effective competition) 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 30 calendar days period 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, which is set to replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (Regulation on Fines). There is no anticipated date for the enactment of the Draft Regulation on Fines.

In addition, the turnover thresholds set forth article 7 of Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ('Communiqué No. 2010/4) are expected to be reassessed in 2017.

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