Merger Control 2021

Consulting editor
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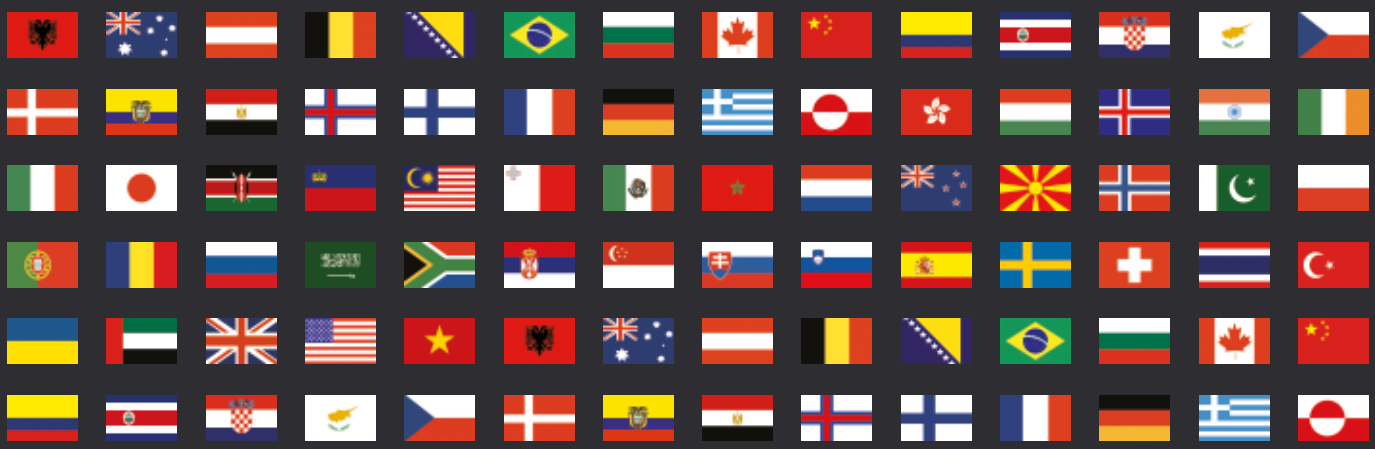

LEXOLOGY®
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 1996
Twenty-fifth edition
ISBN 978-1-83862-373-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Merger Control
2021

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Lexology Getting The Deal Through is delighted to publish the twenty-fifth edition of *Merger Control*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on New Zealand and Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Thomas Janssens of Freshfields Bruckhaus Deringer, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
July 2020

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This article was first published in August 2020
For further information please contact editorial@gettingthedealthrough.com

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Turkey

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation on merger control is the Law on Protection of Competition No. 4054, dated 13 December 1994 (the Competition Law) and the communiqué published by the Turkish Competition Authority (the Competition Authority). In particular, article 7 of the Competition Law governs mergers and acquisitions. Recently, Law No. 7246 on the Amendment to Law No. 4054 on the Protection of Competition was published in the Official Gazette and entered into force on 24 June 2020 (the Amendment Law).

Article 7 authorises the Turkish Competition Board (the Board) to regulate, through communiqués, which mergers and acquisitions should be notified to the Authority to gain validity. Further to this provision, Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) was published on 7 October 2010, replaced Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 1997/1) as of 1 January 2011. The Communiqué No. 2010/4 is now the primary instrument for assessing merger cases in Turkey and sets forth the types of mergers and acquisitions that are subject to the Board's review and approval, bringing about some significant changes to the Turkish merger control regime. The secondary legislation has not been revised and new secondary legislation has not been introduced in view of the Amendment Law at the time of writing.

The national competition authority for enforcing the Competition Law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy. The Competition Authority consists of the Competition Board, Presidency and Main Service Departments. As the competent decision-making body of the Competition Authority, the Board is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Board consists of seven members and is seated in Ankara.

The Main Service Departments consist of five supervision and enforcement departments, department of decisions, economic analyses and research department, information management department, external relations, training and competition advocacy department, strategy development, regulation and budget department, and cartel on-the-spot inspections support division. There is a 'sectoral' job definition of each supervision and enforcement department.

Scope of legislation

2 | What kinds of mergers are caught?

The Amendment Law amends article 7 of Law No. 4054 and introduces the significant impediment of effective competition (SIEC) test, similar to the approach under the EC Merger Regulation. Under this amendment, the Authority may prohibit transactions that could significantly impede competition along with those that may create a dominant position or strengthen an existing dominant position in the market. Communiqué No. 2010/4 defines the scope of the notifiable transactions in article 5 as follows:

- a merger of two or more undertakings; or
- acquisition of or direct or 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 the purchase of assets or a part or all of its shares, an agreement, or other instruments.

Pursuant to article 6 of Communiqué No. 2010/4, the following transactions do not fall within the scope of article 7 of the Competition Law and therefore will not be subject to the approval of the Board:

- intra-group transactions and other transactions that do not lead to change in control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with those securities for their own account or for the account of others, provided that the voting rights attached to such securities are not exercised in a way that affects the competition policies of the undertaking issuing the securities;
- acquisitions by public institutions or organisations further to the order of law, for reasons such as liquidation, winding up, insolvency, cessation of payments, concordat or for privatisation purposes; and
- acquisition by inheritance as provided for in article 5 of Communiqué No. 2010/4.

In addition to the above, the Competition Authority has also introduced Communiqué No. 2017/2 Amending Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board. One of the amendments introduced to Communiqué No. 2010/4 is that article 1 of Communiqué No. 2017/2 abolished article 7(2) of Communiqué No. 2010/4 propounding that 'The thresholds . . . are re-determined by the Board biannually'. Through the mentioned amendment, the Board no longer bears the duty to re-establish turnover thresholds for concentrations every two years. To that end, there is no specific timeline for the review of the jurisdictional turnover thresholds set forth by article 7(1) of Communiqué No. 2010/4. In addition, article 2 of Communiqué No. 2017/2 modified article 8(5) of Communiqué No. 2010/4. Together with this amendment, the Board would now be in a position to evaluate the transactions realised by the same undertaking concerned in the same relevant product market within three years as a single transaction, as well as two transactions carried out between the same persons or parties within a three-year period. Lastly, article 3 of Communique No. 2017/2 introduced a new paragraph to be included to article 10 of Communique No. 2010/4. This newly introduced provision by article 3 of Communique No. 2017/2 is similar to article 7(2) of the European Commission Merger

Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, the case law of the Board shed some light on this matter.

3 What types of joint ventures are caught?

According to article 5(3) of Communiqué No. 2010/4, joint ventures are also subject to notification to, and approval of, the Board. The provision of article 5(3) stipulates that joint ventures that permanently meet all functions of an independent economic entity (ie, full function) are deemed notifiable. Article 13/III of Communiqué No. 2010/4 provides that the Board would carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit on a lasting basis, but have as their object or effect, the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form also allows for such a review.

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

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

> *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 No. 2010/4, control shall be deemed acquired by persons or undertakings that 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 those agreements, have de facto power to exercise these rights.

In short, much like the EU regime, under the Competition Law, mergers and acquisitions resulting in a change of control are subject to the approval of the 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. Therefore, minority and other interests that do not lead to a change of control do not trigger the filing requirement. However, if minority interests acquired are granted certain veto rights that may influence management of the company (eg, privileged shares conferring management powers), then the nature of control could be deemed as changed (such as a change from sole to joint control) and the transaction could be subject to filing.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Communiqué No. 2012/3 on the Amendment of Communique No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board (Communiqué No. 2012/3), amends the turnover thresholds that a given merger or acquisition must exceed before becoming subject to notification for the purposes of the Turkish merger control regime. After the enactment of the amendments, the new thresholds are as follows:

- article 7(a) of the Communique No. 2010/4**:** the aggregate Turkish turnovers of the transacting parties exceeding 100 million liras and the Turkish turnovers of at least two of the transacting parties each exceeding 30 million liras;
- article 7(b)(i) of the Communique No. 2010/4**:** the Turkish turnover of the transferred assets or businesses in acquisitions exceeding 30 million liras; or
- article 7(b)(ii) of the Communique No. 2010/4**:** the Turkish turnover of any of the merging parties exceeding 30 million liras and the worldwide turnover of at least one of the other parties to the transaction exceeding 500 million liras.

As seen above, the tests provided under article 7(b) are two separate tests; article 7(b)(i) is applicable only in cases of acquisition transactions (as well as joint ventures) while article 7(b)(ii) is applicable only in cases of merger transactions.

Where the transaction does not meet the thresholds set out above, the transaction would not be deemed notifiable. Furthermore, Communiqué No. 2010/4 does not seek the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Once the thresholds are exceeded, there is no exception for filing a notification cited in the Competition Law or its secondary legislation. There is no de minimis exception or other exceptions under the Turkish merger control regime, except for a certain type of merger in the banking sector.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus 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. Sales into Turkey may trigger the notification requirement to the extent the thresholds are met. 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.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Article 9 of Communiqué No. 2010/4, along with the general items to be taken into account in calculating the total turnover of the parties to the transaction, sets forth specific methods of turnover calculation for financial institutions. Those special methods of calculation apply to banks, financial leasing companies, factoring companies and insurance companies, etc.

Banking Law No. 5411 provides that the provisions of articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectoral share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. The competition legislation provides no special regulation applicable to foreign investments.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Deadlines for filing

The Competition Law provides no specific deadline for filing but based on ELIG Gürkaynak Attorneys-at-Law's experience in over 300 merger control filings so far, in light of the 30-calendar-day review period, it is advisable to file the transaction at least 40 to 45 calendar days before closing. Owing to this 30-day review period, Communiqué No. 2010/4 has introduced a much more complex notification form to be used in merger filings, therefore the time frame required for preparation of a notification form will be longer than the duration of preparation under the old regime. It is important that the transaction is not closed prior to the approval of the Turkish Competition Board (the Board).

Penalties for not filing

If the parties to a merger or acquisition that requires the approval of the Board realise the transaction without obtaining the approval of the Board, a 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 financial year nearest to the date of the fining decision will be taken into account) shall be imposed on the incumbent undertakings (acquirers in the case of an acquisition; both merging parties in the case of a merger), regardless of the outcome of the Board's review of the transaction. The minimum fine for 2020 is 31,903 liras and the minimum fine is revised annually through a communique published each year.

Invalidity of the transaction

Another very important sanction, which is more of a legal character than economic, is set out under article 7 of the Turkish Competition Law and article 10 of Communiqué No. 2010/4: a notifiable merger or acquisition that is not notified to and approved by the Board shall be deemed as legally invalid with all its legal consequences.

Termination of infringement and interim measures

The Amendment Law – article 9(1) of the Competition Law – now states that, should the Board find any infringement of article 7, it shall order the parties concerned, by a resolution, of the suitable behaviour that should be followed or avoided to establish competition and of structural remedies, such as the transfer of certain activities, shareholdings or assets. However, the relevant amendment introduces a 'first behavioural, then structural remedy' rule for article 7 violations; therefore, where the behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings must comply with the structural remedies ordered by the Board in a minimum of six months.

Termination of the transaction and turnover-based monetary fines

If, at the end of its review of a notifiable transaction that was not notified, the Board decides that the transaction falls within the prohibition of article 7 (in other words, the transaction creates or strengthens a dominant position and causes a significant decrease in competition), the undertakings shall be subject to fines of up to 10 per cent of their turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Managers or employees of parties that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the respective party. In determining the monetary fines on the parties, the Board shall take into consideration repetition of the infringement, its duration, the market power of the undertakings, their decisive influence in the realisation of the infringement, whether they comply with the commitments given, whether they assisted the examination, and the severity of the damage that occurred or is likely to occur.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the transaction, remove all de facto legal consequences of every action that has been unlawfully taken, return all shares and assets if possible to the entities that owned these shares or assets before the transaction or, if such measure is not possible, assign these to third parties, and meanwhile forbid participation in control of these undertakings until this assignment takes place and to take all other necessary measures in this regard.

Failure to notify correctly

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 Board's subsequent request for further data. In addition, the Competition Authority will 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 financial year nearest to the date of the fining decision will be taken into account) on natural persons or legal entities that 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, negative clearance or the approval of a merger or acquisition, or in connection with notifications and applications concerning agreements made before the Competition Law entered into force.

10 Which parties are responsible for filing and are filing fees required?

In principle, under the merger control regime, a filing can be made by either one of the parties to the transaction, or jointly. In case of filing by one of the parties, the filing party should notify the other party of the fact of filing.

There is no filing fee required under Turkish merger control proceedings.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Board, upon its preliminary review (Phase I) 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 days of a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval', through an implied approval mechanism introduced with 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 their opinion concerning the substance of a notification, and it is more sensitive about the 30-day deadline on announcement. Moreover, any written request by the Board for missing information will restart the 30-day period.

If a notification leads to an investigation (Phase II), it changes into a fully fledged investigation. Under Turkish law, the investigation takes about six months. If deemed necessary, this period may be extended only once, for an additional period of up to six months, by the Board.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If a merger or acquisition is closed before clearance, the substantive test is the main important issue for determination of the consequences. If the Board reaches the conclusion that the transaction creates or strengthens a dominant position or significantly impedes effective competition in any relevant product market the undertakings concerned as well as their employees and directors will be subject to monetary fines and sanctions. In any case, a notifiable merger or acquisition not notified to and approved by the Board shall be deemed as legally invalid with all its legal consequences.

The wording of article 16 of the Competition Law envisages imposing a monetary penalty if merger or acquisition transactions subject to approval are realised without the approval of the Board. The monetary fine is 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 financial year nearest to the date of the fining decision will be taken into account) in Turkey. The liability for fines is on firms that are the acquirers in the case of an acquisition, and on both merging parties in the case of a merger. The minimum fine is 31,903 liras for 2020.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The foreign-to-foreign nature of the transaction does not prevent imposition of any administrative monetary fine (either for suspension requirement or for violation of article 7) in and of itself. In case of failure to notify (ie, closing before clearance), foreign-to-foreign mergers are caught under the Turkish Competition Law to the extent they affect the relevant markets within the territory of the Republic of Turkey.

As an example, in the *Simsmetal/Fairless* decision (dated 16 September 2009, No. 09-42/1057-269), where both parties were only exporters into Turkey, the Board imposed an administrative monetary fine on Simsmetal East LLC (ie, the acquirer) subsequent to first paragraph of article 16 of Law No. 4054, totalling 0.1 per cent of Simsmetal East LLC's gross revenue generated in the fiscal year 2009, because of closing the transaction before obtaining the approval of the Board. Similarly, the Board's *Longsheng* (dated 2 June 2011, No. 11-33/723-226), *Flir Systems Holding/Raymarine PLC* (17 June 2010, No. 10-44/762-246) and *CVRD Canada Inc* (8 July 2010, No. 10-49/949-332) decisions are examples whereby the Board imposed a turnover-based monetary fine based on the violation of the suspension requirement in a foreign-to-foreign transaction.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Under article 10 of Communiqué No. 2010/4, a transaction is deemed to be 'realised' (ie, closed) on the date when the change in control occurs. It remains to be seen whether 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 been rejected by the Board so far (eg, the Board's *Total SA* decision dated 20 December 2006 No. 06-92/1186-355, and *CVR Inc-Inco Limited* decision dated 1 February 2007 No. 07-11/71-23), the Board 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.

Public takeovers

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

The notification process differs for privatisation tenders. With regard to privatisation tenders, Communiqué No. 1998/4 of the Competition Board was replaced with a new communiqué entitled Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be filed with the Competition Authority in order for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2). According to Communiqué No. 2013/2, it is mandatory to file a pre-notification before the public announcement of tender and receive the opinion of the Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds 30 million liras. Further to that, the Communiqué promulgates that in order for the acquisitions to become legally valid through privatisation, which requires pre-notification to the Competition Authority, it is also mandatory to get approval from the Board. The application should be filed by all winning bidders after the tender but before the Privatisation Administration's decision on the final acquisition.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Communiqué No. 2010/4 has introduced a new and much more complex notification form, which is similar to the Form CO of the European Commission. One hard copy and one electronic copy of the merger notification form shall be submitted to the Board. The notification form itself is revised from Communiqué No. 1997/1; in parallel with the new notion that only transactions with a relevant nexus to the Turkish jurisdiction will be notified anyway, there has been an increase in the information requested, including data with respect to supply and demand structure, imports, potential competition, expected efficiencies, etc. Some additional documents such as the executed or current copies and sworn Turkish translations of some of the transaction documents, annual reports including balance sheets of the parties, and, if available, market research reports for the relevant market are also required. Bearing in mind that each subsequent request by the Board for incorrect or incomplete information will prolong the waiting period, detailed and justified answers and information to be provided in the notification form is to the advantage of the parties.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The Board, upon its preliminary review of the notification (ie, Phase I), will decide either to approve or to investigate the transaction further (ie, Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval' through an implied approval mechanism introduced with the relevant legislation. Moreover, any written request by the Board for missing information will stop the review process and restart the 30-calendar-day period at the date of provision of that information.

If a notification leads to a Phase II review, it turns into a fully fledged investigation. Under Turkish competition law, Phase II investigations take about six months. If necessary, the Board may extend this period once by up to six months.

In practice, only exceptional cases require a Phase II review, and based on our firm's experience in over 300 merger control filings so

far, most notifications obtain a decision within 40 to 45 days of the original date of notification. Neither Law No. 4054 nor Communiqué No. 2010/4 foresees a 'fast-track' procedure to speed up the clearance process. Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

18 What is the statutory timetable for clearance? Can it be speeded up?

Pursuant to article 10 of the Competition Law, if the Board, upon its preliminary review of the notification, decides to further investigate the transaction, it shall notify the parties within 30 days (from the filing) and the transaction will be suspended and additional precautionary actions deemed appropriate by the Board may be taken until the final decision is rendered. Article 13(4) of Communiqué No. 2010/4 states that if the investigation is decided to be further investigated, provisions of articles 40 to 59 of the Competition Law shall be applied to the extent they are compatible with the relevant situation. Regarding the procedure and steps of such an investigation, article 10 makes reference to sections IV (articles 40 to 55) and V (articles 56 to 59) of the Competition Law, which govern the investigation procedures and legal consequences of restriction of competition, respectively.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The substantive test is a SIEC test under the new Amendment Law (article 9(1) of the Competition Law), similar to the approach under ECMR. With this new test, the Competition Authority will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition. There is no case law or secondary legislation at the time of writing as to how the SIEC test will be applied. In terms of creating or strengthening a dominant position, article 3 of the Competition Law defines dominant position as:

> *any position enjoyed in a certain 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 indication of a dominant position in a relevant product market.

20 Is there a special substantive test for joint ventures?

The Turkish Competition Board (the Board) evaluates joint-venture notifications according to two criteria: existence of joint control in the joint venture, and the joint venture being an independent economic entity (ie, having adequate capital, labour and an indefinite duration). In recent years, the Board has consistently applied the test of 'full-functioning' while determining whether the joint venture is an independent economic entity. If the transaction is found to bring about a full-function joint venture in view of the two criteria mentioned above, the SIEC test will be applied. Additionally, under the merger control regime, a specific section in the notification form aims to collect information to assess whether the joint venture will lead to coordination. Article 13/III of Communiqué No. 2010/4 provides that the Board will carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit on a lasting basis, but have as their object or effect the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form allows for such a review as well.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

Unilateral effects have been the predominant criteria in the Competition Authority's assessment of mergers and acquisitions in Turkey. That said, in recent years, 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 those grounds (eg, the Board's *Ladik* decision, dated 20 December 2005 No. 05-86/1188-340). 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 lessened. Regarding one such decision, when an appeal was made before the Council of State it ruled by mentioning, inter alia, 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. No transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects' yet. A few decisions discuss those theories of harm.

Although no transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects' yet, in *Toyota/Vive* decision (dated 6 April 2017, No. 17-12/143-63), 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 the Board did not focus on conglomerate effects of transactions before, though conglomerate effects have been an important issue for EC in 2017 (eg, *Qualcomm/NXP* and *Bayer/Monsanto*). The transaction concerns the acquisition of sole control over Vive BV by Toyota. 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 and substitute to each other. Accordingly, the Board asserted that foreclosing the market to competitors is realised through unilateral conducts 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 an unconditional approval to the transaction. Conglomerate effects were also analysed in scope of the *Luxottica/Essilor* decision (dated 1 October 2018, No. 18-36/585-286) where the Board examined the possible leveraging effect of Luxottica's market power in the market for sunglasses and optical frames for the market for ophthalmic lenses. At the end of its review, the Board conditionally cleared the transaction based on certain structural commitments.

Further to the Amendment Law (article 9(1) of the Competition Law), the new SIEC test allows a more reliable assessment for the unilateral and cooperation effects that might arise as a result of mergers or acquisitions as it focuses more on whether and how much the competition is impeded as a result of a transaction

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Mergers and acquisitions are assessed on the basis of competition criteria rather than public interest or industrial policies. In view of that, the Competition Authority has financial and administrative autonomy and is independent in carrying out its duties. Pursuant to article 20 of the Competition Law, no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Efficiencies that result from a concentration may play a more important role in cases where the combined market share of the parties exceeds 20 per cent for horizontal overlaps and the market share of both parties exceeds 25 per cent for vertical overlaps. In cases where the market share remains below these thresholds, the parties are at liberty to skip the relevant sections of the notification form on efficiencies. The Board may take into account efficiencies in reviewing a concentration to the extent they operate as a beneficial factor in terms of better quality production or cost savings such as reduced product development costs through the integration, reduced procurement and production costs, etc.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the Turkish Competition Board (the Board) during the investigation stage are very broad.

Article 9 of the Competition Law provides that if the Board establishes that article 4, 6 or 7 of the Competition Law is infringed, it may notify the undertaking or associations of undertakings concerned of a decision with regard to the actions to be taken or avoided so as to establish competition and maintain the situation before infringement and forward its opinion concerning how to terminate such infringement or the behavioural or structural measures. The new amendment to the Competition Law introduces 'first behavioural, then structural remedy' rule for article 7 violations

Mergers and acquisitions prohibited by the Board are not legally valid and the transaction documents are not binding and enforceable even if the 'closing' is done prior to the clearance.

Pursuant to article 13(5) of Communiqué No. 2010/4, authorisation granted by the Board concerning the merger and acquisition shall also cover the limitations that are directly related and necessary to the implementation of the transaction. The principle is that parties to the transaction should determine whether the limitations introduced by the merger or acquisition exceed this framework. Furthermore, article 13(4) and article 14(2) of Communiqué No. 2010/4 stipulate that in its authorisation decision, the Board may specify conditions and obligations aimed at ensuring that any such commitments are fulfilled.

The Board may at any time re-examine a clearance decision and decide on prohibition and application of other sanctions for a merger or acquisition if clearance was granted based on incorrect or misleading information from one of the undertakings or the obligations foreseen in the decision are not complied with. In this case, the transaction shall be re-examined by the Board, which may decide on prohibition and application of pecuniary sanctions.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Board may grant conditional approvals to mergers and acquisitions, and those transactions may be implemented provided that measures deemed appropriate by the 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 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. The parties can complete the merger before the remedies have been complied with. However, the merger gains legal validity after the remedies have been complied with.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Article 14 of Communiqué No. 2010/4 enables the parties to provide commitments to remedy substantive competition law issues of a concentration under article 7 of the Competition Law. The parties may submit to the Board proposals for possible remedies either during the preliminary review or the investigation period. If the parties decide to submit the commitment during the preliminary review period, the notification is deemed filed only on the date of the submission of the commitment. The commitment can be also served together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

Strategic thinking at the time of filing is somewhat discouraged through language confirming expressly that the review periods would start only after the filing is made. This is already the current situation in practice, but now it is explicitly stated. The Board is now expressly given the right in Communiqué No. 2010/4 to secure certain conditions and obligations to ensure the proper performance of commitments.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been several cases where the Board has accepted the remedies or commitments (such as divestments) proposed to, or imposed by, the European Commission as long as these remedies or commitments ease competition law concerns in Turkey (see, for example, *Agilent-Varian* Decision No. 10-18/212-82 of 18 February 2010, *Cookson/Foseco* Decision No. 08-25/254-83 of 20 March 2008, *Bayer/Monstanto* Decision No. 18-14/261-126 of 8 May 2018 and *Synthomer* Decision No. 20-08/90-55 of 6 February 2020).

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The conditions for successfully qualifying a restriction as an ancillary restraint are exactly the same as those applied in EU competition law. Therefore, a restriction such as a non-competition obligation should be directly related and necessary to the concentration, should

be restrictive only for the parties and proportionate. As a result, for instance, it may be said that a restriction will be viewed as ancillary as long as its nature, geographic scope, subject matter and duration is limited to what is necessary to protect the legitimate interests of the parties entering into the notified transaction. The 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 (non-compete, non-solicitation, confidentiality, etc). This will allow the parties to engage in self-assessment, and the Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. If the ancillary restrictions are not compliant, the parties may face article 4, 5 and 6 examinations.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Pursuant to article 15 of Communiqué No. 2010/4, the Turkish Competition Board (the Board) may request information from third parties including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. According to article 11(2) of Communiqué No. 2010/4, if the Competition Authority is required by legislation to ask for another public authority's opinion, this would cut the review period and restart it anew from day one.

Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition may participate in a hearing held by the Board during the investigation, provided that they prove their legitimate interest.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Communiqué No. 2010/4 introduced a mechanism in which the Competition Authority publishes the notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity. Therefore, once notified to the Competition Authority, the existence of a transaction is no longer a confidential matter.

If the Board decides to have a hearing during the investigation, hearings at the Competition Authority are, in principle, open to the public. The Board may, on the grounds of protection of public morality or trade secrets, decide that the hearing shall be held in camera.

The main legislation that regulates the protection of commercial information is article 25(4) of the Competition Law and Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No. 2010/3), which was enacted in April 2010. Communiqué No. 2010/3 puts the burden of identifying and justifying information or documents as commercial secrets to the undertakings. Therefore, undertakings must request confidentiality from the Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. This request must be made in writing. While the Board can also ex officio evaluate the information or documents, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential.

Lastly, the final decisions of the Board are published on the website of the Competition Authority after confidential business information is taken out.

Under article 15(2) of Communiqué 2010/3, the Competition Authority may not take into account confidentiality requests related to information and documents that are indispensable to be used as evidence for proving the infringement of competition. In such cases, the Competition Authority can disclose such information and documents that could be considered as trade secrets, by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Article 43 of Decision No. 1/95 of the EC Turkey Association Council (Decision No. 1/95) authorises the Competition Authority to notify and request the European Commission (Competition Directorate-General) to apply relevant measures if the Board believes that transactions realised in the territory of the European Union adversely affect competition in Turkey. Such provision grants reciprocal rights and obligations to the parties (EU-Turkey), and thus the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

The Commission has been reluctant to share any evidence or arguments with the Competition Authority, in the few cases where the Competition Authority has explicitly asked for them.

Apart from that, the Competition Authority has international cooperation with several antitrust authorities in other jurisdictions. Additionally, the Competition Authority develops training programmes for cooperation purposes. In recent years, programmes have been organised for the board members of the Pakistani Competition Authority, top managers of the National Agency of the Kyrgyz Republic for Anti-Monopoly Policy and Development of Competition, members of the Mongolian Agency for Fair Competition and Consumer Protection, and board members of the Turkish Republic of Northern Cyprus's Competition Authority. Similar programmes have also been developed in cooperation with the Azerbaijan State Service for Antimonopoly Policy and Consumers' Rights Protection, the State Committee of the Republic of Uzbekistan on De-monopolisation and the Ukrainian Anti-Monopoly Committee. These programmes were held according to the bilateral cooperation agreements.

The Competition Authority has also organised the Istanbul Competition Forum in collaboration with UNCTAD (the United Nations Conference on Trade and Development) since 2019 to discuss debate a wide range of key and emerging competition law issues.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

As per Law No. 6352, which took effect on 5 July 2012, the administrative sanction decisions of the Turkish Competition Board (the Board) can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Board. Decisions of the Board are considered as administrative acts, and thus legal actions against them shall be taken in accordance with the Administrative Procedural Law. As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution if the execution of the decision is likely to cause irreparable damages and the decision is highly likely to be against the law.

A significant development in competition law enforcement was the change in the competent body for appeals against the Board's decisions. The new legislation has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will go through the case file both on procedural and substantive grounds and investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The time frame for appeal to the Council of State against final decisions of the Board is 60 days starting from the receipt of the reasoned decision. The judicial review period before the Administrative Court usually takes about eight to 12 months. After exhausting the litigation process before the Administrative Courts of Ankara, the final step for the judicial review is to initiate an appeal against the Administrative Court's decision before the regional courts. The appeal request for the administrative courts' decisions will be submitted to the regional courts within 30 calendar days of the official service of the justified (reasoned) decision of the administrative court.

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the annual Mergers and Acquisitions Status Report for 2018, the Turkish Competition Board (the Board) reviewed 223 transactions in total, including 204 merger and acquisitions, 13 privatisations and four cases beyond the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system owing to lack of change in control) and two information notes.

With regard to 2019, pursuant to the Merger and Acquisition Status Report of the Competition Authority (for the year of 2019), the Board reviewed a total of 208 transactions; these transactions included 204 merger and acquisition transactions and one privatisation, three cases beyond the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system owing to lack of change in control) and two information notes. Among these transactions, two concentrations were taken into Phase II review in 2019, whereas three transactions were granted clearance after the submission of remedies.

In 2019, 115 transactions notified to the Board were foreign-to-foreign transactions, which constitute more than half of the concentrations notified in 2019.

Generally, the Competition Authority pays special attention to those transactions in sectors where infringements of competition are frequently observed and the concentration level is high.

The Competition Authority handles transactions and possible concentrations in the Turkish cement and aviation sectors with special scrutiny. There are a number of ongoing investigations in this sector. It would also be accurate to report that the Competition Authority has a special sensitivity to markets for construction materials. In addition to cement, markets for construction iron, aerated concrete blocks and ready-mixed blocks were investigated and the offenders were fined by the Competition Authority.

To the extent that these decisions were also supported by worries over high levels of concentration, it would be prudent to anticipate that the Competition Authority will scrutinise notifications of transactions leading to a concentration in any one of the markets for construction materials.

Additionally, the Competition Authority published a sector inquiry in 2018 for the hazelnut sector and in 2019 for the fair organisation/hosting sector.

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Reform proposals

35 | Are there current proposals to change the legislation?

The newly introduced Amendment Law (article 9(1) of the Competition Law) aims to embody the Competition Authority's more than 20 years of enforcement experience and bring Turkish competition law closer to EU competition law. It is designed to be more compatible with how the law is being applied in practice and aims to further comply with EU competition law. The most prominent changes introduced by the Amendment Law are:

- the de minimis principle for agreements, concerted practices or decisions of association of undertakings;
- the SIEC test for mergers and acquisitions;
- behavioural and structural remedies for anticompetitive conduct;
- commitments or settlement mechanisms;
- clarification on the powers of the authority in on-site inspections; and
- clarification on the self-assessment procedure in individual exemption mechanism.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2019, major merger control decisions concerning high-value transactions were taken by the Competition Authority.

A notable transaction concluded in 2019 was the Turkish Competition Board (the Board)'s *Nidec/Embraco* decision regarding the transaction concerning the acquisition of sole control of Embraco, the

compressor manufacturing business of Whirlpool Corporation, by Nidec Corporation (18 April 2019, 19-16/231-103). As a result of the Phase I review, the Board took the transaction into Phase II review owing to the potential competition law concerns arising from the transaction. Notwithstanding the foregoing, the transaction was approved pursuant to the commitment package submitted to the EU Commission about the divestment of Nidec's own light commercial compressor and household compressor businesses as the Board concluded that the relevant commitments eliminate the horizontal and vertical overlaps in Turkey regarding the sales of household-type reciprocating hermetic cooling compressors, reciprocating hermetic light commercial cooling compressors and sales of condenser units.

Also, the Board conditionally approved the transaction regarding the acquisition of sole control by Harris Corporation over L3 Technologies, Inc (20 June 2019, 19-22/327-145) upon a Phase I review. The Board held that the commitments completely eliminated the overlap between the parties and thus, the transaction did not result in the creation or strengthening of a dominant position and did not significantly impede competition. In line with the commitments submitted to the Commission, Harris submitted that it would divest its businesses for night vision devices and image intensifier tube Technologies used in these devices to eliminate the vertical overlap.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Turkey	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	No filing deadline. Final and executed version of the transaction document requested. No closing before approval.
Clearance deadlines (Stage 1/Stage 2)	Thirty days following a 'complete' notification. Waiting period of six months with the possibility of a further six months' extension in the case of a Phase II investigation.
Substantive test for clearance	Dominance test: creation of a dominant position or strengthening of an existing dominant position as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country.
Penalties	Realisation of a notifiable transaction without the approval of the Competition Board: 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 financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2020 is 31,903 liras. Liability for fines is on the acquiring firm in the case of an acquisition or on both merging parties in the case of a merger. Moreover, a notifiable transaction, not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences. If the Board concludes that a non-notified notifiable transaction would have been prohibited had it been notified, fines of up to 10 per cent of turnover generated in the financial year preceding the date of the fining decision will be incurred (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Managers or employees of parties that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the respective party.

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ISBN 978-1-83862-373-9