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Merger Control

Law and Practice: Turkey

Contributed by
ELIG Gürkaynak Attorneys-at-Law

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TURKEY

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Law and Practice

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Contributed by ELIG Gürkaynak Attorneys-at-Law ***Authors:*** Gönenç Gürkaynak, K. Korhan Yıldırım

ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by partner, Mr Gönenç Gürkaynak, along with three partners, three counsel and 40 associates. In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority. ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.

Authors

Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 87 lawyers based in Istanbul. Mr Gürkaynak graduated from Ankara Unversity, Faculty of Law in 1997 and was called to the Istanbul Bar in 1998. He received his LL.M. degree from Harvard Law School, and is qualified to practice in Istanbul, New York, Brussels and England and Wales (currently a non-practising Solicitor). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005 he 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 Gürkaynak Attorneys-at-Law, and has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 60 merger clearances of the Turkish Competition Authority, in addition to co-ordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

K. Korhan Yıldırım is a partner at ELIG Gürkaynak Attorneys-at-Law. He graduated from Galatasaray University Faculty of Law in 2005 and was admitted to the Istanbul Bar in 2006. He has been working with ELIG Gürkaynak for more than 13 years and has been a partner in the competition law and regulatory department since January 2014. Mr Yıldırım has extensive experience in all areas of competition law including cartel agreements, abuse of dominance, concentrations and joint ventures. He has represented various multinational and national companies before the Turkish Competition Authority, Administrative Courts and the High State Court. He has given numerous legal opinions and trainings in relation to compliance to competition law rules. Mr Yıldırım has also authored and co-authored many articles on competition law and merger control matters, and is a frequent speaker at various conference and symposia.

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The relevant legislation on merger control is the Law on Protection of Competition No 4054 (the "Competition Law") and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (the "Communiqué No 2010/4", as amended by Communiqué No 2012/3).

Article 7 of the Competition Law governs mergers and acquisitions in particular, and mandates the Competition Board (the "Board") to regulate and establish a merger control regime. Accordingly, mergers and acquisitions are subject to the Turkish Competition Authority's (the "TCA") review and approval in order to gain validity. Further to this provision, Communiqué No 2010/4 is the primary legal instrument that establishes the Turkish merger control regime, and introduces a notification system.

Further guidelines adopted by the TCA are as follows:

- the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control ("Guideline on the Concept of Control");
- the Guideline on the Assessment of Horizontal Mergers and Acquisitions;
- the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions;
- the Guideline on Market Definition;
- the Guideline on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions ("Guideline on Undertakings Concerned"); and
- the Guideline on Remedies Acceptable in Mergers and Acquisitions ("Remedy Guideline").

1.2 Legislation Relating to Particular Sectors

No other legislation is applicable to foreign transactions or investment in Turkey, as far as the merger control rules are concerned, although there are specific merger control rules for mergers that concern banks, privatisation tenders and certain other sectors.

Banks : Banking Law No 5411 provides that mergers in the banking industry fall outside of the merger control regime (Communiqué No 2010/4), subject to the condition that the sectoral share of the total assets of the banks does not exceed 20%. The Board draws a line between transactions involving foreign acquiring banks with no operations in Turkey, to which the Competition Law applies, and foreign acquiring banks already operating in Turkey, to which the Competition Law does not apply if the conditions for the application of the Banking Law exception are fulfilled.

Privatisation tenders : Communiqué No 2013/2 prescribes an additional pre-notification process that applies to privatisations in which the turnover of the undertaking, asset or unit intended for the production of goods or services to be privatised exceeds TRY30 million (approximately EUR7.2 million or USD8.2 million). Statutory sales to public institutions and organisations, including local governments, are excluded for the purposes of this calculation. If the threshold is met, a pre-notification should be filed with the TCA before the public announcement of the tender specifications. The Board will issue an opinion that will serve as the basis for the preparation of the tender specifications. This opinion does not mean that the transaction is to be cleared. Following the tender, the winning bidder will still have to make a merger filing and obtain clearance before the Privatisation Administration's decision on the final acquisition.

Finally, there are various sector-specific rules alongside the merger control rules for sectors such as media, telecommunications, energy and petrochemicals. For example, in the energy sector, approval from the relevant authority is required for share transfers of more than 10% (5% in the case of publicly traded company shares) in an electricity or natural gas company, and in the broadcasting sector, Law No 6112 states that a transfer of shares of a joint stock company holding a broadcasting licence should be notified to the Turkish Radio and Television Supreme Council.

1.3 Enforcement Authorities

The relevant legislation is enforced by the TCA, a legal entity with administrative and financial autonomy, which consists of the Board, the Presidency and service departments. The Board is the competent decision-making body of the TCA and is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Board consists of seven members and is located in Ankara.

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

Other authorities may get involved in the review of mergers in certain sectors. For example, the TCA is statutorily required to get the opinion of the Turkish Information Technologies Authority for mergers that concern the telecommunication sector, and of the Turkish Energy Markets Regulatory Authority in energy mergers.

2. Jurisdiction

2.1 Notification

Notification is compulsory if the following applicable turnover thresholds are exceeded:

- the aggregate Turkish turnover of the transaction parties exceeds TRY100 million (approximately EUR24.3 million or USD27.4 million) and the Turkish turnover of at least two of the transaction parties each exceeds TRY30 million (approximately EUR7.2 million or USD8.2 million); or
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeds TRY30 million (approximately EUR7.2 million or USD8.2 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY500 million (approximately EUR121.6 million or USD137.3 million); or
- the Turkish turnover of any of the parties in mergers exceeds TRY30 million (approximately EUR7.2 million or USD8.2 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY500

million (approximately EUR121.6 million or USD137.3 million).

The Board reviews the above-mentioned thresholds every two years. The next deadline for the Board to confirm or revise the thresholds is the beginning of the year 2019.

Once the above-mentioned thresholds are exceeded, the parties are obliged to notify the transaction. There is no de minimis exception or other exceptions under the Turkish merger control regime, except for certain mergers in the banking sector, as described above.

The following transactions are not subject to the approval of the Board:

- intra-group transactions and other transactions that do not lead to a change of control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with such 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 target company;
- statutory and compulsory acquisitions by public institutions or organisations, for reasons such as liquidation, winding-up, insolvency, cessation of payments, concordat or privatisation; and
- acquisition by inheritance.

2.2 Failure to Notify

Monetary Fines For Failure to Notify

The Competition Law introduces penalties for failing to notify, or for closing the transaction before clearance. Where the parties to a merger or acquisition that requires the Board's approval close the transaction without or before obtaining the Board's approval, the Board imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision on the relevant undertaking(s); in acquisitions, the fine is levied on the acquirer, whereas in mergers it is levied on all merging parties. This monetary fine does not depend on whether or not the TCA ultimately clears the transaction. The minimum amount of this fine is set at TRY21,036 (approximately EUR5,118 and USD5,779) for 2018, and is revised each year.

If the parties close a transaction that violates Article 7 (ie, a transaction that creates or strengthens a dominant position, thereby significantly reducing competition in a relevant market), the Board will impose a turnover-based monetary fine of up to 10% of the parties' turnovers generated in the financial year preceding the date of the fining decision. Employees and managers that had a determining effect on the creation of the violation may also be fined up to 5% of the fine imposed on the undertakings.

Invalidity of the Transaction

If the parties close a notifiable merger or acquisition without or before the approval of the Board, the transaction will be deemed legally invalid with all attendant legal consequences in Turkey, pending clearance.

Termination of Infringement and Interim Measures

If the Board finds that the transaction violates Article 7 (ie, creates or strengthens a dominant position and significantly reduces competition in a relevant market), it instructs the parties to take the necessary actions in order to restore the status that existed before the closure of the transaction, and thereby restore the pre-transaction level of competition. If there is a possibility of serious and irreparable damages occurring, the Board is authorised to take interim measures until the final resolution on the matter.

There have been many cases where companies have been fined for failing to file a notifiable transaction (Tekno İnşaat, 12-08/224-55, 23.02.2012; Zhejiang/Kiri, 11-33/723-226, 02.06.2011; Ajans Press Medya Takip A.Ş.-İnterpress Medya Hizmetleri Ticaret A.Ş./Mustafa Emrah Fandaklı/ Ziya Açıkça, 10-66/1402-523, 21.10.2010, etc). In a very few of these cases, the notifiable transaction also raised substantive competition law concerns as it was viewed as being problematic under the dominance test applicable in Turkey (Ro-Ro, 05-69/959-260, 19.10.2005 – the seller incurred a fine of 5% of its annual Turkish turnover. The buyer was the complaining party, therefore benefiting from a lenient treatment).

The penalties are made public as they are announced via the Board's reasoned decisions, which are published on the TCA's official website.

2.3 Types of Transactions

Notifiable transactions are as follows:

- a merger of two or more undertakings;
- the acquisition of direct/indirect control on a lasting basis 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; and
- the formation of a full-function joint venture.

These transactions are caught if they exceed the applicable thresholds (see **2.1 Notification**).

Please see **2.1 Notification** for the transactions that are not subject to the approval of the Board. Operations that do not involve the transfer of shares or assets can be caught if they result in a change of control and the parties' turnovers surpass the applicable thresholds.

2.4 Definition of 'Control'

Communiqué No 2010/4 provides the definition of 'control', and that definition is akin to the definition in article 3 of Council Regulation No. 139/2004.

According to Article 5(2) of the Communiqué No 2010/4, control can be constituted by rights, agreements or any other means that – either separately or jointly, de facto or de jure – confer the possibility of exercising a decisive influence on an undertaking, particularly by ownership or the right to use all or part of the assets of an undertaking, or by rights or agreements that confer a decisive influence on the composition or decisions of the organs of an undertaking.

According to Article 5(2) of Communiqué No 2010/4, acquisition of control on a de facto basis amounts to a change of control.

Acquisitions of minority or other interests that do not lead to a change of control on a lasting basis are not subject to notification to the TCA. However, in the event that acquired minority interests are granted certain veto rights that may influence the strategic management of the company (eg, privileged shares conferring management powers), then the nature of control could be deemed as changed (from sole to joint control) and the transaction could be subject to filing.

2.5 Jurisdictional Thresholds

Please see **2.1 Notification** for the jurisdictional thresholds.

The Turkish merger control regime does not introduce any sector-specific thresholds, so the thresholds apply to all sectors. However, there are certain special turnover calculation methods for certain sectors, such as banks, financial institutions, leasing companies, factoring companies, securities agents, insurance companies, etc (see **2.6 Calculations of Jurisdictional Thresholds**). There are also specific merger control provisions for banks, privatisation tenders and certain other sectors (see **2.3 Types of Transactions**).

2.6 Calculations of Jurisdictional Thresholds

Communiqué No 2010/4 sets out detailed rules for turnover calculation. The calculation methods can be summarised as follows:

- the turnover of the entire economic group will be taken into account, including that of the undertakings controlling the undertaking concerned and that of all undertakings controlled by the undertaking concerned;
- when calculating turnover in an acquisition transaction, only the turnover of the acquired part will be taken into account with respect to the seller;
- the turnover of jointly controlled undertakings (including joint ventures) will be divided equally by the number of controlling undertakings; and
- two or more transactions carried out by the same parties within a two-year period will be considered as one transaction for the purpose of turnover calculation.

However, as mentioned in **2.5 Jurisdictional Thresholds**, there are certain special turnover calculation methods for entities such as banks, financial institutions, leasing companies, factoring companies, securities agents, insurance companies, etc.

Regarding financial institutions, the turnover considered in the special turnover calculation method consists of the sum of the following:

- for banks and participation banks – as included within the income statement requested under the Communiqué Concerning the Financial Tables to be Disclosed to the Public by Banks, and Related Explanations and Footnotes (Banking Regulatory and Supervisory Agency, 10/2/2007, 26430): interest and profit sharing income, collected fees and commissions, dividend income, commercial profits/losses (net), and other operational income;
- for financial leasing, factoring and funding companies – as included within the income statement requested under the Communiqué Concerning the Uniform Accounting Plan to be Implemented by Financial Leasing, Factoring and Funding Companies and the Explanation Note Thereof, and Concerning the Format and Content of the Financial Tables to be Disclosed to the Public (the Banking Regulatory and Supervisory Agency, 17/5/2007, 26525): real operating income and other operating income,
- for intermediary institutions and portfolio management companies – as included within the detailed income statement requested under the Communiqué Concerning the Principles on Financial Reporting within the Capital Market (the Banking Regulatory and Supervisory Agency, 9/4/2008, 26842): sales income, interests, fees, premiums, commissions and other income, other operating income, shares in the profits/losses of the investments valued via the equity method, and financial income other than operating income;
- for insurance, reassurance and pension companies – in accordance with the last financial statements or data either published by the Undersecretariat of the Treasury, the Association of Insurance and Reinsurance Companies of Turkey or the Pension Monitoring Centre, or disclosed to the public by the companies related to the merger or acquisition, to be confirmed by the Undersecretariat of Treasury: domestic direct premium production for insurance companies (gross), domestic direct premium production for reassurance companies (gross), the total amount of contributions and the total amount of funds in pension companies, as well as domestic direct premium production (gross) for those pension companies that also operate in life insurance; and

- for other financial institutions: interest and similar income, income generated from securities, commissions, net profit generated from financial activities, and other operation income.

Sales and assets that are booked in a foreign currency should be converted into Turkish lira by using the average exchange buying rate of the Central Bank of Turkey for the financial year in which the sales or assets are generated.

Turnover-based thresholds are used in the Turkish merger control regime; therefore, the regime does not deal with asset-based thresholds.

2.7 Relevant Businesses/Corporate Entities for the Purpose of Calculation

See **2.6 Calculations of Jurisdictional Thresholds**.

The seller's turnover is only included in exceptional situations. It is included in joint-venture transactions if the seller remains a controlling party of the joint-ventures post-transaction (ie, both the seller and the buyer would be considered as buyers in cases where the buyer and the seller form a joint venture).

During the reference period, the Board will only consider the changes if they are reflected in the relevant balance sheets of the businesses in question.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the turnover thresholds are triggered. The Competition Law defines the 'effects' criteria', and states that the criterion to apply is whether or not the undertakings concerned affect the goods and services markets in Turkey. Even if the relevant undertakings do not have local subsidiaries, branches, sales outlets, etc, in Turkey, the transaction can still be subject to merger control if the relevant undertakings have sales in Turkey and thus have effects on the relevant Turkish market.

In 2017, 83 of a total of 168 notified transactions were foreign-to-foreign transactions.

The likelihood of the Board discovering a transaction is relatively high, as it closely follows mergers and acquisitions in the local and international press, and also the case practice of the European Commission and other important competition authorities. It may also examine the notifiability of past transactions in the context of a new notification. In its 2014 Activity Report, the Authority announced that it will step up these efforts further.

If a target has no sales and/or assets in Turkey, the transaction would not, in principle, trigger the thresholds set forth by Communiqué No. 2010/4, since Communiqué No 2010/4 requires the Turkish turnover of the transferred assets or businesses in acquisitions to exceed TRY30 million in order for the transaction to be notifiable. However, the transaction could trigger a mandatory merger control filing requirement if it concerns the formation of a joint venture that will not be active in Turkey in the foreseeable future, to the extent the parents trigger the applicable thresholds. The Board has found that some exceptional foreign-to-foreign transactions (eg, Sorgenia/KKR, 14.07.2011, 11-43/919-288) are outside the scope of the Turkish merger control regime, pursuant to Article 2 of the Competition Law.

However, there are some cases where the Board has cleared decisions regarding joint ventures that do not involve sales in Turkey and considered them notifiable. For example, in Lur Berri/LBOF/Financiére de Kiel (12.12.2011, 11-61/1580-565), the Board decided that the joint venture transaction was notifiable, and cleared the transaction. The Board recognised that the conclusion on jurisdiction rested on the fact that the joint venture's products (festive food) "could be" imported into Turkey, so the transaction "could" potentially produce an impact on the Turkish market.

The Board also found a Greenfield healthcare joint venture in Kuwait to be notifiable (Eksim-Rönesans/Acıbadem, 16.05.2012, 12-26/759-213), concluding that the Turkish market could be indirectly affected even though the joint venture would be established and in operation outside of Turkey. The Board also stated that the parties forming the joint venture have companies that are active in Turkey, and the increase of their market power through the turnover generated from the joint venture in Kuwait would indirectly increase their power in Turkey. Therefore, the Board concluded that the transaction would indirectly affect the Turkish market and thus decided that the transaction was notifiable. This approach of the Board indicates that it is inclined to disregard "the ability to import products into Turkey" and consider a joint venture transaction that will not have any effect in the near future in Turkey to be within the scope of Article 7 of the Competition Law.

The Board's other decisions (Galenica Ltd./Fresenius Medical Care AG&Co. KGaA, 24.11.2011, 11-59/1515-540; The Blackstone Group, 17.11.2011, 11-57/1468-525; Ocean, 17.08.2011, 11-45/1106-382; Angola LNG Limited, 25.04.2012, 12-22/564-162) clearly imply that it does not matter that the joint venture is not/will not be active in Turkey and will not have any effects on Turkish markets in the near future.

2.9 Market Share Jurisdictional Threshold

Article 7 of Communiqué No 2010/4 provides turnover-based thresholds and does not seek a market-share threshold

when assessing whether or not a notification is required for a transaction.

2.10 Joint Ventures

To the extent that the joint venture is full-function, the transaction is subject to merger control once the turnover thresholds are exceeded. To qualify as full-function, there must be joint control over the joint venture, and the joint venture must be an independent economic entity established on a lasting basis.

The Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control explains the concept of full-functionality. The following elements should be considered:

- sufficient resources to operate independently;
- activities that go beyond one specific function for the parents;
- independence from the parents in sale and purchase activities; and
- operations on a lasting basis.

The transaction is not notifiable if the parties' turnovers do not trigger the thresholds. The fact that the joint venture's products/services are or will not be offered in Turkey would not change the analysis. However, see **2.8 Foreign-to-Foreign Transactions** for the Board's approach regarding joint venture cases.

2.11 Power of Authorities to Investigate a Transaction

If a transaction raises substantive competition law concerns and is viewed as problematic under the dominance test applicable in Turkey (ie, creates or strengthens a dominant position and significantly lessens competition in a relevant market), the TCA may still investigate the transaction, even if it does not meet the jurisdictional thresholds, either upon complaint or on its own initiative. The applicable limitation period is eight years, pursuant to Article 20(3) of the Law on Misdemeanours No 5326.

2.12 Requirement for Clearance Before Closing

The Turkish competition law regime features a suspension requirement, whereby implementation of a notifiable concentration is prohibited until approval by the Turkish Competition Board (Sections 7, 10, 11 and 16 of the Competition Law. Failure to comply with the suspension requirement might trigger monetary fines and legal status risks, as explained in **2.13 Penalties for Implementation of a Transaction Before Clearance**. 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 is received, and such notifiable transaction cannot be closed in Turkey before the clearance of the Board.

2.13 Penalties for Implementation of a Transaction Before Clearance

Pursuant to Article 16 of the Competition Law, if the parties to a notifiable transaction violate the suspension requirement, a turnover-based monetary fine (based on the local turnover generated in the financial year preceding the date of the fining decision at a rate of 0.1%) will be imposed on the incumbent firms (the acquirer(s) in the case of an acquisition, or both merging parties in the case of a merger). A monetary fine imposed as a result of a violation of the suspension requirement will, in any event, be no less than TRY21,036 (approximately EUR5,118 and USD5,779). It should be noted that the wording of Article 16 of the Competition Law does not give the Board discretion on whether or not to impose a monetary fine in case of a violation of the suspension requirement – in other words, once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically.

These penalties are applied very frequently in practice. Below is a non-exhaustive list of cases where companies were fined by the Board for failing to file a notifiable transaction in Turkey:

- Tekno İnşaat (12-08/224-55, 23.02.2012);
- Zhejiang/Kiri (11-33/723-226, 02.06.2011)
- Ajans Press Medya Takip A.Ş.-İnterpress Medya Hizmetleri Ticaret A.Ş./Mustafa Emrah Fandaklı/Ziya Açıkça (10-66/1402-523, 21.10.2010);
- Batı Çim Enerji Elektirik Üretim A.Ş./Ada Enerji Mühendislik ve Kontrol sistemleri San.Tic.Ltd.Şti. (10-38/641-217, 27.05.2010);
- CVRD Canada Inc. (10-49/949-332, 08.07.2010);
- Mesa Mesken/TOBB/TOBB-ETÜ (10-56/1088-408, 26.08.2010);
- Flir Systems Holding/Raymarine PLC (10-44/762-246, 17.06.2010);
- Sarten Ambalaj/TKS Ambalaj (10-31/471-175, 15.04.2010);
- Cegedim S.A./Cegedim Bilişim Danışmanlık/Dendrite Turkey Inc./Boğaç Giritlioğlu/Sinan Reşit Çilesiz/Mehmet Kerim Kahyagil/Julide Handan Çilesiz/Ayşe İdil Giritlioğlu (10-56/1089-411, 26-08-2010); and
- Samsonite Europe NV/Desa Deri (10-27/391-144, 31.03.2010).

These penalties are published on the TCA's website.

2.14 Exceptions to the Suspensive Effect

There are no general exceptions to the suspensive effect. The Turkish merger control regime does not include a similar provision to Article 7(2) of the EC Merger Regulation. That being said, there is a specific precedent where the Board did

not find a violation of the suspension requirement, on the condition that the acquirer would not exercise voting rights in the case of a public bid (Camargo Corrêa S.A., 12-24/665-187, 03.05.2012).

Apart from this, it is not possible to seek a waiver or obtain derogation from the suspensive effect.

2.15 Circumstances Where Closing Before Clearance Is Permitted

The Board would not permit closing before the clearance decision. There is no specific regulation allowing or disallowing carve-out or hold-separate arrangements, but the Board has so far consistently rejected all carve-out or hold-separate arrangements proposed by undertakings (eg, Total SA, 20.12.2006, 06-92/1186-355; CVR Inc-Inco Limited, 01.02.2007, 07-11/71-23). The Board argued that a closing is sufficient for it to impose a suspension violation fine, and a deep analysis of whether change in control actually took effect in Turkey is unwarranted. The Board therefore considers the "carve-out" concept to be unconvincing.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no specific deadline for filing in Turkey. However, the filing should be made and approval should be obtained before the closing of the transaction.

In practice, it is recommendable to file the transaction at least 40-45 calendar days before the projected closing.

See **2.13 Penalties for Implementation of a Transaction Before Clearance** for examples where the Board imposed penalties for closing without or before the Board's approval.

3.2 Type of Agreement Required

A binding agreement is not required prior to notification: parties can file on the basis of a less formal agreement, such as a letter of intent, a memorandum of understanding or a non-binding term sheet. There are some cases where the parties merely enclosed a letter of intent and/or a memorandum of understanding (Greenwich AeroGroup/Aero Precision Industries 13-05/50-27, 17.01.2013; Evonik, 07.12.2011, 11-60/1564-555). However, Communiqué No 2010/4 does require the submission of a written document prior to notification – ie, a filing cannot be made where there is nothing in writing (eg, based on a good-faith intention to reach an agreement).

3.3 Filing Fees

No filing fees are required under the Turkish merger control regime.

3.4 Parties Responsible for Filing

Pursuant to Article 10 of Communiqué No 2010/4, a filing can be made solely by one of the parties or jointly by some or all of the parties. The filing can be submitted by the parties' authorised representatives. In the event of filing by just one of the parties, the filing party should notify the other party of the filing.

3.5 Information Required in a Filing

The notification form is similar to Form CO of the European Commission. The Board requires one hard copy and an electronic copy of the notification form to be submitted. The parties are required to provide a sworn Turkish translation of the final executed or current version of the document(s) that brings about the transaction. Additional documents are also required, such as the executed or current copies and sworn Turkish translations of the transaction documents, financial statements, including the balance sheets of the parties, and, if available, market research reports for the relevant market. The notification and transaction documents must be submitted in Turkish. A signed and notarised (and apostilled, if applicable) power of attorney is also required.

3.6 Penalties/Consequences if Notification Is Deemed Incomplete

The TCA considers a notification to be complete when it receives the notification in its complete form. The parties are obliged to file correct and complete information with the TCA. If the parties provide incomplete information to the Board, the Board would request further data regarding the missing information. The Board deems notification to be complete on the date when the submitted information is complete.

In practice, the Board sends written information requests when there is information missing. The TCA's written information requests for missing information will cut the review period and restart the 30 calendar-day period as of the date on which the responses are submitted.

3.7 Penalties/Consequences if Notifying Party Supplies Inaccurate or Misleading Information

The TCA imposes a turnover-based monetary fine of 0.1% 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 the event that incorrect or misleading information is provided by the parties. Examples of such cases include Akzo Nobel N.V., 10-24/339-123, 18.3.2010; and Omya Madencilik, 08-62/1017-393, 7.11.2008.

3.8 Phases of the Review Process

Upon its preliminary review (ie, Phase I) of the notification, the Board will decide either to approve or to investigate the transaction further (ie, Phase II).

The Board notifies the parties of the outcome within 30 calendar days following a complete filing. There is an implied approval mechanism where a tacit approval is deemed if the Board does not react within 30 calendar days upon a complete filing. However, in practice, the Board almost always reacts within the 30-day period, either by sending a written request for information or – very rarely – by rendering its decision within the original 30-day period. In addition, the TCA frequently asks formal questions and adds more time to the review process, as it is advisable to notify the filing at least 45-50 calendar days before the projected closing.

The TCA can send written requests to the parties of the transaction, to any other party related to the transaction, or to third parties such as competitors, customers or suppliers.

The TCA's written information requests for missing information will cut the review period and restart the 30-day period as of the date on which the responses are submitted.

If a notification leads to an investigation (Phase II), it turns into a full-fledged investigation, which, under Turkish law, 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.

3.9 Parties Engaging in Pre-Notification Discussions with the Authorities

The Turkish merger control rules do not have a pre-notification mechanism. Also, in practice, a filing is seen as a one-sided review by the TCA, once a formal one-shot notification is made. As explained in **3.6 Penalties/Consequences if Notification is Deemed Incomplete** and **3.8 Phases of the Review Process**, the TCA may issue various information requests, but it will only do so after the notification is made.

3.10 Requests for Information During the Review Process

It is common practice for the TCA to send written requests to the parties of the transaction, to any other party related to the transaction, or to third parties such as competitors, customers or suppliers.

The TCA's written information requests for missing information will cut the review period and restart the 30-day period as of the date on which the responses are submitted.

3.11 Accelerated Procedure

There is a short-form notification (without a fast-track procedure) on the condition that one of the transaction parties will be acquiring sole control of an undertaking over which it has joint control, or that the total of the parties' respective market shares is less than 20% in horizontally affected markets and each party's market share is less than 25% in vertically affected markets. Turkish merger control rules do not introduce other ways to speed up the procedure.

The Competition Law and Communiqué No 2010/4 do not include a 'fast-track' procedure to speed up the clearance process. Apart from close follow-up with the case-handlers reviewing the transaction, the parties have no other possible way to speed up the review process.

4. Substance of the Review

4.1 Substantive Test

The relevant substantive test in the Turkish merger control regime is a typical dominance test. Pursuant to Article 7 of the Competition Law and Article 13 of Communiqué No 2010/4, the Board clear mergers and acquisitions that do not create or strengthen a dominant position, and that do not significantly impede effective competition in a relevant product market within the whole or part of Turkey.

Article 3 of the Competition Law defines a 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".

However, the substantive test is a two-prong test and the Board only blocks a merger or acquisition when the concentration not only creates or strengthens a dominant position but also significantly impedes competition in the whole territory of Turkey or in a substantial part of it.

4.2 Markets Affected by a Transaction

Pursuant to Communiqué No 2010/4, the relevant product markets are those that might be affected by the notified transaction where two or more of the parties are commercially active in the same product market (horizontal relationship), or where at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates (vertical relationship). There is no de minimis or other exception under the Turkish merger control regime, except for certain mergers in the banking sector, as described above.

4.3 Reliance on Case Law

The TCA closely follows the European Commission decisions as well as the CJEU's precedents, and regularly incorporates them into its decisions. See, for instance, decisions where the Board explicitly referred to the Commission's

findings regarding competition issues – ie, L'Oréal SA v The Body Shop International Plc., 06-41/515-136, 07.06.2006; Vateks Tekstil Sanayi ve Ticaret A.Ş.v PGI Nonwovens B.V., 99-12/94-36, 03.03.1999; Royal Packaging Industries N.V. v Eskinazi Ailesi, 99-21/170-89, 28.04.1999; IBM Danmark A/S v Maersk Data A/S, 04-69/983-239, 27.10.2004; Flir Systems Holding AB v Raymarine PLC, 10-44/762-246, 17.06.2010; and Efes Pazarlama ve Dağıtım Ticaret A.Ş., 05-48/696-184, 21.07.2005. In its decisions, the Board has also referred to the US Federal Trade Commission decisions (see International Dialysis Centers B.V. v Others, 09-33/744-180, 15.07.2009 or Google International LLC, 16-39/638-284, 16.11.2016), as well as the French and German competition authorities' precedents (BSH Ev Aletleri Sanayi ve Ticaret A.Ş, 17-27/454-195, 22.08.2017; BSH Ev Aletleri Sanayi ve Ticaret A.Ş, 17-27/454-195, 22.08.2017; Booking.com B.V., 17-01/12-4, 05.01.2017; and Condor Flugdienst GmbH, 11-54/1431-507, 27.10.2011).

4.4 Competition Concerns

The TCA primarily focuses on unilateral effects, and may also consider co-ordinated effects (Ladik, 20.12.2005, 05-86/1188-340). However, the TCA has not yet prohibited a transaction on the grounds of 'vertical foreclosure' or 'conglomerate effects'.

4.5 Economic Efficiencies

The Board considers economic efficiencies to the extent that 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.

Efficiencies that result from a concentration may play a more important role in cases where the combined market shares of the parties exceed 20% for horizontal overlaps, and where the market share of both parties exceeds 25% for vertical overlaps. In cases where the market shares remain below these thresholds, the parties are at liberty to skip the relevant sections of the notification form on efficiencies.

4.6 Non-competition Issues

The TCA does not take non-competition issues such as industrial policies, national security, foreign investment, employment or other public interest issues into account when assessing a merger. Therefore, the TCA is independent while carrying out its duties. Article 20 of the Competition Law implies that no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

4.7 Special Consideration for Joint Ventures

Special consideration is given to joint ventures under the Turkish merger control regime. A joint venture must not have the object or effect of restricting competition between the parties and itself. Article 5 of the Competition Law defines that the parties may notify the joint venture to the Board (which is not full-function) for individual exemption. Communiqué No 2010/4 provides individual exemption for full-function joint ventures if the joint venture has the object or effect of restricting competition between the parties and the joint venture.

The standard dominance test applies to the joint venture on the condition that the joint venture is full-function. In addition, under the merger control regime, the notification form includes a certain section that is aimed at collecting information to assess whether the joint venture will lead to co-ordination. 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.

Non-full-function joint ventures are not subject to merger control but may fall under Article 4 of the Competition Law, which prohibits restrictive agreements. The parties may conduct a self-assessment to see if the non-full-function joint venture fulfils the conditions of individual exemption.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with a Transaction

The Board may render either a clearance or a prohibition decision; it may also decide to give a conditional approval.

The Board has broad powers during the investigation stage. If it determines that the transaction violates Articles 4, 6 or 7 of the Competition Law, the Board 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 on how to terminate such infringement.

The Board may re-examine a clearance decision at any time, and decide on prohibition and the application of other sanctions for a merger or acquisition if the clearance was granted based on incorrect or misleading information from one of the undertakings or if the obligations provided in the decision are not complied with. In such a scenario, the Board is to re-examine the clearance decision for the transaction in question.

In order for there to be a prohibition decision, the Board must show that the transaction creates or strengthens a

dominant position in at least one relevant market, and significantly reduces competition in such relevant market(s). In cases of conditional clearance, the Board must show that the transaction would have produced these effects, absent the relevant structural and/or behavioural remedies.

5.2 Parties' Ability to Negotiate Remedies

The parties are able to negotiate remedies according to Article 14 of Communiqué No 2010/4, which enables the parties to provide commitments to remedy substantive competition law issues of a concentration under Article 7 of the Competition Law.

The Remedy Guideline requires that the parties should submit detailed information on how the remedy would be applied and how it would resolve the competition concerns. It states that the parties can submit behavioural or structural remedies, and explains the acceptable remedies, such as divestment in order to cease all kinds of connection with the competitors, remedies that enable undertakings to access certain infrastructure issues (eg, networks, intellectual property, essential facilities) and remedies on concluding/amending long-term exclusive agreements.

5.3 Legal Standard

Pursuant to the Remedy Guideline, the parties must take the following principles into consideration when submitting proposed remedies:

- parties must base their remedies on the legal and economic principles specific to the transaction at hand. Solutions must aim to protect the market from the potential effects of the transaction through the protection of the market's competitive structure;
- the main expectation from a remedy is to protect the pre-transaction level of competition;
- the remedy must protect competition not the competitors; and
- the conditions of the remedy must be clear and feasible.

The Board should only accept remedies that have been proven to be sufficient in eliminating the problem of significant reducing competition. In addition, the Remedy Guideline requires the remedies to be capable of being implemented effectively as soon as possible, as market conditions may not stay the same until the implementation of the proposed remedy.

When assessing the remedies proposed by the parties, the Board takes all factors into consideration, such as the type of remedy, its scope, the market position of the parties and competitors, and whether the proposed remedy is capable of being implemented by the parties fully and timely in an effective manner. The Board shall evaluate whether proposed remedies are proportionate to the competition problems related to the transaction, and whether they fulfil the main conditions for an acceptable remedy before making a decision.

According to the Remedy Guideline, the feasibility of the proposed remedies may be affected by risks such as the method of divestiture envisaged by the parties, third-party rights on the asset to be divested, the difficulty of finding a suitable purchaser, or the devaluation of the assets during the period up to the fulfilment of the remedy. There is a risk that the Board will not grant approval for transactions where it considers that the feasibility and sufficiency of the remedies in eliminating competitive concerns cannot be decisively determined due to their scope and complicated nature. The Board can also reject proposed remedies if it considers that they may not be effectively supervised.

5.4 Typical Remedies

The number of cases in which the Board has requested divestment or licensing commitments or other structural or behavioural remedies has increased dramatically in the last four years. In practice, the Board is inclined to apply different types of divestment remedies. Examples of the Board's pro-competitive divestment remedies include divestitures, ownership unbundling, legal separation, access to essential facilities, obligations to apply non-discriminatory terms, etc. The Remedy Guideline includes all steps and conditions. The jurisdiction of the TCA is limited to competition-related matters, so remedies that do not concern competition-related matters fall outside of the Turkish antitrust enforcement.

As set out in the Remedy Guideline, the intended effect of the divestiture will take place only if the divestment business is assigned to a suitable purchaser that is capable of creating an effective competitive power in the market. To make sure that the business will be divested to a suitable purchaser, the proposed remedy must include the elements that define the suitability of the purchaser.

The approval of a possible purchaser by the Board is basically dependent on the following requirements:

- the purchaser must be independent of and not connected to the parties;
- the purchaser must have the financial resources, business experience and ability to become an effective competitor in the market through the divestment business;
- the transfer transaction to be carried out with the purchaser must not cause a new competitive problem. In the event that such a problem exists, a new remedy proposal will not be accepted; and
- the transfer to the purchaser must not cause a risk of delay in the implementation of the commitments. Therefore, the purchaser must be capable of obtaining all the necessary

authorisations from the relevant regulatory authorities concerning the transfer of the divestment business.

The aforementioned conditions may be revised on a case-by-case basis, depending on the peculiarities of the situation. For instance, in some cases an obligation may be imposed such that the purchaser is not the one that seeks financial investment but the one that is active in the sector.

As per the Remedy Guideline, there are two methods that are accepted by the Board. The first method is for a purchaser fulfilling the aforementioned conditions to acquire the divested business, within a period of time following the authorisation decision and upon the approval of the Board. The second method is the signing of a sales contract with a suitable purchaser before the authorisation decision (fix-it-first).

5.5 Negotiating Remedies with the Authorities

The parties may submit proposals for possible remedies during either the preliminary review or the investigation process. If the parties submit the commitment during the preliminary review period, the date of the submission of the commitment is considered the notification date, and the review process begins on that date. If the parties decide to serve the commitment together with the notification form, the parties should attach a signed version of the commitment to the notification form.

Under the Turkish merger control regime, authorities cannot propose or demand remedies on their own motions; it is at the parties' own discretion whether to submit a remedy. Therefore, the Board will neither impose any remedies nor ex parte change the submitted remedy. If the Board considers the submitted remedies to be insufficient, it may enable the parties to make further changes to the remedies. If the remedy is still insufficient to resolve the competition problems, the Board may not grant clearance.

There have been several cases where the Competition 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, Cookson/Foseco, No 08-25/254-83, 20.03.2008).

5.6 Conditions and Timing for Divestitures

The Board conditions its approval decision on the observance of the remedies. The characteristics of the remedies are important when determining whether the parties may complete the transaction before the remedies are complied with. In other words, remedies have different natures – some are a condition precedent for the closing, and some are an obligation that could only be complied with after closure. Therefore, the parties cannot complete the transaction before the remedies are complied with on the condition that the nature of the remedy requires that it is complied with before the closing.

The TCA imposes a turnover-based monetary fine of 0.05% 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) if the parties do not comply with the remedies.

5.7 The Decision

The Board serves the final decisions to the representative(s) of the notifying party/parties, and also publishes final decisions on the website of the TCA after any confidential business information is taken out.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In an example of a recent conditional clearance case (15-04/52-25, 22.01.2015), the Board granted its conditional approval to the transaction based on the commitments provided by Bekaert during its Phase II review. In a very recent case, the Board outright prohibited the acquisition by Setur (a subsidiary of Koç Holding, Turkey's largest industrial conglomerate) of Beta Marina and Pendik Turizm.

Whilst there are few decisions where behavioural remedies were recognised (eg, Bekaert/Pirelli 22.01.2015, 15-04/52-25; Migros/Anadolu Endüstri Holding 09.07.2015, 29/420-117), the great majority of conditional clearance decisions rely on structural remedies (eg, AFM/Mars, 22.11.2012, 12-59/1590-M; ÇimSA/Bilecik, 02.06.2008, 08- 36/481-169; Mey Içki/Diageo, 17.08.2011, 11-45/1043-356; and Burgaz Raki/Mey Içki, 08.07.2010, 10-49/900-314). In some of these cases (eg, Cadbury/Schweppes, 07-67/836-314, 23.08.2007), the parties initially proposed purely behavioural remedies, which ultimately failed.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The Board's approval of the transaction shall also cover the restraints that are directly related and necessary to enforce the transaction (Article 13(5) of Communiqué No 2010/4). Therefore, a restraint shall be covered to the extent that its nature, subject-matter, geographic scope and duration are limited to what is necessary to enforce the transaction.

General rules on ancillary restraints are defined in the Guideline on Undertakings Concerned. The parties make a self-assessment as to whether a certain restriction could be deemed as ancillary and, therefore, the Board will not

allocate a separate part in its decision to explaining about the ancillary status of all the restraints. In the event that the transaction contains uncommon restraints that have not been included in the Guideline on Undertakings Concerned and the Board's early decisions, the Board may review the restraints per the parties' request, and may open an Article 4 investigation if the ancillary restrictions are not compliant with the merger control regulation.

7. Third Party Rights, Confidentiality and Cross-border Cooperation

7.1 Third Party Rights

The Board is authorised to request information from third parties such as customers, competitors, complainants, and other persons related to the transaction. During the review process, third parties may submit complaints about a transaction and request a hearing from the Board, provided that they prove their legitimate interest to do so. They may also challenge the Board's decision regarding the transaction before the competent judicial tribunal, again on the condition they prove their legitimate interest.

If the legislation requires TCA to ask for another public authority's opinion, this would cut the review period, which would start when the Board receives the public authority's opinion.

7.2 Contacting Third Parties

The Board frequently contacts third parties as part of its review process, where needed, usually in a written form; oral communication with third parties is of an exceptional nature. There are a limited number of decisions where the Board has applied an economic test on the proposed remedies (eg,Mars Sinema Turizm ve Sportif Tesisler İşletmeciliği A.Ş. v AFM Uluslararası Film Prodüksiyon Ticaret ve Sanayi (11-57/1473-539; 17.11.2011). Although the Board does not tend to conduct a proper economic analysis, it does, however, make a comprehensive assessment on the content of the proposed remedies (eg, Anadolu Endüstri Holding A.Ş. v Moonlight Capital S.A., 15-29/420-117, 09.07.2015).

7.3 Confidentiality

Communiqué No 2010/4 introduces a mechanism that requires the TCA to publish notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity. Therefore, once the parties have notified a transaction to the TCA, the existence of a transaction is no longer a confidential matter. Communiqué No 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets ("Communiqué No 2010/3") is the main legislation that regulates the protection of commercial information, pursuant to which undertakings must identify and justify information or documents as commercial secrets. Therefore, it is the undertakings' obligation to request confidentiality from the Board in writing, and to justify their reasons for the confidential treatment of the information or documents. The general rule is that information and documents that are not requested to be treated as confidential are accepted as not being confidential.

The reasoned decisions of the Board are published on the website of the Authority after confidential business information has been removed.

Additionally, Article 25 of the Competition Law requires that the Board and personnel of the TCA are bound by a legal obligation not to disclose any trade secrets or confidential information they have acknowledged during the course of their work.

In the event that the Board decides to have a hearing during the investigation, hearings at the TCA are, in principle, open to the public, although the Board may decide that the hearing shall be held in camera, in order to protect public morality or trade secrets.

Article 15(2) of Communiqué 2010/3 implies that the TCA may not take into account confidentiality requests related to information and documents that are necessary evidence to prove the infringement of competition. In such cases, the TCA can disclose such information and documents that could be considered trade secrets by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

7.4 Cooperation with Other Jurisdictions

The TCA is authorised to contact certain regulatory authorities around the world, including the European Commission, in order to exchange information. In this respect, Article 43 of Decision No 1/95 of the EC-Turkey Association Council (Decision No 1/95) empowers the TCA 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 the relevant markets.

In addition, TCA's research department makes periodical consultations with relevant domestic and foreign institutions and organisations.

In the past, the European Commission has been reluctant to share any evidence or arguments that the TCA had explicitly requested on a limited number of occasions.

Authorities are not obliged to seek the parties' permission to share information with each other.

Nonetheless, the TCA co-operates with several national competition authorities of various jurisdictions, and also develops training programmes for co-operation purposes. In recent years, programmes have been organised for the board members of the Pakistani Competition Authority, the top managers of the National Agency of the Kyrgyz Republic for Anti-monopoly Policy and Development of Competition, the members of the Mongolian Agency for Fair Competition and Consumer Protection, and the board members of the Turkish Republic of Northern Cyprus's Competition Authority. Similar programmes have also been developed in co-operation with the Azerbaijan State Service for Anti-monopoly 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 bilateral co-operation agreements.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties can appeal the Board's final decisions before the administrative courts of Ankara, including decisions on interim measures and fines. Third parties can also challenge a Competition Board decision before the competent administrative courts on the condition that they have a legitimate interest. Decisions of the Competition Board are considered as administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

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, at the request of the plaintiff, the court – by providing its justifications – may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages, and if the decision is highly likely to be against the law (ie, showing of a prima facie case).

The judicial review period before the Ankara administrative courts of first instance usually takes about 12 to 24 months, but may take longer to finalise due to the characteristics and complexities of the case and, in particular, the workload of the court. The decisions of the Ankara administrative courts of first instance are subject to appeal before the regional courts (appellate courts) and the High State Court.

After the recent legislative changes, administrative litigation cases will now be subject to judicial review before the newly established regional courts (appellate courts). This creates 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, on both procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, as set forth in Article 46 of the Administrative Procedure Law. In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision that takes the High State Court's decision into account. The appeal period before the High State Court usually takes about 24 to 36 months. 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.

8.2 Typical Timeline for an Appeal

The parties should file an appeal case within 60 calendar days of receiving the reasoned decision of the Board. The judicial review period before the Ankara administrative courts of first instance usually takes about 12 to 24 months, but may take longer to finalise due to the characteristics and complexities of the case and, in particular, the workload of the court.

8.3 Third Parties Appealing a Clearance Decision

Third parties can challenge a Competition Board decision before the competent administrative courts, on the condition that they have a legitimate interest.

9. Recent Developments

9.1 Recent Changes or Impending Legislation

The Draft Law reforming Turkish competition law proposes to align the Competition Law further with EU competition law, and is currently under discussion at the Turkish Parliament. It also aims to shape procedures that are more efficient with regard to time and resource allocation.

The significant changes proposed with the Draft Law are as follows:

- the Phase I review period will be changed from 30 calendar days to 30 working days – approximately 40 days in total. Phase I proceedings are thus expected to last longer;

- the Phase II procedure (six or 12 months) will be abolished and there will instead be an extension of the review period to four months for cases that require an in-depth assessment. During this process, the parties can submit written opinions to the Board;
- the current dominance test will be replaced by the SIEC test, which is applicable in the EU;
- the term "concentration" will be consistently used instead of "mergers and acquisitions"; and
- the exemption from the merger control rules of acquisitions by inheritance will be abolished.

The Draft Law also suggests determining upper limits for the fines for certain procedural violations, such as a 0.1% fine for failure to notify a concentration and hindering on-site inspections.

Additionally, the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition ("Draft Regulation") was sent to the Turkish Parliament on 17 January 2014 and is set to replace the current Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices and Decisions and Abuse of Dominance.

Furthermore, on 24 February 2017, Communiqué No 2010/4 was amended by Communiqué No 2017/2 on the Amendment of Communiqué No 2010/4 ('Communiqué No 2017/2'). The new amendments brought by Communiqué No 2017/2 are as follows:

- Prior to the amendment brought by Communiqué No 2017/2, Article 8(5) of Communique No 2010/4 stated that "two or more transactions carried out between the same persons or parties within a period of two years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of the Communiqué." Article 2 of Communiqué No 2017/2 amended Article 8(5) of Communique No 2010/4 is set to read as follows: "two or more transactions carried out between the same persons or parties or within the same relevant product market, within a period of three years, shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué."
- Article 3 of Communiqué No 2017/2 introduced a new paragraph to be included in Article 10 of Communiqué No 2010/4, which reads as follows: "If the control is acquired from various sellers through a series of transactions in terms of securities within the stock exchange, the concentration could be notified to the Turkish Competition Board after the realisation of the transaction, provided that the following conditions are satisfied: (a) the concentration is notified to the Turkish Competition Board without delay; (b) the voting rights attached to the acquired securities are not exercised or the voting rights are exercised only upon an exception provided by the Board, which ensures that the full value of the investment is protected."

9.2 Recent Enforcement Record

Enforcement actions by the Board are very frequent in the merger control field. There are several cases where the Board levied monetary fines against the parties for failing to notify in foreign-to-foreign transactions. The same is true for conditional clearances. So far, only a few transactions have been blocked altogether (Setur, 15-29/421-118, 09.07.2015; Gaziantep Çimento, 05-86/1190-342, 20.12.2005).

9.3 Current Competition Concerns

In 2015, the Board took the acquisition by Anadolu Endüstri Holding A.Ş. (which controls major food and beverages companies, including Coca Cola Turkey) of the majority shares of MH Perakendecilik Perakendecilik ve Ticaret A.Ş. (which is controlled by Moonlight Capital S.A. and is one of the major retail companies in Turkey) into Phase II review, and cleared it conditionally.

The Board's eagerness shows that it will not hesitate to go into Phase II review if it finds the review to be necessary on the basis of potential competition law concerns.

The following is a summary of the Board's merger control decisions in the last three years:

- in 2017, the Board assessed 184 transactions and took four transactions into Phase II review
- in 2016, the Board assessed 209 transactions and took seven transactions into Phase II review; and
- in 2015, the Board assessed 158 transactions and took seven into Phase II.

This summary also shows the Board's inclination towards Phase II reviews.

ELIG Gürkaynak Attorneys-at-Law
Çitlenbik Sokak, No:12
Yıldız Mahallesi 34349
Beşiktaş
İstanbul

Tel: +90 212 327 17 24
Fax: +90 212 327 17 25
Email: gonenc.gurkaynak@elig.com
Web: www.elig.com